CONSTITUTIONAL CHALLENGES TO COURTHOUSE CIVIL ARRESTS OF NONCITIZENS

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ABSTRACT

This Article analyzes the constitutional issues raised by courthouse civil arrests of noncitizens. It discusses national concerns over the arrests and the responses of national and state actors, examines current policy on courthouse enforcement actions, and analyzes courthouse arrests under the Free Speech Clause, the Petition Clause, the Due Process Clause and the principles of separation of powers and federalism of the United States Constitution. The Article concludes that courthouse civil arrests of noncitizens implicate serious constitutional issues and greater level of protection should be extended to courthouses.

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I.
INTRODUCTION

On February 8, 2018, more than 100 New York City public defenders walked out of a Bronx courthouse in protest of the arrests of their noncitizen clients by federal immigration officials.[1] The walkout was prompted by a United States Immigration and Customs Enforcement ("ICE") arrest of an immigrant who was brought to the United States as a 3-year-old and is now an adult married to a United States citizen.[2]

1. Associated Press, *Public Defenders Walk out in Protest of ICE Court Arrests*, FOX NEWS (Feb. 9, 2018), http://www.foxnews.com/us/2018/02/09/public-defenders-walk-out-in-protest-ice-court-arrests.html [https://perma.cc/8KFA-7W3Y].

2. Georgett Roberts & Joe Tacopino, *Illegal Immigrant's Arrest at Courthouse Sparks Pro-*

Since President Donald Trump took office in January 2017, ICE has increased its presence at courthouses to arrest noncitizens who appear for judicial proceedings.[3] Recent courthouse arrests have sparked a strong response from state court judges, lawyers, and activists who worry that ICE's arrests and presence chills noncitizens' willingness to appear in courts as petitioners and witnesses.[4] State officials worry that courthouse arrests are harming public trust in, and willingness to utilize, state court systems and the police.[5] The Trump administration has defended its courthouse arrest policy by criticizing local authorities for making apprehensions of noncitizens difficult and alleging the promotion of law enforcement efficiency and reduction of safety risks.[6] In response to concerns over the courthouse arrests, ICE released a directive in January 2018 formalizing its courthouse enforcement policy.[7] Pursuant to the directive, ICE will continue courthouse enforcement actions subject to self-imposed limitations.[8]

Courts are a forum for petition and speech. Litigation serves as "a vehicle for effective political expression and association, as well as a means of com-

test, N.Y. POST (Feb. 8, 2018, 5:13 PM), https://nypost.com/2018/02/08/ice-arrest-at-courthouse-sparks-protest/ [https://perma.cc/ZRG4-2XGE].

3. Press Release, U.S. Comm'n on Civil Rights, U.S. Commission on Civil Rights Expresses Concern with Immigrants' Access to Justice (Apr. 24, 2017), https://www.usccr.gov/press/2017/Statement_04-24-2017-Immigrant-Access-Justice.pdf [https://perma.cc/37WC-LLVK] (U.S. Commission on Civil Rights' condemns ICE's presence in courthouses under the Trump administration); Stephen Rex Brown, *Courthouse Arrests of Immigrants by ICE Agents Have Risen 900% in New York This Year: Immigrant Defense Project*, N.Y. DAILY NEWS (Nov. 15, 2017, 4:00 AM), http://www.nydailynews.com/new-york/ice-courthouse-arrests-immigrants-900-n-y-2017-article-1.3633463 [https://perma.cc/7X8C-KHS9] (900% increase in ICE courthouse arrests in 2017, including arrests in traffic, family, and Queens Human Trafficking Court); *see also* Noelle Phillips, *Mayor Hancock Tells ICE: Back off Arrests in Courthouses and Near Schools*, DENVER POST (Apr. 6, 2017, 1:32 PM), https://www.denverpost.com/2017/04/06/denver-ice-agents-courthouse-school-raids/ [https://perma.cc/UK9W-N6GQ] (describing Denver's mayor's disapproving response to U.S. Immigration and Customs Enforcement agents' appearances at the city's courthouse to make arrests).

4. *See, e.g.*, Associated Press, *supra* note 1; Roberts & Tacopino, *supra* note 2; Matt Zapotosky, *Top U.S. Officials Defend Courthouse Arrests of Undocumented Immigrants in Escalating Feud with California Justice*, WASH. POST (Mar. 31, 2017), https://www.washingtonpost.com/world/national-security/top-us-officials-defend-courthouse-arrests-of-undocumented-immigrants-in-escalating-feud-with-california-justice/2017/03/31/d92dddfe-1627-11e7-ada0-1489b735b3a3_story.html?utm_term=.4fc21ecc1c7d [https://perma.cc/6YQZ-M98P].

5. *See* James Queally*, ICE Agents Make Arrests at Courthouses, Sparking Backlash from Attorneys and State Supreme Court*, L.A. TIMES (Mar. 16, 2017, 10:40 AM), www.latimes.com/local/lanow/la-me-ln-ice-courthouse-arrests-20170315-story.html [https://perma.cc/L3WC-ATLP].

6. Alex Dobuzinskis, *Trump Officials Defend Immigration Arrests at California Courthouses,* REUTERS (Mar. 31, 2017, 4:03 PM), https://www.reuters.com/article/us-usa-immigration-courthouses/trump-officials-defend-immigration-arrests-at-california-courthouses-idUSKBN1722T1 [https://perma.cc/79RC-8JS5]; *see also infra* notes 73–75 and accompanying text.

7. U.S. IMMIGR. & CUSTOMS ENF'T, DIRECTIVE NUMBER 11072.1: CIVIL IMMIGRATION ENFORCEMENT ACTIONS INSIDE COURTHOUSES (2018), https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf [https://perma.cc/K66W-ALHX].

8. *Id.* at 1–2.

municating useful information to the public."[9] An individual's participation in court proceedings may also qualify as a petitioning activity.[10] Individuals have a right of access to the courts, a branch of their government, to petition for a redress of grievances.[11] Moreover, access to courts is a fundamental tenet of due process under law, which requires that no person shall be "deprived of life, liberty, or property, without due process of law."[12] The government has a constitutional obligation to provide people with fundamentally fair legal proceedings in accordance with due process rights.

Federal and state courts' exercise of jurisdiction is also an important aspect of the separation of powers and federalism.[13] The judicial branch can check and balance the legislative and executive branches. Federal courts are tasked to interpret the law and the Constitution while resolving cases or controversies.[14] State courts provide remedies to parties whose suits are subject to that jurisdiction's rulings.[15]

Because courts are an important forum for individuals to exercise their rights, courthouse arrests raise several constitutional issues including the right to petition, free speech, due process, separation of powers, and federalism.

Courthouse arrests chill individuals' willingness to appear in courts, whether as petitioners, defendants, or witnesses.[16] As a result, courthouse arrests may vi-

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9. Borough of Duryea v. Guarnieri, 564 U.S. 379, 397 (2011) (quoting *In re* Primus, 436 U.S. 412, 431 (1978)).

10. NAACP v. Button, 371 U.S. 415, 429–30 (1963).

11. *See, e.g.*, United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 221–22 (1967); Bhd. of R.R. Trainmen v. Virginia *ex rel.* Va. State Bar, 377 U.S. 1, 7 (1964); *Button*, 371 U.S. at 430–31.

12. U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]").

13. *See, e.g.*, Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1944 (2015) (citation omitted) (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986)) ("Article III also serves a structural purpose, 'barring congressional attempts to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts and thereby prevent[ing] the encroachment or aggrandizement of one branch at the expense of the other.'"); *cf.* James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 WM. & MARY L. REV. 1725, 1746–56 (2003) (state courts as agents of federalism).

14. *See* U.S. CONST. art III, § 2.

15. *Cf.* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Milliken v. Bradley, 433 U.S. 267, 291 (1977) (stating that the Tenth Amendment reserves nondelegated powers to the States but is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct); Younger v. Harris, 401 U.S. 37, 43–45 (1971) (noting that there is a "longstanding public policy against federal court interference with state court proceedings" and that the primary sources of the policy are "that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief," notions of comity, and principles of federalism).

16. *See ICE in New York State Courts Survey*, IMMIGRANT DEF. PROJECT, www.immdefense.org/ice-courts-survey [https://perma.cc/38NB-WKBJ]; *see also* Queally, *supra* note 5.

olate immigrants' First Amendment rights under the Petition Clause and Free Speech Clause of the United States Constitution. Petitions to courts are protected speech under the Free Speech Clause of the First Amendment.[17] The Free Speech Clause allows citizens to speak freely without government restrictions.[18] Although ICE's courthouse arrests seem content-neutral because the arrests do not depend on the type of lawsuit for which the individual is to appear, it would nevertheless be difficult for ICE to pass the intermediate scrutiny test to which content-neutral regulations are subject.[19]

The First Amendment's Petition Clause also independently guarantees the right "to petition the Government for a redress of grievances,"[20] which extends to all court filings, so long as they are not objectively baseless.[21] Applying the doctrine to courthouse arrests, courts should not impute an intent to invade the right to petition by allowing ICE to arrest the people who are petitioning those courts.[22]

Courthouse arrest policy also likely violates the Due Process Clause of the United States Constitution, which provides that no person shall be "deprived of life, liberty, or property, without due process of law."[23] A person's access to courts is a fundamental right protected by due process.[24] Since, as this Article will show, noncitizens have the same access-to-court rights as citizens, and courthouse arrests are frustrating noncitizens' court appearances, courthouse arrests of noncitizens, whether in courtrooms or courthouses, before or after court proceedings, raise serious due process questions.[25]

The third constitutional concern that courthouse arrests present relates to separation of powers. Important separation-of-powers considerations also weigh

17. *See* discussion *infra* Sections V.B.1.

18. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 467, 469 (2009) (citation omitted) ("[t]he Free Speech Clause restricts government regulation of private speech" and although reasonable time, place, and manner restrictions are allowed, "any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest, and restrictions based on viewpoint are prohibited"); *see also* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (noting that the government may create content neutral regulations on speech and that a "regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others").

19. *See* discussion *infra* Sections V.B.5.

20. U.S. CONST. amend. I.

21. BE&K Constr. Co. v. NLRB, 536 U.S. 516, 526 (2002) (citing Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60–61 (1993)) (outlining two-prong framework to determine whether a lawsuit is objectively baseless including both a subjective and objective analysis); *see also infra* notes 297–300 and accompanying text.

22. *See* E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961) ("The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.").

23. U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]").

24. *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 523 (2004).

25. *See* discussion *infra* Part VI.

against courthouse arrests at federal and state courthouses. If ICE's arrests discourage noncitizens from appearing in federal courts, federal courts will not be able to "say what the law is" in cases involving noncitizens.[26] In addition, without a congressional preemptive intent to modify state court jurisdiction, ICE's courthouse arrests effectively exclude noncitizens from the state courts and modify state court jurisdiction. The possibility of intrusion into federal courts and Congressional power to modify state courts' jurisdiction due to arrests by ICE raises separation-of-powers concerns.

Fourth, federal expectation of local government's cooperation through contribution of state resources[27] in courthouse arrests and retaliation for state's noncooperation[28] may conflict with the Constitution's guarantees of federalism in the Tenth Amendment under the anti-commandeering principle.

This Article discusses the constitutional issues raised by courthouse arrests, the reasons ICE agents should avoid courthouse arrests, and litigation strategies for challenging courthouse arrests. Part II describes recent courthouse arrests of noncitizens in multiple states. Part III discusses national concerns over the arrests, state court chief justices' letters to the federal government, and the responses. Part IV analyzes ICE's new directive on courthouse enforcement actions, which formalizes its policy and imposes some limitations on courthouse arrests. Part V argues that courthouse arrests may violate noncitizens' First Amendment rights under the Free Speech Clause and the Petition Clause of the United States Constitution. Part VI argues that these arrests may also be challenged under the Due Process Clause. Part VII addresses the separation of powers and federalism arguments against the constitutionality of courthouse arrests of noncitizens. Part VIII concludes by arguing that, because of these serious constitutional issues, ICE agents should refrain from making courthouse arrests.

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26. Marbury v. Madison, 5 U.S. 137, 177 (1803).

27. According to ICE, "[c]ivil immigration enforcement actions inside courthouses should . . . be conducted in collaboration with court security staff, and utilize the court building's nonpublic entrances and exits." U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 7, at 2.

28. Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13,768, 82 C.F.R. 8799 (2017), https://www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02102.pdf [https://perma.cc/WH53-JJCD] (making sanctuary jurisdictions ineligible for federal grants); Interview by Neil Cavuto with Thomas Homan, Acting Dir., U.S. Immigr. & Customs Enf't, *Acting ICE Director: California Made a Foolish Decision*, FOX NEWS (Jan. 2, 2018), https://www.foxnews.com/transcript/acting-ice-director-california-made-a-foolish-decision [https://perma.cc/6MVC-3VSZ] (stating that there would be "a lot more deportation officers" in California in response to the state declaring itself a sanctuary state); Press Release, U.S. Immigr. & Customs Enf't, ICE Arrests over 450 on Federal Immigration Charges During Operation 'Safe City' (Sept. 28, 2017), https://www.ice.gov/news/releases/ice-arrests-over-450-federal-immigration-charges-during-operation-safe-city [https://perma.cc/K4XS-D2BL] (reporting on ICE raids which targeted sanctuary cities).

II.
COURTHOUSE ARRESTS ACROSS THE COUNTRY

In February 2017, half a dozen ICE agents showed up at an El Paso, Texas courthouse and arrested an undocumented woman, Irvin Gonzalez, who was seeking a protective order against her boyfriend.[29] An affidavit filed by the federal government claimed that Gonzalez was arrested outside the courthouse:

> At approximately 9:30 a.m., [federal agents] observed GONZALEZ exiting the El Paso County Courthouse and proceeded to walk along the side walk on San Antonio Ave. . . . [A]gents approached GONZALEZ[,] identified themselves as United States Border Patrol Agents and questioned [her] as to [her] citizenship and immigration status.[30]

The court's surveillance videos, however, tell a different story.[31] Surveillance footage shows that two men in plain clothes, identified as ICE agents, escorted Gonzalez towards the courtroom exit.[32] The men put Gonzalez in the back seat of an SUV while other agents were waiting nearby.[33] County Attorney Jo Anne Bernal suspected that ICE was acting on a tip that came from Gonzalez's alleged abuser, who knew the time and date of the proceeding.[34]

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29. Katie Mettler, *'This Is Really Unprecedented': ICE Detains Woman Seeking Domestic Abuse Protection at Texas Courthouse*, WASH. POST (Feb. 16, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/16/this-is-really-unprecedented-ice-detains-woman-seeking-domestic-abuse-protection-at-texas-courthouse/?utm_term=.d5f96bc58c24 [https://perma.cc/DNU9-965V]; Marty Schladen, *Affidavit Detaining Violence Victim Disputed*, EL PASO TIMES (Feb. 16, 2017, 11:20 AM), http://www.elpasotimes.com/story/news/2017/02/16/affidavit-detaining-violence-victim-disputed/97999436/ [https://perma.cc/6KCZ-TFTE].

30. Criminal Complaint at 2, United States v. Gonzales, No. 3:17-CR-00397-FM (W.D. Tex. Feb. 10, 2017); *see also* Petition for a Writ of Habeas Corpus Pursuant to 28 USC § 2241, ¶ 11, Gonzales-Torres v. Hayes, No. 3:17-cv-00051-DB (W.D. Tex. Feb. 22, 2017) [hereinafter Petition], https://www.courthousenews.com/wp-content/uploads/2017/02/Habeas.pdf [https://perma.cc/6PNT-6PPD]; OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., CASE NO. I17-BP-ELP-10029, REPORT OF INVESTIGATION 5 (2017), https://www.oig.dhs.gov/sites/default/files/assets/FOIA/OIG-117-BP-ELP-10299.pdf [https://perma.cc/85X8-XAYU]; Schladen, *supra* note 29.

31. *Video: Agents Detain Domestic Violence Victim Inside Courthouse*, EL PASO TIMES (Feb. 16, 2017, 8:26 AM), http://www.elpasotimes.com/videos/news/immigration/2017/02/16/video-agents-detain-domestic-violence-victim-inside-courthouse/98009768/ [https://perma.cc/Y6L8-28XG]*; see also* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., *supra* note 30, at 5–6.

32. Jesse Martinez, *Irvin Gonzalez Enters Plea Agreement, Could Face Deportation*, KFOX14 (March 27, 2017), http://kfoxtv.com/news/local/irvin-gonzalez-enters-plea-agreement-could-face-deportation [https://perma.cc/BEF2-LEXS]; Schladen, *supra* note 29; *see also* Petition, *supra* note 30, ¶ 13; OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., *supra* note 30, at 5–6.

33. Schladen, *supra* note 29; *see also* Petition, *supra* note 30, ¶ 13; OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., *supra* note 30, at 5–6.

34. *Undocumented Transgender Woman Filing Domestic Violence Claim Arrested at El Paso Courthouse by ICE, Official Says*, CBS (Feb. 16, 2017, 5:35 AM), https://www.cbsnews.com/news/undocumented-transgender-woman-filing-domestic-violence-claim-arrested-at-el-paso-courthouse-by-ice-official-says/ [https://perma.cc/K2P6-MAPT].

Similar incidents have been reported in Arizona, California, Colorado, Maine, New Jersey, New York, Oregon, and Texas.[35] These courthouse arrests have impacted all noncitizens, documented or not, and may include "defendants, victims of human trafficking, targets of domestic violence, witnesses, unaccompanied minors and those suffering from [poor] mental health and severe medical disabilities."[36]

In February 2017 in Denver, Colorado, ICE agents waited in the hallway outside a courtroom to detain Juan Carlos Lara-Rios, a legal United States permanent resident who was appearing for sentencing in an old case that charged him with stealing tools from the back of a truck.[37]

In Oregon, three agents followed Ivan Rodriguez Resendiz, who had been arrested for DUII (driving under the influence of intoxicants), through a Portland courthouse in January 2017.[38] Ivan Rodriguez Resendiz's defense attorney told the agents that Rodriguez Resendiz would cooperate with them.[39] The three men followed Rodriguez Resendiz back to his lawyer's office, watched him from the alcoves of buildings or from behind columns, and eventually left.[40]

Also in Oregon, Judge Monica Herranz was investigated for allegedly helping an undocumented immigrant, Diddier Pacheco Salazar, evade ICE agents in January 2017 by allowing him to leave through the back door.[41] The investiga-

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35. Jake Bleiberg, *Somali Man ICE Arrested in Court Is a Permanent Resident Who's Lived in U.S. for 20 Years*, BANGOR DAILY NEWS (Apr. 11, 2017, 11:00 AM), https://bangordailynews.com/2017/04/11/news/state/somali-man-ice-arrested-in-court-is-a-permanent-resident-whos-lived-in-u-s-for-20-years/ [https://perma.cc/E5M8-78JK] (reporting a similar incident in Maine); Erica Meltzer, *Report: The Man ICE Agents Wanted to Arrest in a Denver Courthouse Had a Felony Record*, DENVERITE (Mar. 2, 2017, 7:23 PM), https://www.denverite.com/report-man-ice-agents-wanted-arrest-denver-courthouse-felony-record-30796/ [https://perma.cc/V9PL-K4PF] (reporting a similar incident in Colorado); Curt Prendergast, *Arrest by ICE at Tucson Courthouse Concerns Judge*, TUSCON.COM (Mar. 18, 2017), https://tucson.com/news/local/border/arrest-by-ice-at-tucson-courthouse-concerns-judge/article_b7444b3a-700c-5265-9292-4d980c483726.html [https://perma.cc/XKN4-LXN7] (reporting similar incidents in Arizona, California, Oregon, and Texas); Liz Robbins, *A Game of Cat and Mouse with High Stakes: Deportation*, N.Y. TIMES (Aug. 3, 2017), https://www.nytimes.com/2017/08/03/nyregion/a-game-of-cat-and-mouse-with-high-stakes-deportation.html [https://perma.cc/A347-LMKS] (reporting a similar incident in New York); S.P. Sullivan, *N.J.'s Chief Justice Asks ICE to Stop Arresting Immigrants at Courthouses*, NJ ADVANCE MEDIA *(*Apr. 20, 2017), http://www.nj.com/politics/index.ssf/2017/04/nj_top_judge_asks_ice_to_stop_arresting_immigrants.html [https://perma.cc/ACV5-JU8X] (reporting a similar incident in New Jersey).

36. THE FUND FOR MODERN COURTS, PROTECTING THE ADMINISTRATION OF JUSTICE IN NEW YORK STATE: IMPACT OF ICE ARRESTS ON NEW YORKERS' ACCESS TO STATE COURTHOUSES 3 (2017), http://moderncourts.org/wp-content/uploads/2017/12/Modern-Courts-Report-December-2017-ICE-and-NY-COURTHOUSES2-1.pdf [https://perma.cc/VSA9-NBJA].

37. Meltzer, *supra* note 35.

38. Aimee Green, *Men Won't Say They're Federal Agents, Follow Immigrant Through Portland Courthouse*, OR. LIVE (Jan. 31, 2017), http://www.oregonlive.com/portland/index.ssf/2017/01/men_wont_say_theyre_federal_ag.html [https://perma.cc/R844-QMLK].

39. *Id.*

40. *Id.*

41. Carma Hassan, *Judge Scrutinized After Undocumented Immigrant Escapes Courtroom*, CNN, https://www.cnn.com/2017/03/02/us/undocumented-immigrant-escapes-courtroom-trnd/

tion found that the judge did not knowingly help Pacheco Salazar escape ICE agents.[42] Salazar's defense attorney told the judge that the defendant did not have his immigration documentation with him and ICE agents were in the hall asking Latinx[43] defendants for their documents.[44] Around two weeks later, Salazar was arrested by ICE agents outside the same courthouse when appearing for another hearing.[45]

In June 2017, in New York, ICE agents went to Queens Human Trafficking Intervention Court looking for a Chinese woman who had been charged with unlicensed practice of massage and prostitution and had overstayed her tourist visa.[46] The protocol of the Chief Administrative Judge of New York State generally discourages ICE from making arrests inside courtrooms.[47] "Court officers, as per union policy, told Judge Toko Serita that ICE officers were in the hallway near the courtroom."[48] The judge set bail at $500 and sent the defendant to Rikers Island— "keeping [her] out of ICE's hands because the jail complex does not turn over undocumented immigrants to the agency. . . . Later that afternoon, Judge Serita released the defendant on her own recognizance."[49] The ICE agents had left, apparently in search of another target.[50] They later arrested another woman as she left the court, walking toward the subway.[51]According to a spokesman for the New York State Office of Court Administration, in 2017, ICE agents arrested approximately 50 people while they were in courts in New York State.[52]

index.html [https://perma.cc/LK5G-U9LD] (last updated Mar. 3, 2017, 11:04 AM).

42. Aimee Green, *Judge Didn't Violate Rules in Letting Immigrant Leave Through Back Door, Review Finds*, OR. LIVE (June 19, 2017), http://www.oregonlive.com/portland/index.ssf/2017/06/court_officials_find_no_violat.html [https://perma.cc/9VBN-3LUP].

43. Throughout this article, I use the term Latinx as a gender-neutral alternative to the gendered designation of Latino/a.

44. Green, *supra* note 42.

45. Hassan, *supra* note 41.

46. Beth Fertig, *When ICE Shows up in Human Trafficking Court*, WNYC (June 22, 2017), http://www.wnyc.org/story/when-ice-shows-court/ [https://perma.cc/MBQ9-GGLV?type=image]; Robbins, *supra* note 35.

47. OFFICE OF THE CHIEF ADMIN. JUDGE, N.Y. STATE UNIFIED COURT SYS., POLICY AND PROTOCOL GOVERNING ACTIVITIES IN COURTHOUSES BY LAW ENFORCEMENT AGENCIES (2017), https://www.nycourts.gov/whatsnew/pdf/2017_law_enforcement_activities.pdf [https://perma.cc/54ZW-R585] ("Absent leave of the court under extraordinary circumstance (e.g., extradition orders), no law enforcement action may be taken by a law enforcement agency in a courtroom.").

48. Robbins, *supra* note 35.

49. *Id.*

50. *Id.*

51. *Id.*

52. *See, e.g.*, Josefa Velasquez & Colby Hamilton, *Group Proposes Changes for How NY Courts Deal with ICE Arrests*, N.Y.L.J. (Dec. 5, 2017, 5:02 PM), https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/12/05/group-proposes-changes-for-how-ny-courts-deal-with-ice-arrests/ [https://perma.cc/85AB-MEHS].

III.
NATIONAL CONCERNS OVER COURTHOUSE ARRESTS AND THE RESPONSES

A. Activist and State Government Responses

The arrests have raised concerns across the country about ICE's increased presence at courthouses.[53] Local leaders worry that ICE's presence at courthouses will discourage crime victims and witnesses from showing up to courts.[54]

Local activists and legal service providers have staged walkouts to protest ICE's courthouse arrests.[55] On November 28, 2017, approximately 100 defense attorneys staged an impromptu protest outside a Brooklyn courthouse after federal authorities arrested a lawyer's client.[56] Also in New York, on February 14, 2018, Manhattan, Brooklyn, and Bronx prosecutors protested ICE arrests of New Yorkers involved in criminal cases in front of the Manhattan Supreme Court.[57] This protest followed the February 8, 2018 walkout by public defenders. On February 28, 2018, "[a]round 100 local activists, legal aid organizations, religious leaders and community members gathered outside the New Haven County Courthouse . . . to demonstrate against recent courthouse arrests and deportations in Connecticut."[58]

Beyond walkouts and protests, many of these activists and legal service providers are putting pressure on the state court systems to ban ICE arrests within state courthouses. For example, in New York, the Legal Aid Society, New York

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53. *See, e.g.*, IMMIGR. DEF. PROJECT, IDP UNVEILS NEW STATISTICS & TRENDS DETAILING STATEWIDE ICE COURTHOUSE ARRESTS IN 2017, at 1 (2017), https://www.immigrantdefenseproject.org/wp-content/uploads/ICE-Courthouse-Arrests-Stats-Trends-2017-Press-Release-FINAL.pdf [https://perma.cc/3F46-4LMF] ("There have been 144 reports of ICE arrests and attempted arrests in courthouses this year, up from11 reports in all of 2016. . . . 'The exponential increase in ICE courthouse arrests reflects a dangerous new era in enforcement and immigrant rights violations[.] . . . The alarming ICE trends we're seeing in New York undermine the safety and promise of sanctuary.'").

54. *See, e.g.*, Letter from Former U.S. State & Fed. Judges to Ronald D. Vitiello, Acting Dir., U.S. Immigr. & Customs Enf't 1–2 (Dec. 12, 2018) [hereinafter Letter from Former Judges], https://www.scribd.com/document/395488473/Letter-From-Former-Judges-Courthouse-Immigration-Arrests#fullscreen&from_embed.

55. *See, e.g.*, Associated Press, *supra* note 1; Isabel Bysiewicz, *Activists Protest ICE Arrests*, YALE DAILY NEWS (Feb. 28, 2018, 11:17 PM), https://yaledailynews.com/blog/2018/02/28/activists-protest-ice-arrests/ [https://perma.cc/3QKA-56D2]; Noah Hurowitz & Felipe de La Hoz, *Legal Aid Lawyers Stage Walkout After Yet Another ICE Court Arrest*, VILL. VOICE (Nov. 28, 2017), https://www.villagevoice.com/2017/11/28/legal-aid-lawyers-stage-walkout-after-yet-another-ice-court-arrest/ [https://perma.cc/BM7B-7HHB].

56. Christina Carrega, *Defense Attorneys Protest Outside Brooklyn Courthouse After ICE Cuffs One Lawyer's Client*, N.Y. DAILY NEWS (Nov. 28, 2017, 2:51 PM), http://www.nydailynews.com/new-york/brooklyn/defense-attorneys-protest-client-ice-arrest-brooklyn-article-1.3663018 [https://perma.cc/3AFG-YDZT].

57. Nick Encalada-Malinowski, *Protesting ICE Courthouse Arrests Doesn't Get NYC Prosecutors off the Hook for Everyday Injustice*, MEDIUM: IN JUST. TODAY (Feb. 22, 2018), https://medium.com/in-justice-today/protesting-ice-courthouse-arrests-doesnt-get-nyc-prosecutors-off-the-hook-for-everyday-injustice-d8d52b29392d [https://perma.cc/8UMR-SPUN].

58. Bysiewicz, *supra* note 55.

County Defender Services, Brooklyn Defender Services, The Bronx Defenders, and Neighborhood Defender Service of Harlem have called on the Office of Court Administration and Chief Judge Janet DiFiore to issue rules to curb ICE arrests in courts through publicly released statements and sign-on letters.[59]

Multiple state court chief justices have taken up the issue and sent letters to the federal government that echo local activists' concerns.[60] Chief justices from California, Washington, New Jersey, and Oregon expressed their worries about the effects of courthouse arrests on court appearance, public trust, confidence in the system, the fairness of the judiciary, and courts' mission to ensure due process. These state court justices worry that courthouse arrests discourage court appearances. In a letter from New Jersey Supreme Court Chief Justice Stuart Rabner to then-Secretary of the United States Department of Homeland Security (DHS) John F. Kelly, the Chief Justice wrote:

> Witnesses to violent crimes may decide to stay away from court and remain silent. Victims of domestic violence and other offenses may choose not to testify against their attackers. Children and families in need of court assistance may likewise avoid the courthouse. And defendants in state criminal matters may simply not appear.[61]

By deterring people from going to court, courthouse arrests harm public trust and confidence in the system. In the open letter from California Chief Justice Tani Cantil-Sakauye to prior United States Attorney General Jeff Sessions and prior DHS Secretary John F. Kelly, she stated that using courtrooms as bait in enforcement of immigration laws would harm public trust and confidence in the state court system and compromise the judiciary's core value of fairness.[62]

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59. *See* Josefa Velasquez, *Legal Groups Ask Courts to Issue Rules to Curb ICE Arrests in Courts*, N.Y.L.J. (Dec. 7, 2017, 5:54 PM), https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/12/07/legal-groups-ask-courts-to-issue-rules-to-curb-ice-arrests-in-courts/ [https://perma.cc/K3AS-9637]; *see also* Erin Durkin, *Judge Urged to Curb ICE Arrests at New York State Courts*, N.Y. DAILY NEWS (May 9, 2018), https://www.nydailynews.com/new-york/judge-urged-curb-ice-arrests-new-york-state-courts-article-1.3981075 [https://perma.cc/F3N8-57H4].

60. *See also* Letter from Former Judges, *supra* note 54.

61. Letter from Stuart Rabner, C.J., Supreme Court of N.J., to John F. Kelly, Sec'y, U.S. Dep't of Homeland Sec. (Apr. 19, 2017), https://www.documentcloud.org/documents/3673664-Letter-from-Chief-Justice-Rabner-to-Homeland.html#document/p1 [https://perma.cc/PRY3-2D6S]. Likewise, a letter from Chase Rogers, Chief Justice of the Connecticut Supreme Court, to Attorney General Jeff Sessions and DHS Secretary John F. Kelly marks another instance of a state chief justice concerned that ICE's intrusion into courthouses undermines the justice system. Roque Planas, *Chief Justice in Connecticut Asks ICE to Stay out of Courthouses*, HUFFINGTON POST (June 8, 2017, 2:19 PM), https://www.huffingtonpost.com/entry/judge-courthouse-immigration-arrests_us_59398006e4b0c5a35c9d3928 [https://perma.cc/Z4SZ-7MDA]. The letter reads, "[H]aving ICE officers detain individuals in public areas of our courthouses may cause litigants, witnesses and interested parties to view our courthouses as places to avoid, rather than as institutions of fair and impartial justice." *Id.*

62. Letter from Tani G. Cantil-Sakauye, Chief Justice, Supreme Court of Cal., to Jeff Sessions, U.S. Att'y Gen., U.S. Dep't of Justice, & John F. Kelly, Sec'y, U.S. Dep't of Homeland Sec.

Many state court justices also worry that courthouse arrests impede courts' mission to ensure due process. In Washington State Chief Justice Mary Fairhurst's letter to former DHS Secretary John F. Kelly, she wrote "[t]hese developments are deeply troubling because they impede the fundamental mission of our courts, which is to ensure Due Process and access to justice for everyone, regardless of their immigration status."[63] California Chief Justice Tani Cantil-Sakauye shared the same worry that the arrests will undermine the judiciary's ability to provide equal access to justice.[64]

To address these concerns, Oregon Supreme Court Chief Justice Thomas A. Balmer requested that federal law enforcement agencies, including ICE, refrain from arresting individuals inside or in the immediate vicinity of Oregon's courthouses.[65] If they were unwilling to adopt this policy, the Chief Justice urged the federal agencies at least to include courthouses and their immediate surroundings in the definition of "sensitive locations," which would require ICE to thoroughly review the implications of and alternatives to making courthouse arrests.[66]

After ICE's arrest near the Queens Human Trafficking Intervention Court, New York Chief Judge Janet DiFiore stated that she was "greatly concerned" and that courthouses should be designated sensitive locations where ICE's enforcement actions will not occur.[67] However, the Chief Judge's office stopped short of banning ICE enforcement within the courts, claiming such an action would be illegal.[68]

(Mar. 16, 2017) [hereinafter Cantil-Sakauye], http://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses [https://perma.cc6LK4-QGRS] ("I am concerned about the impact on public trust and confidence in our state court system if the public feels that our state institutions are being used to facilitate other goals and objectives, no matter how expedient they may be. . . . They not only compromise our core value of fairness but they undermine the judiciary's ability to provide equal access to justice.").

63. Letter from Mary E. Fairhurst, Chief Justice, Wash. Supreme Court, to John F. Kelly, Sec'y, U.S. Dep't of Homeland Sec. (Mar. 22, 2017), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/KellyJohnDHSICE032217.pdf [https://perma.cc/WC69-GFU3]; *see also* Joseph O'Sullivan, *Chief Justice Asks ICE Not to Track Immigrants at State Courthouses*, SEATTLE TIMES (Mar. 22, 2017, 6:51 PM), https://www.seattletimes.com/seattle-news/politics/chief-justice-asks-ice-not-to-track-immigrants-at-state-courthouses/ [https://perma.cc/AK2W-LGES]; Dan Springer, *ICE Raids in Courthouses Pits Immigration Agency Against Federal Judges*, FOX NEWS (Apr. 4, 2017), http://www.foxnews.com/us/2017/04/04/ice-raids-in-courthouses-pits-immigration-agency-against-federal-judges.html [https://perma.cc/9BCR-FTGA].

64. Cantil-Sakauye, *supra* note 62.

65. Letter from Thomas A. Balmer, Chief Justice, Or. Supreme Court., to Jeff Sessions, Att'y Gen., U.S. Dep't of Justice, & John F. Kelly, Sec'y, U.S. Dep't of Homeland Sec. 1 (Apr. 6, 2017), https://assets.documentcloud.org/documents/3540528/Chief-Justice-Balmer-Letter-to-AG-Sessions-Secy.pdf [https://perma.cc/MVS2-AYGQ].

66. *Id*.

67. Fertig, *supra* note 46.

68. Edwin Martinez, *Cortes de NY confirman que no pueden cerrar entrada a 'La Migra'* [*NY Courts Say They Can't Keep ICE out*], EL DIARO (May 9, 2018), https://eldiariony.com/2018/05/09/cortes-de-ny-confirman-que-no-pueden-cerrar-entrada-a-la-migra/ [https://perma.cc/LLU7-38NA], *translated in* K. Casiano, *NY Courts Say They Can't Keep ICE out,* VOICES OF NY (May 10, 2018), https://voicesofny.org/2018/05/ny-courts-say-they-cant-keep-ice-out/ [https://

Meanwhile, other actors in New York state government have taken up the issue. On April 15, 2018, New York State Governor Andrew Cuomo signed an executive order prohibiting the federal immigration agency from making arrests in state government buildings without a judicial warrant "unless the civil arrest is related to a proceeding within such facility."[69] However, the executive order does not apply to the courts because Chief Judge DiFiore, not Governor Cuomo, has jurisdiction over the New York state courthouses.[70] At the time of writing, the New York state Office of Court Administration was reported to be considering a requirement that ICE agents obtain a judicial warrant prior to making arrests in state courthouses.[71] Additionally, the New York state legislature introduced a bill similar to the policy under consideration by the Office of Court Administration in that it would require ICE agents to obtain a warrant prior to making arrests in or around state courthouses.[72]

B. Federal Government Responses

In response to these concerns, the federal government has emphasized the necessity of the arrests. In an open response letter to Chief Justice Cantil-Sakauye, former Attorney General Jeff Sessions and former DHS Secretary John F. Kelly claimed that the courthouse detentions had been made necessary by California's and other jurisdictions' sanctuary policies, which the federal government believes hinder ICE from enforcing immigration law.[73] To justify its court-

perma.cc/R86X-UMKP]. Lucian Chalfen, spokesman for the Office of Court Administration, argued that it is illegal to close a public building to the authorities, and that "[t]here is not one state court system in the country that bars law enforcement from their courthouses." Claudia Irizarry Aponte, *NY Court Officials Say They 'Cannot and Will Not' Ban ICE from Courtrooms*, NPR: LATINO USA (Feb. 26, 2018), https://latinousa.org/2018/02/26/ny-court-officials-say-cannot-will-not-ban-ice-courtrooms/ [https://perma.cc/7KBR-RX2R]; *see also* Martinez, *translated in* Casiano, *supra.*

69. Amendment to Executive Order 170 - State Policy Concerning Immigrant Access to State Services and Buildings, N.Y. Exec. Order No. 170.1 (Apr. 5, 2018), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_170.1.pdf [https://perma.cc/FR8G-A4V5].

70. *See* N.Y. CONST. art. VI, § 28 ("Administrative supervision of court system.").

71. Dan M. Clark, *OCA Mulls Rule Requiring Judicial Warrants for ICE Arrests in NY Courts*, N.Y.L.J. (Jan. 29, 2019, 4:26 PM), https://www.law.com/newyorklawjournal/2019/01/29/oca-mulls-rule-requiring-judicial-warrants-for-ice-arrests-in-ny-courts/?slreturn=20190106134452 [https://perma.cc/GB8Q-XCTL].

72. A. 2176, 203rd Assemb. Reg. Sess. (N.Y. 2019); *see also* Beth Fertig, *Albany Bill Could Make It Harder for ICE to Arrest Immigrants at Courthouses*, GOTHAMIST (Jan. 31, 2019, 4:13 PM), http://gothamist.com/2019/01/31/ice_arrests_court_new_york.php [https://perma.cc/CT6W-DK2S].

73. Letter from Jefferson B. Sessions III, Att'y Gen., U.S. Dep't of Justice, & John F. Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Tani G. Cantil-Sakauye, Chief Justice, Supreme Court of Cal. 2 (Mar. 29, 2017) [hereinafter Sessions], https://assets.documentcloud.org/documents/3533830/Sessionskelly.pdf [https://perma.cc/84UK-DARZ]; *see also* Alan Neuhauser*, Sessions, Kelly Defend Courthouse Immigration Arrests,* U.S. NEWS, (Mar. 31, 2017), https://www.usnews.com/news/national-news/articles/2017-03-31/jeff-sessions-john-kelly-defend-courthouse-immigration-arrests.

house arrests, an ICE spokesman claimed that "every effort is made to take the person into custody in a secure area, out of public view; but this is not always possible."[74] ICE additionally argues that civil immigration enforcement actions taken inside courthouses can reduce safety risks to the public, targeted immigrants, and ICE officers and agents because "[i]ndividuals entering courthouses are typically screened by law enforcement personnel to search for weapons and other contraband."[75]

In response to the concerns over the effects of courthouse arrests on courts' functions, on January 10, 2018, ICE released the *Directive on Civil Immigration Enforcement Inside Courthouses* as an effort to "minimize the impact on court proceedings."[76] ICE also claimed that its courthouse arrests are consistent with longstanding law enforcement practices nationwide as "[f]ederal, state, and local law enforcement officials routinely engage in enforcement activity in courthouses throughout the country because many individuals appearing in courthouses for one matter are wanted for unrelated criminal or civil violations."[77]

IV.
ICE'S COURTHOUSE ENFORCEMENT POLICY

A. ICE's Directive on Civil Immigration Enforcement Inside Courthouses

On January 10, 2018, ICE released a directive on *Civil Immigration Enforcement Actions Inside Courthouses* ("the Directive").[78] In the four-page directive, ICE formalized its courthouse enforcement actions and imposed some limitations on civil enforcement actions inside courthouses by its agents, allowing for some exceptions.[79] The Directive does not apply to criminal immigration enforcement actions.[80]

The Directive says ICE's courthouse enforcement actions apply to "actions against specific, targeted aliens[81] . . . when ICE officers or agents have infor-

74. Heidi Glenn, *Fear of Deportation Spurs 4 Women to Drop Domestic Abuse Cases in Denver*, NPR (Mar. 21, 2017, 4:43 AM), https://www.npr.org/2017/03/21/520841332/fear-of-deportation-spurs-4-women-to-drop-domestic-abuse-cases-in-denver [https://perma.cc/JZ76-3DF6].

75. U.S. IMMIGR. & CUST. ENF'T, *supra* note 7, at 1. See *infra* Sections V.B.4, V.B.5 for an argument that the courthouse arrests are not justified by the given governmental interest.

76. U.S. IMMIGR. & CUST. ENF'T, *supra* note 7, at 1.

77. *Id.*

78. *Id*.

79. *Id.*

80. *Id*. at 2.

81. Hereafter "[noncitizens]." The author and journal do not use this term recently re-adopted by the Department of Justice. *See* Nash Jenkins, *Justice Department Says Undocumented Immigrants Should Be Called 'Illegal Aliens,'* TIME (July 26, 2018), http://time.com/5349694/doj-press-illegal-undocumented/ [https://perma.cc/DG54-N4YY]; E-mail from redacted sender, Pub. Info. Officer, U.S. Dep't of Justice, to Pub. Info. Officers, Exec. Office for U.S. Att'ys, U.S. Dep't of Justice, http://cdn.cnn.com/cnn/2018/images/07/24/pio_guidance.pdf [https://perma.cc/5QZV-GELY]. *See generally* W. Gardner Selby, *Is 'Illegal Alien' a Legal Term in Federal Law?*,

mation that leads them to believe the targeted [noncitizens] are present at that specific location."[82] The people targeted by ICE are immigrants "with criminal convictions, gang members, national security or public safety threats, [noncitizens] who have been ordered removed from the United States but have failed to depart, and [noncitizens] who have re-entered the country illegally after being removed."[83]According to the Directive, bystanders encountered during a civil immigration enforcement action inside a courthouse, "such as family members or friends accompanying the target [noncitizen] to court appearances or serving as a witness in a proceeding", will not be subject to arrest, "absent special circumstances."[84] One of the Directive's footnotes explains that ICE agents may make case-by-case determinations.[85]

POLITIFACT: TEX. (May 9, 2018, 11:12 AM), https://www.politifact.com/texas/statements/2018/may/09/steve-mccraw/illegal-alien-legal-term-federal-law/ [https://perma.cc/9MS9-BD7S] ("The term ["illegal alien"] appears—yet scarcely—in federal law. Best we can tell, though, no law defines the term as referring to all individuals living in the U.S. without legal authorization.").

82. U.S. IMMIGR. & CUST. ENF'T, *supra* note 7, at 1 ("ICE civil immigration enforcement actions inside courthouses include actions against specific, targeted [noncitizens] with criminal convictions, gang members, national security or public safety threats, [noncitizens] who have been ordered removed from the United States but have failed to depart, and [noncitizens] who have re-entered the country illegally after being removed, when ICE officers or agents have information that leads them to believe the targeted [noncitizens] are present at that specific location.").

83. *Id.*

84. *Id.* ("[Noncitizens] encountered during a civil immigration enforcement action inside a courthouse, such as family members or friends accompanying the target [noncitizen] to court appearances or serving as a witness in a proceeding, will not be subject to civil immigration enforcement action, absent special circumstances, such as where the individual poses a threat to public safety or interferes with ICE's enforcement actions.").

85. *Id.* at 1 n.1 (first citing Memorandum from John Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Prot., Thomas D. Homan, Acting Dir., U.S. Immigr. & Customs Enf't, Lori Scialabba, Acting Dir., U.S. Citizenship & Immigr. Servs., Joseph B. Maher, Acting Att'y Gen., U.S. Dep't of Justice, Dimple Shah, Acting Assistant Sec'y of Int'l Affairs, U.S. Dep't of Energy, & Chip Fulghum, Acting Undersecretary for Mgmt., U.S. Dep't of State, Enforcement of the Immigration Laws to Serve the National Interest 4 (Feb. 20, 2017) [hereinafter Kelly on Enforcement], https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [https://perma.cc/W2ZG-G3EC] ("The Department shall prioritize aliens described in the Department's Enforcement Priorities (Section A) for arrest and removal. This is not intended to remove the individual, case-by-case decisions of immigration officers."); and then citing Memorandum from John Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Prot., Thomas D. Homan, Acting Dir., U.S. Immigr. & Customs Enf't, Lori Scialabba, Acting Dir., U.S. Citizenship & Immigr. Servs., Joseph B. Maher, Acting Att'y Gen., U.S. Dep't of Justice, Dimple Shah, Acting Assistant Sec'y of Int'l Affairs, U.S. Dep't of Energy, & Chip Fulghum, Acting Undersecretary for Mgmt., U.S. Dep't of State, Implementing the President's Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf [https://perma.cc/W7LM-WSP2] ("ICE officers and agents will make enforcement determinations on a case-by-case basis in accordance with federal law and consistent with U.S. Department of Homeland Security (DHS) policy.").

The Directive also says federal agents should "generally avoid" enforcement actions in courthouses that are dedicated to "non-criminal (e.g., family court [or] small claims court) proceedings."[86] However, if the enforcement action in these courts is "operationally necessary," approval from a supervisor is required.[87]

B. ICE's Policy Concerning Sensitive Locations

The Directive provides less protection to immigrants at courthouses than ICE's policy provides to immigrants at locations determined to be sensitive. ICE previously issued and has been implementing policy guidance ("Policy") concerning enforcement actions at sensitive locations, such as schools and churches, but does not consider courthouses to be sensitive locations.[88] The Policy provides more protection for sensitive locations than the Directive provides for courthouses, despite the fact that courts are as important as the other sensitive locations, such as schools and healthcare facilities. Advocates and judges alike point out the need to extend this greater level of protection for sensitive locations to courthouses.[89]

The Policy "is designed to ensure that . . . enforcement actions do not occur at . . . sensitive locations . . . unless (a) exigent circumstances exist (b) other law enforcement actions have led officers to a sensitive location . . . or (c) prior approval is obtained."[90] ICE will give special consideration to requests for enforcement actions at or near sensitive locations if the only known address of a target is at or near a sensitive location.[91]

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86. *Id*. at 2 ("ICE officers and agents should generally avoid enforcement actions in courthouses, or areas within courthouses that are dedicated to non-criminal (e.g., family court, small claims court) proceedings.").

87. *Id.* ("In those instances in which an enforcement action in the above situations is operationally necessary, the approval of the respective Field Office Director (FOD), Special Agent in Charge (SAC), or his or her designee is required.").

88. Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf't, to Field Office Directors, U.S. Immigr. & Customs Enf't, Special Agents in Charge, U.S. Immigr. & Customs Enf't, & Chief Counsel, U.S. Immigr. & Customs Enforcement, Enforcement Actions at or Focused on Sensitive Locations 1 (Oct. 25, 2011) [hereinafter Morton], https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf [https://perma.cc/V56U-GUVD]; *see also FAQ on Sensitive Locations and Courthouse Arrests*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/ero/enforcement/sensitive-loc#wcm-survey-target-id [https://perma.cc/BGD8-M6TU] (last updated Sept. 25, 2018) ("Locations treated as sensitive locations under ICE policy would include, but are not . . . limited to: [s]chools . . . ; [m]edical treatment and health care facilities, such as hospitals, doctors' offices, accredited health clinics, and emergent or urgent care facilities; [p]laces of worship . . . ; [r]eligious or civil ceremonies or observances . . . ; and [d]uring a public demonstration, such as a march, rally, or parade.").

89. Letter from Former Judges, *supra* note 54; *see also* Letter from ICE Out of Courts Coalition to Janet DiFiore, N.Y. Chief Judge, and Lawrence Marks, N.Y. Chief Admin. Judge (June 22, 2017), https://www.immigrantdefenseproject.org/wp-content/uploads/Open-Letter-to-Judge-DiFiore-06222017.pdf [https://perma.cc/HK44-FEFP].

90. Morton, *supra* note 88, at 1.

91. *Id*. at 2 ("ICE will give special consideration to requests for enforcement actions at or near sensitive locations if the only known address of a target is at or near a sensitive location (e.g., a target's only known address is next to a church or across the street from a school).").

The Policy on sensitive locations grants ICE broad permission to conduct enforcement action in sensitive locations when "exigent circumstances" exist. These circumstances include:

- the enforcement action involves a national security or terrorism matter;
- there is an imminent risk of death, violence, or physical harm to any person or property;
- the enforcement action involves the immediate arrest or pursuit of a dangerous felon, terrorist suspect, or any other individual(s) that present an imminent danger to public safety; or
- there is an imminent risk of destruction of evidence material to an ongoing criminal case.[92]

C. Comparison Between the Directive and the Policy

	Directive on Courthouse Arrests	**Policy on Sensitive Locations**
Enforcement Actions	"civil immigration enforcement actions inside federal, state, and local courthouses"[93]	"certain enforcement actions by ICE officers and agents at or focused on sensitive locations"[94]
The General Rule	"ICE civil immigration enforcement actions inside courthouses include actions against specific, targeted [noncitizens] with criminal convictions, gang members, national security or public safety threats, [noncitizens] who have been ordered removed from the United States but have failed to depart, and [noncitizens] who have re-entered the country illegally after being removed, when ICE officers or agents have information that leads them to believe the targeted [noncitizens] are present at that specific location."[95]	"This policy is designed to ensure that these enforcement actions do not occur at nor are focused on sensitive locations such as schools and churches unless (a) exigent circumstances exist, (b) other law enforcement actions have led officers to a sensitive location as described in the 'Exceptions to the General Rule' section of this policy memorandum, or (c) prior approval is obtained."[96]

92. *Id.* at 2–3.
93. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 7, at 1.
94. Morton, *supra* note 88, at 1.
95. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 7, at 1.
96. Morton, *supra* note 88, at 1.

	Directive on Courthouse Arrests	**Policy on Sensitive Locations**
Exceptions	"[Noncitizens] encountered during a civil immigration enforcement action inside a courthouse, such as family members or friends accompanying the target [noncitizen] to court appearances or serving as a witness in a proceeding, will not be subject to civil immigration enforcement action, absent special circumstances, such as where the individual poses a threat to public safety or interferes with ICE's enforcement actions. ICE officers and agents should generally avoid enforcement actions in courthouses, or areas within courthouses that are dedicated to non-criminal (e.g., family court, small claims court) proceedings."[97]	"ICE officers and agents may carry out an enforcement action covered by this policy without prior approval from headquarters when one of the following exigent circumstances exists: • the enforcement action involves a national security or terrorism matter; • there is an imminent risk of death, violence, or physical harm to any person or property; • the enforcement action involves the immediate arrest or pursuit of a dangerous felon, terrorist suspect, or any other individual(s) that present an imminent danger to public safety; or • there is an imminent risk of destruction of evidence material to an ongoing criminal case."[98]
Special Considerations	"In those instances in which an enforcement action in the above situations is operationally necessary, the approval of the respective Field Office Director (FOD), Special Agent in Charge (SAC), or his or her designee is required."[99]	"ICE will give special consideration to requests for enforcement actions at or near sensitive locations if the only known address of a target is at or near a sensitive location (e.g., a target's only known address is next to a church or across the street from a school)."[100]

The Directive does not afford as much protection as the Policy. First, the Directive on enforcement actions at courthouses gives ICE agents more discretion than the Policy. The Policy limits situations where ICE may carry out an enforcement action at sensitive locations without prior approval to an exhaustive list of "exigent circumstances."[101] The Directive, however, uses nonexclusive words. The Directive states that courthouse enforcement actions "include actions against specific, targeted [noncitizens],"[102] but it does not limit courthouse arrests to those individuals. The Directive leaves open the possibility that a larger

97. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 7, at 1–2.
98. Morton, *supra* note 88, at 2–3.
99. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 7, at 2.
100. Morton, *supra* note 88, at 2.
101. *Id*. at 2–3.
102. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 7, at 1.

group of immigrants may be targeted.[103] A courthouse arrest at Bronx Criminal Court in New York on February 8, 2018, shortly after the release of the Directive proves that ICE still arrests immigrants who are not "specific, targeted [noncitizens]."[104] According to information provided by Legal Aid, the arrestee had no previous criminal record, "currently has a green card application pending," and "was at the Bronx courthouse attempting to resolve an open case of misdemeanor assault."[105]

Likewise, without a definition, the Directive uses a "such as" clause to illustrate "[noncitizens] encountered" who are generally not subject to civil enforcement actions at courthouses.[106] It is not clear whether all "[noncitizens] encountered" are exempted from courthouse enforcements absent specific circumstances, as long as they are not "specific, targeted [noncitizens]."[107] If the answer is affirmative, then the "such as" clause is superfluous. The canon against superfluity favors a narrower interpretation that the Directive only exempts some "[noncitizens] encountered," especially including the immigrants listed in the "such as" clause, namely "family members or friends accompanying the target [noncitizen] to court appearances or serving as a witness in a proceeding."[108] This narrow interpretation means unlisted immigrants are in a worse position than the listed "family members or friends" when it comes to courthouse arrests.[109]

The Directive only expressly exempts the witnesses who are "family members or friends" of targeted immigrants rather than all witnesses.[110] The last antecedent rule states that qualifying words are to be applied to the immediately preceding words and not extended to other words more remote absent a showing

103. IMMIGR. DEF. PROJECT & NYU SCH. OF LAW IMMIGR. RIGHTS CLINIC, ICE DIRECTIVE 11072.1: CIVIL IMMIGRATION ENFORCEMENT INSIDE COURTHOUSES: ANNOTATIONS BY THE IMMIGRANT DEFENSE PROJECT AND THE NYU IMMIGRANT RIGHTS CLINIC 3 (2018), https://www.immigrantdefenseproject.org/wp-content/uploads/IDP-NYU-ICE-Courthouse-Directive-Annotated.pdf [https://perma.cc/N2R7-CRWX].

104. *See* Press Release, Immigr. Def. Project, U.S. Immigration and Customs Enforcement (ICE) Arrest at Bronx Criminal Court Today (Feb. 8, 2018), https://www.immigrantdefenseproject.org/wp-content/uploads/IDP-Statement-on-ICE-Bronx-Arrest-1.pdf [https://perma.cc/G2ZG-XU5B].

105. Colby Hamilton, *Public Defenders Protest New ICE Arrest at Bronx Criminal Court*, N.J.L.J. (Feb 8, 2018, 4:54 PM), https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2018/02/08/public-defenders-protest-new-ice-arrest-at-bronx-criminal-court/ [https://perma.cc/2EUD-KQXF].

106. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 7, at 1 ("[Noncitizens] encountered during a civil immigration enforcement action inside a courthouse, such as family members or friends accompanying the target [noncitizen] to court appearances or serving as a witness in a proceeding, will not be subject to civil immigration enforcement action, absent special circumstances, such as where the individual poses a threat to public safety or interferes with ICE's enforcement actions.").

107. *See id.*

108. *See id.*

109. *See id.*

110. *Id.*

of contrary intent.[111] This means the qualifying words, "serving as a witness," are to be applied to the words immediately preceding, "family members or friends," and not extended to other words more remote, "[noncitizens] encountered."[112] If we follow the canon against superfluity and the last antecedent rule, then only those witnesses who are family members or friends of targeted people are clearly exempt from courthouse arrests. Given the ambiguity and arbitrary distinction, a noncitizen witness who is not a family member or friend of "targeted [noncitizens]" may choose not to risk an arrest by going to a court to testify. Furthermore, the Directive does not exempt any targeted individuals, even when they go to courts to serve as witnesses.

Without a definition, the Directive again uses a "such as" clause to describe the "special circumstances" in which the exceptions to the self-imposed limitations apply.[113] The examples of "special circumstances" are "where the individual poses a threat to public safety or interferes with ICE's enforcement actions."[114] This ambiguity suggests that ICE could invoke this authority to arrest anyone who does not immediately comply with ICE, has a criminal record, or a number of other reasons, if they arguably "pose[] a threat to public safety or interfere[] with ICE's enforcement actions."[115] Rather than issuing a bright line rule that protects witnesses and family members, ICE instead allows broad power to arrest under ill-defined circumstances that are left to the officer's discretion.[116] The administration regards "many [noncitizens] who illegally enter the United States and those who overstay or otherwise violate the terms of their visas" as "a significant threat to national security and public safety."[117] The Directive also says ICE should "generally" avoid enforcement actions at courthouses that are dedicated to noncriminal proceedings with some exceptions but does not define the exceptional situations where an enforcement action is "operationally necessary."[118]

While the Policy illustrates "special consideration" to requests for enforcement actions at or near sensitive locations ("if the only known address of a target

111. Lockhart v. United States, 136 S. Ct. 958, 962 (2016) (quoting Barnhart v. Thomas, 540 U.S. 20, 26 (2003)) ("[A] limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.").

112. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 7, at 1.

113. *Id.* ("[Noncitizens] encountered during a civil immigration enforcement action inside a courthouse, such as family members or friends accompanying the target [noncitizen] to court appearances or serving as a witness in a proceeding, will not be subject to civil immigration enforcement action, absent special circumstances, such as where the individual poses a threat to public safety or interferes with ICE's enforcement actions.").

114. *Id.*

115. *Id.*

116. *See* IMMIGR. DEF. PROJECT & NYU SCH. OF LAW IMMIGR. RIGHTS CLINIC, *supra* note 103, at 3.

117. Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13,768, 82 C.F.R. 8799, §1 (2017), https://www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02102.pdf [https://perma.cc/WH53-JJCD].

118. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 7, at 2.

is at or near a sensitive location")[119], the Directive does not give guidance on the considerations for approval of enforcement actions in noncriminal courts by supervisors. Unlike the Policy concerning sensitive locations, the Directive does not, for example, require "an immediate need" for enforcement actions inside courthouses.[120] Finally, the Policy imposes conditions on enforcement actions at or near sensitive locations, while the Directive only sets limitations on civil enforcement actions inside courthouses.[121]

D. The Possible Effects of the Directive

The effects of the Directive remain to be seen. According to a statement from the Immigrant Defense Project, the Directive is essentially "a continuation of what ICE has been doing for the past year under President Trump's leadership."[122] The Directive will do nothing to change ICE's practice, and "ICE will continue to stalk and arrest survivors of violence, young people, and people with serious mental illness."[123] Sarah Mehta, a human rights researcher with the American Civil Liberties Union, said the Directive helps to understand ICE's self-imposed limitations, but she worried the Directive "may have come too late, with fear already spread."[124] Given the substantial discretion bestowed upon ICE officers and the limited protection that the Directive provides to immigrants seeking court access, these commentators are likely correct.

V.
THE FIRST AMENDMENT RIGHT TO ACCESS TO COURTS

Courthouse arrests not only harm public trust and confidence in courts, but also raise serious constitutional questions under the First Amendment Free Speech and Petition Clauses, which protect speech and petitioning activities against governmental interference. In this Part, I first establish that noncitizens are able to make a First Amendment claim in this context. Then, I evaluate potential First Amendment free speech and right to petition claims that could be raised to challenge ICE's practice of making courthouse arrests.

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119. Morton, *supra* note 88.

120. *Compare* U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 7, *with* Morton, *supra* note 88, at 2. ("The policy is not intended to categorically prohibit lawful enforcement operations when there is an immediate need for enforcement action[.]").

121. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 7; Morton, *supra* note 88.

122. Press Release, Immigr. Def. Project, Statement on U.S. Immigration and Customs Enforcement (ICE) Directive on Enforcement in Courthouses (Jan. 31, 2018), https://www.immigrantdefenseproject.org/wp-content/uploads/IDP-Statement-on-ICE-Directive-1.pdf [https://perma.cc/8HZ6-SDX8].

123. *Id.*

124. Elliot Spagat, *ICE Issues Directive to Make Deportation Arrests at Courthouses*, PBS (Feb. 1, 2018, 10:09 AM), https://www.pbs.org/newshour/politics/ice-issues-directive-to-make-deportation-arrests-at-courthouses [https://perma.cc/JA3M-KVFL] (Mehta added that "[a] lot of the damage has been done over the last year").

A. Noncitizens and the First Amendment Rights

The First Amendment uses the words "the people" rather than "citizens" in its text.[125] Its scope should accordingly not be limited to citizens.[126] Indeed, the Supreme Court has held that the First Amendment applies to noncitizens.[127] In *Bridges v. Wixon*, for example, the Court declared that "[f]reedom of speech and of press is accorded [noncitizens] residing in this country," and found a noncitizen's utterances were entitled to that protection.[128]

Despite this precedent, critics may cite four cases—*United States v. Verdugo-Urquidez*,[129] *Harisiades v. Shaughnessy*,[130] *Reno v. American-Arab Anti-Discrimination Committee*,[131] and *Kleindienst v. Mandel*[132]—to argue that some or all noncitizens inside the country do not have the First Amendment rights that would protect them from courthouse arrests. Since the cases were decided, federal and state courts have left the extent of the applicability of the First Amendment to noncitizens unsettled. However, a close reading of the Court's reasoning in these cases compels the conclusion that the usual First Amendment analysis applies to noncitizens and could be invoked to protect them from courthouse arrests.

1. The First Amendment Text Does Not Exclude Noncitizens[133]

In *Verdugo-Urquidez*, the Court alluded to the First Amendment's limited scope of application based on the words "the people."[134] The Court distinguished

125. U.S. CONST. amend. I.

126. *See* Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237, 1242–53 (2016) (describing instances when the Supreme Court has held that the First Amendment applies to noncitizens); Note, *The Meaning(s) of "The People" in the Constitution*, 126 HARV. L. REV. 1078, 1088–93, 1096 (2013) ("The contours of noncitizens' First Amendment rights are complex, but at a minimum, certain noncitizens have speech rights in certain contexts.").

127. Bridges v. Wixon, 326 U.S. 135, 148 (1945) (finding a lawful immigrant possesses the right to free speech and free press); Bridges v. California, 314 U.S. 252 (1941) (same).

128. *Wixon*, 326 U.S. at 148. See Maryam Kamali Miyamoto, *The First Amendment After* Reno v. American-Arab Anti-Discrimination Committee*: A Different Bill of Rights for Aliens?*, 35 HARV. C.R.-C.L. L. REV. 183 (2000) for an argument that free speech and association rights should be applied to all persons within the jurisdiction of the United States because they are fundamental to democracy.

129. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

130. Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

131. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999).

132. Kleindienst v. Mandel, 408 U.S. 753 (1972).

133. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.")

134. *Verdugo-Urquidez*, 494 U.S. at 264–66 (Fourth Amendment protections do not apply to searches and seizures by United States agents of property owned by a Mexican citizen in Mexico.).

the words "the people" used in the Fourth Amendment and the First Amendment from the word "person" used in the Fifth Amendment:

> While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. [*See* United States *ex rel.* Turner v. Williams,] 194 [U.S.] 279, 292 (1904) (Excludable [noncitizen] is not entitled to First Amendment rights, because "[h]e does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law"). The language of these Amendments contrasts with the words "person" and "accused" used in the Fifth and Sixth Amendments regulating procedure in criminal cases.[135]

These comments are only dicta. The implication of the dicta is also limited by the Court's concession that the textual exegesis is not conclusive. Justice Kennedy's concurrence posits that the use of "the people" in the Fourth Amendment "may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it."[136] The First Amendment is framed to restrict the government's power: "Congress shall make no law . . . ."[137] In addition to protecting individual rights, it curbs the government to promote the free flow of information for the benefit of society.[138] Additionally, it ties "the people" to the right to assemble and to petition the Government for a redress of grievances; the other First Amendment rights, including the freedom of speech, are framed more generally.[139] Therefore, the comments in the Fourth Amendment case that some noncitizens are not protected should not control the scope of the First Amendment.

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135. *Id*. (quoting United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904)).

136. *Id.* at 276 (Kennedy, J., concurring). Justice Kennedy wrote in his concurrence that he could not "place any weight on the reference to 'the people' in the Fourth Amendment as a source of restricting its protections," when he joined "fundamental respects" of and provided the fifth vote for the majority's opinion. *Id.* at 275–76 (Kennedy, J., concurring). Justice Stevens filed a separate opinion concurring in the judgment, which stated that noncitizens "who are lawfully present in the United States are among those 'people' who are entitled to the protection of the Bill of Rights, including the Fourth Amendment." *Id.* at 279 (Stevens, J., concurring).

137. U.S. CONST. amend. I.

138. New York Times Co. v. United States, 403 U.S. 713, 716 (1971) (Black, J., concurring) ("The Bill of Rights changed the Original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly.").

139. Michael Kagan, *Do Immigrants Have Freedom of Speech?*, 6 CALIF. L. REV. CIR. 84, 91 (2015).

2. The First Amendment Is Applicable to Noncitizens

The second case critics may refer to is *Harisiades*.[140] Although the Court in *Harisiades* rejected some noncitizens' First Amendment challenge, this rejection was not due to their immigration status.[141] Thus, a close reading actually demonstrates that traditional First Amendment standards governed in *Harisiades*.[142] The plaintiff noncitizens requested review of deportation decisions based on their former Communist Party membership under the Alien Registration Act, which made noncitizens who had been members of the Community Party deportable even if membership was no longer current.[143] The decision of rejection, however, can be explained by the *Harisiades* Court's narrow interpretation of First Amendment protection more generally, as opposed to an analysis specific to petitioners' immigration status. Justice Jackson's First Amendment analysis underscored "the practice or incitement of violence" as a reason for the decision: "Our Constitution sought to leave no excuse for violent attack on the status quo. . . . This means freedom to advocate or promote Communism by means of the ballot box, but it does not include the practice or incitement of violence."[144]

Justice Jackson's reading of the First Amendment was based on *Dennis v. United States*, a case involving citizens in which the Court held that the government could regulate otherwise-protected speech "where there is a 'clear and present danger' of the substantive evil which the legislature had the right to prevent."[145] In a subsequent case, *Brandenburg v. Ohio*, the Court expanded the scope of the First Amendment beyond what it was in *Dennis*.[146] Under the broader modern interpretation of the First Amendment in *Brandenburg*, a state cannot "forbid . . . advocacy of the use of force . . . except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[147] In *Harisiades*, the noncitizen petitioners were not subjected to a different First Amendment analysis due to their immigration status, and nothing in *Harisiades* would foreclose the applicability of the more stringent *Brandenburg* test to noncitizens today. "*Harisiades* stands for the

140. Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (upholding the Alien Registration Act of 1940, so far as it authorizes the deportation of a legal resident noncitizen because of membership in the Communist Party, even though such membership terminated before enactment of the Act).

141. *See id.* at 592.

142. *Id.*

143. *Id.* at 581, 584.

144. *Id.* at 592.

145. Dennis v. United States, 341 U.S. 494, 515 (1951) (holding no First Amendment protection for Communist Party leaders plotting to overthrow the government).

146. Brandenburg v. Ohio, 395 US 444 (1969) (finding Ohio's criminal syndicalism statute unconstitutional because that statute broadly prohibited the mere advocacy, as opposed to incitement, of violence).

147. *Id.* at 447.

proposition that the First Amendment protects citizens and noncitizens equally."[148]

3. Noncitizens Who Cross the Border Have First Amendment Rights.

The third case, *Mandel*, is a case involving *unadmitted* noncitizens,[149] and it should not control a case where noncitizens have crossed the border. In *Mandel*, the Court affirmed the government's authority to refuse a visa to a Marxist journalist who claimed that the visa denial impacted freedom of speech.[150] The Court only required the government to proffer a "facially legitimate and bona fide" standard for a visa denial, which is a far lower standard than ordinary free speech tests.[151] However, the "facially legitimate and bona fide" test in *Mandel* is limited to *unadmitted* immigrants seeking visas from outside of the country.[152] The Court stated that "as an unadmitted and nonresident [noncitizen]," Mandel had no constitutional right of entry to this country.[153]

In a more recent case, *Zadvydas v. Davis*, the Court found "[t]he distinction between [a noncitizen] who has effected an entry into the United States and one who has never entered runs throughout immigration law" and affects the substantive constitutional rights of immigrants.[154] Moreover, several Supreme Court cases demonstrate that exclusion cases—which concern denial of a noncitizen's entry into the United States—should not control deportation cases, which concern removal of a noncitizen from the United States.[155] In exclusion cases, the

148. T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON, & JULIET P. STUMPF, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 655 (8th ed. 2016); *see* Am.-Arab Anti-Discrimination Comm. v. Meese, 714 F. Supp. 1060, 1075, 1081 (C.D. Cal. 1989), *rev'd on other grounds sub nom.* Am.-Arab Anti-Discrimination Comm. v. Thornburgh, 940 F.2d 445 (9th Cir. 1991); *but cf.* STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 170–71 (6th ed. 2015).

149. Kleindienst v. Mandel, 408 U.S. 753 (1972).

150. *Id.* at 756–57, 759–60, 770.

151. *Id.* at 770; Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 26 (2015).

152. *See Mandel*, 408 U.S. at 762, 770 ("[A]n unadmitted and nonresident [noncitizen] ha[s] no constitutional right of entry to this country as a nonimmigrant or otherwise."); *but see* Kagan, *supra* note 151, at 26–27 ("It would be tempting to view Mandel as applying only to visa requests from outside the country. But it is not entirely clear that this explains the Court's decisions in which fundamental rights conflict with immigration enforcement decisions. . . . As a result, it may be a fair reading to suggest that the Court has departed from the traditional plenary power doctrine on matters of procedural due process for noncitizens inside the United States but that the Court has not yet been willing to apply substantive constitutional rights to immigration law.").

153. *Id.* at 762.

154. Zadvydas v. Davis, 533 U.S. 678, 682, 693, 695 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to [noncitizens] outside of [the United States'] geographic borders.").

155. *See, e.g.*, *id.* at 693 ("The distinction between [a noncitizen] who has effected an entry into the United States and one who has never entered runs throughout immigration law."); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 213 (1953) ("Neither respondent's harborage on Ellis Island nor his prior residence here transforms this into something other than an exclusion proceeding.").

"Constitution has no extraterritorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions,"[156] while deportation entails "deprivation of that which has been lawfully acquired."[157] Therefore, *Mandel* shall not control a case where noncitizens have crossed the border and they shall have the First Amendment rights.

Immigrants who have crossed the border, including those without legal immigration status, are afforded more constitutional rights than unadmitted noncitizens. For instance, in *Zadvydas*, the Court ruled that the United States cannot detain immigrants under deportation orders indefinitely.[158] The Court found it is well established that persons inside the United States are entitled to certain constitutional protections that are unavailable to people outside its geographic borders.[159] The Supreme Court has noted in many cases that "[noncitizens] who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."[160] The reasoning underlying this quote is that these immigrants, documented or not, have established a connection with the country, including family and community ties, and should have the constitutional rights that are not expressly reserved to citizens.[161] Likewise, since these immigrants have established connection with the country, their communication within the country should be protected under the traditional standards of the First Amendment.[162]

Moreover, the *Mandel* Court also referred to the First Amendment right of citizens to receive information and ideas from noncitizens.[163] In *Mandel*, American professors asserted their First Amendment rights, "individually and as members of the American public," to "hear, speak, and debate with" noncitizens in person.[164] Even assuming those outside the United States seeking admission

156. Fong Yue Ting v. United States, 149 U.S. 698, 738 (1893) (Brewer, J., dissenting).

157. *Id.* at 762 (Fuller, C.J., dissenting).

158. *Zadvydas*, 533 U.S. at 689.

159. *Id*. at 693.

160. *Mezei*, 345 U.S. at 212.

161. Such rights are the ones in the Privileges and Immunities Clauses of the U.S. Constitution. U.S. CONST. art. IV, § 2, Cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); U.S. CONST. amend. XIV, § 1, Cl. 2 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]").

162. *See* Kamali Miyamoto, *supra* note 128, at 220 (one of the reasons that the Bill of Rights should uniformly apply to citizens and noncitizens is that "the rights of [noncitizens] and U.S. citizens are closely linked, given the relationships and associations that [noncitizens] form with the United States throughout the duration of their stay in the country"); *cf.* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[O]nce [a noncitizen] gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.").

163. Kleindienst v. Mandel, 408 U.S. 753, 762 (1972).

164. *Id.* Mandel conceded in his brief that "Congress could enact a blanket prohibition against entry of all [noncitizens] falling into the class defined [in the Immigration and Nationality Act of 1952], and that the First Amendment rights could not override that decision." *Id.* at 767; Brief for Appellees at 16, Kleindienst v. Mandel, 408 U.S. 753 (1972) (No. 71-16), 1972 WL

have no standing to complain, citizens who may benefit from noncitizens' speech do.[165] The purpose of the First Amendment is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail" and the public has the right to receive information and ideas.[166] As Congressional power to write immigration laws implicates citizens' First Amendment rights, the usual First Amendment standards apply.

Therefore, courthouse arrests of noncitizens cannot be validated by *Mandel*. Unlike excludable noncitizens, noncitizen arrestees are inside the country, and some of them are permanent residents.[167] Many have lived in the United States for extended periods of time, even if they were not legally admitted into the country.[168] Since the noncitizens in courthouse arrests have more constitutional rights than noncitizens seeking admission, the exclusion cases do not control. Moreover, Professor Mandel disputed the decision of the Executive Branch to exclude him.[169] In courthouse arrests, noncitizens' prima facie deportability is not disputed, it is the means of arrests that infringes on arrestees' rights.

4. American-Arab Anti-Discrimination Committee as a National Security Case

In the fourth case, *American-Arab Anti-Discrimination Committee*, the Court found that it did not have jurisdiction to review a group of noncitizens' First Amendment challenge against selective enforcement.[170] Importantly for advocates, the Court's comment on noncitizens' constitutional rights is dictum and this case is unique for its national security context. In *American-Arab Anti-Discrimination Committee*, noncitizens sued the government, claiming that the government targeted them for deportation because of their affiliation with a politically unpopular group, in violation of their First and Fifth Amendment rights.[171] The government argued that a provision of the Illegal Immigration Re-

135746, at *16. Consequently, the Court found that Congress delegated conditional exercise of its power to the Executive and that the recognition of citizens' First Amendment rights to hear noncitizens' ideas was not dispositive of the result. *Mandel*, 408 U.S. at 765, 769.

165. *Cf. Mandel*, 408 U.S. at 771-72 (Douglas J., dissenting) (discussing the various audiences which Dr. Mandel would be meeting who may have the First Amendment right to hear, to learn from, and to meet with him).

166. *Id.* at 763 (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386-390 (1969)).

167. *E.g.*, Ryan Haarer, *ICE Agents Recorded in Denver Courthouse Were Trying to Arrest Four-Time Felon*, 9NEWS (Mar. 2, 2017, 8:58 PM), http://www.9news.com/article/news/crime/ice-agents-recorded-in-denver-courthouse-were-trying-to-arrest-four-time-felon/418675303 [https://perma.cc/D789-BRUN]; *see also* Betsy Woodruff, *Legal Immigrants Fear Getting Arrested in Court by ICE*, DAILY BEAST (Mar. 30, 2017, 1:00 AM), https://www.thedailybeast.com/legal-immigrants-fear-getting-arrested-in-court-by-ice [https://perma.cc/H938-NPEM].

168. Vivian Yee, Kenan Davis, & Jugal K. Patel, *Here's the Reality About Illegal Immigrants in the United States*, N.Y. TIMES (Mar. 6, 2017), https://www.nytimes.com/interactive/2017/03/06/us/politics/undocumented-illegal-immigrants.html [https://perma.cc/2KPX-2H4Z].

169. *Mandel*, 408 U.S. at 769–70.

170. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999).

171. *Id.* at 473–74.

form and Immigrant Responsibility Act of 1996 ("IIRIRA"), which restricted judicial review of the Attorney General's decision to "commence proceedings, adjudicate cases, or execute removal orders against any [noncitizen] under [the Act]," deprived federal courts of jurisdiction over the selective-enforcement claim.[172]

The Supreme Court granted certiorari only to the jurisdictional issue,[173] but wrote a much broader opinion. The Court held IIRIRA deprived federal courts jurisdiction over the noncitizens' claims of selective enforcement.[174] Additionally, it found that the Constitution did not grant noncitizens the right to review of their selective enforcement claims.[175] The Court stated that a noncitizen "unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation. . . . [S]uch claims invade a special province of the Executive—its prosecutorial discretion."[176] It reasoned that deportation cases did not merely involve the disclosure of normal domestic law enforcement priorities and techniques, but often the disclosure of "foreign-policy objectives" and "foreign-intelligence products and techniques."[177] Nonetheless, *American-Arab Anti-Discrimination Committee* does not compel a broad interpretation that noncitizens are without First Amendment rights in the context of deportation.[178] In dissent, Justice Souter characterized the part of the Court's opinion on the merits—as opposed to the jurisdictional issue—as dictum because the Court had no need to address the merits of the respondent's claims.[179]

The First Amendment claims against courthouse arrests can be distinguished from *American-Arab Anti-Discrimination Committee*, which is unique due to its allusion to foreign policy interests and the particular context of selective enforcement.[180] In *American-Arab Anti-Discrimination Committee*, respondents claimed that they were targeted because they were members of an international terrorist and communist organization.[181] A review of their First Amendment claims will necessarily involve "foreign[ ]policy" and "foreign[ ]intelligence."[182] In contrast, courthouse arrests do not involve substantial national security or for-

172. *Id.* at 473 (quoting Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1252(g) (1996)).

173. *Id.* at 497 (Ginsburg, J., concurring in part).

174. *Id.* at 492.

175. *Id.* at 488.

176. *Id.* at 488–89.

177. *Id.* at 490–91.

178. Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After* Reno v. AADC*,* 14 GEO. IMMIGR. L.J. 313, 345 (2000); *but see* Kamali Miyamoto, *supra* note 128, at 205 ("By rejecting a valid constitutional defense of selective enforcement in this context, Scalia implied that [noncitizens] who were unlawfully present in the United States did not enjoy the protection of the First Amendment.").

179. *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 510–11 (Souter, J., dissenting).

180. Neuman, *supra* note 178, at 346.

181. *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 472–73.

182. *Id.* at 490–91.

eign policy: in the vast majority of courthouse arrests, there is no risk of disclosure of "foreign-policy objectives" or "foreign-intelligence products and techniques."[183] If we consider *American-Arab Anti-Discrimination Committee* as a unique case because of its anti-terrorism nexus (when substantial national security and foreign policy meet), it should not have too much influence on cases concerning courthouse arrests.

The selective enforcement in *American-Arab Anti-Discrimination Committee* is not unique to the immigration context; courts presumptively do not review prosecutorial discretion in any context.[184] In this way, *American-Arab Anti-Discrimination Committee* is like *Harisiades* in that normal standards apply. While prosecutorial discretion is a decision to prosecute or not prosecute a specific person, courthouse arrests are about the means of arresting a person. A challenge to a courthouse arrest does not concern ICE's power to detain a person, but rather the location of the arrest. ICE's arrests in courthouses unnecessarily infringe on noncitizens' access to court, even if the decision to begin deportation proceedings against them is discretionary. Although the Executive has broad discretion in prosecutorial decisions, numerous Fourth Amendment cases show that courts generally have no problem in reviewing the manner and location of arrests in violation of Constitutional rights.[185]

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183. *Id.* According to the Court in *American-Arab Anti-Discrimination Committee*, "[t]he Executive should not have to disclose its 'real' reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country" in deportation decisions. *Id.* at 491. The Court found deportation decisions involved not only "domestic law enforcement priorities and techniques" but also "foreign-policy objectives and . . . foreign-intelligence products and techniques." *Id.* at 490–91. However, courthouse arrests concern the locations to make arrests and are different from the decisions on who should be deported. *See* Hernandez v. United States, 757 F.3d 249, 276–77 (5th Cir. 2014) (indicating that not every immigration enforcement action involves foreign-policy objectives and foreign-intelligence products and allowing an action against an immigration officer for shooting and killing a Mexican who stood in Mexico); *cf.* Martinez-Aguero v. Gonzalez, 459 F.3d 618 (5th Cir. 2006) (holding an excludable noncitizen was protected from false imprisonment and excessive use of force by immigration enforcement personnel and had the standing to assert the Fourth Amendment right).

184. *See* Heckler v. Chaney, 470 U.S. 821 (1985) (finding that an agency's decision not to take enforcement action is presumed immune from judicial review); *see also* United States v. Armstrong, 517 U.S. 456 (1996) (finding that defendant failed to overcome presumption of prosecutorial regularity on a claim of selective criminal prosecution); United Stated v. Scott, 631 F.3d 401 (7th Cir. 2011) (holding that review of the government's decision to dismiss charges would improperly hinder exercise of prosecutorial discretion); *cf.* Drake v. F.A.A., 291 F.3d 59, 70–71 (D.C. Cir. 2002) (finding that an FAA decision to dismiss a complaint without a hearing was akin to prosecutorial discretion and presumptively committed to agency discretion).

185. *See, e.g.*, Steagald v. United States, 451 U.S. 204, 211–13 (1981) (reviewing a warrantless search of a third party's home in an attempt to apprehend the subject of an arrest warrant); Payton v. New York, 445 U.S. 573, 583–86 (1980) (finding that the Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest); United States v. Watson, 423 U.S. 411, 416–18 (1976) (reviewing a warrantless arrest under the Fourth Amendment); Giordenello v. United States, 357 U.S. 480, 485–86 (1958) (finding the arrest and seizure were illegal and setting aside a petitioner's conviction); Martinez-Aguero, 459 F.3d 618 (allowing an excludable noncitizen's Fourth Amendment claim

None of the major cases constricting First Amendment rights in the deportation context would control in a challenge to ICE's courthouse arrest policy. The First Amendment does not distinguish between "the people" in the country based on their immigration status, unlike in *Verdugo-Urquidez*.[186] Moreover, *Harisiades* stands for the proposition that the First Amendment protects citizens and noncitizens equally.[187] *Mandel* involves a different set of circumstances that government imposes on the rights of noncitizens who live inside the United States, and differs significantly from courthouse arrests because the exclusion ground was challenged in *Mandel*.[188] Finally, *American-Arab Anti-Discrimination Comm*ittee does not deny noncitizens' First Amendment rights; it is limited to selective enforcement claims in national security cases.[189] These cases should not prevent noncitizens from asserting their First Amendment rights against courthouse arrests.

B. Free Speech Rights

Courthouse arrests may infringe the right of free speech of both noncitizens and citizens. Litigation can be ordinary speech under the First Amendment. Courthouse arrests chill noncitizens' willingness to appear in courts, which violates their rights of litigation as free speech. On the other hand, the chilling effect may also trigger the overbreadth doctrine, which noncitizens may use to challenge the courthouse arrest for deterring others' protected speech even without asserting their First Amendment rights.

1. Litigation as Free Speech

Litigation can be ordinary speech under the First Amendment. Litigation serves as "a vehicle for effective political expression and association, as well as a means of communicating useful information to the public."[190] Noncitizens should be protected from courthouse arrests because they impede noncitizens' free speech rights.

Courts generally apply the same First Amendment guarantees to the right to petition as other First Amendment rights and afford the petitioning activities the same protection as ordinary speech.[191] Although it is recognized that "courts

against immigration enforcement for false imprisonment and excessive use of force).

186. U.S. CONST. amend. I; United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); Bridges v. Wixon, 326 U.S. 135, 148 (1945); Kagan, *supra* note 126, at 1242–53; Kagan, *supra* note 139, at 91.

187. Harisiades v. Shaughnessy, 342 U.S. 580, 591–92 (1952).

188. Kleindienst v. Mandel, 408 U.S. 753, 762,769–70 (1972); *see* Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

189. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999); Neuman, *supra* note 178, at 345–46.

190. Borough of Duryea v. Guarnieri, 564 U.S. 379, 397 (2011) (quoting *In re Primus*, 436 U.S. 412, 431 (1978)).

191. McDonald v. Smith, 472 U.S. 479, 490 (1985) (Brennan, J., concurring) ("[W]e have

should not presume there is always an essential equivalence in the [Free Speech and Petition Clause]",[192] courts tend to import the free speech rational when litigants characterize their claims as arising under another First Amendment clause because the tools for adjudicating free speech claims have been so extensively developed.[193]

2. Overbreadth and Noncitizens' Standing

The overbreadth doctrine may help noncitizens to challenge courthouse arrests on their face without asserting their own First Amendment rights. Under the doctrine, restricting speech is unconstitutional if it prohibits more protected speech or activity than is necessary to achieve a compelling government interest.[194] Noncitizens may challenge courthouse arrests by arguing that the arrests

recurrently treated the right to petition similarly to, and frequently as overlapping with, the First Amendment's other guarantees of free expression."); United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 222 (1967) ("[T]he rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights."); Thomas v. Collins, 323 U.S. 516, 530 (1945) (citations omitted) (citing De Jonge v. Oregon, 299 U.S. 353, 364 (1937)) ("[T]he rights to freedom in speech and press . . . coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, and therefore are united in the First Article's assurance.").

192. *Guarnieri*, 564 U.S. at 388.

193. *See* Thaddeus-X v. Blatter, 175 F.3d 378, 390 (6th Cir. 1999) ("Because the analytic tools for adjudicating First Amendment retaliation claims under the Free Speech Clause have been so extensively developed, courts in this and other circuits have tended to import fully that reasoning when litigants have characterized their claims as arising under another First Amendment clause."); *see also Guarnieri*, 564 U.S. at 387 ("[T]his case provides no necessity to consider the correct application of the Petition Clause beyond [the forced arbitration] context."); *In re Primus*, 436 U.S. at 412 (first citing NAACP v. Button, 371 U.S. 415 (1963); and then quoting United Transp. Union v. Mich. Bar, 401 U.S. 576, 585 (1971)) (citing NAACP v. Button, 371 U.S. 415 (1963)) ("Subsequent decisions have interpreted *Button* as establishing the principle that 'collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.'"); *Button*, 371 U.S. at 429 ("[L]itigation . . . is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, . . . [and] is thus a form of political expression.").

194. United States v. Williams, 553 U.S. 285, 292 (2008) ("According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech."); Massachusetts v. Oakes, 491 U.S. 576, 581 (1989) (citing Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980)) (the overbreadth doctrine is "predicated on the danger that an overly broad statute, if left in place, may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear of criminal sanction"); Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 799 (1984) (weighing "the likelihood that the statute's very existence will inhibit free expression" to decide whether the overbreadth exception is applicable in a particular case); Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (noting that claims of facial overbreadth have been entertained for statutes regulating only spoken words when "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes").

keep lawful permanent residents' and citizens' from using their protected speech rights.

This approach would be especially helpful in cases in which a court finds certain undocumented noncitizens are not entitled to the same First Amendment protection as citizens. For instance, the doctrine may be invoked by an undocumented immigrant arrestee by claiming ICE's courthouse arrest policy too broadly deters lawful permanent residents from going to a court because they think they might be deportable.

Courthouse arrests chill litigation, which is protected speech, so broadly that they may trigger the overbreadth doctrine of the First Amendment. "The overbreadth doctrine prohibits the Government from banning [even] unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."[195] The underlying concern of this doctrine is the chilling effect on First Amendment rights.[196] The doctrine is a strong remedy intended to reduce the social costs of inhibition of protected speech "by suspending *all* enforcement of an overinclusive law."[197]

Because of the chilling effect and social costs at issue, the overbreadth doctrine expands the traditional norms of standing. Under the overbreadth doctrine, litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[198] In other words, a person whose conduct may validly be prohibited can nevertheless challenge laws for their chilling effect on protected speech by others.[199] Before applying the "strong

195. Ashcroft v. Free Speech Coal., 535 U.S. 234, 255–56 (2002) (finding a provision of the Child Pornography Prevention Act of 1996 is overbroad and unconstitutional because it abridged "the freedom to engage in a substantial amount of lawful speech"); *see also Oakes*, 491 U.S. at 584 (finding that overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression and that an overbroad statute, although not void *ab initio,* is voidable); *Vill. of Schaumburg*, 444 U.S. at 634 ("Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court.").

196. *Oakes*, 491 U.S. at 584 (plurality opinion) ("Overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression. An overbroad statute is not void *ab initio*, but rather voidable, subject to invalidation notwithstanding the defendant's unprotected conduct out of solicitude to the First Amendment rights of parties not before the court.").

197. Virginia v. Hicks, 539 U.S. 113, 116, 119, 123–23 (2003) (finding that the overbreadth doctrine did not invalidate a policy authorizing the Richmond police to serve a barment notice on any person lacking "a legitimate business or social purpose" for being on the premises and to then arrest for trespassing any person who remains or returns because Hicks had not shown that the policy prohibits a substantial amount of protected speech in relation to its many legitimate applications).

198. *Broadrick*, 413 U.S. at 602–07, 612, 618 (upholding an Oklahoma statute which prohibited state employees from engaging in partisan political activities on the ground that it was not substantially overbroad).

199. Note, *Overbreadth and Listeners' Rights*, 123 HARV. L. REV. 1749, 1753 (2010) (quoting *Vill. of Schaumburg*, 444 U.S. at 634).

medicine" of overbreadth invalidation, however, a law's application to protected speech must be "substantial."[200]

For instance, in *United States v. Stevens*, Stevens successfully argued that a statute criminalizing depictions of animal cruelty was unconstitutionally overbroad without arguing that its application to his situation was illegitimate. [201] According to Stevens, the statute "applie[d] to common depictions of ordinary and lawful activities, and . . . these depictions constitute[d] the vast majority of the materials subject to the statute."[202] Applying the overbreadth doctrine, the Court agreed.[203] It noted that the Government made no effort to defend the statute as applied beyond extreme examples, or "to extend these arguments to depictions of any other activities—depictions that are presumptively protected by the First Amendment but that remain subject to [the statute]."[204] The Court also rejected the Government's argument that the executive branch would only prosecute for extreme cruelty by invoking its prosecutorial discretion.[205]

The overbreadth doctrine may allow noncitizens in the United States to challenge ICE's policy on its face without asserting their own First Amendment rights. Like *Stevens*, noncitizens do not need to claim the courthouse arrest policy restricts their own speech in courts. Undocumented immigrants can assert that the courthouse arrest policy over-broadly chills lawful permanent residents' and citizens' speech and challenge the policy on its face. ICE has reportedly arrested lawful permanent residents, to whom the First Amendment undoubtedly applies,[206] at courthouses.[207] ICE's courthouse arrests may trigger the overbreadth doctrine if ICE's policy substantially chills protected speech by "the people," including lawful permanent residents, in courts.[208] Legal service lawyers have not-

200. *Broadrick*, 413 U.S. at 613, 615.

201. United States v. Stevens, 559 U.S. 460, 472–73, 482 (2010).

202. *Id.* at 473.

203. *Id.* at 482.

204. *Id.* at 481.

205. *Id*. at 480 ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

206. Bridges v. Wixon, 326 U.S. 135, 148 (1945) (citing Bridges v. California, 314 U.S. 252 (1941)) (finding a lawful immigrant possesses the right to free speech and free press).

207. *See, e.g*., Bleiberg, *supra* note 35; Haarer, *supra* note 167; *but see* Alexander v. United States, 509 U.S. 544, 556 (1993) (rejecting argument that the overbreadth doctrine should apply to RICO's forfeiture provisions because "the threat of forfeiture has no more of a chilling effect on free expression than the threat of a prison term or a large fine").

208. Although courthouse arrests are civil matters, ICE's courthouse arrests may trigger the overbreadth doctrine. Although First Amendment overbreadth cases typically involve criminal sanctions, but they can also arise in a civil context. Alfred Hill, *The Puzzling First Amendment Overbreadth Doctrine,* 25 HOFSTRA L. REV. 1063, 1064 n.3 (1997) (citing Broadrick v. Oklahoma, 413 U.S. 601 (1973)) (overbreadth doctrine "can also arise in a civil context."). Overbreadth doctrine typically involves criminal matters because it typically used to fend off criminal prosecutions. *Id. See generally* Arizona v. United States, 567 U.S. 387, 396 (2012) ("[r]emoval is a civil, not criminal, matter."); INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (characterizing a deportation proceeding as "a purely civil action to determine eligibility to remain in this country").

ed the chilling effects of these arrests on their clients.[209] Lawyers are often asked by their lawful permanent resident clients about the risk of courthouse arrests, but ICE's aggressive policy makes it hard for the lawyers to counsel their clients effectively.[210]

Moreover, citizens' and lawful permanent residents' First Amendment rights may also be affected if litigants have to drop cases due to noncitizen witnesses' fear of courthouse arrests. Arrests have had a "chilling effect felt by victims and witnesses."[211] According to a statement issued by former New York Attorney General Eric Schneiderman and then-Acting Brooklyn District Attorney Eric Gonzalez, reported ICE arrests and attempted arrests in New York State courthouses have increased five-fold in 2017, and some immigrants are afraid and unwilling to move forward with criminal prosecutions or serve as witnesses as a result.[212] Given that the Directive on enforcement actions at courthouses does not unambiguously exempt all witnesses,[213] noncitizen witnesses may still choose not to take the risk to testify in lawful permanent residents' and citizens' cases. Undocumented noncitizens, therefore, may challenge the policy on its face, asserting the overbroad policy chills lawful permanent residents' and citizens' free speech rights.

The chilling effect on protected speech can be substantial. Latinxs in Los Angeles, San Francisco, and San Diego reported 3.5 percent, 18 percent, and 13 percent fewer instances of spousal abuse respectively in the first six months of the year compared with 2016, while reporting among non-Latinx victims was virtually unchanged.[214] In Houston, domestic violence reports declined sixteen percent in 2017 from its growing Hispanic population.[215] The Immigrant Defense Project's survey of 225 attorneys from legal service providers in New York State in 2017 show ICE's previous arrests have spread fear among immigrants in general, immigrant survivors of violence, and immigrant tenants, and

209. *See, e.g.*, Woodruff, *supra* note 167 (reporting that a lawful permanent resident saw an ICE arrest in a court and "was so frightened by the arrest . . . that he fled the courtroom and missed his hearing").

210. *Id.* (reporting that it is hard for attorneys to counsel their clients because ICE has become much more aggressive in New York courts).

211. Press Release, N.Y. Att'y Gen., New York AG Eric Schneiderman and Acting Brooklyn DA Eric Gonzalez Call for ICE to End Immigration Enforcement Raids in State Courts (Aug. 3, 2017), https://ag.ny.gov/press-release/new-york-ag-eric-schneiderman-and-acting-brooklyn-da-eric-gonzalez-call-ice-end [https://perma.cc/4PL5-E4RY].

212. *Id*.

213. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 7, at 1 n.1.

214. James Queally, *Fearing Deportation, Many Domestic Violence Victims Are Steering Clear of Police and Courts*, L.A. TIMES (Oct. 9, 2017, 5:00 AM), https://www.latimes.com/local/lanow/la-me-ln-undocumented-crime-reporting-20171009-story.html [https://perma.cc/CL6S-287L].

215. Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation.*, N.Y. TIMES (June 3, 2018), https://www.nytimes.com/2018/06/03/us/immigrants-houston-domestic-violence.html [https://perma.cc/J6UK-QEF5].

have deterred their participation in courts.[216] The following chart lists the results of the survey:[217]

The General Chilling Effects on Immigrants	
74%	"have worked with immigrants who have expressed fear of the courts because of ICE"
45%	"have worked with immigrants who have either failed to file a petition or withdrawn a petition due to fear of encountering ICE in the courts"
29%	"have worked with immigrants who have failed to appear in court due to fear of ICE"
The Chilling Effects on Survivors of Violence ("A third of the survey participants work with survivors of violence")	
67%	"have had clients who decided not to seek help from the courts due to fear of ICE"
50%	"have worked with immigrants who are afraid to go to court because their abusive partners have threatened that ICE will be there"
48%	"have worked with immigrants who have failed to seek custody or visitation due to fear of ICE"
46%	"have worked with immigrants who have expressed fear of serving as a complaining witness"
37%	"have worked with immigrants who have failed to pursue an order of protection due to fear of ICE"
37%	"have worked with immigrants who have failed to seek a U certification verifying that they are a victim of violence"
The Chilling Effects on Tenants ("A sixth of the respondents work with tenants in Housing Court")	
56%	"have clients who have expressed fear of filing a housing court complaint due to fear of ICE"

The chilling effects will not be eliminated by the Directive. With the fear already spread by the previous courthouse arrests, the newly-released Directive further formalized the policy of courthouse arrests. Although the Directive does exempt some noncitizens (with exceptions allowed even to that exemption), it uses language that is subject to different interpretations.[218] As the Court stated in *Stevens*, "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*."[219] The Court "would not uphold an unconstitutional statute merely because the Government promised to use it re-

216. *ICE in New York State Courts Survey*, *supra* note 16. The survey does not specify the immigration status of the noncitizen respondents. *Id.*

217. *Id.*

218. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 7, at 1 & n.1.

219. United States v. Stevens, 559 U.S. 460, 480 (2015).

sponsibly."[220] Here, federal immigration authorities have not articulated their policies sufficiently narrowly to avoid an overbreadth challenge.

3. Different Levels of Free Speech Scrutiny

Different types of laws affecting free speech are subject to different levels of scrutiny, depending on whether the law regulates the content of speech or whether it is content neutral. It is presumptively unconstitutional for the government to place burdens on speech because of its content.[221] To be upheld as constitutional, a content-based regulation of speech requires strict scrutiny analysis, in which the government must "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."[222] A content-neutral restriction on speech is subject to an intermediate level of scrutiny,[223] under which a regulation shall not place a substantial burden on speech by failing to "leave open ample alternative channels for communication," and "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so."[224] As the following two subsections will discuss, courthouse arrests will not pass strict scrutiny and likely also fail intermediate scrutiny.[225]

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220. *Id.*

221. Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 358 (2009); *see also* Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 188 (2007) (discussing when the presumption may be overcome); Boos v. Barry, 485 U.S. 312 (1988) (finding a District of Columbia display clause violated the First Amendment because it is a content-based restriction on political speech in a public forum, which is not narrowly tailored to serve a compelling state interest); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

222. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228, 2231 (2015) (quoting Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734 (2011)) (finding a sign ordinance that imposed content-based restrictions violated the First Amendment because the ordinance was not narrowly tailored to further a compelling government interest.); *see also* McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2014) (stating that a state-imposed speech restriction that is not content neutral "must satisfy strict scrutiny—that is, it must be the least restrictive means of achieving a compelling state interest."); United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000) (content-based speech must satisfy strict scrutiny).

223. R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing*, 8 ELON L. REV. 291, 296–97 (2016); Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 719 (2003); *see also* Ward v. Rock Against Racism, 491 U.S. 781,797–98 (1989) ("[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so."); United States v. O'Brien, 391 U.S. 367, 377 (1968) ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

224. *Ward*, 491 U.S. at 791, 797–99, 803 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

225. *See infra* Sections V.B.4, V.B.5.

4. Courthouse Arrests Under Strict Scrutiny

While it is more likely that arrests would be subject to an intermediate scrutiny test, courts might consider subjecting the arrests to strict scrutiny.[226] The Supreme Court has noted that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content."[227] If a noncitizen can prove that speaker-based laws reflect the Government's aversion to what the disfavored speakers have to say, then the speaker-based laws are in fact content-based, and strict scrutiny should apply.[228]

Courthouse arrests would probably fail strict scrutiny. ICE's policy does not require the government show that there are no reasonable alternatives to courthouse arrest before they resort it. ICE does not view courthouses as sensitive locations. The Government also fails to provide a compelling interest.[229] As the next section on intermediate scrutiny will discuss in detail,[230] the Government cannot even establish "important or substantial governmental interests" in general.[231] If we look at reported arrests, the failure is obvious. There is no compelling government interests in arresting a domestic abuse victim based on a tip from her abuser right after a hearing for a protective order.[232] ICE also targeted vulnerable people appearing in human trafficking intervention courts,[233] the mission of which is to treat people as victims and not criminal defendants and where criminal defendants are often victims of human trafficking.[234] Even under ICE's new policy of "generally" avoiding enforcement actions at courthouses that are

226. *Cf*. Wishnie, *supra* note 223, at 719–20 ("Thus, an outright prohibition on immigrants seeking redress for unlawful activity would constitute a direct, speaker-based regulation of speech that is presumptively invalid and could be justified only upon the demonstration of a compelling state interest.").

227. Citizens United v. Federal Election Comm'n, 558 U.S. 310, 340 (2010) (holding that laws that regulated political campaign spending by corporations and unions violated the First Amendment).

228. Turner Broad. Sys. v. FCC, 512 U.S. 622, 658 (1994) ("[S]peaker-based laws demand strict scrutiny when they reflect the Government's . . . aversion to what the disfavored speakers have to say[.]"); *see also* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2223 (2015) (noting that speaker-based distinctions are not always content-neutral and may be subject to strict scrutiny if they reflect preference for certain content"); United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000) (content-based speech regulations must satisfy strict scrutiny).

229. *See Playboy Entm't Grp.*, 529 U.S. at 816–17 (explaining that when the Government restricts speech, it bears the burden of proving the constitutionality of the restriction).

230. *See infra* Section V.B.5.

231. United States v. O'Brien, 391 U.S. 367, 377 (1968).

232. *Cf*. Richard Gonzales, *ICE Detains Alleged Victim of Domestic Abuse at Texas Courthouse*, NPR (Feb. 16, 2017, 10:33 PM), https://www.npr.org/sections/thetwo-way/2017/02/16/515685385/ice-detains-a-victim-of-domestic-abuse-at-texas-courthouse [https://perma.cc/L23P-V4U4].

233. Fertig, *supra* note 46; Robbins, *supra* note 35.

234. THE FUND FOR MODERN COURTS, *supra* note 36, at 11; Melissa Gira Grant, *ICE Is Using Prostitution Diversion Courts to Stalk Immigrants*, VILLAGE VOICE (July 18, 2017), https://www.villagevoice.com/2017/07/18/ice-is-using-prostitution-diversion-courts-to-stalk-immigrants/ [https://perma.cc/L23P-V4U4].

dedicated to non-criminal proceedings,[235] criminal defendants and witnesses in criminal proceedings are still vulnerable. No language in the Directive indicates any avoidance of future enforcement actions in courts where States have expressed an interest in rehabilitation. As discussed in depth in the later intermediate scrutiny analysis, it is not permissible to override civil litigants' or criminal defendants' rights to courthouse access absent a specific determination of real danger.[236]

Because the governmental interest in courthouse arrests is not compelling and the restrictions are not narrowly tailored to achieve that interest, the arrests will likely fail strict scrutiny.

5. Courthouse Arrests Under Intermediate Scrutiny

It is more likely that intermediate scrutiny applies to ICE's courthouse arrests. The Supreme Court has rejected the "broad assertion that all speaker-partial laws are presumed invalid."[237] Laws favoring some speakers over others demand strict scrutiny only when "the legislature's speaker preference reflects a content preference."[238] It would be impossible to establish that ICE's speaker preference reflects a content preference because the content of the speech noncitizens express in courts varies significantly.[239]

Although courthouse arrests are likely content-neutral, it would be an uphill battle for ICE to pass intermediate scrutiny. The federal government has defended ICE's practice of courthouse arrests on several grounds. Former U.S. Attorney General Sessions and former DHS Secretary John F. Kelly have written that the courthouse arrests are the most effective means for U.S. agents to enforce immigration policy.[240] ICE also argues that courthouse arrests reduce the safety risks for the arresting officers and for the arrestees because courthouse visitors are typically screened upon entry to search for weapons and other contraband.[241] The federal government further alleges that many of the arrestees are foreign nationals who have prior criminal convictions.[242]

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235. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 7, at 2.

236. *See infra* Section V.B.5.

237. Turner Broad. Sys. v. FCC, 512 U.S. 622, 658 (1994).

238. *Id*.

239. See Part II for a discussion on the courthouse arrests of immigrants appearing at the court for different types of cases, including a petitioner who was seeking a protective order, a defendant who was being charged with selling sex, and a defendant who was participating in a sentencing proceeding for his nonviolent crimes.

240. *See* Dobuzinskis, *supra* note 6 ("Sessions and Kelly criticized California officials for limiting the cooperation of state and local law enforcement officers with U.S. agents, preventing them from going to jails to pick up illegal immigrants arrested for other crimes. 'As a result, ICE officers and agents are required to locate and arrest these [noncitizens] in public places, rather than in secure jail facilities[.]'").

241. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 7, at 1.

242. *Id.*

These alleged "important or substantial governmental interests" are illusory.[243] Although the officials said the raids targeted known criminals, they also detained immigrants without criminal records.[244] Moreover, given prosecutors' longstanding reliance on the cooperation of low-level defendants, the governmental interest in concentrating limited enforcement resources on "innocent" victims is not substantial.[245] ICE's increased presence at courthouses will discourage immigrants, including lawful permanent residents, from going to courts and reduce cooperation with law enforcement in the long term, likely compromising public safety.[246] This chilling effect is not speculative. For example, a city prosecutor in Denver had to drop four cases as a result of witnesses' fear of courthouse arrests.[247] These unfortunate effects undermine the very public safety rationale that is used to justify the courthouse arrest policy.

A restriction on the First Amendment freedoms is not essential to the furtherance of the alleged interests. First, there is no evidence that noncitizen arrestees generally possess weapons or contraband.[248] ICE reportedly has used courthouses as bait to arrest numerous individuals with no documented connection to weapons or contraband, including a domestic violence victim seeking a protective order, a defendant being charged with selling sex, a defendant participating in a sentencing proceeding for his nonviolent crimes, and a person ac-

243. United States v. O'Brien, 391 U.S. 367, 377 (1968).

244. Sarah Pulliam Bailey, *This Undocumented Immigrant Just Announced That She Is Seeking Sanctuary at a Church. Now She Waits*, WASH. POST (Feb. 15, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/02/15/this-undocumented-immigrant-just-announced-shes-seeking-sanctuary-at-a-church-now-she-waits/?utm_term=.6fdf33b318e6 [https://perma.cc/W4RC-26MA]; *see* Kelly on Enforcement, *supra* note 85, at 2 (DHS personnel "shall faithfully execute the immigration laws of the United States against all removable aliens"). The Trump administration has targeted a much broader set of unauthorized persons for removal. "Under the executive order, ICE will not exempt classes or categories of removable [noncitizens] from potential enforcement. All of those in violation of immigration law may be subject to immigration arrest, detention and, if found removable by final order, removal from the United States." *Q&A: DHS Implementation of the Executive Order on Border Security and Immigration Enforcement*, U.S. DEP'T OF HOMELAND SECURITY (Feb. 21, 2017), https://www.dhs.gov/news/2017/02/21/qa-dhs-implementation-executive-order-border-security-and-immigration-enforcement [https://perma.cc/HK4P-MDJK].

245. Wishnie, *supra* note 223, at 721.

246. *See* Woodruff, *supra* note 167.

247. Queally, *supra* note 5.

248. *Cf.* U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 5 (2017), https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf [https://perma.cc/X5HY-HRDY]. Approximately twenty-six percent of arrestees are not convicted of crimes and ICE arrestees with prior convictions, the most common criminal conviction was driving under the influence of alcohol in 2017. *Id*. Anna Flagg, *The Myth of the Criminal Immigrant*, N.Y. TIMES (Mar. 30, 2018), https://www.nytimes.com/interactive/2018/03/30/upshot/crime-immigration-myth.html [https://perma.cc/X3MD-N5KY]. Studies show either that immigration has the effect of reducing average crime, or that there is simply no relationship between the two. *Id*. Chris Nichols, *MOSTLY TRUE: Undocumented Immigrants Less Likely to Commit Crimes Than U.S. Citizens*, POLITIFACT CAL. (Aug. 3, 2017, 4:04 PM), https://www.politifact.com/california/statements/2017/aug/03/antonio-villaraigosa/mostly-true-undocumented-immigrants-less-likely-co/ [https://perma.cc/8UWT-MJJ8].

cused of a DUII.[249] There is no particularized danger linked to these people who are being arrested. ICE cannot assume every undocumented immigrant is a dangerous fugitive to justify their widespread courthouse arrests.

ICE's recent directive on courthouse enforcement is overly broad. It permits courthouse arrests of broad categories of immigrants, mentioning "targeted [noncitizens] with criminal convictions, gang members, national security or public safety threats, [noncitizens] who have been ordered removed from the United States but have failed to depart, and [noncitizens] who have re-entered the country illegally after being removed."[250] The Directive also greenlights immigration enforcement arrests in criminal courts.[251] Again, previous criminal convictions or removal history does not correspond to the degree of "danger" immigrants may pose to ICE agents in civil enforcement actions. So-called "national security or public safety threats"[252] are similarly overbroad categories. According to the Executive Order "Enhancing Public Safety in the Interior of the United States," the administration simply regards "[m]any [noncitizens] who illegally enter the United States and those who overstay or otherwise violate the terms of their visas" as "a significant threat[s] to national security and public safety."[253] The government should make case-by-case determinations of the danger posed to law enforcement agents before they override the important First Amendment right to access the courts.[254] The Government should have to demonstrate a particularized interest in the arrest whether the arrestees are citizens or not.[255] Furthermore, it is not more permissible to frustrate speech in criminal proceedings than in noncriminal proceedings, given that "members of the public have a right of access to criminal proceedings secured by the First Amendment."[256]

Second, the government's claim that its courthouse arrests are necessitated by sanctuary cities' noncooperation policies is factually questionable and constitutionally dubious.[257] ICE has made courthouse arrests in cities that cooperate

249. *See* Part II.

250. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 7, at 1.

251. *See id*. at 2.

252. *Id.* at 1.

253. Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13,768, 82 C.F.R. 8799, §1 (2017), https://www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02102.pdf [https://perma.cc/GCU5-P2KB] ("Many [noncitizens] who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety. This is particularly so for [noncitizens] who engage in criminal conduct in the United States.").

254. *See* Ward v. Rock Against Racism, 491 U.S. 781,797–98 (1989) ("[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.").

255. *See id.*

256. Tennessee v. Lane, 541 U.S. 509, 523 (2004) (citing Press-Enter. Co. v. Superior Court of Cal., Riverside, 478 U.S. 1, 8–15 (1986)).

257. See *infra* Section VII.C for a discussion under the principle of anti-commandeering principle.

with federal immigration enforcement agents, showing that its practice of making arrests at courthouses is not limited to sanctuary cities.[258]

Third, courthouse arrests leave no alternative way for noncitizens to petition the government, a protected First Amendment right.[259] Federal law has prohibited noncitizens from voting in federal elections.[260] At the state level, "non-citizen voting has been extinct since Arkansas became the last state to ban it in 1926."[261] In *NAACP v. Button*, the Supreme Court recognized the importance of litigation not only as a means of vindicating the rights of discrete groups, but also as a process that makes minority voices heard by society.[262] Like the African American community in the 1950s in *Button*, immigrants may find courthouses to be the most effective and "sole practicable avenue . . . to petition for redress of grievances."[263]

Fourth, these arrests undermine states' interests in maintaining "public trust and confidence" in their court systems.[264] States have an interest in preventing disrupted or delayed court operations, and in law enforcement agencies not compromising public safety or court decorum.[265] The Supreme Court has found that litigation may "facilitate the informed public participation that is a cornerstone of democratic society."[266] The Court has also emphasized the value of litigation as a way for a minority group to contribute to the ideas and beliefs of our society.[267] This argument is even stronger if members of society are unable to observe criminal cases because of fear of courthouse arrests of noncitizen petitioners or witnesses; members of the public—citizen and noncitizen alike—have a right of access to criminal proceedings secured by the First Amendment.[268]

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258. *See* Press Release, U.S. Comm'n on Civil Rights, *supra* note 3, at 2. (citing a courthouse arrest by ICE in El Paso County, Texas, even though the county sheriff, Richard Wiles, had cooperated with ICE by "requiring his office to hold any individuals with an ICE detainer request"). In addition, ICE arrested an immigrant moments after he stepped out of a courtroom in November 2017 in Saratoga Springs, New York, Wendy Liberatore, *ICE Arrests Mexican Man Outside Saratoga City Court*, TIMESUNION (Nov. 2, 2017, 5:37 PM), https://www.timesunion.com/news/article/ICE-arrests-Mexican-man-outside-Saratoga-city-12327064.php [https://perma.cc/KA3V-L47E], which is not a sanctuary city according to Michael Zurlo, spokesman for Saratoga County Sheriff. Kyle Hughes, *Local Authorities: We Will Honor ICE Warrants*, SARATOGIAN (Nov. 17, 2016), http://www.saratogian.com/general-news/20161117/local-authorities-we-will-honor-ice-warrants [https://perma.cc/28FE-WXCJ].

259. *See* NAACP v. Button, 371 U.S. 415, 429–30 (1963) (upholding the First Amendment rights of a civil rights group to engage in public interest litigation).

260. 18 U.S.C. § 611 (2012).

261. *Simon Thompson, Voting Rights: Earned or Entitled?, HARV. POL. REV. (Dec. 3, 2010), http://harvardpolitics.com/united-states/voting-rights-earned-or-entitled/ [https://perma.cc/Z5TR-ZTUV].*

262. *See Button*, 371 U.S. at 431.

263. *Id.* at 430.

264. Cantil-Sakauye*, supra* note 62.

265. OFFICE OF THE CHIEF ADMIN. JUDGE, *supra* note 47, at 1.

266. Borough of Duryea v. Guarnieri, 564 U.S. 379, 397 (2011).

267. *Button*, 371 U.S. at 431.

268. *See* Tennessee v. Lane, 541 U.S. 509, 523 (2004) (citing Press-Enterprise Co. v. Supe-

Moreover, courthouse arrests may be a "prior restraint" on speech, "the most serious and the least tolerable infringement on First Amendment rights."[269] A prior restraint is a government action that prohibits speech or other expression before it can take place. "A prior restraint . . . has an immediate and irreversible sanction[ing]" effect.[270] While a threat of criminal or civil sanctions after publication "chills" speech, a prior restraint "freezes" speech as a categorical bar on the release of information.[271] A prior restraint of expression bears "a heavy presumption against its constitutional validity."[272] Courthouse arrests are a "prior restraint" of speech when they block speech at courtrooms before it takes place by keeping potential litigants from the courthouse; this is highly disfavored in First Amendment jurisprudence.[273]

Because the alleged important government interests are illusory and the restriction on the First Amendment freedoms is greater than necessary to further government interests, the arrests at courthouses likely fail intermediate scrutiny for content-neutral regulations.

C. The Right to Petition

An individual's participation in court proceedings may also qualify as petitioning activities. Like citizens, noncitizens are protected against courthouse arrests by the Petition Clause when they participate in valid petitioning activities in courts. The Petition Clause of the First Amendment guarantees the "right of the people . . . to petition the Government for a redress of grievances."[274] At the Founding, the right to petition protected individuals' rights to express their views to the legislative branch.[275] The Supreme Court later expanded the petition right to include petitions in the judicial and executive branches.[276] The right to peti-

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rior Court of Cal., Riverside, 478 U.S. 1, 8–15 (1986)).

269. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559, 570 (1976) (holding that it was unconstitutional to bar media reporting on a criminal case prior to the trial itself)*; see also Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 71 (1963) (finding Rhode Island system of informal censorship violated the Fourteenth Amendment).

270. *Neb. Press Ass'n*, 427 U.S. at 559.

271. *Id.*; Gregory A. Garbacz, *Gentile V. State Bar of Nevada: Implications for the Media*, 49 WASH. & LEE L. REV. 671, 673 (1992) (A prior restriction "invariably creates a categorical bar on the release of information.").

272. *Bantam Books, Inc*., 372 U.S. at 70; *see also* Near v. Minnesota, 283 U.S. 697, 701–02, 712, 722–23 (1931) (holding that a statute enjoining publication of certain newspapers and periodicals with the object of suppression was facially unconstitutional).

273. *Cf. Near*, 283 U.S. at 701–02, 712, 722–23.

274. U.S. CONST. amend. I.

275. *See* Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN L. REV. 1131, 1136 (2016).

276. *See, e.g.*, United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965) (applying *Noerr* to the executive branch); *see also* Benjamin Plener Cover, *The First Amendment Right to a Remedy*, 50 U.C. DAVIS L. REV. 1741, 1745 n.11 (2017) (collecting cases) ("In more than twenty Supreme Court cases over the past five decades, one or more Justices has asserted or assumed that a lawsuit is a petition, without a single colleague disputing the premise.").

tion applies to petitions to both federal courts and state courts.[277] In this section, I will first discuss the independent guarantees under the First Amendment's Petition Clause; then I will apply the doctrine to courthouse arrests and argue that courts should not impute intent to invade the right to petition to Congress by allowing ICE to arrest the people who are petitioning those courts.[278]

1. The Right to Petition as an Independent Guarantee

The right to petition for a redress of grievances is separate from the other rights guaranteed under the First Amendment.[279] Historically, the right to petition was superior to other First Amendment rights.[280] While the rights of speech and the press were subject to greater restrictions, the right to petition was far less restricted and was often the only authorized way to complain of a governmental action.[281] The Supreme Court has found that the right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights."[282]

However, few litigants have pressed the right under the Petition Clause and few courts have engaged in separate analysis of the right to petition as opposed to other First Amendment rights.[283] Courts have repeatedly held that the right to petition and other expressive First Amendment rights "are inseparable."[284] The

277. *See* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510–11 (1972) (emphasis added) ("We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of *state and federal agencies and courts* to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors."). For instance, the Court applied the doctrine of right to petition to a state-court action in *Bill Johnson's Rests. v. NLRB, Inc.*, 461 U.S. 731 (1983) (holding that the National Labor Relations Board may not halt a state-court lawsuit unless the suit lacks a reasonable basis in fact or law).

278. *See* E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961) ("The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.").

279. *See* Wayte v. United States, 470 U.S. 598, 610 n.11 (1985) (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911–15 (1982) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)) ("The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.'")) ("Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis.").

280. Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 17 (1993).

281. *Id.* at 37–38.

282. United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 222 (1967) (holding that the First Amendment freedoms of speech, petition and assembly include the right of a labor union to retain a salaried attorney to represent its members in worker compensation claims); *see also* BE&K Constr. Co. v. NLRB, 536 U.S. 516, 524 (2002) (finding that the National Labor Relations Board could not impose liability on an employer for an unsuccessful retaliation suit).

283. *See, e.g.*, *Wayte*, 470 U.S. at 610 n.11; Spanbauer, *supra* note 280, at 16; Wishnie, *supra* note 223, at 715 ("Few litigants have pressed claims under the Petition Clause, and few courts have engaged in significant analysis of the scope or content of the rights it protects.")

284. *Ill. State Bar Ass'n*, 389 U.S. at 222 (quoting *Thomas*, 323 U.AS. at 530); *see* De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (discussing right to petition and other expressive First Amendment Rights).

right to petition and other First Amendment rights "are intimately connected, both in origin and in purpose."[285] As a result, courts generally subject the right to petition to the same constitutional analysis as other First Amendment rights.[286] However, in a small number of cases, the Supreme Court has indicated that the right to petition can function as an independent guarantee against government action.[287] This may allow noncitizens to bring an additional First Amendment claim against ICE's courthouse arrests by arguing that courts should not lightly impute an intent to invade the right to petition to Congress.

2. The Noerr-Pennington Doctrine

The Supreme Court has relied on the Petition Clause to avoid chilling the exercise of the First Amendment right to petition in special areas of law,[288] which could also help inform challenges to courthouse arrests. The analysis of a separate right to petition first appeared in antitrust cases as the *Noerr-Pennington* doctrine.[289] Under the *Noerr-Pennington* doctrine, the First Amendment protects valid petitioning activities even if they might have anticompetitive effects and violate antitrust laws.[290]

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the Court found that "[t]he right of petition is one of the freedoms protected by the

285. *Ill. State Bar Ass'n*, 389 U.S. at 222.

286. *Wayte*, 470 U.S. at 610 n.11; *see* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911–15 (1982).

287. In *Thomas,* a union official sought review of his confinement for contempt for violating a temporary restraining order, which had enjoined him from soliciting members for specified labor unions without first obtaining an organizer's card. *Thomas*, 323 U.S. 518. The Court recognized that the rights of speech and petition are "not identical," although it also considered the right to petition and other expressive First Amendment rights "inseparable." *Id.* at 530. In *Borough of Duryea v. Guarnieri*, a public employee challenged a borough council's directives and denial of overtime as retaliation for his petitioning activities in violation of the Petition Clause. Borough of Duryea v. Guarnieri, 564 U.S. 379 (2011). Although the Court held that claims of retaliation by public employees did not call for a divergent analysis for the Speech Clause and Petition Clause, it observed that courts should not presume that the Speech Clause precedents necessarily and in every case resolve Petition Clause claims and acknowledged that "[t]here may arise cases where the special concerns of the Petition Clause would provide a sound basis for a distinct analysis; and if that is so, the rules and principles that define the two rights might differ in emphasis and formulation." *Id.* at 388–89.

288. Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749, 1757 (2014) (citing Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56 (1993) (citing E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)) (finding a genuine effort to litigate cannot be a "sham" for purposes of the Noerr-Pennington doctrine) ("We crafted the *Noerr-Pennington* doctrine . . . to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances.").

289. Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 580 (1999).

290. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (the Sherman Act did not apply to an anticompetitive publicity campaign that railroads conducted against truck operators in order to monopolize the long-distance freight business because no violation could be predicated upon "mere solicitation of governmental action with respect to the passage and enforcement of laws").

Bill of Rights, and [the Court] cannot . . . lightly impute to Congress an intent to invade these freedoms."[291] Four years later, in *United Mine Workers v. Pennington*, the Court extended Noerr's protection to the executive branch.[292] Finally, the Court applied the doctrine to petitioning to courts in *California Motor Transport Co. v. Trucking Unlimited*, where it found that "the right to petition extends to all departments of the Government [and] [t]he right of access to the courts is indeed but one aspect of the right of petition."[293] The *Noerr-Pennington* doctrine provides protection for individuals in the process of petitioning a governmental branch, because the court shall not lightly impute to Congress an intent to invade the right to petition.[294]

3. The Expansion of the Noerr-Pennington Doctrine

The *Noerr-Pennington* doctrine is not limited to antitrust cases. The Supreme Court has expanded the principle of the *Noerr-Pennington* doctrine to labor cases and found that the right to petition restricted the National Labor Relations Board's authority to impose liability on an employer for losing a retaliation lawsuit[295] and to enjoin a state suit.[296]

While independent protections for the right of petition were developed in the antitrust and labor contexts, the right logically extends to all court filings that are not objectively baseless. In *Professional Real Estate Investors, Inc., v. Columbia Pictures Industries, Inc.*, another antitrust case, the Court broadly held that "litigation cannot be deprived of immunity as a sham unless the litigation is

291. *Id.* at 137–39 ("A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them. We reject such a construction of the Act."). Lower courts consider *Noerr-Pennington* as a specific application of the canon of constitutional avoidance. *See, e.g.*, Sosa v. DIRECTV, Inc., 437 F.3d 923, 931 n.5 (9th Cir. 2006) ("*Noerr-Pennington* is a specific application of the rule of statutory construction known as the canon of constitutional avoidance, which requires a statute to be construed so as to avoid serious doubts as to the constitutionality of an alternate construction.").

292. United Mine Workers v. Pennington, 381 U.S. 657, 669–72 (1965) (holding that *Noerr* protected a "concerted effort to influence public officials regardless of intent of purpose" by labor unions even when such action intended to violate the Sherman Act). Because *Noerr* shields a concerted effort to influence public officials, the Court in *United Mine Workers v. Pennington* found joint efforts to influence the executive branch did not violate antitrust laws regardless of whether they had "a purpose or intent to further a conspiracy to violate a statute." *Id.*

293. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (holding that while petitioners have the right of access to the agencies and courts to be heard and that right is part of the right of petition protected by the First Amendment, they are not immune from the antitrust laws).

294. *See Noerr Motor Freight, Inc.*, 365 U.S. at 137–39; Michael Pemstein, *The Basis for Noerr-Pennington Immunity: An Argument That Federal Antitrust Law, Not the First Amendment, Defines the Boundaries of Noerr-Pennington*, 40 T. MARSHALL L. REV. 79, 79 (2014).

295. BE&K Constr. Co. v. NLRB, 536 U.S. 516, 528-33 (2002).

296. Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 741 (1983).

objectively baseless."[297] Lower courts have endorsed the immunity in criminal complaints,[298] tax assessment challenges,[299] and demand letters seeking settlement of claims under the Federal Communications Act.[300]

4. The Right to Petition in Courthouse Arrests

The rule of the right to petition is highly relevant to ICE's presence at courthouses. The Court refuses to interpret antitrust laws to deprive the people of their right to petition because the Court shall not lightly impute to Congress an intent to invade these freedoms.[301] Likewise, courts should not impute to Congress an intent to invade the right to petition by allowing ICE to arrest people petitioning to courts in the absence of a statute that explicitly mandates or authorizes arrests in courthouses.[302]

The labor cases indicate that the right to petition prohibits a federal agency from imposing prior restraints or posting penalties on participation in lawsuits when litigation is not a sham.[303] Arresting immigrants at courthouses is a more

297. Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., 508 U.S. 49, 51 (1993). In another case, the Court recognized that the First Amendment right protected in *Bill Johnson's Restaurants v. NLRB* is "plainly a 'right of access to the courts . . . for redress of alleged wrongs.'" Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 896–97 (1984) (quoting *Bill Johnson's Rests., Inc.*, 461 U.S. at 741) (holding petitioners' reporting their employees, known to be undocumented noncitizens, to the INS in retaliation was not an aspect of their First Amendment right "to petition the Government for a redress of grievances").

298. Meyer v. Bd. of Cty. Comm'rs, 482 F.3d 1232, 1243 (10th Cir. 2007) (reporting a danger of commission of crimes is protected by the First Amendment); Jackson v. New York, 381 F. Supp. 2d 80, 89 (N.D.N.Y. 2005) (holding plaintiff's actions in seeking enforcement of her orders of protection were protected by the First Amendment); *see also* United States v. Hylton, 558 F. Supp. 872, 874 (S.D. Tex. 1982) (holding the filing of criminal charges with local law enforcement officials was constitutionally protected under the First Amendment).

299. Van Deelen v. Johnson, 497 F.3d 1151, 1155–58 (10th Cir. 2007) (reversing the grant of summary judgment to various county officials on the taxpayer's claim that his First Amendment rights were violated when they threatened and intimidated him into dropping various tax assessment challenges).

300. Sosa v. DIRECTV, Inc., 437 F.3d 923 (9th Cir. 2006) (citing *Noerr Motor Freight, Inc.*, 365 U.S. 127) (prelitigation communications demanding settlement of legal claims must be afforded Noerr-Pennington protection.).

301. *Noerr Motor Freight, Inc.*, 365 U.S. 127.

302. See *infra* Section VI.A.1. for a discussion that Congress rather than the Executive branch is entrusted to make policy decisions on immigration. In addition, there might be an argument that the First Amendment only constrains Congress because the First Amendment begins with the words: "Congress shall make no law." But see Daniel J. Hemel, *Executive Action and the First Amendment's First Word*, 40 PEPP. L. REV. 601 (2013), for the argument that the First Amendment constrains the Executive Branch. Also, in *De Jonge v. Oregon*, the Supreme Court stated, "The First Amendment of the Federal Constitution expressly guarantees that right against abridgment by Congress. But explicit mention there does not mean exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions[ ]— principles which the Fourteenth Amendment embodies in the general terms of its due process clause." De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (incorporating the First Amendment rights against state government through the Fourteenth Amendment Due Process Clause).

303. *See* BE&K Constr. Co. v. NLRB, 536 U.S. 516, 528–33 (2002) (finding that the Na-

serious obstruction of the right to petition than imposing liability on petitioners as retaliation in the labor context. As the Supreme Court has noted, "litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."[304] For noncitizens who have very limited participation in the political branches, litigation may be the *only* way to petition.[305] The above precedents establish that the right to petition is "a fundamental right that must be protected through close judicial scrutiny of even modest burdens on its exercise."[306]

VI.
DUE PROCESS CHALLENGES TO COURTHOUSE ARRESTS

Courts are not only a forum for petitions and speech; access to courts is a fundamental tenet of due process under law. The Fifth Amendment's Due Process Clause requires that no person shall be "deprived of life, liberty, or property, without due process of law."[307] The Fourteenth Amendment's Due Process Clause uses the same words to describe the legal obligation of all states to provide people with fundamentally fair legal proceedings.[308] Courthouse arrests should be avoided under the principle of due process, and noncitizens can bring due process challenges to ICE's practice of courthouse arrests.

A. Noncitizens and Due Process

Noncitizens have due process rights.[309] However, Congress has the plenary power to make immigration policy and may limit the due process rights of noncitizens in the immigration enforcement context in ways that would not be acceptable for citizens.[310] Although courts have affirmed this "plenary power" doctrine since *Chae Chan Ping v. United States*,[311] more recent cases show cracks in the doctrine.[312] In the following sections, I will argue the principle of due process may still apply to noncitizens in the immigration enforcement con-

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tional Labor Relations Board could not impose liability on an employer for an unsuccessful retaliation suit); Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 741 (1982) (holding that the National Labor Relations Board may not halt the prosecution of a suit unless the suit lacks a reasonable basis in fact or law).

304. NAACP v. Button, 371 U.S. 415, 430 (1963).

305. *See supra* text accompanying notes 259–63.

306. *Id.* at 719.

307. U.S. CONST. amend. V.

308. U.S. CONST. amend. XIV, §1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]").

309. *See infra* Section VI.C.1.

310. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

311. Chae Chan Ping v. United States (*The Chinese Exclusion Case),* 130 U.S. 581 (1889).

312. *See* JON FEERE, PLENARY POWER: SHOULD JUDGES CONTROL U.S. IMMIGRATION POLICY? 7 (2009), https://www.cis.org/sites/cis.org/files/articles/2009/back209.pdf [https://perma.cc/Y78X-J3XT]; David S. Rubenstein, *Putting the Immigration Rule of Lenity in Its Proper Place: A Tool of Last Resort After Chevron,* 59 ADMIN. L. REV. 479, 484 n.23, 486–87 (2007).

text and courthouse arrests should be avoided because of the due process right to access to court.

1. The Plenary Power Doctrine

As the Court (in)famously said in *United States ex rel. Knauff v. Shaughnessy*, "[w]hatever the procedure authorized by Congress is, it is due process as far as [a noncitizen] denied entry is concerned."[313] The statement is based on the plenary power doctrine, or the notion that Congress has authority "to regulate immigration free from judicial review or constitutional limitations."[314] The doctrine of plenary power rests "on a notion of democratic self-determination" by its political branch.[315] The plenary power doctrine began in *Chae Chan Ping v. United States*, decided in 1889, in which the Court emphasized the "undoubted right [of every society] to determine who shall compose its members."[316] The Court found that if Congress "considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary."[317] In the modern era, the Supreme Court reiterated in *Mandel* that the power to make policy decisions on immigration is entrusted exclusively to Congress:

> In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . . [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly [e]mbedded in the legislative and judicial tissues of our body politic as any aspect of our government.[318]

2. The Cracks in the Plenary Power Doctrine

Following the logic behind the plenary power doctrine, courts are more deferential to Congressional regulation of immigration than regulation by the executive. In *Mandel*, for example, the Court set some limits on the executive's enforcement decisions that might not have been applicable to congressional decisions. In *Mandel*, noncitizens conceded that Congress had the power to exclude them but challenged the executive's decision not to grant them a waiv-

313. Knauff, 338 U.S. at 544.

314. Kagan, *supra* note 151, at 22–23 (because of the "extra-constitutional foundation for immigration law, the Court quickly came to the conclusion that the judiciary had little or no role" reviewing immigration decisions); *accord* FEERE, *supra* note 312, at 1; *see also Knauff*, 338 U.S. at 543; Rubenstein, *supra* note 312, at 484.

315. Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 126 (2017).

316. *Chae Chan Ping*, 130 U.S. at 607.

317. *Id.* at 606.

318. Kleindienst v. Mandel, 408 U.S. 753, 766–67 (1972) (quoting Galvan v. Press, 347 U.S. 522, 531 (1954)).

er.[319] The Executive was authorized to grant waivers of inadmissibility by Section 212(d)(3)(A) of the Immigration and Nationality Act of 1952.[320] The Government argued for "a broad decision that Congress has delegated the waiver decision to the Executive in its sole and unfettered discretion, and any reason or no reason may be given."[321] The Court did not reach the broad decision, but stated that the Attorney General informed Mandel's counsel of the reason for refusing him a waiver and the reason was "facially legitimate and bona fide."[322]

The *Mandel* case suggested a distinction between congressional immigration statutes and enforcement of those statutes by the executive branch.[323] As the Court stated, "[i]n the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process," while "the formulation of these policies is entrusted exclusively to Congress."[324] By requiring the executive branch to offer a "facially legitimate and bona fide reason," the Court set limits to executive actions that might not be applicable to congressional decisions.[325] The distinction between congressional and executive action is especially powerful when the executive branch acts under a broad grant of power rather than under narrow and specific delegation of discretion.[326] The *Mandel* case and others suggest that the general principles of administrative law that the executive's action should not be arbitrary and capricious, nor contrary to constitutional right or power, nor in excess of statutory delegation, still apply to immigration cases.[327]

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319. *Id.* at 767.

320. The Immigration and Nationality Act of 1952 § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A) (2012) (an inadmissible noncitizen may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer, be admitted temporarily despite his inadmissibility).

321. *Mandel*, 480 U.S. at 769.

322. *Id.*

323. *See id.* at 767, 770 (reviewing the executive branch's decision under the "facially legitimate and bona fide reason" standard); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 581 (1990).

324. *Mandel*, 408 U.S. at 766–67 (quoting Galvan v. Press, 347 U.S. 522, 531 (1954)).

325. Motomura, *supra* note 323, at 581.

326. *See* Narenji v. Civiletti, 481 F. Supp. 1132, 1140 (D.D.C. 1979) (citations omitted) (finding a "fundamental distinction" between the case where the executive acted under "broad, general authority to promulgate the regulations" and cases where "the challenged provision was either a specific statutory enactment of Congress, a regulation promulgated directly under the authority of an act of Congress, or a regulation that was promulgated pursuant to authority other than that of the Congress or the executive over immigration and naturalization matters"), *rev'd on other grounds*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980); Motomura, *supra* note 323, at 582.

327. *See Mandel*, 408 U.S. at 769 (finding the reason given by the executive branch was "facially legitimate and bona fide"); Peter S. Munoz, *The Right of an Illegal Alien to Maintain a Civil Action*, 63 CALIF. L. REV. 762, 78–92 (1975); Jeffrey D. Stein, *Delineating Discretion: How* Judulang *Limits Executive Immigration Policymaking Authority and Opens Channels for Future Challenges*, 27 GEO. IMMIGR. L.J. 35, 37–38 (2012); *see also* Judulang v. Holder, 565 U.S. 42, 53, 61 (2011) ("Agencies, the [Board of Immigration Appeals] among them, have expertise and experi-

Zadvydas shows another crack in the plenary power doctrine: the due process exception.[328] In *Zadvydas*, noncitizens filed habeas actions when they remained in custody after they were ordered removed but were held by the United States, with no realistic prospect of release.[329] The Supreme Court found the Attorney General's interpretation of 8 U.S.C. section 1231(a)(6)[330] that contained no time limit for post-final order detention of immigrants raised a serious constitutional problem.[331] The Court read the statute, in light of the Constitution, to limit a noncitizen's post-removal-period detention "to a period reasonably necessary to bring about that [noncitizen's] removal from the United States," rather than allowing indefinite civil detention.[332] The Court explained that the Fifth Amendment's Due Process Clause applies to noncitizens because it refers to "any person," and found that once a noncitizen "enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent."[333]

Zadvydas should be read as a due process exception to the plenary power doctrine[334] because courts may construe immigration statutes in a manner consistent with due process rights to avoid constitutional problems. Critics of *Zadvydas* have tried to interpret it as solely a procedural due process case. In Justice Scalia's dissent, he argued that a noncitizen who has been ordered removed or denied admission to the United States has no substantive constitutional right to release in the United States.[335] Despite arguments in the dissent, however, *Zadvydas* should be understood as recognition of substantive rights. "[T]he Fifth and Fourteenth Amendments' guarantees of 'due process of law' . . . include[s] a substantive component, which forbids the government to infringe certain 'fundamental' *liberty interests* at all, *no matter what process is provided*, unless the infringement is narrowly tailored to serve a compelling state interest."[336] In *Zadvydas*, the Court found that a noncitizen's *liberty interest* is, "at

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ence in administering their statutes that no court can properly ignore. But courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking.").

328. Zadvydas v. Davis, 533 U.S. 678 (2001).

329. *Id.*

330. 8 U.S.C. § 1231(a)(6) (1994 & Supp. V 1994).

331. *Zadvydas*, 533 U.S. at 678, 682–83, 688, 690 (reviewing post-removal-period detention statute that applies to any noncitizen who is (1) "inadmissible," or (2) removable as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy, or (3) "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal").

332. *Id.* at 689.

333. *Id.* at 690, 693.

334. *Id.* at 690.

335. *Id*. at 703 (Scalia, J., dissenting).

336. Reno v. Flores, 507 U.S. 292, 301–02 (1993) (emphasis added). In contrast, the Court uses a three-factor balancing test when analyzing procedural due process cases. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (The three factors to determine the amount of due process are (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous

the least, strong enough to raise a serious question as to whether, *irrespective of the procedures used,* the Constitution permits detention that is indefinite and potentially permanent."[337] Following this logic, the Court asked whether governmental interests justified Zadvydas's potential indefinite detention:

> [G]overnment detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and "narrow" nonpunitive "circumstances," where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint."[338]

By inquiring into the substantive problem of arbitrary confinement, irrespective of the procedures used, and demanding "special justification" for the restraints of "individual's constitutionally protected interest,"[339] the Court has recognized noncitizens' substantive due process right to be free from indefinite detention in immigration proceedings. The review of indefinite detention in *Zadvydas* indicates noncitizens' due process rights should be recognized even in immigration context. Courthouse arrests should be avoided due to the due process right to access courts.[340]

B. The Right to Access Courts Under the Due Process Clause

In a separate line of cases, the Supreme Court invoked the Due Process Clause to establish the rights of litigants to equal access to courts.[341] Although the scope of the constitutional right of access to courts under the Due Process Clause is not settled, ICE should refrain from courthouse arrests due to serious due process concerns.

1. The Early Right to Court Access Cases

The Court first upheld the right to court access in a line of prisoners' rights cases. In the 1940s, the Supreme Court declared unconstitutional officials' efforts to impede prisoners' direct appeals.[342] Based on these early access to court cases, the Court has invalidated filing fees and laws imposing transcript costs

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deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

337. *Zadvydas*, 533 U.S. at 696 (emphasis added) (citation omitted).

338. *Id.* at 690 (citations omitted).

339. *Id.*

340. *See infra* Section VI.C.

341. Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2112, 2118 (2009).

342. Cochran v. Kansas, 316 U.S. 255, 256–58 (1942); Ex parte Hull, 312 U.S. 546, 549 (1941).

that have obstructed prisoners' ability to seek judicial review.[343] The Court found that these filing laws violated the Due Process and Equal Protection Clauses.[344] In *Wolff v. McDonnell*, the Court observed that "[t]he right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."[345]

Later, in *Bounds v. Smith*, the Court found due process violations even when the government did not affirmatively impede access to courts.[346] Prisoners alleged that they were denied access to the courts in violation of their Fourteenth Amendment rights through the state's failure to provide legal research facilities.[347] The Court agreed and held that the fundamental constitutional right of access to the courts requires prison authorities to provide legal assistance and counsel to inmates.[348] In Justice Rehnquist's dissenting opinion, he criticized the majority for finding a violation of the right of access to the courts even when there was no affirmative act to block access,[349] but acknowledged a right of physical access to a federal court in the precedents.[350] After *Bounds*, however, the Supreme Court has declined to find additional violations of the right to access to courts in cases challenging inadequate legal assistance for prisoners[351] and a subpar law library for prisoners.[352]

2. Two-Prong Test in Boddie v. Connecticut Where an Asserted Claim Affects a Fundamental Right

There are three possible approaches to access-to-court cases (1) procedural due process; (2) substantive due process, in which the asserted claim affects a fundamental right; and (3) substantive due process, in which access to courts itself is a fundamental right.[353] In *Boddie v. Connecticut*, the Supreme Court adopted the second approach to discuss the right to access to civil courts where another fundamental right is affected.[354] *Boddie v. Connecticut* set out two im-

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343. *See* Lewis v. Casey, 518 U.S. 343, 371 & n.2 (1996) (Thomas, J., concurring); Griffin v. Illinois, 351 U.S. 12 (1956).

344. *Griffin*, 351 U.S. at 18.

345. Wolff v. McDonnell, 418 U.S. 539, 579 (1974) (finding prisoners in state institutions are not wholly without the protections of the Constitution and the Due Process Clause).

346. Bounds v. Smith, 430 U.S. 817 (1977).

347. *Id.* at 818.

348. *Id.* at 828.

349. *Id.* at 837–41 (Rehnquist, J., dissenting).

350. *Id.* at 838 (Rehnquist, J., dissenting).

351. Pennsylvania v. Finley, 481 U.S. 551, 348–64 (1987) (rejecting a petitioner's challenge to inadequate legal assistance).

352. Lewis v. Casey, 518 U.S. 343 (1996) (rejecting a petitioner's challenge to a subpar law library).

353. Steve Barber, *Constitutionality of Cost and Fee Barriers for Indigent Litigants: Searching for the Remains of Boddie After a Kras-Landing*, 48 IND. L.J. 452, 452 (1973).

354. Boddie v. Connecticut, 401 U.S. 371, 374 (1971); *see* Barber, *supra* note 353, at 452. In

portant factors to be considered: the impingement on a fundamental right and the nonexistence of alternative methods of vindicating the right. The fundamental right in the Court's analysis is not the right to access to court itself.

3. The Right to Access to Court in Tennessee v. Lane

In 2004, the Supreme Court reaffirmed criminal defendants' and civil litigants' right to access court even when the government did not affirmatively block access to courts. In *Tennessee v. Lane*, two wheelchair users sued Tennessee because they were unable to enter the courtrooms due to non-accessibility of courthouses.[355] Plaintiff George Lane was forced to answer criminal charges on the second floor of a courthouse that had no elevator.[356] Another plaintiff, Beverly Jones was a certified court reporter.[357] She was not able to access a number of county courthouses and "lost both work and an opportunity to participate in the judicial process."[358] The Court found the Due Process Clause "guarantee[s] to a criminal defendant . . . 'the right to be present at all stages of the trial where his absence might frustrate the fairness of the proceeding.'"[359] The Due Process Clause also requires the States to "afford certain civil litigants a 'meaningful opportunity to be heard' by removing obstacles to their full participation in judicial proceedings."[360]

Boddie, welfare recipients challenged certain state procedures, including court fees and service charges, required in order to bring actions for divorce. *Boddie*, 401 U.S. at 372. The Court did not engage in the *Mathews v. Eldridge* procedural due process analysis. *Id.* at 374–83. Rather, the Court used a substantive due process analysis, under which state actions abridging access to the courts will be upheld only if justified by a compelling or overriding state interest. *Id.* The Court found that alternatives to the fees existed for the government; denied that there was a "necessary connection" between the fee imposed and the governmental interest; and dismissed the state's "substantial" interest in preventing "frivolous litigation" and "rational" interest in "use of court fees and process costs to allocate scarce resources" as insufficient to "override the interest of these plaintiff-appellants in having access to the only avenue open for dissolving their allegedly untenable marriages." *Id.* at 381–82. It concluded that due process prohibited a state from denying indigent people access to courts to divorce. *Id.* at 374. *See generally* Risa E. Kaufman, *Access to the Courts as a Privilege or Immunity of National Citizenship*, 40 CONN. L. REV. 1477, 1506 (2008) (discussing the primary concerns of *Boddie* as an issue of whether the restriction imposed preclude the only effective means of resolving the dispute). The predominant view treats *Boddie* as a substantive due process case. *See* Christopher E. Austin, *Due Process, Court Access Fees, and the Right to Litigate*, 57 N.Y.U. L. REV. 768, 773–74 (1982). "Two leading constitutional law casebooks deal with the civil access cases as fundamental rights cases." *Id.* at 774 n.35 (first citing GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 947–48 (10th ed. 1980); and then citing WILLIAM B. LOCKHART, YALE KAMISAR, & JESSE H. CHOPER, CONSTITUTIONAL LAW: CASES–COMMENTS–QUESTIONS 1476–77 (5th ed. 1980)).

355. Tennessee v. Lane, 541 U.S. 509 (2004).

356. *Id*. at 513. At his first appearance in the criminal proceedings, "Lane crawled up two flights of stairs to get to the courtroom." Afterwards, he refused to crawl up the stairs or to be carried by officers to the courtroom for a subsequent hearing and was arrested and jailed for the failure to appear. *Id*.

357. *Id.*

358. *Id*.

359. *Id*. at 523 (quoting Faretta v. California, 422 U.S. 806, 819, n.15 (1975)).

360. *See id*. (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).

C. Due Process Rights Against Courthouse Arrests

Applying the above principles, noncitizens may use the Due Process Clause to challenge courthouse arrests.

1. Noncitizen Arrestees Retain Due Process Rights

The plenary power doctrine shall not block a noncitizen's due process claim against courthouse arrests. Unlike *Chae Chan Ping v. United States*, in which the noncitizen argued for his due process right to be heard on the decision to exclude him from the United States,[361] the due process rights compromised by courthouse arrests are noncitizens' rights to be heard on their non-immigration claims. Noncitizens have the same due process rights as citizens to be heard when they go to courts for non-immigration cases. Even in the Chinese Exclusion era, the Supreme Court recognized noncitizens' equal protection rights in the non-immigration context in *Yick Wo v. Hopkins*.[362] While *Yick Wo* is an equal protection case, it states explicitly that noncitizens are subject to full Fourteenth Amendment protections, including due process.[363] In *Yick Wo*, no exclusion or deportation determination was at issue. Instead, the case concerned the equal protection rights of people who were already living in the United States.[364] In the unanimous opinion, the Court held that a San Francisco ordinance that discriminated against Chinese laundry owners was unconstitutional.[365] The *Yick Wo* analysis has been dominant outside the core immigration issues of admission and deportation.[366] Considering noncitizens' due process claims against courthouse arrests as claims for equal participation in non-immigration court proceedings, the *Yick Wo* test should be applied because no core immigration issues are relevant to the proceeding.

Because the Due Process Clause does not limit its application to citizens,[367] a noncitizen has the right to access courts in non-immigration proceedings.[368] As indicated in *Yick Wo*, in non-immigration contexts when the plenary power doctrine is not even implicated, the ordinary constitutional standard should apply to

361. Chae Chan Ping v. United States (T*he Chinese Exclusion Case),* 130 U.S. 581 (1889).

362. Yick Wo v. Hopkins, 118 U.S. 356, 367–68 (1886) ("The rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are [noncitizens].")

363. *Id*. at 369.

364. *Id.* at 367 (finding a city ordinance to regulate public laundries unconstitutionally discriminated against Chinese workers); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights.*, 92 COLUM. L. REV. 1625, 1626 (1992) ("[T]he Constitution protects all individuals inside the United States, including aliens, from invidious discrimination at state hands—though later cases made clear that this principle would apply only outside the immigration context.").

365. *Yick Wo*, 118 U.S. at 367, 374.

366. Hiroshi Motomura, *Immigration and We the People After September 11*, 66 ALB. L. REV. 413, 425 (2003).

367. Zadvydas v. Davis, 533 U.S. 678, 690–93 (2001).

368. *Yick Wo*, 118 U.S. at 367–68.

noncitizens. Unlike *Mandel*[369] and *Chae Chan Ping v. United States*, [370] courthouse arrestees in the country are entitled to more constitutional rights than noncitizens who have not crossed the border.

Even if Congress has plenary power to limit noncitizens' rights in immigration contexts, Congress did not clearly delegate to the Executive the power to infringe upon noncitizens' non-immigration-related due process rights. In *Zadvydas*, although the Court conceded that it must give effect to Congressional intent if Congress had made clear its intent in the statute to authorize indefinite detention,[371] it found the Executive's reading of a statute unconstitutional because Congress did not specifically authorize an indefinite detention.[372] Unlike the specific delegation of the waiver in *Mandel*,[373] ICE rests its courthouse arrest policy not on a specific delegation of enforcement authority, but on its broader authorization to enforce immigration laws.[374] This is no argument for the *Knauff* logic that "[w]hatever the procedure authorized by Congress is, it is due process."[375] Because ICE's courthouse arrests are neither Congressional actions nor specially delegated executive actions, they are especially amenable to judicial review.

This due process exception to the plenary power doctrine should allow noncitizens to challenge ICE courthouse arrests. Courthouse arrests can be a substantive due process exception to the plenary power under *Zadvydas*. If a right affected by the arrests is strong enough to be a "'fundamental' liberty interest[]," then such rights should not be denied, irrespective of the procedures used, unless the infringement is narrowly tailored to serve a compelling state interest.[376]

Even if the right is not strong enough to be a substantive due process right or if the plenary power doctrine does not allow immigrants' substantive challenges, noncitizens can raise a procedural due process claim. The Constitution requires the government to give an individual notice and the opportunity to be heard before denying them life, liberty, or a property interest.[377] Here, courthouse arrests deny noncitizens the opportunity to be heard. Unlike *Shaughnessy*

369. Kleindienst v. Mandel, 408 U.S. 753 (1972).

370. Chae Chan Ping v. United States (*The Chinese Exclusion Case),* 130 U.S. 581 (1889).

371. *Zadvydas*, 533 U.S. at 696.

372. *Id.* at 696–97 ("We cannot find here, however, any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed.").

373. *Mandel*, 408 U.S. at 767–69.

374. According to ICE, "ICE officers and agents are expressly authorized by statute to make arrests of [noncitizens] where probable cause exists to believe that such [noncitizens] are removable from the United States." *FAQ on Sensitive Locations and Courthouse Arrests*, *supra* note 88.

375. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (affirming the exclusion of a war bride from entry into the United States because whatever procedure was authorized by Congress constituted due process as far as a noncitizen denied entry was concerned).

376. Reno v. Flores, 507 U.S. 292, 301–02 (1993).

377. *See* U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV, § 1.

v. United States ex rel. Mezei,[378] the case discussed in Justice Scalia's dissent in *Zadvydas*,[379] courthouse arrests do not involve substantive constitutional challenges to admission and deportation decisions. Even if courts are reluctant to hear such cases,[380] they have recognized noncitizens' procedural rights to be heard in court. In *Yamataya v. Fisher*, where the Court "for the first time permitted judicial review of a [noncitizen's] procedural due process claim" in the deportation context,[381] it held that "it is not competent . . . to cause [a noncitizen], who has entered the country . . . to be taken into custody and deported without giving him all opportunity to be heard."[382] Therefore, noncitizens have due process rights and the plenary power doctrine shall not block their due process challenge to courthouse arrests.

2. Courthouse Arrests as an "Access to Court" Issue

Courthouse arrests of noncitizens are questionable in light of the access-to-courts cases.[383] The access to courts cases demonstrate that due process violations are more likely to arise when the government affirmatively acts to preclude court access.[384] The Court viewed physical access to courts as the most basic form of the right.[385] *Lane* shows that a person is not only protected by due process principles in courtrooms, but also has the right to access to courtrooms via courthouses.[386] In *Lane*, the plaintiff encountered great difficulty in going to the second floor of the courthouse.[387] Lane's claim was upheld even though he did

378. Shaughnessy v. United States *ex rel.* Mezei*,* 345 U.S. 206 (1953) (challenging the indefinite detention of a noncitizen after he was refused admission to the United States).

379. Zadvydas v. Davis, 533 U.S. 678, 703–05 (2001) (Scalia, J., dissenting).

380. See *id*. for Justice Scalia's argument that a noncitizen who has been ordered removed or denied admission to the United States has no substantive constitutional right to release in the United States.

381. Motomura, *supra* note 364, at 1637–39.

382. Yamataya v. Fisher (The Japanese Immigration Case), 189 U.S. 86, 101 (1903) (since appellant had been afforded an opportunity to be heard and she did not take an appeal to the Secretary of the Treasury from the decision of the Inspector, the decision constituted due process of law and were not subject to judicial review).

383. Although the above cases discussed the due process rights under the Fourteenth Amendment against a state, the reasoning is applicable to the due process analysis under the Fifth Amendment because the two Due Process Clauses are of equal stature. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954). As a result, the due process right to access to courts in the above cases can be used to challenge courthouse arrests by federal government under Fifth Amendment.

384. *Compare* Cochran v. Kansas, 316 U.S. 255 (1942) (if officials of a state penitentiary, enforcing prison rules, suppress petitioners' appeal documents, they violate the Equal Protection Clause of the Fourteenth Amendment) *and* Ex parte Hull, 312 U.S. 546 (1941) (invalidating state prison rules abridging or impairing a prisoner's right to apply to the federal courts for a writ of habeas corpus) *with* Pennsylvania v. Finley, 481 U.S. 551 (rejecting the petitioner's claim) (1987).

385. Bounds v. Smith, 430 U.S. 817, 837–39 (Rehnquist, J., dissenting) (criticizing the expansion of the line of cases that held an incarcerated prisoner has a right of physical access to a federal court to finding a violation of the petition right in a prison's failure to make law libraries available to prisoners).

386. *See* Tennessee v. Lane, 541 U.S. 509 (2004).

387. *Id.* at 513–14.

not claim an interference within the courtroom where the proceeding took place.[388]

In courthouse arrests, noncitizens' right to access to the courts is at risk. Courthouse arrests are affirmative enforcement actions that frustrate court appearances. Unlike the failure to provide legal assistance or an adequate law library,[389] which do not affect one's physical access to courthouses, courthouse arrests block physical access and make physical appearances more difficult. It is unnecessary to prove the total impossibility of access to courts to establish a violation of due process rights. In *Lane*, the fact that Lane could have crawled or have asked officers to carry him to the courtroom for the second hearing did not defeat his claim.[390] Likewise, the fact that noncitizens could have risked courthouse arrests to appear in courtrooms should not defeat an access to courts claim. As indicated in *Lane*, noncitizens are protected by the right to access the courts without interference even if they are arrested in courthouses rather than courtrooms where the proceedings take place.[391] ICE's Directive only addresses arrests inside courthouses; and it does not set limitation on arrests near courthouses.[392] Yet the boundary of a courtroom or a courthouse does not provide a clear-cut determination of due process violations: courthouse arrests should be avoided inside and near courthouses.

3. Courthouse Arrests May Violate Noncitizens' Substantive Due Process Rights

Some courthouse arrests may violate the substantive due process test laid out in *Boddie*.[393] Like *Boddie*, "fundamental" rights can be gained or lost depending on the availability of noncitizens' access to court.[394] When noncitizens go to courts for a protective order against a violent partner, they are claiming their "fundamental rights to bodily integrity and . . . against slavery."[395] Noncitizens' access to courts as criminal defendants is specially protected, because the "Constitution has provided special protections for people charged with crime."[396] On the exclusivity prong, noncitizens' immigration status itself may

388. *See id.* at 515.

389. Lewis v. Casey, 518 U.S. 343 (1996).

390. *Lane*, 541 U.S. at 513–14, 533–34.

391. *See id.*

392. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 7.

393. The two prongs in *Boddie* are the impingement on a fundamental right and the nonexistence of alternative methods of vindicating the right. Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

394. *See Boddie*, 401 U.S. 371.

395. *See* Wishnie, *supra* note 223, at 731.

396. *See Boddie*, 401 U.S. at 390 (Black, J., dissenting) (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)). In objecting to the holding in *Boddie*, Justice Black discusses "strict and rigid due process rules" established by the Constitution for people charged with crimes and discusses this implicit distinction between civil and criminal proceedings discussed in *Cohen*. *See id*. *Boddie* is a civil case and the dissent argued the doctrine should be limited to criminal cas-

constitute extra barriers to resolve the matters by alternative means.[397] In such cases that passed the two-prong test, access to courts should be protected unless infringement is narrowly tailored to serve a compelling state interest.[398]

4. Courthouse Arrests Under the Mathews Balancing Test

While the Supreme Court developed its access to court and procedural due process analyses separately, it has implicitly applied a procedural due process analysis to the access to court cases.[399] Noncitizen litigants may be able to argue that ICE courthouse arrests amount to a denial of due process by interfering with the adjudication of their private interests, and that the courthouse arrest policy is subject to the procedural due process test announced in *Mathews v. Eldridge*.[400]

In *Mathews*, the Supreme Court used a three-factor balancing test to determine whether a regulation violates procedural due process rights.[401] The Court will consider (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[402]

The courthouse arrest policy would likely not pass the *Mathews* test. When noncitizens go to courts for non-immigration cases, they are presumably entitled to adequate due process by the courts. But ICE's practice of courthouse arrests renders the process inadequate by infringing upon noncitizens' access to the court's otherwise adequate procedures. If arrested in court, a noncitizen litigant is denied their opportunity to be heard in their pending case. Courthouse arrests deprive the private interest in any asserted claims or defenses in the court proceedings, the risk of erroneous deprivation of such interest is high because of the

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es, but even the dissent recognized the due process right of criminal defendants. *See id.*

397. *See id.* at 375 (discussing the nonexistence of alternative methods of vindicating a right).

398. *See* Reno v. Flores, 507 U.S. 292, 301–02 (1993) ("Respondents' 'substantive due process' claim relies upon our line of cases which interprets the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."); *see also Boddie*, 401 U.S. at 381–82 (discussing the two prongs, focusing on the no-reasonable-alternative prong); R.D. Rees, *Plaintiff Due Process Rights in Assertions of Personal Jurisdiction*, 78 N.Y.U. L. REV. 405, 411–12 (2003); *cf.* United States v. Kras, 409 U.S. 434, 446 (1973) (applying the two prongs, focusing on the lack of fundamentality of the right).

399. Michael Millemann, *Capital Post-Conviction Petitioners' Right to Counsel: Integrating Access to Court Doctrine and Due Process Principles*, 48 MD. L. REV. 455, 472–73 (1989).

400. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

401. *Id.*

402. *Id.* at 335.

very problematic procedures used by ICE in making such arrests, and the governmental interest does not outweigh noncitizens' interests.

The first prong of the *Mathews* test is concerned with "the private interest that will be affected by the official action."[403] Noncitizen litigants have a private interest in whatever issue brings them before the court, whether the private interest is liberty in criminal court or property in a civil case. ICE makes arrests in various courthouses dedicated to different proceedings and therefore deprives individuals of private interest in any asserted claims or defenses in the court proceedings. ICE's Directive does not avoid enforcement in criminal courthouses, where arrestees' liberty interests are at risk. Nor does it attempt to taper its courthouse enforcement depending on the significance of the proceeding.

Second, the risk of an erroneous deprivation of such interests is high. After ICE arrests noncitizens at courthouses, DHS will generally commence deportation proceedings. The arrestees may have no chance to return to courts where they are arrested to continue their case. When an arrest prevents a noncitizen litigant from continuing their case, the noncitizen is at a very high risk of losing their case and, consequently, of being erroneously deprived of the interest they sought to protect in court. The risk of an erroneous deprivation of protected interests is further increased by the chilling effects on other immigrants who are threatened by the courthouse arrest procedure. These chilling effects on immigrants' speech add to the risk of error as noncitizens may be unwilling to come forward as complainants or witnesses. "There is . . . widespread consensus . . . that noncitizens tend to underreport illegal activity due in part to fear of deportation."[404] A survey of 715 advocates and attorneys from 46 states and the District of Columbia showed 43 percent of advocates working with immigrant survivors of domestic violence, sexual assault, and human trafficking had to drop civil or criminal cases because their clients were fearful to continue their cases.[405] When noncitizens are prevented from coming forward, serving as witnesses, or seeing litigation through to a decision because of ICE's practice of making courthouse arrests, the risk of the erroneous deprivation of protected interests is high.

Third, ICE's interest in arresting noncitizens at courthouses does not outweigh the noncitizens' rights affected. As discussed in Section V.B.5, the federal government's categorical assumption that many immigrants are dangerous does not create a sufficient governmental interest to justify the arrest.[406] ICE may argue that if their agents arrest noncitizens after court hearings, noncitizens are not precluded from being heard in courts. However, noncitizens may need to return to courts after their first appearances, and courthouse arrests could make their

403. *Id.*

404. *See* Wishnie*, supra* note 223, at 679.

405. TAHIRIH JUSTICE CTR., KEY FINDINGS: 2017 ADVOCATE AND LEGAL SERVICE SURVEY REGARDING IMMIGRANT SURVIVORS (2017), www.tahirih.org/wp-content/uploads/2017/05/2017-Advocate-and-Legal-Service-Survey-Key-Findings.pdf [https://perma.cc/5TV3-6GR7].

406. *See supra* text accompanying notes 240–47.

future appearances impossible. *Lane* specially provides that criminal defendants have the due process right to be present at all stages of a trial where one's absence might frustrate the fairness of the proceeding.[407] Noncitizens may not ever appear if they perceive a risk of courthouse arrests.

ICE argues that their courthouse arrests are consistent with longstanding practices of law enforcement in courthouses.[408] However, ICE's civil law enforcement actions are different from normal criminal law enforcement. There are a very limited number of circumstances in which officers may make criminal arrests, including where the officer has probable cause to believe that the person arrested committed a crime or the officer has an arrest warrant issued by a judge or magistrate.[409] ICE's civil arrests do not meet such requirements. In addition, except for ICE's courthouse arrests, civil arrests have largely disappeared in American courts.[410] Contrary to ICE's assertion, there is longstanding common-law privilege from civil arrests when people attend court proceedings.[411]

The courthouse arrest policy likely does not pass the balancing test under *Mathews*.[412] Because noncitizens retain their due process rights and courthouse arrests fail the procedural due process balancing test, these arrests should not occur.

VII.
THE SEPARATION OF POWERS AND FEDERALISM ARGUMENTS

There are also separation-of-powers and federalism concerns over ICE's courthouse arrests. The system of separation of powers divides the government's authority into legislative, executive, and judicial branches in a way that each of

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407. Tennessee v. Lane, 541 U.S. 509, 523 (2004) (quoting Faretta v. California, 422 U.S. 806, 819 n.15 (1975)).

408. U.S. IMMIGRATION & CUSTOMS ENF'T, *supra* note 7, at 1.

409. *Cf.* Elk v. United States, 177 U.S. 529, 537–38 (1900) ("[W]here the officer is killed in the course of the disorder which naturally accompanies an attempted arrest that is resisted, the law looks with very different eyes upon the transaction, when the officer had the right to make the arrest, from what it does if the officer had no such right. What might be murder in the first case might be nothing more than manslaughter in the other, or the facts might show that no offence had been committed."); AM. BAR ASS'N, CHAPTER 14: CRIMINAL JUSTICE 9, https:// www.americanbar.org/content/dam/aba/migrated/publiced/practical/books/family/chapter_14.authcheckdam.pdf [https://perma.cc/SW4S-G2CS] ("Where the police are allowed to arrest you may depend on whether the police have a warrant for your arrest. The police make most arrests without a warrant. If you commit a misdemeanor in the officer's presence, that officer is permitted to arrest you without a warrant. If the officer has probable cause (the minimum level of evidence needed to make a lawful arrest) to believe that you committed a felony, the officer is allowed to arrest you without a warrant, even if he or she did not see you commit the crime. The law permits warrantless arrests in public places, such as a street or restaurant."); Jon Roland, *Your Right of Defense Against Unlawful Arrest*, CONST. SOC'Y (July 10, 1996), http://www.constitution.org/uslaw/defunlaw.htm [https://perma.cc/P6X7-AEVY].

410. Christopher N. Lasch*, A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis,* 127 YALE L.J.F. 410, 422 (2017).

411. *Id.* at 430–31.

412. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

them can check and balance the others.[413] Courthouse arrests create separation-of-powers problems because they give too much power to the Executive Branch and interfere with federal courts' ability to interpret the law, and because the Executive Branch interferes the states' power to grant remedies to individuals within their jurisdiction, without a clear sign of Congressional intent. Courthouse arrests create federalism concerns because the expectation of local government's cooperation through contribution of state resources and retaliation for state's noncooperation violate the anti-commandeering principle.

A. The Separation of Powers Weighs Against Arrests at Federal Courthouses

The arrests may create separation-of-powers problems because if ICE, a prong of the executive branch, prevents noncitizens from appearing in federal courts, those courts will not be able to "say what the law is" in cases involving noncitizens.[414] Although news reports focus on ICE's state courthouse arrests, ICE policy allows for arrests in federal courts as well.[415] ICE has listed neither state nor federal courts as "sensitive locations."[416] In addition, state courthouse arrests may discourage noncitizens' appearances in federal courts due to the ambiguity in ICE's courthouse arrest policy.

There are separation-of-powers concerns over ICE courthouse arrests if noncitizens' appearances in federal courts are blocked or chilled. In *Boumediene v. Bush*, the government attempted to strip habeas corpus jurisdiction over noncitizens in Guantanamo Bay, Cuba, effectively blocking their access to courts.[417] In response, Justice Kennedy highlighted the importance of separation of powers as an organizing principle of American government.[418] He noted that adopting the government's view that the political branches can eliminate Constitutional rights at will "would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'"[419] Although Congress and the President have the power under the Constitution to govern territory, that power is not "absolute and unlimited."[420] Kennedy's separation-of-powers argument echoes Justice Brandeis's concurrence in *St. Joseph Stock Yards Co. v. United States*, which states

413. THE FEDERALIST NO. 51 (James Madison).

414. *See* Boumediene v. Bush, 553 U.S. 723, 765 (2008) (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).

415. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 7, at 1.

416. Morton*, supra* note 88, at 2; *FAQ on Sensitive Locations and Courthouse Arrests*, *supra* note 88.

417. *Boumediene*, 553 U.S. at 734–35.

418. *Id.* at 765; *see* Vladeck, *supra* note 341, at 2143 (arguing that the importance of judicial review in maintaining separation of powers influenced Justice Kennedy's interpretation of the Suspension Clause).

419. *Boumediene*, 553 U.S. at 765 (quoting *Marbury*, 5 U.S. at 177).

420. *See, e.g.*, *id*. (quoting Murphy v. Ramsey, 114 U.S. 15, 44 (1885)) (stating that Congress and the President are restrained by the Constitution in deciding when and where the Constitution applies and governing territories outside of the United States).

"[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly."[421]

Justice Kennedy's and Justice Brandeis' views show that maintaining judicial review can serve as independent justification for the protection of access to courts.[422] Judicial recognition of access to courts as a right was developed "at least largely by the courts' need to protect themselves."[423] For example, in *Legal Services Corp. v. Velazquez*, there is a separation-of-powers component in the Court's finding that a funding condition was unconstitutionally designed to insulate the Government's interpretation of the Constitution from judicial challenge.[424] The Court found it "must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge."[425] Relying on *Marbury v. Madison*, the Court emphasized that the primary mission of the judiciary is to interpret the law and the Constitution when it resolves a case or controversy.[426] The Court found that such restriction "threaten[ed] severe impairment of the judicial function" as it "sift[ed] out cases presenting constitutional challenges in order to insulate the Government's laws from judicial inquiry."[427] Therefore, it concluded that the scheme was "so inconsistent with accepted separation-of-powers principles" that it was "an insufficient basis to sustain or uphold the restriction on speech."[428]

If noncitizens are precluded from appearing in federal courts by ICE's courthouse arrests, federal courts will not be able to ensure that a "proceeding in which facts were adjudicated was conducted regularly" or to "decide whether an erroneous rule of law was applied."[429] Although Congress has plenary power in immigration policymaking, the power is not "absolute and unlimited" to preclude federal courts from hearing any cases from noncitizens in non-immigration proceedings.[430] The chilling effects on noncitizens' lawsuits, including suits pre-

421. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring).

422. Vladeck, *supra* note 341, at 2115 (quoting *Marbury*, 5 U.S. at 177 (emphasizing that the primary mission of the judiciary is to interpret the law and the Constitution when it resolves a case or controversy)) ("From Brandeis' perspective, it was the protection of judicial supremacy—of the court's prerogative to 'say what the law is'—that required the protection of a litigant's substantive access to the courts, and not the other way around.").

423. *Id.*

424. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 546–48 (2001) (finding a violation of the First Amendment of a funding condition that prohibited Legal Services Corporation-funded lawyers from arguing that a state statute conflicts with a federal statute or that a state or federal statute violates the United States Constitution).

425. *Id.* at 548.

426. *Id.* at 545.

427. *Id.* at 546.

428. *Id.*

429. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring).

430. Boumediene v. Bush, 553 U.S. 723, 765 (2008) (quoting Murphy v. Ramsey, 114 U.S.

senting constitutional challenges, would thus pose separation-of-powers problems, which arise when "the laws furnish no remedy for the violation of a vested legal right."[431]

One counterargument might be that ICE's policy only applies to noncitizens alleged to be in the country unlawfully, not all noncitizens' lawsuits. But still, barring all undocumented immigrants from judicial protection hinders the judicial function of interpreting the law and furnishing remedies. These undocumented immigrants may also be witnesses for citizens' and lawful immigrants' proceedings. The possibility that federal courts will be deprived of the power to say "what the law is"[432] constitutes a separation-of-powers argument against ICE's courthouse arrests in federal courts.

B. Interference with State Courts' Exercises of Jurisdiction

Separation of power also militates against some courthouse arrests in state courts, as ICE interferes with state courts' exercise of their jurisdiction, without a clear congressional intent.

States have the power to define state court jurisdiction and to provide remedies to people within that jurisdiction.[433] "[E]ach State . . . may establish its own judicature, distribute judicial power among the courts of its choice, [and] define the conditions for the exercise of their jurisdiction and the modes of their proceeding[s]."[434] State courts "are not inferior courts in the sense of the constitution" and state courts "are left to consult their own duty from their own state authority and organization."[435] For Congress to divest state courts of jurisdiction over state law cases would conflict with the general principle.[436]

15, 44 (1885)).

431. Marbury v. Madison, 5 U.S. 137, 163 (1803); *cf.* Marissa C.M. Doran, *Lawsuits as Information: Prisons, Courts, and a Troika Model of Petition Harms*, 122 YALE L.J. 1024, 1065–66 (2013) (arguing that blocking prisoners' access to courts interferes with the separation of powers by preventing the courts from protecting prisoners' rights).

432. *Marbury*, 5 U.S. at 177.

433. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

434. Brown v. Gerdes, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring).

435. Stearns v. United States, 22 F. Cas. 1188, 1192 (C.C.D. Vt. 1835); *accord* Ponzi v. Fessenden, 258 U.S. 254, 259 (1922) (We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. . . . The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws.").

436. Anthony J. Bellia, *Congressional Power and State Court Jurisdiction*, 94 Geo. L.J. 949, 1009 (2006) ("There is no specific constitutional provision that authorizes Congress to regulate state court jurisdiction over state law cases, unless one rejects the notion that, at the time the Constitution became law, general law could have been understood to mark limitations on congressional power to regulate state court jurisdiction.").

To be sure, Congress has the power to modify state jurisdictional authority to hear certain federal claims.[437] The power is not unlimited. If Congress strips jurisdiction from federal and state courts and leaves the victims with no courts in which to assert their constitutional rights, such jurisdiction stripping can be unconstitutional in some cases.[438] Congress lacks power to strip state courts of jurisdiction in constitutional challenges to state laws cases.[439] Moreover, if Congress intends to divest state courts of jurisdiction over federal causes of action, it must do so "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests."[440]

As regards arrests at state courthouses, Congress cannot strip jurisdiction from federal and state courts and leave any noncitizen victims with no courts to assert their constitutional rights in some cases.[441] Congress lacks power to strip state courts of jurisdiction in noncitizens' constitutional challenges to state laws cases. Moreover, Congress did not explicitly or implicitly preempt state courts' jurisdiction to entertain noncitizens' federal causes of action. There is no evidence that Congress has divested state courts of jurisdiction over noncitizens in such proceedings "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests."[442]

Nor did Congress divest state courts of jurisdiction over state law cases involving noncitizens.[443] On the contrary, in one immigration statute, Congress has already demonstrated its respect of states' power, by requiring certification that ICE "did not rely on a tip from [an] abuser" to initiate proceedings against an immigrant who has been allegedly "battered or subject to extreme cruelty."[444]

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437. RICHARD W. BAUMAN & TSVI KAHANA, THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 442 (2006); Michael C. Dorf*, Congressional Power to Strip State Courts of Jurisdiction*, 97 TEX. L. REV. 1, 3 (2018).

438. *See* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1052, 1100–01 (2010). For instance, Congress cannot strip all courts of jurisdiction to hear habeas corpus claims guaranteed by the Suspension Clause or claims for just compensation in takings cases, as the judicial jurisdiction is necessary for courts to award constitutionally necessary remedies. *Id.* at 1100, 1104. Additionally, Congress may not strip all courts of jurisdiction to hear Establishment Clause challenges to the Pledge of Allegiance, or challenges to laws restricting abortion, because "Congress may not, in a constitutional case, use jurisdictional tools as a means of directing a particular outcome." Dorf*, supra* note 437, at 8–9.

439. Dorf*, supra* note 437, at 28

440. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981).

441. *See supra* notes 438–439 and accompanying text.

442. *See Gulf Offshore Co.,* 453 U.S. at 478.

443. *Cf.* Bellia, *supra* note 436, at 1001.

444. Pursuant to 8 U.S.C. section 1229(e)(1), when "enforcement actions lead[] to the issuance of a Notice to Appear (NTA) at certain locations, DHS must certify on the Notice to Appear that the agency has complied with 8 U.S.C. § 1367," including that DHS "did not rely on a tip from an abuser or his or her family to initiate the enforcement action." DAN KESSELBRENNER & SEJAL ZOTA, REMEDIES TO DHS ENFORCEMENT AT COURTHOUSES AND OTHER PROTECTED LOCATIONS 2 (2017), https://www.nationalimmigrationproject.org/PDFs/practitioners/practice

This statue also implies that states courts' powers to grant remedies to undocumented immigrants are not clearly incompatible with federal interests in enforcing immigration law.

Courthouse arrests of noncitizens effectively exclude a group of people from the state courts and substantially modify the jurisdiction of state courts. Such "jurisdiction stripping" has not been evaluated by the Congress, and cannot even be exercised by Congress in some cases. Allowing an executive branch to exclude a large group of people from state courts without a Congressional preemptive intent is allowing an executive branch to intrude the power of the Congress and jurisdiction of the states, and therefore should be avoided.

C. Anti-Commandeering Principle

ICE's expectation of local government's cooperation through contribution of state resources[445] in courthouse arrests and retaliation for state's noncooperation[446] are also problematic.[447] The Supreme Court has ruled that the Constitution's guarantees of federalism in the Tenth Amendment forbids the federal government from "commandeering" state governments to enforce federal law, and this retaliation could violate the anti-commandeering principle.[448]

_advisories/gen/2017_12Apr_remedies.pdf [https://perma.cc/UQU2-F545]. The protected locations that required such Notice include:

> a courthouse (or in connection with that appearance of the [noncitizen] at a courthouse) if the [noncitizen] 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 [noncitizen] has been battered or subjected to extreme cruelty or if the [noncitizen] is described in subparagraph (T) or (U) of section 1101(a)(15)

namely victims of criminal activity and victims of human tracking. 8 U.S.C. § 1229(e)(2)(B).

445. According to ICE, civil immigration enforcement actions inside courthouses should be conducted "in collaboration with court security staff, and utilize the court building's non-public entrances and exits." U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 7, at 2.

446. Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13,768, 82 C.F.R. 8799 (2017), https://www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02102.pdf [https://perma.cc/WH53-JJCD] (making sanctuary jurisdictions ineligible for federal grants); Interview by Neil Cavuto with Thomas Homan, *supra* note 28 (stating that there would be "a lot more deportation officers" in California in response to the state declaring itself a sanctuary state); Press Release, U.S. Immigr. & Customs Enf't, *supra* note 28 (reporting on ICE raids which targeted sanctuary cities).

447. *See, e.g.*, City & Cty. of San Francisco v. Trump, 897 F.3d 1225, 1234–35 (9th Cir. 2018) (declaring the executive order making sanctuary jurisdictions ineligible for federal grants an unconstitutional violation of separation of powers).

448. Printz v. United States, 521 U.S. 898, 902, 935–36 (1997) (finding a federal statute requiring state and local officials to perform background checks on gun buyers violated the Tenth Amendment because the "Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivision, to administer or enforce a federal regulatory program"); New York v. United States, 505 U.S. 144, 188 (1992) (federal government cannot commandeer the state governments by directly compelling them to participate in the federal regulatory program); *see also* Cty. of Santa Clara v. Trump, 275 F. Supp. 3d 1196, 1216 (N.D. Cal. 2017) ("The Executive Order's threat to pull all federal grants from [sanctuary] jurisdictions that refuse to honor [ICE] detainer requests or to bring

Therefore, federalism, along with separation of powers, disfavors such courthouse arrests.

VIII.
CONCLUSION

Litigation is an important way for noncitizens to contribute their voices to society and to seek justice. ICE's courthouse arrests have a chilling effect on noncitizens' appearances in courts as petitioners and witnesses. As the arrests may implicate the Petition, Free Speech, and Due Process Clauses as well as separation-of-powers and federalism principles, arrests at or near courthouses should be generally avoided when federal agents enforce immigration law. The states and individuals may find their support in the Constitution to defend themselves against federal intrusion into state jurisdiction and individual rights. The federal government shall at least extend greater level of protection for sensitive locations to courthouses.

'enforcement action' against them violates the Tenth Amendment's prohibitions against commandeering."), *aff'd in part, vacated in part sub nom. San Francisco v. Trump*, 897 F.3d 1225, 1235 & n.5 (9th Cir. 2018).