No. 19-1838

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MARIAN RYAN, in her official capacity as Middlesex County District Attorney; RACHAEL ROLLINS, in her official capacity as Suffolk County District Attorney; COMMITTEE FOR PUBLIC COUNSEL SERVICES; CHELSEA COLLABORATIVE, INC.,

Plaintiffs-Appellees,

v.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; MATTHEW T. ALBENCE, in his official capacity as the Acting Deputy Director of U.S. Immigration and Customs Enforcement and Senior Official Performing the Duties of the Director; TODD M. LYONS, in his official capacity as Acting Field Office Director of U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations; U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD WOLF, in his official capacity as Acting Secretary of United States Department of Homeland Security,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Massachusetts
Case No. 19-cv-11003; The Hon. Indira Talwani

ANSWERING BRIEF OF PLAINTIFFS-APPELLEES

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee The Chelsea Collaborative, Inc. ("Chelsea Collaborative"), by its undersigned counsel, hereby discloses:

1. Parent Company of the Chelsea Collaborative: None.

2. Publicly-held corporations owning more than 10% of the Chelsea Collaborative's stock: None.

Dated: May 15, 2020

Respectfully submitted,

/s/ Oren N. Nimni

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INTRODUCTION

For centuries, courts in England and in this country have enforced what the Supreme Court described as a "well settled" common-law privilege against civil arrest of those attending court on official business. *Stewart v. Ramsay*, 242 U.S. 128, 129-130 (1916). This privilege rests on the common-sense notion that if individuals appearing in court can be arrested in unrelated civil actions, then parties, victims, and witnesses will be deterred from appearing in court at all and the judicial process itself will be disrupted. In complete disregard for both that well-recognized limitation on the government's civil-arrest power and the important judicial interests that the privilege was designed to protect, United States Immigration and Customs Enforcement ("ICE") has implemented an unprecedented policy officially authorizing its agents to arrest parties and witnesses appearing in court based on alleged *civil*, not criminal, immigration infractions.

The undisputed factual record, which Defendants ignore, shows that ICE's policy has undermined access to justice and disrupted judicial proceedings in precisely the ways that common-law courts have predicted and protected against for centuries. As a result of ICE's policy, many Massachusetts residents will not set foot in Massachusetts courts. Victims of domestic violence and abusive practices by landlords and employers tolerate that abuse rather than risk ICE arrest.

Some criminal defendants accept default rather than risk appearing in court. And defendants that do appear are at times arrested by ICE on their way into the courthouse, forcing them into default and wasting legal and judicial resources spent preparing for hearings that cannot take place. Plaintiffs—the Middlesex and Suffolk County District Attorneys, the Massachusetts Committee for Public Counsel Services ("CPCS"), and the Chelsea Collaborative—brought this suit to ensure that *all* the victims, witnesses, criminal defendants, and civil litigants on whose court appearances Plaintiffs depend are able to access the courts on the same terms that have applied to individuals appearing in court for half a millennium.

The district court correctly held that Plaintiffs are likely to establish that ICE's civil-courthouse-arrest policy exceeds its statutory authority and enjoined that policy during the pendency of this lawsuit. When a statute invokes a concept traditionally governed by common law, it presumptively incorporates common-law limits to define the statute's scope. *See, e.g.*, *United States v. Texas*, 507 U.S. 529, 534 (1993); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014). Nothing in the INA's grant of a generic civil-arrest power comes close to overcoming the presumption that the statutory civil-arrest power is limited by the longstanding common-law privilege against civil arrest while attending court on official business. Unsurprisingly, then, the district court's decision in this case

has been endorsed by each of the other courts to have considered this question. *New York v. U.S. Immigration and Customs Enforcement*, __ F. Supp. 3d __, 2019 WL 6906274, at *8-12 (S.D.N.Y. Dec. 19, 2019); *Washington v. U.S. Dep't of Homeland Security*, __ F. Supp. 3d __, 2020 WL 1819837, at *10 (W.D. Wash. Apr. 10, 2020).

Defendants' contrary arguments lack merit and have been rejected by every court to consider them. Most importantly, the civil-arrest privilege was not "superseded" by a more limited process privilege, as Defendants claim, but was *expanded* to protect against service of process in some circumstances. The very cases recognizing such expansion make clear that the civil-arrest privilege maintains its vitality and that it protects those residing both outside and within the court's jurisdiction. Moreover, the two core purposes of the civil-arrest privilege—ensuring the attendance of necessary parties and witnesses and avoiding disruption of court proceedings—apply as much today as ever, including in the context of civil immigration arrests. Defendants also err in repeatedly relying on cases holding that the privilege does not apply to *criminal* arrests, as Plaintiffs have never disputed ICE's authority to criminally arrest those attending court. Finally, Defendants claim that the Immigration and Nationality Act ("INA") displaces the civil-arrest privilege, but they cannot identify *any* provision in the INA that speaks directly to civil courthouse arrests.

The district court also did not abuse its discretion in balancing the equities or fashioning its preliminary injunction. The district court found, based on the uncontested factual record, that ICE's policy is causing Plaintiffs, and the Massachusetts public, significant and irreparable harm by eroding access to the courts and hindering state criminal prosecution and adjudication. No government interest remotely outweighs that harm. Defendants' purported safety concerns can be addressed through the use of criminal courthouse arrests of those who actually pose a danger to the public, civil arrests of those brought to court in state custody, or civil arrests unrelated to court appearances. The district court also appropriately tailored the injunction to Plaintiffs' harms.

The district court thus correctly enjoined Defendants, during the pendency of this lawsuit, from "civilly arresting parties, witnesses, and others attending Massachusetts courthouses on official business while they are going to, attending, or leaving the courthouse," excepting those "brought to the courthouse in state or federal custody."[1] A031. This Court should affirm.

[1] For convenience, this Brief uses the phrase "civil courthouse arrests" to mean the arrests covered by the district court's preliminary injunction.

STATEMENT OF THE CASE

I. The Immigration and Nationality Act grants a generic civil-arrest power against the backdrop of a longstanding privilege against civil courthouse arrests.

For more than five centuries, common-law courts have recognized "a common law privilege against civil arrests on courthouse premises and against arrests of parties and other persons necessarily traveling to or from court." *New York*, 2019 WL 6906274, at *1; A018-A019. As explained below, pp. 21-28, *infra*, this privilege was well established in England by the time of independence and was incorporated into this country's common law. *E.g.*, *Stewart*, 242 U.S. at 129-130. Every court to consider the question has concluded that this privilege retains its vitality today. A018-019; *New York*, 2019 WL 6906274, at *9; *Washington*, 2020 WL 1819837, at *10; *see also Matter of C. Doe*, No. SJ-2018-119, at 10-12 (Mass. Sept. 18, 2018) (reproduced at JA134-147).

Against this common-law background, the Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163, granted the immigration agencies a civil-arrest power to facilitate the civil process of deportation. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action[.]"). Section 242(a) of that Act states that, "[p]ending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into

custody." Section 287(a)(2) of that Act authorizes an immigration officer to carry out a warrantless civil arrest "if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest." Those provisions remain largely unaltered today. *See* 8 U.S.C. §§ 1226(a), 1357(a)(2).

II. ICE's Directive No. 11072.1 explicitly authorizes, for the first time, civil courthouse arrests, in conflict with the well-settled common-law privilege.

For more than six decades after Congress authorized civil immigration arrests, no federal agency has ever formally interpreted that authority to extend to arresting parties and witnesses traveling to or appearing at court under their own power. Defendants repeatedly suggest (*e.g.*, at 1-2, 10-11) that agency policy had long authorized such arrests, but Defendants cannot actually identify any such policy. Of the three official policy documents Defendants cite, one focuses on whether victims or witnesses to a crime should be removed *at all*, JA199, and two focus on the requirements for implementing statutory restrictions on the initiation of "enforcement actions"—a term that is significantly broader than civil arrests, *see* pp. 43-44, *infra*—at certain sensitive locations, including courthouses, JA219-238.

Defendants' claim (at 11) that "ICE issued a further policy on courthouse arrests" in 2014 is highly misleading. The document Defendants cite is not a

formal "policy," and was not publicly "issued"; it is merely an internal ICE email, which Defendants did not even authenticate, intended to *limit* "enforcement actions at courthouses." JA197. That phrase does not necessarily contemplate *civil*, as opposed to criminal, "enforcement actions." *See* pp. 43-44, *infra*. And even if this email suggests that civil courthouse arrests at times took place prior to the policy at issue here—a fact Plaintiffs have never disputed—the email does not suggest that the agency had formally authorized such arrests, that such arrests took place with any frequency, or even that such arrests were carried out against those appearing in court under their own power rather than in state custody.

Starting in 2017, however, the federal government began to both publicly insist that it had the right to civilly arrest those attending court and dramatically increase the number of such arrests. JA032-034; JA051-054; JA171; JA217. On January 10, 2018, ICE formalized its courthouse-arrest policy in Directive No. 11072.1, entitled "Civil Immigration Enforcement Actions Inside Courthouses" (the "Directive"). JA149-152. This Directive "sets forth [ICE's] policy regarding civil immigration enforcement actions inside federal, state, and local courthouses." JA149. While ostensibly setting some limitations on ICE enforcement at courthouses, the Directive ultimately vests ICE with the discretion to arrest anyone in virtually any courthouse location when ICE deems it necessary. JA149-150.

The Directive states that ICE's courthouse arrests will "*include* actions against specific, target aliens with criminal convictions, gang members, national security or public safety threats, aliens who have been ordered removed from the United States but have failed to depart, and aliens who have re-entered the country illegally after being removed." JA149 (emphasis added). That list itself is broad given that it includes anyone who has re-entered after being ordered removed. It is also non-exhaustive, as the Directive's civil-arrest authorization is not limited to these "target aliens."

Similarly, the Directive provides that "[a]liens encountered during a civil immigration enforcement action inside a courthouse" who are not "target alien[s] … will not be subject to … enforcement action, absent special circumstances." JA149. The Directive does not explain what ICE considers "special circumstances," but states that ICE's decision will be consistent with an unspecified "U.S. Department of Homeland Security (DHS) policy." JA149 n.1. The Directive then suggests that the relevant DHS policy encompasses civil arrest of anyone potentially removable by cross-referencing another DHS memorandum that states that DHS "no longer will exempt classes or categories of removable aliens from potential enforcement." JA149 n.1; JA155.

Ultimately, the Directive embodies the agency's determination that ICE has complete discretion to target individuals appearing in court for arrest for a

suspected civil immigration infraction—including victims, witnesses, criminal defendants, and parties to civil proceedings.

III. Plaintiffs challenge the Directive and introduce unrebutted facts showing that ICE's civil courthouse arrests interfere with the judicial process in precisely the way common-law courts predicted and protected against for centuries.

Plaintiffs brought this suit to ensure that Massachusetts residents maintain the same ability to access the courts free from civil arrest that residents of the United States and England have enjoyed for centuries. Each Plaintiff depends on such access: District Attorneys cannot prosecute crime if victims, witnesses, and defendants cannot or do not appear; CPCS cannot defend against criminal charges if defendants and witnesses cannot or do not appear; and the Chelsea Collaborative cannot protect its members' rights if they cannot access the courts. *See* A025-027. Plaintiffs alleged that the Directive violates the Administrative Procedure Act and the U.S. Constitution. JA17-64. Plaintiffs also sought a preliminary injunction, raising only the merits argument that ICE does not have statutory authority to conduct civil courthouse arrests. A002-003.

In support of its motion for a preliminary injunction, Plaintiffs submitted unrebutted evidence concerning ICE's civil-courthouse-arrest practices and the impact those practices are having in Massachusetts. The Directive has coincided with a dramatic increase in civil courthouse arrests. JA171; *see also New York*, 2019 WL 6906274, at *2 (noting alleged 1700 percent increase in courthouse

arrests in New York). ICE conducts civil arrests of criminal defendants arriving at or leaving Massachusetts courts. JA172-173. This includes many defendants who do not qualify as "target aliens" as defined in the Directive. JA172. Not only do these arrests lead to obvious inefficiencies and disruptions to the criminal process, JA172-174, they can also lead to violent confrontations in the public areas of the courthouse, JA180-181. These arrests interfere with prosecutions by preventing prosecutors from assuring victims and witnesses that they can appear in court without fear of arrest. JA163-165, 179-180. This is particularly true in the context of domestic violence victims, who may be threatened by their abusers with the immigration consequences of testifying for the prosecution. JA180, 193-195.

ICE's civil courthouse arrests have an equally dramatic impact in civil litigation. Given reports of ICE arresting women appearing in connection with domestic-violence proceedings, *e.g.*, JA194, domestic-violence victims in Massachusetts have become more reluctant to file for protective orders against their abusers, JA164; JA193-195. Victims of fraud and abusive practices by employers and landlords have also been too afraid of civil immigration arrests to appear in court to assert their rights. JA165-166. To help address these issues, the Chelsea Collaborative has been forced, at significant expense, to implement a mediation system that effectively functions as a shadow court to resolve disputes in which one party is not willing to appear in court due to the fear of civil

immigration arrest. JA166-167. Prior to the district court's injunction, Chelsea Collaborative was conducting approximately three to four mediations *per week* in areas ranging from family disputes to wage claims. JA166.

Defendants introduced no responsive evidence. A012. At the second day of the preliminary injunction hearing, Defendants submitted a binder with certain policy documents and the 2014 ICE email discussed above. *See* A012; JA315. Defendants introduced no evidence supporting their assertions (*e.g.*, at 10-15) concerning either how these policies relate to each other or how Defendants apply them.

The undisputed factual record in this case is similar to the record in other challenges to the Directive. The record in *Washington v. DHS*, for instance, includes numerous instances of violent, disruptive civil arrests at courthouses as well as arrests of those appearing in court to, among other things, seek protection from domestic abuse, pay a parking fine or citation, or register a vehicle or renew a driver's license.[2] The record in *New York v. ICE* includes evidence that domestic violence victims refuse to appear in court to protect themselves from their abusers

[2] *E.g.*, *Washington v. U.S. Dep't of Homeland Security*, W.D. Wash. No. 19-cv-02043, ECF Nos. 13 at 4; 18 at 3-7; 25 at 5-6; 36 at 2-3; 38 at 4-13 (Dec. 18, 2019).

due to fear of civil immigration arrest, and demonstrates the many ways in which civil immigration arrests interfere with criminal proceedings.[3]

IV. The district court preliminarily enjoins ICE from arresting individuals attending Massachusetts courts on official business under their own power.

On June 20, 2019, the district court granted Plaintiffs' motion and enjoined Defendants, during the litigation, from "civilly arresting parties, witnesses, and others attending Massachusetts courthouses on official business while they are going to, attending, or leaving the courthouse," excluding those "who are brought to the courthouse in state or federal custody."[4] A031.

In concluding that Plaintiffs have "a strong likelihood of success on the merits," A025, the district court applied the accepted interpretive principle that statutes presumptively retain established common-law doctrines unless the statute "speaks directly" to the issue addressed by the common law. A021. The court recognized that the "privilege against civil arrest" while attending court is

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[3] *E.g.*, *New York v. U.S. Immigration and Customs Enforcement*, S.D.N.Y. No. 19-cv-8876, ECF Nos. 13 at 4; 18 at 3-7; 25 at 5-6; 36 at 2-3; 38 at 4-13 (Mar. 13, 2020).

[4] Given that the injunction does not prevent the arrest of defendants brought to court in state custody, Defendants' insistence (at 12-13) that *Lunn v. Commonwealth*, 477 Mass. 517 (2017), necessitates the arrests at issue here makes little sense. *Lunn* held merely that Massachusetts court officers have no authority to arrest and hold individuals solely based on civil immigration detainers if they are otherwise entitled to be released from state custody. *Id.* at 537. Nothing in *Lunn* or the district court's injunction prevents ICE from arresting such defendants at the courthouse before being "released to the streets of Massachusetts."

"fundamental to the functioning of both federal and state judiciary" and "remained present at common law when Congress enacted the provisions at issue here." A020-021. Because nothing in the INA speaks directly to the "common law privilege against civil arrest at the courthouse," that privilege is incorporated as a limitation on the generic civil-arrest power granted to the agency. A022-025.

The court also found that Plaintiffs established irreparable harm in two ways.[5] First, ICE's courthouse-arrest practices imposed costs on Plaintiffs that could not "be recovered from the government in the event Plaintiffs succeed at trial." A025-027. Second, Plaintiffs made an "unrebutted showing that each day that the threat of ICE civil arrests looms over Massachusetts courthouses impairs the DAs' and CPCS's ability to successfully perform their functions within the judicial system, and Chelsea Collaborative's members' ability to enforce legal rights, and that absent an injunction, some state criminal and civil cases may well go unprosecuted for lack of victim or witness participation"—harms that cannot "be remedied after the conclusion of this litigation." A027.

Finally, the court found that the equities as a whole weighed in favor of a preliminary injunction, emphasizing the importance of the public's ability to freely

[5] The district court made factual *findings* based on *evidence* that Plaintiffs introduced and that Defendants never disputed. It did not, as Defendants misleadingly suggest (at 19-20), simply "credit Plaintiffs' *allegations*" and "accept Plaintiffs' *assertions*."

access the courts and the fact that Defendants' purported safety concerns could be addressed by the use of criminal arrests at courthouses. A027-029.

SUMMARY OF THE ARGUMENT

I. The district court correctly held that Plaintiffs "have a strong likelihood of success on the merits" of their claim that the INA does not authorize Defendants to conduct civil courthouse arrests. A025.

A. Statutes that invoke a common-law principle incorporate common-law limitations on that principle unless the statute "speak[s] directly to the question addressed by the common law." *Texas*, 507 U.S. at 534 (quotation marks omitted). Similarly, federal statutes do not preempt "the historic police powers of the States" unless that was "the clear and manifest purpose of Congress." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 316 (1981). Such purpose must be "unmistakably clear in the language of the statute" when preemption would "alter the usual constitutional balance between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quotation marks omitted).

B. At common law, the government's civil-arrest power was limited by a "well settled" privilege against civil courthouse arrest. *Stewart*, 242 U.S. at 129-130. As numerous common-law cases and treatises have recognized, this privilege originated in England and was incorporated into this country's common law at independence, including Massachusetts common law. The privilege serves two

core purposes: Ensuring that parties and witnesses are free to attend court without fear of civil arrest in an unrelated matter and protecting the courts themselves from the delay and disruption caused by the civil arrest of those appearing before them.

Defendants' attempts to limit the scope of the privilege conflict with the privilege's history and purposes. The civil-arrest privilege applied to residents and non-residents alike, and was not superseded by a process privilege limited to those outside the court's jurisdiction; instead, the civil-arrest privilege was *expanded* to protect against service of process in some contexts. Indeed, the undisputed factual record here shows why the purposes that have always animated the civil-arrest privilege are as important today as they ever were. Defendants also claim that the privilege does not protect against "law enforcement," but cite only on inapposite cases involving *criminal* arrest.

C. Nothing in the INA abrogates the privilege or preempts the privilege as enforced by state common law. Defendants identify nothing in the actual grant of civil-arrest authority that speaks to civil courthouse arrests. Instead, Defendants rely heavily on 8 U.S.C. § 1229(e), a provision that Congress added in 2005 to *limit* "enforcement actions" at certain sensitive locations, including courthouses. This provision does not speak to ICE's authority to carry out civil courthouse arrests, as the "enforcement actions" addressed in section 1229(e) are far broader than the civil courthouse arrests at issue here. Moreover, even if the 2005

Congress did believe that the 1952 Congress had authorized civil courthouse arrests, a later Congress's interpretation of an earlier Congress's enactment is entitled to little, if any, weight.

Plaintiffs are thus likely to succeed in establishing that the INA does not authorize ICE to conduct civil courthouse arrests, especially in a state, like Massachusetts, where such arrests are barred by state common law.

II. The district court did not abuse its discretion in balancing the equities. Defendants' claim that Plaintiffs' irreparable harm is not "cognizable" conflicts with decisions from the Supreme Court and this Court. And Defendants do not dispute the district court's finding that Defendants could address their purported safety concerns consistent with the injunction.

III. The district court appropriately tailored the injunction to Plaintiffs' harms. CPCS operates throughout Massachusetts, so the statewide scope is necessary. And applying the injunction only to Plaintiffs' litigation would not address the deterrence effect of ICE's Directive and conduct.

ARGUMENT

I. The district court correctly held that Plaintiffs are likely to succeed in proving that ICE lacks the statutory authority to civilly arrest individuals attending court on official business.

The question before this Court is one of statutory interpretation: It is about the scope of the civil-arrest power Congress authorized, not, as Defendants

repeatedly suggest, the scope of the civil-arrest power Congress *could have* authorized. After all, as a federal agency, ICE "literally has no power to act … unless and until Congress confers powers upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Here, Congress conferred on the agency a generic civil-arrest power, and that generic power presumptively carries with it the limitations that accompanied that power at common law. As the district court correctly recognized, the civil-arrest power was limited at common law by the privilege against civil arrest of those attending court on official business, and nothing in the INA overcomes the presumption that such a privilege is incorporated into, not abrogated by, the INA.

A. Congress is presumed to retain, not displace, common-law rules and limitations that apply in the area in which it is legislating.

It is a "longstanding … principle that statutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Texas*, 507 U.S. at 534 (quotation marks and alterations omitted); *see also Samantar v. Yousuf*, 560 U.S. 305, 320 n.13 (2010). In such cases, "Congress does not write upon a clean slate," and thus "[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *Texas*, 507 U.S. at 534 (quotation marks omitted); *see also, e.g.*, *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538 (2013); *Meyer v. Holley*, 537 U.S.

280, 285 (2003); *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 142 (1st Cir. 2006); *New York*, 2019 WL 6906274, at *10; A021.

The Supreme Court has repeatedly applied this principle and held that statutes' broad, generic invocations of common-law principles incorporate common-law limitations. For instance, when Congress creates a tort-like cause of action, it presumptively incorporates common-law limitations on tort actions, even if those principles are not apparent from the statute's seemingly-unlimited text. Thus, while the Lanham Act's cause of action, "[r]ead literally," would allow anyone with Article III standing to bring suit, it must be read to incorporate "well established" common-law limitations on tort liability, like proximate cause, because "Congress, we assume, is familiar with the common-law rule and does not mean to displace it *sub silentio*." *Lexmark*, 572 U.S. at 129, 132. Other facially-unlimited causes of action also incorporate common-law limitations. *E.g.*, *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020) (42 U.S.C. § 1981); *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1305 (2017) (Fair Housing Act); *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 266-267 (1992) (RICO); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529, 535 (1983) (Sherman Act).

In other contexts, too, the Court has held that facially-unlimited statutory language incorporates background common-law principles. For instance, in

Malley v. Briggs, 475 U.S. 335, 339-340 (1986), the Court held that, though 42 U.S.C. § 1983 "on its face admits of no immunities" because it creates liability for "[e]very person" who violates its terms, it must be read "in harmony" with common-law tort limitations, rather than "in derogation of them." In *Meyer v. Holley*, the Court held that the Fair Housing Act's cause of action, which "says nothing about vicarious liability," nevertheless imposes such liability as a background common-law principle. 537 U.S. at 285. And in *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 32 (1983), while the Court expressed "no doubt" that a utility company qualified as a "displaced person" entitled to certain relocation benefits under the Uniform Relocation Act, the utility company was nevertheless not entitled to recover because the statute did not expressly abrogate a "traditional common law rule" barring recovery of the benefits at issue. *Id.* at 35-36; *see also United States v. Bestfoods*, 524 U.S. 51, 55, 63 (1998) (CERCLA incorporates the "well-settled" common-law rules regarding corporate veil piercing).

The Supreme Court has applied a similar presumption disfavoring preemption of state common law, holding that, as a general matter, a "Federal Act" does not preempt "the historic police powers of the States" unless that was "the clear and manifest purpose of Congress." *Milwaukee*, 451 U.S. at 316; *see also New York*, 2019 WL 6906274, at *10-11. The required showing is even higher

when such preemption would "alter the usual constitutional balance between the States and the Federal Government." *Gregory*, 501 U.S. at 460 (quotation marks omitted). In that context, because "States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere," Congress's intention to displace state law must be "unmistakably clear in the language of the statute" itself. *Id.* at 460-461; *see also New York*, 2019 WL 6906274, at *11.

Defendants do not, and could not, dispute these interpretive principles. The question in this case is therefore whether there was a common-law privilege against civil arrest of those attending court on official business and whether anything in the INA "speak[s] directly" to Congress's intent to abrogate that privilege. *Texas*, 507 U.S. at 534. As explained below, such a privilege plainly existed in 1952 (and still exists today), and nothing in the INA's generic delegation of civil-arrest authority to the agency abrogates that principle.

B. Congress authorized federal agencies to conduct civil immigration arrests against the background of the common-law privilege against civil courthouse arrests.

As every court to consider the question has recognized, the common-law background against which Congress authorized civil immigration arrests included a longstanding privilege from civil arrest for those attending court on official business. A018-021; *New York*, 2019 WL 6906274, at *7-12; *Washington*, 2020

WL 1819837, at *10. Defendants' attempts to limit the scope of that privilege have no support in case law and would deprive the privilege of the ability to accomplish the purposes for which it was created.

1. There is a long-standing and well-settled common-law privilege against civil arrest while attending court on official business.

"Courts cannot be expected to function properly if third parties … feel free to disrupt the proceedings and intimidate the parties and witnesses by staging arrests for unrelated civil violations in the courthouse, on court property, or while the witnesses or parties are in transit to or from their court proceedings." *New York*, 2019 WL 6906274, at *1. Thus, courts in England and in this country have recognized, for more than five centuries, a common-law privilege against civil arrest of those attending court on official business. *E.g.*, *id.*; A018-021.

Civil litigants historically commenced their suits through a writ of *capias ad respondendum*. Such a writ directed the sheriff to civilly arrest the defendant to "secure the defendant's appearance" in court. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999); *see also* A018-019 (citing Clinton W. Francis, *Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740-1840*, 80 Nw. U. L. Rev. 807, 810 (1986); Nathan Levy, Jr., *Mense Process in Personal Actions at Common Law and the Power Doctrine*, 78 Yale L. J. 52, 61 (1968)); *Long v. Ansell*, 293 U.S. 76, 83 & n.4

(1934). This method of initiating civil suits, however, created the possibility that civil arrests would take place in or near courts, a practice the judiciary feared would significantly disrupt judicial proceedings and deter parties and witnesses from attending court. *See* Christopher N. Lasch, *A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis*, 127 Yale L.J. F. 410, 424-31 (2017).

The English courts thus adopted, centuries ago, a common-law privilege against the civil arrest of those attending court on official business. *See, e.g.*, *New York*, 2019 WL 6906274, at *8; Lasch, *Common-Law Privilege*, *supra*, at 424. This principle was repeatedly endorsed by the English courts, which held that, "for the purposes of justice," and "to encourage witnesses to come forward voluntarily," they are privileged from arrest "in coming, in staying, and in returning" from court. *The King v. Holy Trinity in Wareham*, 99 Eng. Rep. 530, 531 (1782); *see also Meekins v. Smith*, 126 Eng. Rep. 363, 363 (1791) ("[A]ll persons who had relation to a suit which called for their attendance, whether they were compelled to attend by process or not, (in which number bail were included,) were intitled to privilege from arrest endo et redeundo [*i.e.*, coming and returning][.]"); *Spence v. Stuart*, 102 Eng. Rep. 530 (1802); *Ex Parte Byne*, 35 Eng. Rep. 123 (1813).[6]

[6] Unless otherwise noted, all cited English authorities are reproduced at JA96-132.

By the time of American independence, the privilege was firmly entrenched in English common law. For instance, Blackstone's *Commentaries on the Laws of England*—on which early U.S. courts heavily relied in incorporating English common law, *see New York*, 2019 WL 6906274, at *8—explained that "[s]uitors, witnesses, and other persons, necessarily attending any courts of record upon business, are not to be arrested during their actual attendance, which includes their necessary coming and returning." 3 William Blackstone, *Commentaries on the Laws of England* 289 (1768). Similarly, "all other persons whatsoever, are freed from arrests, so long as they are in view of any of the courts at Westminster, or if near the courts, though out of view, lest any disturbance may be occasioned to the courts or any violence used." 6 Matthew Bacon, *A New Abridgment of the Law* 530 (7th ed. 1832).

This privilege was then incorporated into this country's common law after independence. A019. In the late eighteenth century, "arrests in civil suits were still common in America," *Long*, 293 U.S. at 83, and it was widely recognized that such civil arrests could not be carried out against those attending court on official business. *See* Lasch, *Common-Law Privilege*, *supra*, at 425. For instance, Joseph Story's *Commentaries on the Constitution of the United States* recognized the "privilege … from arrest, except for crimes" that is "conceded by law to the humblest suitor and witness in a court of justice" while both attending courts and

"going to and returning from them." Joseph Story, *Commentaries on the Constitution of the United States* § 859 (1833); *see also Williamson v. United States*, 207 U.S. 425, 443 (1908). Justice Bushrod Washington, riding circuit, held that a witness is "privileged" from civil arrest while "coming to, going from, the Court." *Ex Parte Hurst*, 4 U.S. (4 Dall.) 387, 389 (C.C.D. Pa. 1804). Numerous other courts also recognized, in the years following independence, that the privilege against civil courthouse arrests was part of this country's common law. *E.g.*, *Fletcher v. Baxter*, 2 Aik. 224, 228-229 (Vt. 1827); *Norris v. Beach*, 2 Johns. 294, 294 (N.Y. Sup. Ct. 1807); *Richards v. Goodson*, 4 Va. 381, 382 (Va. Gen. Ct. 1823).

Over time, courts, including the Supreme Court, both recognized this "well settled" privilege, and expanded it to prohibit *all* forms of civil process on someone attending court. *Stewart*, 242 U.S. at 129. In *Stewart*, for instance, the Court recognized that there was an "exemption from arrest," or "capias," and held that this immunity extended to any civil process to avoid deterring parties and witnesses from appearing and to protect the "necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify." 242 U.S. at 129-130. The Court has repeatedly emphasized the "necessity of [the rule's]

inflexibility" in order to serve its purpose of protecting litigants and witnesses who appear in court. *Page Co. v. MacDonald*, 261 U.S. 446, 448 (1923); *see also Lamb v. Schmidt*, 285 U.S. 222, 225 (1932); *Long*, 293 U.S. at 83.

The privilege against civil courthouse arrests is also firmly entrenched in the common law of Massachusetts and other states. As the Massachusetts Supreme Judicial Court has explained, "[p]arties and witnesses, attending in good faith any legal tribunal, whether a court of record or not, having power to pass upon the rights of the persons attending, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning." *Valley Bank & Trust Co. v. Marrewa*, 354 Mass. 403, 406-407 (1968) (quoting *In re Thompson*, 122 Mass. 428, 429 (1877)); *see also In re M'Neil*, 3 Mass. 288 (1807); *Diamond v. Earle*, 217 Mass. 499, 500-501 (1914); Samuel Howe, *The Practice in Civil Actions and Proceedings at Law in Massachusetts* 143-144 (1834) ("[A]ll persons connected with a cause, which calls for their attendance in court, and who attend *bonâ fide*,— are protected from arrest, *eundo, morando, et redeundo*"). Justice Elspeth Cypher recently recognized, in a Single Justice opinion, that the "privilege against civil arrest" in attending court is "well[ ]settled" in Massachusetts, and "is broad enough to include [civil] arrests by Federal officers." *C. Doe*, *supra*, at 10-12 (JA144-146). The privilege is equally settled in other states. *See, e.g.*, *Stewart*, 242 U.S. at 130 ("The state courts, with few exceptions,

have" adopted the privilege); *New York*, 2019 WL 6906274, at *9 n.9 (noting the privilege's "ubiquity among the common laws of the states").

There are two consistent purposes that both English and U.S. courts invoke to justify the privilege. First, the privilege is necessary to encourage parties to court proceedings to "come forward voluntarily" without the threat that a court appearance will be used as a trap for a civil arrest. *Holy Trinity in Wareham*, 99 Eng. Rep. at 531; *see also New York*, 2019 WL 6906274, at *8; *Stewart*, 242 U.S. at 129. As the Supreme Court explained, "the due administration of justice requires that a court shall not permit interference with the progress of a cause pending before it, by the service of process in other suits, which would prevent, or the fear of which might tend to discourage, the voluntary attendance of those whose presence is necessary or convenient to the judicial administration in the pending litigation." *Lamb*, 285 U.S. at 225.

Similarly, in a decision the Supreme Court recognized as a "leading authority" on the privilege, *Stewart*, 242 U.S. at 129, the New Jersey Supreme Court explained that "[c]ourts of justice ought, everywhere, to be open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them," *Halsey v. Stewart*, 4 N.J.L. 366, 367 (N.J. 1817). The "fear that … a *capias* might be served upon [parties and witnesses]" would "prevent [their] approach," obstructing "this great object in the administration of

justice." *Id.* at 368. The privilege thus "takes away a strong inducement to disobey [the court's] process, and enables the citizen to prosecute his rights without molestation, and procure the attendance of such as are necessary for their defence and support." *Id.* at 368-369. It allows parties to court proceedings "to approach [the courts], not only without subjecting himself to evil, but even free from the fear of molestation or hindrance" and "to procure, without difficulty, the attendance of all such persons as are necessary to manifest his rights." *Stewart*, 242 U.S. at 129 (quoting *Halsey*, 4 N.J.L. at 367-368).

Second, the privilege enables the courts to function without interruption. *See, e.g.*, *Orchard's Case*, 38 Eng. Rep. 987, 987 (1828)[7] ("To permit arrest to be made in the Court would give occasion to perpetual tumults."); *Halsey*, 4 N.J.L. at 369 (privilege "protects the court from interruption and delay"); *Fisher v. Bouchelle*, 61 S.E.2d 305, 306 (W. Va. 1950) ("[C]ourts will not permit their proceedings to be disturbed by the arrest in a civil case of attorneys, litigants and witnesses."); *New York*, 2019 WL 6906274, at *10. As the Supreme Court explained, the privilege is "of the court," as it "is founded in the necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted" if those appearing in court could be civilly arrested in unrelated suits. *Stewart*, 242 U.S. at 130.

[7] Available at https://tinyurl.com/orchards-case.

In sum, as courts in England and in this country have recognized for centuries, the privilege against the civil arrest of those attending court on official business is a vital protection for the functioning of the judiciary—both to ensure that parties and witnesses are able to attend and to prevent interference with judicial proceedings themselves.

2. Defendants' attempts to artificially cabin the scope of the privilege have no basis in the common law and conflict with the privilege's purposes.

Defendants do not dispute the existence of a common-law privilege against civil courthouse arrests in either England or this country, but instead attempt to artificially cabin the privilege's scope. Defendants' arguments misunderstand the privilege's history and conflict with its purposes.

a. Defendants' primary argument is that the privilege does not apply to those traveling to court from within the court's jurisdiction. Defendants largely ignore the common-law cases and treatises discussing the civil-arrest privilege, which reach precisely the opposite conclusion. Instead, Defendants claim that the privilege against civil courthouse *arrest* was "superseded" by the privilege against service of civil *process*, and that this *different* (albeit related) privilege was limited to those traveling from outside the court's jurisdiction. *See* Def. Br. 23-26, 31-32. That argument reflects a profound misunderstanding of the history and purpose of both the civil-arrest and process privileges.

The case law concerning the civil-arrest privilege directly refutes Defendants' argument. Defendants do not and could not dispute that, as originally formulated in England, the privilege *primarily* applied to those traveling from within the court's jurisdiction. Indeed, it was not until 1782 that the privilege was first "extended to witnesses coming from abroad, as well as to those who are resident in this country." *Holy Trinity in Wareham*, 99 Eng. Rep. at 531. Courts in this country similarly recognized that the privilege applies to "[p]arties and witnesses … whether they are residents of this state or come from abroad." *In re Thompson*, 122 Mass. at 429; *see also Hopkins v. Coburn*, 1 Wend. 292, 293 (N.Y. Sup. Ct. 1828) (resident party was "undoubtedly privileged from [civil] arrest"). Leading treatises also recognized that the privilege applies to "*all persons* connected with a cause," Howe, *supra*, at 143-144 (emphasis added), and "*every person* who has any relation to a suit," David Graham, *Treatise on the Practice of the Supreme Court of the State of New York* 129 (2d ed. 1836) (emphasis added). Unsurprisingly, then, courts here, as in England, applied the privilege to those coming from within the court's jurisdiction. *E.g.*, *Fletcher*, 2 Aik. at 224-225, 228-229; *Hopkins*, 1 Wend. at 293. While both English and American courts recognized that the privilege was particularly important for those traveling across jurisdictions, *e.g.*, *Holy Trinity in Wareham*, 99 Eng. Rep. at 531; *Sanford v.*

Chase, 3 Cow. 381 (N.Y. 1824), and the privilege thus often *arose* in that context, the privilege from civil arrest was not *limited to* that context.

Lacking support from common-law authority addressing the civil-arrest privilege itself, Defendants claim (at 24-29) that the civil-arrest privilege was replaced by a narrower privilege against service of process. No court has ever adopted this position, and it is plainly wrong. As service of process gradually replaced arrest as the standard means of initiating suit, there was some question as to whether the privilege even applied to service of process, as the "mere service of a summons" is far less likely to deter court attendance or disrupt court proceedings than an actual arrest. *Christian v. Williams*, 35 Mo. App. 297, 303 (1889); *see also Blight v. Fisher*, 3 F. Cas. 704, 705 (C.C.D.N.J. 1809). Over time, courts held that there is generally a privilege against service of civil process on those attending court, but made clear that it was an expansion of the existing civil-arrest privilege, not a replacement for it. *E.g.*, *Fisher*, 61 S.E.2d at 307 ("[T]he [privilege against civil arrest] *was enlarged* so as to afford full protection to suitors, witnesses, and court officials, from all forms of process[.]" (emphasis added)); *Filer v. McCornick*, 260 F. 309, 314 (N.D. Cal. 1919) (privilege "is now very generally recognized as extending *not only to immunity from arrest*, but from service of process as well." (emphasis added)). Thus, "[f]ar from being abandoned, … the privilege was being expanded." *New York*, 2019 WL 6906274, at *9.

There was also a question as to whether this expansion of the privilege to service of process applied to those residing in the court's jurisdiction. Contrary to Defendants' brief (at 24-25), the Supreme Court's decision in *Stewart* suggests that the privilege, even as applied to mere process, *did* apply to residents. Invoking the historic purposes of the civil-arrest privilege, the Court explained that even service of process on those attending court could lead to significant deterrence and disruption. *Stewart*, 242 U.S. at 129-130. Indeed, the Court's recognition of the process privilege as "especially" warranted for non-residents implies that the Court did not view the privilege as limited to non-residents. Other cases, too, refused to limit the process privilege to non-residents. *E.g.*, *Richards*, 4 Va. at 381-382; *Parker v. Hotchkiss*, 18 F. Cas. 1137, 1138 (C.C.E.D. Pa. 1849).

To be sure, as Defendants note (at 24-27), other courts have held that the process privilege does not apply to those within the court's jurisdiction. But even many courts reaching that conclusion recognized that this limitation does *not* apply in the context of civil *arrests*. For instance, in *In re Healey*, 53 Vt. 694 (1881), the court reiterated that it "has long been a well-settled rule of law that *all* persons who have any relation to a cause which calls for their attendance in court … are for the sake of public justice protected from arrest in coming to, attending upon and returning from the court." *Id.* at 695 (emphasis added). As to service of process, however, the "authorities differ" as to whether residents are protected, while

establishing that "immunity is absolute" for non-residents. *Id.*; *see also Frisbie v. Young*, 11 Hun. 474, 475 (N.Y. 1st Dep't 1877)[8] ("As a resident witness, he was exempt *only from arrest* … and not from the service of process[.]").

Given the purposes the privilege was intended to serve, it is not surprising that the process privilege was applied more narrowly than the civil-arrest privilege. After all, while, as *Stewart* recognized, serving civil process on those attending court could deter attendance and disrupt court proceedings, it is far less likely to do so than *arresting* someone. The justification for the civil-process privilege thus rests far more heavily on the need to encourage voluntary attendance of non-resident parties and witnesses without fear of being dragged into unrelated civil matters. *E.g.*, *Christian*, 35 Mo. App. at 305.

Defendants note (at 26) that this specific purpose of the process privilege was undermined by the expansion of long-arm jurisdiction following *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945). But Defendants ignore the fact that the civil-arrest privilege was *also* motivated by the overall deterrence and disruption civil arrests cause—concerns that justified the privilege even when it applied *only* to those within the court's jurisdiction. *See* pp. 26-27, 29-30, *supra*. Defendants identify no historical or legal development that makes civil courthouse arrests any less of a deterrent or disruption than they have always been. Indeed,

[8] Available at https://tinyurl.com/frisbie-v-young.

the undisputed facts of this case show that the privilege is as important now as it ever was. *See* pp. 9-12, *supra*; *New York*, 2019 WL 6906274, at *10 (noting that ICE's Directive has "deter[ed] immigrants from appearing in court" and "caused precisely the delays, re-schedulings, waste, and disruptions that so many earlier courts feared").

The civil-arrest privilege thus maintains the same importance, vitality and scope as it has had for centuries, and protects *all* of those—resident and non-resident alike—traveling to and from and appearing in court.

b. Defendants' claim (at 29-31) that the common-law privilege would not have applied to the type of civil arrests at issue also lacks any relevant support. Defendants repeatedly insist (*e.g.*, at 4, 29) that the privilege did not apply to "law enforcement," but it cites only cases holding that the privilege does not protect against *criminal* arrest. Not one of those cases rests on an exemption for "law enforcement" that could sweep in arrests under *civil* law. To the contrary, the very cases Defendants cite make clear that the relevant distinction is between criminal and civil arrest. *E.g.*, *Morse v. United States*, 267 U.S. 80, 81-82 (1925) (recognizing that the privilege has a "wide application in civil cases but a limited one in criminal cases"); *United States v. Conley*, 80 F. Supp. 700, 701-702 (D. Mass. 1948) (recognizing that the privilege applies to "civil suit[s]," but holding that it generally does not apply to "a criminal suit").

Given that the privilege applied to civil arrests *generally*, it is irrelevant that that common-law courts had not explicitly applied the privilege to civil arrests in the context of "federal immigration enforcement." Def. Br. 21. Congress presumptively incorporates common-law limitations not only when a statutory concept is *identical* to something at common law, but also when that concept is "akin" to a common-law predecessor. *Bank of Am.*, 137 S. Ct. at 1305. Thus, for instance, the Supreme Court has repeatedly applied background common-law tort principles to the Fair Housing Act's cause of action even though there was no common-law tort for housing discrimination. *Id.*; *Meyer*, 537 U.S. at 285.

The civil arrests at issue here are "akin" to those at common law in that their purpose is to facilitate the civil removal process, not enforce criminal law. *See Murphy Bros., Inc.*, 526 U.S. at 350 (civil arrest at common law was intended to "secure the defendant's appearance"). Civil (as opposed to criminal) immigration arrest and detention is intended to effectuate civil removals. *E.g.*, *Demore v. Kim*, 538 U.S. 510, 528 (2003) (immigration arrest and detention "prevent[s] deportable criminal aliens from fleeing prior to or during their removal proceedings"); Def. Br. 8 (removal proceedings often initiated "through arrest"); *cf. Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (removal proceedings are "civil, not criminal, and we assume that they are nonpunitive in purpose and effect"). The statutory distinction between civil and criminal immigration arrests also shows that the two types of

arrests are different. And even the cases Defendants cite (at 31) distinguish between arrest and detention in *criminal* immigration cases and *civil* immigration proceedings. *E.g.*, *United States v. Vasquez-Benitez*, 919 F.3d 546, 553 (D.C. Cir. 2019) (in contrast to criminal pre-trial detention, an "illegal alien is detained under the INA to facilitate his removal from the country"). Because civil immigration arrests are thus "akin" to the civil arrests at common law—*not* the criminal arrests on which Defendants rely—the INA presumptively incorporates common-law limitations on the scope of the civil-arrest power.

Defendants also ignore the crucial distinction between criminal and civil law in discussing *Pasquantino v. United States*, 544 U.S. 349 (2005). Contrary to Defendants' brief, that case did *not* reject incorporation of a common-law rule because it had never been applied to "'a domestic sovereign acting pursuant to' statutory authority." Def. Br. 32 (quoting *Pasquantino*, 544 U.S. at 363). The question in that case was whether the common-law "revenue rule" that barred *civil* enforcement of one country's income-tax laws in another country barred the federal government from bringing a *criminal* fraud prosecution where the purpose of the fraud was to evade foreign taxes. *Id.* at 359-360. The Court held that such a civil rule does not limit "a domestic sovereign acting pursuant to *authority conferred by a criminal statute*." *Id.* at 364 (emphasis added). The italicized language—which Defendants conveniently replace with "statutory authority"—is

crucial here, as the district court's injunction is limited to the civil arrests actually governed by the common-law privilege. *Pasquantino*'s emphasis on the "traditional rationales" of the common-law rule also supports Plaintiffs, not Defendants, because the purposes behind the civil-arrest privilege at common law apply directly to the civil arrests at issue here. *See* pp. 9-12, 26-27, *supra*; *contra* Def. Br. 32.

c. Defendants' argument (at 34) that state law cannot "rewrite a federal statute" attacks a strawman. The question here is what the federal statute *means*, and that question is informed by the common-law background against which Congress legislated. *See* pp. 17-19, *supra*. Moreover, while a federal statute *can* preempt state common law, there is a general presumption that it does *not* preempt rules relating to "the historic[al] police powers of the States" unless that was "the clear and manifest purpose of Congress." *Milwaukee*, 451 U.S. at 316; pp. 19-20, *supra*.

* * *

The district court correctly held that the INA's grant of a civil-arrest power presumptively incorporates the deeply entrenched common-law privilege against civil arrest while appearing at or traveling to or from court. A020-021.

C. The INA's grant of a generic civil-immigration-arrest authority incorporates, not abrogates, the long-standing privilege against civil courthouse arrests.

1. The INA's grant of a generic civil-arrest authority does not abrogate the common-law privilege against civil courthouse arrests.

As discussed above, § I.A, *supra*, because there was a "long-established and familiar [common-law] principle[]" barring civil courthouse arrests, the INA only grants ICE the authority to conduct such arrests if the INA "speak[s] directly" to such authority. *Texas*, 507 U.S. at 534. Nothing about the INA's generic authorization of civil immigration arrests speaks *at all*—let alone directly—to the issue of civil courthouse arrests.

As Defendants recognize (at 8-9, 38), two provisions in the INA authorize civil immigration arrests. The INA's warrant-based civil arrest provision states that a noncitizen can be "arrested and detained" pending a removal decision. 8 U.S.C. § 1226(a). The INA's warrantless civil arrest power is more limited, authorizing arrest only if the person is "likely to escape before a warrant can be obtained." *Id.* § 1357(a)(2). As Defendants effectively concede (at 9-10), neither of these provisions touches on *where* civil immigration arrests are authorized. *Texas*, 507 U.S. at 534.

Defendants note (at 38) that the statute identifies "no limitations on courthouse arrests," but that undermines, not supports, their position. After all,

Congress's invocations of generic common-law concepts often, when, "[r]ead literally," include no limitations on their scope. But, such "broad language notwithstanding," Congress does not "displace [the common-law rule] *sub silentio*." *Lexmark*, 572 U.S. at 129, 132. Thus, the district court correctly held that the statute's silence cannot overcome the presumption that the common-law privilege limits the scope of ICE's statutory authority, and that ICE's Directive authorizing civil courthouse arrests exceeds the scope of that statutory authority.

At the very least, the INA does not grant ICE the authority to conduct civil courthouse arrests *when those arrests would violate governing state common law*—as they plainly would in Massachusetts, pp. 25-26, *supra*. As described above, pp. 19-20, *supra*, the INA only preempts state common law if such preemption was "the clear and manifest purpose of Congress." *Milwaukee*, 451 U.S. at 316. That standard is even higher when, as here, Congress intends "to pre-empt the historic powers of the States." *Gregory*, 501 U.S. at 460-461. In that context, Congress must undertake such preemption "plain[ly]," making its intention "unmistakably clear in the language of the statute" itself. *Id.*

That heightened standard applies here, and Defendants cannot satisfy it. After all, states' "historic powers" include the "maintenance of state judicial systems" separate from the federal government, *Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 285 (1970), and the Supreme Court has

repeatedly resisted federal interference with state judiciaries, *e.g.*, *Younger v. Harris*, 401 U.S. 37, 53-54 (1971). Moreover, the judiciary is a key component of states' exercise of the police power, which "the Founders denied the National Government and reposed in the States," *United States v. Morrison*, 529 U.S. 598, 618 (2000). Massachusetts has long recognized that the privilege against civil courthouse arrests is vital to the operation of its judiciary, describing the privilege as "a prerogative exerted by the sovereign power through the courts for the furtherance of the ends of justice." *See Valley Bank*, 354 Mass. at 405. Displacing that privilege—and installing ICE agents in state courts to civilly arrest victims, witnesses, and parties attempting to access those courts in violation of the "prerogative exerted" by the Massachusetts courts to protect them from civil arrest—would thus "pre-empt" the State's "historic powers." Indeed, as the undisputed factual record shows, ICE's policy has significantly interfered with the core police power of investigating and prosecuting crime. *See* pp. 9-12, *supra*.

Defendants do not even try to satisfy *Gregory*'s heightened preemption standard. Nor could they, as nothing in the "language of the [INA]" itself makes it "unmistakably clear" that Congress intended to preempt the historic state-law privilege barring civil courthouse arrests. *Gregory*, 501 U.S. at 460-461.

The district court thus correctly recognized that the INA does not grant ICE the authority to conduct civil courthouse arrests *at all*, and it certainly does not

authorize it to do so in violation of state common-law rules barring such civil arrests. A021-025; *New York*, 2019 WL 6906274, at *10-11.

2. Defendants' contrary arguments apply the wrong legal standard and rely on inapposite provisions of the statute that do not speak to civil courthouse arrests.

a. Defendants primarily err (at 35-38) in resting their argument on the inapplicable standard governing "whether a statutory scheme displaces federal common law." This is not a case, like the two cases on which Defendants rely, in which a post-*Erie* federal common-law rule that addressed a uniquely federal concern on which Congress had not yet legislated was later displaced by a comprehensive Congressional scheme. *See Milwaukee*, 451 U.S. at 307-308 (interstate water pollution); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011) (regulation of greenhouse gases). In that context, it makes sense that a comprehensive statutory scheme would displace judge-made federal law intended solely to address important federal questions lacking a statutory answer.

The relevant interpretive question here, however, is different. The privilege against civil courthouse arrests is not the type of recent federal-common-law rule at issue in *Milwaukee* and *American Electric Power*, but a centuries-old, widely-recognized common-law limitation on the civil-arrest power. In that context, the fact that Congress legislated concerning civil immigration arrests *generally* does not displace the common-law rule. To the contrary, the statute presumptively

incorporates the common-law rule unless the statute "speak[s] directly to the question addressed by the common law." *Texas*, 507 U.S. at 534 (quotation marks omitted). Indeed, the very cases on which Defendants rely (at 35-37) recognize the presumption in favor of incorporating such common-law rules. *E.g.*, *Astoria Fed. Sav. & Loan Assoc. v. Solimino*, 501 U.S. 104, 109-110 (1991) (holding that every statute incorporates background common-law principles unless Congress "expressly or impliedly … evince[d] any intention on the issue," an intention that must be "clear" when there are "weighty and constant values" at stake). Those cases similarly recognize the particularly strict standard for preemption of *state* common-law rules. *E.g.*, *Am. Elec.*, 564 U.S. at 423 (recognizing that "evidence of a clear and manifest congressional purpose [is] demanded for preemption of state law" (quotation marks and alterations omitted)); *Milwaukee*, 451 U.S. at 316.

b. The statute says practically nothing about the scope of the agency's civil-arrest powers, and certainly does not "speak[] directly" to civil courthouse arrests. *Texas*, 507 U.S. at 534. Defendants claim that when Congress "wanted to restrict immigration officers' powers, it did so explicitly," but does not cite a *single* provision actually restricting the scope of the civil-arrest authority. Instead, Defendants cite (at 38-40) one provision *expanding* the agency's warrantless-civil-arrest authority within twenty-five miles of the border. 8 U.S.C. § 1357(a)(3). That undermines Defendants' argument, as it makes clear that the general civil-

arrest authority under sections 1226(a) and 1357(a)(2) is not as unlimited as Defendants claim.[9] After all, if the generic civil-arrest authority under sections 1226(a) and 1357(a)(2) were limited only by the Constitution—as Defendants seem to suggest—there would be no need for Congress to have authorized *broader* civil-arrest authority near the border.

The other provisions Defendants cite do not relate to civil arrest at all. Defendants cite (at 38) various provisions governing detention and bond proceedings, but those provisions only highlight the *absence* of any meaningful legislation concerning the scope of the civil-arrest authority. Defendants also get no help from section 1226(c), which has nothing to do with the scope of ICE's civil-arrest authority, but merely states that when the Attorney General is required to "take [an alien] into custody," he or she should do so "when the alien is released" after a criminal sentence. Defendants' citation to section 1357(e) is even further off base, as that provision relates to "interrogat[ion]," not civil arrest.

Thus, Congress did not make "conscious—but limited—choices about when, where, and how" to "limit DHS's arrest authority." Def. Br. 39. Congress simply granted a generic civil-arrest power, leaving the scope of that power to be

[9] The restriction on access to "dwellings" on which Defendants rely is not a restriction on the generic civil-arrest authority, but a qualification of the expansion of authority near the border under section 1357(a)(3).

determined by background common-law principles like the privilege against civil courthouse arrests.

c. Lacking any support in the civil-arrest provisions themselves, Defendants rely heavily on 8 U.S.C. § 1229(e). Congress added that provision in 2005 to protect victims of abuse from "enforcement actions" initiated based on information provided by their abusers. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005 § 825(c), Pub. L. 109-162, 119 Stat. 2960, 3065; H.R. Rep. 109-233, at 120-121 (2005). Specifically, section 1229(e) provides that, when "an enforcement action leading to a removal proceeding" takes place at a courthouse (among other places), and the alien is in court in connection with specified family-law or domestic-violence matters, immigration officers may not make an adverse determination of removability based on information from an abuser. 8 U.S.C. §§ 1229(e), 1367. As both courts to have considered this question have recognized, this provision—added more than a half century after the relevant civil-arrest provisions—does not inform or change the scope of the agency's civil-arrest power.

First, nothing about section 1229(e) speaks at all—let alone directly or with a clear and manifest purpose—concerning the civil courthouse arrests at issue here. Section 1229(e) provides protections that apply when an "enforcement action leading to a removal proceeding" is taken against an abuse victim at certain

locations, including courthouses. This provision thus implies that *some* "enforcement action[s]" can be taken at a courthouse, but it does *not* imply that the civil arrests at issue in this case can take place at a courthouse. A criminal arrest under sections 1357(a)(4) and (5) is an "enforcement action" that often will "lead[] to a removal proceeding." *E.g.*, *id.* § 1357(a) (using "enforcement activities" to encompass criminal arrests); *New York*, 2019 WL 6906274, at *11. So is an arrest by "state and local police forces, which lead to eventual ICE removal proceedings." *New York*, 2019 WL 6906274, at *11. And so, too, is a civil arrest of a party brought to court in state custody, which, as ICE has recognized, can include "an arrested victim or witness of domestic violence." *See* JA199-200. The 2005 Congress thus would have had every reason to enact section 1229(e) to govern these "enforcement action[s]" *even if* sections 1226(a) and 1357(a)(2) do not authorize the civil courthouse arrests at issue here.

Second, even if section 1229(e) did somehow imply that the 2005 Congress thought that the 1952 Congress had authorized civil courthouse arrests, that would have "little bearing" on this Court's interpretation of the civil-arrest provisions. A024. After all, in interpreting a statutory provision, "[i]t is the intent of the Congress that enacted the section that controls." *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839-840 (1988) (alterations omitted). As the district court recognized, under well-settled interpretive principles, the 2005

Congress's reading of the civil-arrest provisions says little about the intent of the Congress that had enacted those provisions more than a half-century earlier. A024; *Mackey*, 486 U.S. at 839-840; *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977); *United States v. Price*, 361 U.S. 304, 313 (1960); *Rainwater v. United States*, 356 U.S. 590, 593 (1958).

Defendants complain (at 41-42) that the district court cited the concurrence, not the majority, in *Bilski v. Kappos*, 561 U.S. 593 (2010). But that concurrence merely recited the Court's longstanding recognition, repeatedly stated in majority opinions, that "the views of a subsequent Congress … form a hazardous basis for inferring the intent of an earlier one," *Price*, 361 U.S. at 313, and thus, when a later statute is offered as "an expression of how the ... Congress interpreted a statute passed by another Congress ... a half century before," "such interpretation has very little, if any, significance." *Rainwater*, 356 U.S. at 593; *see also Mackey*, 486 U.S. at 839-840 ("[T]he opinion of [a] later Congress as to the meaning of a law enacted 10 years earlier does not control the issue," as the "views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."); *Int'l Bhd. of Teamsters*, 431 U.S. at 354 n.39. Defendants rely on the 2005 Congress's interpretation of "a statute passed by another Congress … a half century before" in precisely the way the Supreme Court has rejected. *Rainwater*, 356 U.S. at 593.

Third, Defendants' argument ignores the purpose of section 1229(e), which was to *encourage* abuse victims to appear in court and prevent abusers from using ICE enforcement to insulate their abuse from law enforcement. *See* H.R. Rep. 109-233, at 120-121. It would be "odd" to view section 1229(e) as evidence that Congress intended to allow ICE to carry out arrests that *discourage* abuse victims from appearing in court, hindering the very objectives that the 2005 Congress was trying to promote. *New York*, 2019 WL 6906274, at *11.

The cases Defendants cite (at 41-43) are not to the contrary. The majority in *Bilski* merely recognized that the presumption against superfluity applies even to provisions enacted "at different times." 561 U.S. at 607-608. For the reasons just explained, nothing about the district court's decision renders section 1229(e) superfluous. Defendants' other two cases—*FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and *United States v. Fausto*, 484 U.S. 439 (1988)—involve later congressional action that was sufficiently clear that it would have *changed* the meaning of the originally-enacted provision, to the extent such change was necessary. Section 1229(e) is not remotely comparable to those provisions, and plainly does not provide the "relatively clear indication of … intent" required for an amendment to one provision to *change* the meaning of another one. *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017); *see also Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 139 S. Ct. 628, 634

(2019). After all, section 1229(e) is not specifically about civil courthouse arrests *at all* and its purpose is antagonistic to the civil-courthouse-arrest authority Defendants assert in this case.

d. Finally, Defendants' claim (at 37) that Congress's exclusive authority to "control immigration" preempts the state common-law privilege against civil courthouse arrests fails for two reasons. First, and most importantly, Plaintiffs' primary argument, and the argument adopted by the district court, has nothing to do with preemption of state law. Plaintiffs' argument is that the INA's generic grant of civil-arrest authority—like any other invocation of a common-law concept—presumptively incorporates background common-law principles, like the privilege against civil courthouse arrests, and nothing in the INA overcomes that presumption. Thus, the INA does not grant ICE the authority to conduct civil courthouse arrests *at all*, regardless of state common law.

Second, Defendants' state-law preemption argument fails on its own terms. There is, of course, no dispute that Congress *can* generally preempt state common law. The question is whether the "language of the [INA]" shows an "unmistakably clear" intent to do so here, *Gregory*, 501 U.S. at 460-461, or at least shows that such preemption was the "clear and manifest purpose of Congress," *Milwaukee*, 451 U.S. at 316. For the reasons already discussed, pp. 38-39, *supra*, it does not.

Relying on *Arizona v. United States*, 567 U.S. 387 (2012), Defendants claim that *any* state-law limitation on immigration enforcement is preempted. But contrary to Defendants' brief, *Arizona* did *not* hold that "[a]ny State attempt to alter th[e] [INA's] comprehensive removal scheme" is preempted because it "'creates an obstacle to the full purposes and objectives of Congress.'" Def. Br. 37 (quoting *Arizona*, 567 U.S. at 411). What the Court actually held is that a state law "authorizing state and local officers to engage in [immigration] enforcement activities" creates such an obstacle. *Arizona*, 567 U.S. at 410. The generally-applicable common-law privilege at issue here is not an obstacle to federal immigration enforcement, but is "a very narrow limitation on federal enforcement authority that is tailored to protect states' interests in managing their own judicial systems." *New York*, 2019 WL 6906274, at *11; *see also* JA269 (arrests at issue here are "a tiny, tiny fraction of all ICE arrests").

II. The district court did not abuse its discretion in finding that the equitable factors favor a preliminary injunction.

The district court's analysis of the equitable factors is entitled to substantial deference and Defendants come nowhere close to demonstrating any abuse of discretion. *See K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 915 (1st Cir. 1989). Plaintiffs' unrebutted evidentiary record shows that they, and the Massachusetts public, are suffering substantial and irreparable injury from the Directive and ICE's corresponding civil-courthouse-arrest practice. That injury far

outweighs the unsubstantiated safety concerns Defendants raise—concerns that, even if credited, could be addressed while complying with the injunction.

1. The district court carefully reviewed Plaintiffs' unrebutted evidence and correctly found that the Directive has inflicted and will continue to inflict substantial irreparable harm on Plaintiffs and the Massachusetts public. The Directive has led to "defendants with pending charges [being] arrested in the courthouse before they can appear before a judge," A026, impeding CPCS's ability to do its work and wasting the time that both CPCS and assistant district attorneys spend preparing for hearings that cannot take place. The Directive "interferes with the District Attorney's ability to prosecute specific cases because victims and witnesses are scared to participate in the proceedings." A026. The Directive has forced CPCS to "shift[] their staff focus" to immigration-related issues, including "assist[ing] criminal defense attorneys in the process of navigating the potential immigration consequences of their client's circumstances." A026. And the Directive has imposed serious financial burdens on Chelsea Collaborative, forcing it to "diver[t] … resources from [its] normal activities to 'an extra-judicial mediation and dispute-resolution system'" because its members are "are afraid to use the courts to vindicate their rights when they are victimized by employers, landlords, family members, and others." A025-026. All of these harms are

irreparable: Many, like lost prosecutions, are not financially compensable at all, and Plaintiffs cannot recover their financial harms from the government. A026.

Defendants do not challenge these factual findings—nor could they, given that Defendants neither disputed Plaintiffs' evidence nor introduced their own. *See* A012. Instead, Defendants insist that the injuries the district court identified are not "cognizable," either because they are not traceable to courthouse arrests or because irreparable harms inflicted by the federal government on local governments do not count. These arguments fail.

As to traceability, Defendants ignore the evidence and findings that defendants are "arrested in the courthouse before they can appear before a judge." A026; *see also* A017; JA172. Those arrests *directly* impose costs—without any intervening acts—both on CPCS lawyers and the assistant district attorneys who have prepared for hearings that cannot take place.

Defendants also erroneously discount the harms caused by the deterrent effect of ICE's civil courthouse arrests. Harm can be traceable to defendants' conduct through the "coercive effect [defendants' conduct has] upon the action of someone else." *Wine and Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 45 (1st Cir. 2005). As the Supreme Court recently held in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), that is true even when those third parties act in violation of a legal obligation. Plaintiffs' injuries in that case were traceable to a

proposed citizenship question on the U.S. Census even though the injuries resulted from the "action of third parties choosing to violate their legal duty to respond to the census." *Id.* at 2565. "[T]hird parties will likely react in predictable ways to the citizenship question, even if they do so unlawfully[.]" *Id.* at 2566. That is precisely what has happened here: Prior to the Directive, noncitizens freely attended Massachusetts state courts, but now many will not appear for any reason. *E.g.*, JA162-167. Thus, unlike in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42 (1976), the connection between injury and conduct is not "purely speculative," but is demonstrated and concrete. And individuals' failure to appear in court is not "*independent*" action that breaks the causal chain, *Bennett v. Spear*, 520 U.S. 154, 169 (1997), but the direct, predictable result of Defendants' Directive and conduct.

Defendants also invoke (at 44-45) the principle that interference with a plaintiff's ability to commit a crime is not a cognizable harm, but that is irrelevant. This case is about arrests for alleged civil infractions, not criminal activity. And, more fundamentally, Plaintiffs' interests are not in allowing anyone to avoid removal, but in ensuring that Massachusetts courts are accessible so that Plaintiffs, and the courts, can *enforce* the law.

Finally, the district court correctly rejected Defendants' unsupported claim (at 46) that local governments are categorically barred from invoking

organizational harm caused by "federal action." A014-015 & n.4. Courts routinely find that local governments suffer cognizable injury from federal action based on the types of organizational harm at issue here. *E.g.*, *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 618 (S.D.N.Y. 2019); *Regents of the Univ. of Cal. v. DHS*, 279 F. Supp. 3d 1011, 1033 (N.D. Cal. 2018). The cases Defendants cite do not support its position at all: *New York v. United States*, 505 U.S. 144 (1992), involved anti-commandeering principles that have nothing to do with standing or irreparable harm, while the state in *Massachusetts v. Mellon*, 262 U.S. 447, 483 (1923), asserted *no injury at all* other than the "mere enactment of the statute."

2. The district court also did not abuse its discretion in balancing those harms against the public and governmental interests. Defendants invoke (at 46) their "lawful authority to enforce the immigration laws" and (at 47) their statutory civil arrest power. But the district court only enjoined Defendants' *unlawful*, extra-statutory civil *courthouse* arrests authorized by the Directive. Moreover, as Defendants represented at the preliminary injunction hearing, the enjoined arrests make up only "a tiny, tiny fraction of all ICE arrests," JA269, and so the district court's injunction can have at most a minimal impact on overall immigration enforcement.

Defendants' claim (at 46) that the injunction will prevent ICE from "protect[ing] the public" from criminals fares no better. As an initial matter, the ICE arrests at issue are *not* for violent offenses, or even for crimes, but for *civil* immigration infractions. As the district court found, ICE's *civil* arrests actually *harm* public safety by hindering state law enforcement from prosecuting *actual crimes*. *See* A028 ("Plaintiffs … and the public in general will suffer harm each day that witnesses and victims refuse to participate in proceedings[.]"). Even crediting ICE's claim that its civil courthouse arrests generally target those who also committed criminal offenses, the district court correctly explained that its injunction does not prevent Defendants from *criminally* arresting dangerous noncitizens at courthouses. A028-029. Defendants do not dispute that criminal arrests would address their safety concern; instead they simply repeat (at 46-47) their incorrect merits argument that they are statutorily authorized to make such civil courthouse arrests. Finally, Defendants ignore the fact that the injunction allows them to *civilly* arrest those brought into court in state custody—which will likely be the case for most, if not all, of the noncitizens in court who pose an actual safety threat. *See* A021 n.5, A031; p. 12 n.4, *supra*.

Defendants also err in relying (*e.g.*, at 46-47, 49) on the policy the Massachusetts trial courts enacted in the wake of *Lunn*. *See* JA203-207; *Lunn*, 417 Mass. at 537. Defendants are wrong (at 49) that this policy shows a desire to

"cooperate with federal immigration enforcement." Defendants have always strongly suggested—and have now explicitly stated—that they will not comply with state-court orders barring civil courthouse arrests, so a policy banning civil immigration arrests would have been pointless.[10] Moreover, the policy makes clear that its primary purpose is not to "cooperate with federal immigration authorities," but to restrict the involvement of trial court officials in ICE enforcement activities at state courthouses, consistent with *Lunn*. As such, the trial court policy has no bearing on the equitable balancing here, and certainly does not displace the well-settled Massachusetts privilege from civil arrest while attending court on official business—a privilege that "is broad enough to include [civil] arrests by Federal officers." *C. Doe*, *supra*, at 12 (JA146); pp. 19-20, *supra*.

III. The scope of the district court's preliminary injunction was not an abuse of discretion.

The district court also did not abuse its discretion in defining the scope of the injunction, which the court appropriately "tailored to the specific harm to be prevented." *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 217 F.3d 8, 14 (1st Cir. 2000); *see also, e.g.*, *Vaquería Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 487 (1st Cir. 2009) ("[T]he district court is in the best position to tailor the scope of

[10] *See* Letter from William P. Barr and Chad F. Wolf to Chief Justice Martha L. Walters and Chief Justice Mary Fairhurst (Nov. 21, 2019), https://www.justice.gov/ag/page/file/1219556/download.

injunctive relief to its factual findings[.]"). Defendants' two contrary arguments lack merit.

First, contrary to Defendants' brief (at 49-50), the injunction is not broader than necessary to remedy Plaintiffs' harms. Defendants complain (at 49) that the injunction applies "throughout the State of Massachusetts," but that geographic scope is necessary given CPCS's state-wide practice. Defendants also err in suggesting that the injunction should have been limited to litigation in which Plaintiffs are involved. Plaintiffs' harms result in part from the statewide chilling effect ICE's Directive and civil-courthouse-arrest practice have on parties' willingness to come forward. So long as ICE agents can conduct civil courthouse arrests in Massachusetts in violation of the statute, that chilling effect will continue. A litigation-specific injunction would be particularly problematic because ICE officers do not always know why or when someone is appearing in court, which would make compliance with a litigation-specific injunction impossible. The cases Defendants cite specifically recognize that injunctions far broader than the one at issue here—including even *nationwide* injunctions—are appropriate "where such breadth [is] necessary to remedy a plaintiff's harm." *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019); *see also Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001). The District Court appropriately entered an injunction that sweeps that broadly and no further.

Second, Defendants insist (at 49-50) that the district court improperly enjoined "enforcement actions undertaken under all prior ICE Guidance," rather than only those undertaken under the Directive. But, as discussed, pp. 6-7, *supra*, Defendants cite no ICE guidance other than the Directive that the preliminary injunction might implicate. Moreover, given that ICE lacks the statutory authority to conduct civil courthouse arrests, it would make no sense for the district court to enjoin enforcement of the Directive but allow ICE to conduct extra-statutory courthouse arrests pursuant to some pre-Directive guidance. Defendants cite no authority for the bizarre proposition that a court cannot enjoin an extra-statutory agency policy simply because there were *prior* agency policies authorizing the same extra-statutory practice. Ultimately, though, it is the Directive—not some amorphous "prior ICE guidance"—that authorizes civil courthouse arrests. The preliminary injunction appropriately targets those arrests and nothing more.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision.

Respectfully submitted,

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Dated: May 15, 2020

CERTIFICATE OF COMPLIANCE

I, David J. Zimmer, counsel for Plaintiffs-Appellees, hereby certify pursuant to Fed. R. App. P. 32(g) that the Answering Brief for Plaintiffs-Appellees complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). This brief was prepared in a proportionally spaced typeface using 14 point, Times New Roman font, and according to the word count of Microsoft Word, the word-processing system used to prepare the brief, the brief contains 13,000 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

Dated: May 15, 2020

/s/ David J. Zimmer
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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2020 I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following counsel of record for Defendants-Appellants U.S. Immigration and Customs Enforcement, Matthew T. Albence, Todd M. Lyons, U.S. Department of Homeland Security, and Chad Wolf are registered as ECF Filers and that they will be served by the CM/ECF system:

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