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
No. 19-cv-11003
The Hon. Indira Talwani

APPELLANTS' REPLY BRIEF

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INTRODUCTION

This Court should vacate the district court's preliminary injunction establishing for the first time a right to evade federal law enforcement for those coming to or returning from courthouses and enjoining U.S. Immigration and Customs Enforcement (ICE) from exercising its statutory authority to make civil immigration arrests in or around courthouses. Gov't Br. 23-43. Plaintiffs' contrary arguments are unavailing.

Plaintiffs claim that the district court merely recognized that Congress incorporated the common-law privilege against civil arrest under a writ of *capias ad respondendum* to initiate private suits into its immigration-enforcement scheme. Appellees' Br. 16-48. But that privilege is a dead doctrine, replaced by a privilege against civil process for transient jurisdiction long before the Immigration and Nationality Act (INA) was codified, and long after *Erie Railway Co. v. Tompkins*, 304 U.S. 64 (1938), foreclosed the freewheeling adoption of new federal-common-law rules. Gov't Br. 23-43.

The district court also erred in concluding that Congress intended to incorporate the privilege against civil arrest into the INA. Gov't Br. 29-35. Plaintiffs contend that Congress must have intended to adopt the privilege because it made immigration enforcement a civil, rather than criminal, system. Appellees' Br. 16-48. But Congress' immigration system is equal to the federal government's criminal

duties, and Congress did not distinguish civil from criminal enforcement. Gov't Br. 29-31. No case prior to this suit has applied the privilege against the federal government's law enforcement.

Finally, the district court's statewide injunction is overbroad and should be narrowed in any event.

I. The District Court Erred in Issuing an Injunction.

A. The Injunction is Flawed on the Merits, as the INA Does Not Incorporate a Privilege that Applied to a Dead Writ.

The district court erred by concluding that a well-established privilege against federal law enforcement enforcing immigration law in or around a state courthouse existed when the INA was passed, and that Congress incorporated that privilege into the INA. Gov't Br. 23-33. No such privilege exists, and Congress did not intend to incorporate such a privilege into the INA. Gov't Br. 23-43. Plaintiffs' contrary arguments are meritless. Appellees' Br. 16-48.

i. The Common-Law Privilege Against Civil Arrest was a Dead Doctrine by the Time that the INA was Enacted and Amended, and Thus Congress Cannot Have Incorporated it.

As the government explained, there was no currently extant privilege against civil arrest at the time that the INA was codified, and thus Congress cannot have codified it. Gov't Br. 23-35. Plaintiffs' contrary arguments are unpersuasive. Appellees' Br. 16-36.

First, Plaintiffs maintain that there exists a "long-established and familiar

principle[]" preventing the federal government from arresting persons in public places under its lawful authority, so long as that person is going to or coming from court. *See id.* 17-36. As the government described, *see* Gov't Br. 24-34, there is no such principle.

Plaintiffs fail to describe the exacting test that courts must apply, citing cases on uncontroversial incorporations of common-law tenets of liability, agency, and alike. *See* Appellees' Br. at 17-19. Authorities are clear that common-law rules are not "well established" when they are "obsolete" at the time that the statutory scheme was enacted. *Taylor v. United States*, 495 U.S. 575, 594 (1990); *see, e.g.*, *Pasquantino v. United States*, 44 U.S. 349, 361 (2005); *United States v. Craft*, 535 U.S. 274 (2002); *Malley v. Briggs*, 475 U.S. 335, 340 (1986); Appellees' Br. 19 (discussing *Malley*); *see, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). The Supreme Court has refused to apply "[t]he arcane distinctions embedded" in the common law when it would "have little relevance to modern law-enforcement concerns," "the contemporary understanding" of it "has diverged a long way from its commonlaw [sic] roots" and "[o]nly a few States retain" the traditional view. *Taylor*, 495 U.S. at 594.

Plaintiffs acknowledge that the privilege against civil arrest hails from a time when arrest initiated suits. *See* Appellees' Br. 24. But they attempt to resurrect that dead doctrine by arguing that the replacement of the privilege with a privilege

against service of process was an "expansion" of it. *See* Appellees' Br. 24. As Plaintiffs acknowledge, *see id.* at 21-22, the privilege applied to the writ of *capias ad respondendum*, "the contemporary counterpart" of which is "the requirement that a defendant be brought into litigation by official service." *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999); *see* Appellees' Br. at 21, 34 (quoting *Murphy Bros.*). That "contemporary counterpart" has existed at least since *International Shoe*, which issued years before the INA was codified. *Murphy Bros., Inc.*, 526 U.S. at 350. The privilege applied in a specific procedural posture, against a specific writ, that has ceased to exist under the statutory canon of *cessante ratione legis cessat lex ipsa*. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 319 (2012). The most recent case that Plaintiffs cite involving an arrest in a civil suit is from 1828, 124 years prior to the enactment of the arrest statute and over 178 years after the INA was amended in 2006. *See* Appellees' Br. 29, 30 (citing *Hopkins v. Coburn*, 1 Wend. 292 (N.Y. Sup. Ct. 1828)).

Plaintiffs' Supreme Court citations involve the privilege against service of process or the arrest-privilege afforded to Congress. Appellees' Br. 24-25. No Supreme Court case applies the privilege against private civil arrest, which was already defunct before their decisions. As the government detailed in its opening brief, Gov't Br. 23-28, long before the INA was codified, the Supreme Court had documented this shift in procedure and its attendant modification of the privilege. In

1916, the Supreme Court proclaimed that "[t]he true rule … is that suitors, as well as witnesses, *coming from another state or jurisdiction*, are exempt from the *service of civil process* while in attendance upon court, and during a reasonable time in coming and going." *Stewart v. Ramsay*, 242 U.S. 128, 129 (1916) (emphasis added). Every single federal case that *Stewart* cited involved the federal courts' recognition of a privilege against service of process for transient jurisdiction. *See id.* at 131. And the Supreme Court held that the privilege "should not be enlarged beyond the reason upon which it is founded, and that it should be extended or withheld only as judicial necessities require." *Lamb v. Schmitt*, 285 U.S. 222, 225 (1932). The privilege "fills the gap only where it needs to be filled[,] that is, in cases where a district court wishes to shield an individual from service of process to encourage his or her travel to the forum state." *N. Light Tech., Inc. v. N. Lights Club*, 236 F.3d 57, 63 (1st Cir. 2001). Plaintiffs' argument thus has no basis in federal law.

Pasquantino shows that a court must consider changes to the common-law doctrine that occurred prior to the statute's enactment, including those in the "late 19th and early 20th century." 544 U.S. at 360. If "[e]ven those courts that as of 1952 had extended the … rule beyond its core prohibition had not faced a case closely analogous with this one," the court cannot "say with any reasonable certainty whether Congress in 1952" would have considered the common-law rule. *Id.* at 364-65. Plaintiffs attempt to qualify *Pasquantino* as relying on a criminal-civil distinction

and an analysis of "traditional rationales" that they claim support them. Appellees' Br. at 35-36. But they fail to show that the common-law privilege existed when the INA was codified, as *Pasquantino* requires.[1] A privilege apparently not applied once in more than 180 years prior to the district court's decision[2] cannot be "so well established" that Congress must be presumed to have intended to incorporate it into the INA. *See* Gov't Br. 23-35.

Thus, because there was no well-established privilege against civil arrest when the INA was adopted, Congress did not incorporate it into the INA.

ii. The Privilege Never Applied to Government Arrests, and Congress Would Thus Not Have Analogized Federal Immigration Enforcement With Civil Arrests for Service of Process.

As the government explained, no case at the time of the INA's enactment had ever applied the privilege to protect a person from federal law enforcement. Gov't Br. 29-31. Plaintiffs' arguments to the contrary are unsupported. Appellees' Br. 16-36.

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[1] Even some of their citations acknowledge that as the procedure shifted, so did the rule. *See, e.g.*, *Fisher v. Bouchelle*, 61 S.E.2d 305, 336, 339 (W. Va. 1950) ("the rule should be reasonably adjusted to conform to modern practices"); *Christian v. Williams*, 35 Mo. App. 297, 303 (1889) (similar); Appellees' Br. 27, 30, 32.

[2] To the extent that Plaintiffs rely on *New York v. U.S. Immigration and Customs Enforcement*, -- F. Supp. 3d ----, 2019 WL 6906274 (S.D.N.Y. Dec. 19, 2019), and *Washington v. U.S. Dep't of Homeland Security*, -- F. Supp. 3d ----, 2020 WL 1819837 (W.D. Wash. Apr. 10, 2020), as authorities, those are recent opinions that rely on the district court's holding in this case for support, are not controlling on this Court, and, in any event, post-date the enactments of the statutes at issue, so are not evidence of what the state of the common law was at enactment.

Plaintiffs nevertheless contend that Congress must have analogized civil immigration enforcement with arrests to initiate suits by private parties, and thus incorporated a civil-criminal distinction into the INA's arrest authority. Appellees' Br. 16-36. This argument fails, as the privilege against arrest never applied to sovereign arrests, and the civil-criminal distinction provides the federal government greater leeway over immigration enforcement, not less. *See* Gov't Br. 29-31.

Even the ancient privilege against arrest did not apply to sovereigns' arrests. None of Plaintiffs' citations (Appellees' Br. 16-36) of common-law cases connect the writ of *capias ad respondendum* with arrests by the sovereign for violations of the sovereign's laws. *See The King v. Holy Trinity in Wareham*, 99 Eng. Rep. 530, 531 (1782) (debtor's arrest); *Meekins v. Smith*, 126 Eng. Rep. 363, 363 (1791) ("debts … unpaid"); *Spence v. Stuart*, 102 Eng. Rep. 530 (1802) (no clear mention of reason for arrest); *Ex Parte Byne*, 35 Eng. Rep. 123 (1813) (debtor's arrest); 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2, 281-82, 286, 289 (1768) ("private wrongs"); 6 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 530 (7th ed. 1832) (arrest under a writ of *latitat*); *Orchard's Case*, 38 Eng. Rep. 987, 987 (1828)[3] (*capias*); DAVID GRAHAM, TREATISE ON THE PRACTICE OF THE

[3] *Orchard's Case* involved the Court of Chancery, which did not follow the common law and could provide broader remedies than a common-law court could. *See* A.H. MARSH, HISTORY OF THE COURT OF CHANCERY AND OF THE RISE AND DEVELOPMENT OF THE DOCTRINES OF EQUITY 12-17, 29-30, 66-67, 78-94 (1890).

SUPREME COURT OF THE STATE OF NEW YORK 80 (2d ed. 1836) (*capias*); *see also* *Anderson v. Hampton*, 106 Eng. Rep. 114, 114-15 (1818) (no privilege against arrest by marshal "on his own authority").

Plaintiffs' legal authorities describe how the privilege did not extend to law-enforcement arrests. In England, one of Plaintiffs' authorities stated that "[i]n indictments, informations, or suits, in which the king alone is concerned, the officer shall not have privilege; for it would be unreasonable that the court should allw [sic] protection to those who offend against the public peace of the community and the king's interest." 6 BACON, A NEW ABRIDGMENT, at 533; *e.g.*, 1 BLACKSTONE, COMMENTARIES, at 251-52 (aliens are "liable to be sent home whenever the king sees occasion"). In the United States, Justice Story discussed how the broader, Constitution-based privilege against arrest for members of Congress upon which Plaintiffs rely does not extend to arrests for "breach of the peace," which encompasses "all indictable offences, … [as well] as those which are only constructive breaches of the peace of the government, inasmuch as they violate its good order." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 865 (1833).

Since 1938, federal courts have been foreclosed from relying on the common law to fashion new rules like the expansion of a privilege against a now-dead writ. *See Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020); *Sosa*, 542 U.S. at 741 (Scalia,

Roberts, & Thomas, JJ., concurring in part and concurring in the judgment) (discussing the "death of the old general common law"). Therefore, Congress could not have expected the federal courts to step in to create a new privilege.

Plaintiffs next rely on a purported distinction between criminal and civil arrests, suggesting that because immigration arrests are civil in nature, Congress meant to limit the federal government's arrest authority as if it were a private party arresting someone to initiate private suit. *See* Appellees' Br. 33-36. Plaintiffs concede that the privilege never "explicitly applied" to "federal immigration enforcement." *Id.* at 34. That should end the analysis. As explained, the privilege against private suits does not apply to law enforcement. *See* Gov't Br. 29-31. Plaintiffs' contention ignores the state of immigration law at the time that the INA's arrest provision was ratified — which, Plaintiffs contend, is the dispositive time period for analysis. *See id.* at 44. Courts apparently never were confronted with an attempt to assert the privilege to avoid civil law-enforcement arrests.

It was well-settled at the time of the INA's enactment that (1) Congress and the Executive had plenary power over immigration, (2) immigration enforcement was as much the federal government's duty as criminal law enforcement, and (3) immigration's civil nature entitled aliens to *lesser* process than criminal defendants received, thus undermining Plaintiffs' argument that Congress incorporated a privilege that treated criminal defendants worse than subjects of civil

immigration enforcement. *See* Gov't Br. 29-31.

First, the Supreme Court constantly affirmed that even aliens with lawful status "remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders." *Carlson v. Landon*, 342 U.S. 524, 534 (1952). The Attorney General had broad authority to effectuate immigration laws. *See, e.g.*, *U.S. ex rel. Turner v. Williams*, 194 U.S. 279, 284-90 (1904). Congress did not limit this authority by making it a civil system. That broad authority has been continually reaffirmed. *See, e.g.*, *Arizona v. United States*, 567 U.S. 387, 394 (2012); *State v. U.S. Dep't of Justice*, 951 F.3d 84, 113 (2d Cir. 2020) ("It is doubtful that States have reserved power to adopt … immigration policies *contrary* to those preferred by the federal government.") (internal quotation marks and citation omitted).

Second, as the INA made clear, the Executive Branch has long had a dual duty to enforce immigration laws and prosecute crimes. Criminal enforcement is not privileged over immigration enforcement. The Supreme Court recognized that the Immigration and Naturalization Service "*would not have performed its responsibilities* had it been deterred from instituting deportation proceedings solely because" it knew that a petitioner was suspected of criminal activity that it could prosecute. *Abel v. United States*, 362 U.S. 217, 229 (1960) (emphasis added). And, the Court held, the government was free to prefer deportation over criminal

prosecution. *See id.* Under 8 U.S.C. § 1226(c) and § 1231(a)(2), for example, Congress made it mandatory for ICE to arrest persons during their removal period and those with certain criminal convictions while their removal proceedings are pending. These two alien classes comprise the majority of aliens subject to the Directive. JA149. The same rationales that apply in the criminal cases that Plaintiffs cite, *see* Appellees' Br. 33, regarding the public interest in enforcement of the criminal law apply equally to the immigration context. *See United States v. Vasquez-Benitez*, 919 F.3d 546, 552 (D.C. Cir. 2019) (immigration arrest authority is concurrent with criminal authority); *United States v. Lett*, 944 F.3d 467 (2d Cir. 2019) (same).

Third, it was well-established that the civil nature of immigration enforcement entitled aliens to *fewer*, not more, protections — thus showing that Congress would not have understood its arrest statute to incorporate a protection unavailable to criminal defendants. The Supreme Court had held that "[a] person arrested on [a] preliminary [civil immigration] warrant is not protected by a presumption of citizenship comparable to the presumption of innocence in a criminal case." *U.S. ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 154-55 (1923). Because "deportation proceedings are in their nature civil," the heightened "rule excluding involuntary confessions could have no application." *Id.* at 157. In 1960, the Supreme Court recognized that, "[a]ccording to the uniform decisions of this Court deportation

proceedings are not subject to the constitutional safeguards for criminal prosecutions." *Abel*, 362 U.S. at 237. The Supreme Court years prior had rejected as "without substance" the argument that federal immigration enforcement "interferes with the police power of the state" when it deports someone for activity that could be prosecuted by the state. *Zakonaite v. Wolf*, 226 U.S. 272, 275 (1912). Indeed, as the Supreme Court noted in the context of estoppel, "[i]t is well settled that the Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress." *U.S. Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8 (1973). The immigration scheme's civil nature does not impose restrictions on the federal government: for example, the differences between criminal and immigration arrests do not warrant a more stringent exclusionary rule for evidence gathered in immigration enforcement actions — and the Supreme Court indicated that they may be entitled to a lesser one because the criminally charged deserve greater protections. *Abel*, 362 U.S. at 237.

Plaintiffs acknowledge that the cases that they cite, involving private-party suits, are not directly on point by arguing instead that they are "akin" to immigration enforcement because immigration enforcement "is intended to effectuate civil removals" while civil private-party arrest is intended to "secure the defendant's appearance." Appellees' Br. at 34 (quoting *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1230 (2017)) (internal quotation marks and citation omitted). That

characterization itself shows how different the two arrests are. *See Pasquantino*, 544 U.S. at 368-70. Nor are the differences between criminal and immigration detention stark. *See, e.g.*, *Vasquez-Benitez*, 919 F.3d at 553 (one of the purposes of criminal detention is to "ensure [a defendant's] presence at his criminal trial" and a purpose of immigration detention is "to facilitate [an alien's] removal").

Moreover, *Pasquantino* rejected imposition by analogy of a common-law rule on the Executive's statutory authority, entitling weight to that authority. "[B]efore [a court] may conclude that Congress intended" to incorporate a common-law principle against government enforcement, a court "must find" that the principle "clearly barred" such enforcement. *Pasquantino*, 544 U.S. at 360. The Supreme Court stressed the importance of the fact that the prosecution "was brought by the Executive to enforce a statute passed by Congress." *Id.* at 369. The Executive "has ample authority and competence" over international relations and effectuated the "policy choice of the two political branches of our Government — Congress and the Executive." *Id.* The common-law rule applied to a "suit to enforce a judgment." *Id.* Because a prosecution is "brought by the United States in its sovereign capacity," and is not a suit to enforce a judgment, the common-law rule could not be "analogize[d]" to apply. *Id.* at 370. No common-law case "involved a domestic sovereign acting pursuant to authority conferred by a criminal statute." *Id.* at 364. And "none of petitioners' [common-law] cases" involved "a substantial domestic

regulatory interest." *Id.* Nothing in *Pasquantino* narrows this analysis to criminal laws.

In the absence of clear authority in their support, Plaintiffs rely on two broad judicial statements of purpose for limiting courthouse arrests: to encourage voluntary attendance and to keep courts open. Appellees' Br. 27-26. As the government explained, those concerns never trumped the interests of the public in law-enforcement arrests or permitted persons to avoid law enforcement. Gov't Br. 28-31; *see, e.g.*, *United States v. Conley*, 80 F. Supp. 700, 701-02 (D. Mass. 1948) (arrest for violation of law "outweighs the public interests ... in encouraging vindication of private rights and in preventing the interruption of judicial proceedings"); *Nken v. Holder*, 556 U.S. 418, 436 (2009) ("There is always a public interest in prompt execution of removal orders … ."). Generalized concerns about disruption do not in themselves establish a common-law doctrine.[4] Moreover, the disruption rationales apply equally — and potentially more strongly — to arrests that take place in courthouses for criminal defendants, whose fugitive status could imply a higher likelihood of disruption and arrest-resistance. But those concerns

[4] In fact, Plaintiffs incompletely quote *Halsey v. Stewart*'s discussion of "fear" of suit: the "fear" of suit applies to those wanting to "prevent … suit in any court at a distance from his home and his means of defence." *Halsey v. Stewart*, 4 N.J.L. 366, 368 (N.J. 1817). The privilege is not concerned with "noise, disturbance, or confusion created" by arrest, *Halsey*, 4 N.J.L. at 368. To the extent that this statement may conflict with Plaintiffs' other citations, it shows that the privilege is not well-established because of the disuniformity of rationales for it, *see* Section I.A.iii *infra*.

have never overridden the government's interest in executing the law. *See* Gov't Br. 28-30; *Morse v. United States*, 267 U.S. 80, 82 (1925) (persons cannot evade arrest from "the sovereignty which is their common superior"); *Peckham v. Henkel*, 216 U.S. 483, 486 (1910) (the United States may detain a person subject to another suit, and his arrest should "exonerate his sureties"). Plaintiffs cite no case that applies the privilege against sovereigns because of federalism or separation-of-powers concerns either, and state courts are uniquely required to follow federal law. *See generally Nixon v. Fitzgerald*, 457 U.S. 731, 748 (1982) ("any historical analysis must draw its evidence primarily from our constitutional heritage and structure" when it involves an issue particular to the United States that "did not exist through most of the development of common law"); U.S. CONST. art VI, § 2 ("[T]he judges in every state shall be bound [by federal law], anything in the Constitution or the laws of any State to the contrary notwithstanding.").

ICE arrests, like criminal arrests, effect the laws of the United States. The Directive makes clear that it only prioritizes aliens who are a threat to the community by gang affiliation or criminal activity; have final orders of removal or re-entered after being removed and so have received a final, binding judgment to have no claim to remain in the United States; and those who, in ICE's reasoned judgment, warrant arrest collaterally for actions like causing disruption during another's arrest. JA149.

Thus, Congress did not analogize immigration-enforcement arrests to private

civil arrests.

iii. The Federal Common-Law Privilege is Narrow and Applied to Transient Jurisdiction, and There Was No Uniformity Among States Regarding the Common-Law Privilege.

In arguing that a privilege against civil arrest retains vitality, Plaintiffs rely substantially on state common-law cases, citing only one federal case that actually applied a privilege against arrest, rather than service of process. Appellees' Br. 24 (quoting *Ex Parte Hurst*, 4 U.S. (4 Dall.) 387, 389 (C.C.D. Pa. 1804)); *see id.* at 20-26. This reliance is misplaced. When construing federal common law, courts must look to federal law, which clearly recognizes a limited privilege based on transient jurisdiction. Meanwhile, the "common law" may not be drawn from conflicting and disjointed state-court decisions.

As *Pasquantino* shows, disuniformity in states' common-law rules cannot clearly establish a general common-law rule. The *Pasquantino* court concluded that, "[e]ven if the present prosecution is analogous" to the common-law cases on which petitioners relied, the "uncertainty" in early cases showed that the rule was "unsettled as of 1952." *Id.* at 368. As such, they "do not yield a rule sufficiently well established to narrow the wire fraud statute." *Id.*

As the government explained, Gov't Br. 32 & *supra*, *Erie* abrogated federal courts' ability to freely create new common law. But even before *Erie*, the "common law" was not equivalent to states' disjointed sets of law that comprise individual

states' "state common law." The "common law" referred to "a substantial core of uniform law that was administered by the federal and state courts as a general American common law." William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1521 (1984). It "had never been perfectly uniform among the states" and was already divergent by the 1820s. *Id.* Indeed, Justice Story determined that Massachusetts had deviated from the "general law" and the "common law" at least twice, rendering the Massachusetts common law in those areas "local law" rather than a part of the general common law. *Halsey v. Fairbanks*, 11 F. Cas. 295, 298 (C.C.D. Mass. 1826); *see Robinson v. Commonwealth Ins. Co.*, 20 F. Cas. 1002, 1004 (C.C.D. Mass. 1838).

The disparate state-court cases that Plaintiffs cite do not evince the "common law." *See Pasquantino*, 544 U.S. at 368. The disjointedness of the doctrine and its rationales[5] is well-documented. It led a federal court to remark that "[n]o useful purpose would be subserved by an attempt … to collocate or classify or distinguish the decisions upon this subject from the state courts. It must be conceded that they are hopelessly in conflict; … [and] that the weight of authority is in harmony with

[5] For example, in Massachusetts alone, the privilege shifted from applying to involuntary attendance to applying to voluntary attendance of a nonresident. *See, e.g.*, *Diamond v. Earle*, 217 Mass. 499, 501 (1914) (voluntary attendance); SAMUEL HOWE, THE PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS AT LAW IN MASSACHUSETTS 144 (1834) (involuntary attendance).

the rule followed by the federal courts." *Skinner & Mounce Co. v. Waite*, 155 F. 828, 830 (C.C.D. Idaho 1907). The Court of Appeals of New York, reviewing the privilege, stated that "[v]olumes of opinions have been written in which one can find all sorts of conflicting decisions and almost any dictum that one may be looking for." *Netograph Mfg. Co. v. Scrugham*, 90 N.E. 962, 962 (N.Y. 1910); *accord Husby v. Emmons*, 268 P. 886, 8878 (Wash. 1928) (deeming privilege decisions "extremely confusing" and unable to "be reconciled"). In *Stewart*, the Supreme Court acknowledged that state law on the privilege conflicted and relied on the consistency of the federal decisions, all of which applied it to transient jurisdiction. *Stewart*, 242 U.S. at 131.

However, notwithstanding the broad language on which Plaintiffs rely, many of the civil-arrest cases that Plaintiffs cite concern out-of-jurisdiction arrests, any broad language on the privilege notwithstanding. *See Ex Parte Hurst*, 4 U.S. (4 Dall.) 387 (New York resident arrested "at his lodgings" at a hotel in Philadelphia); *Norris v. Beach*, 2 Johns. 294, 294 (N.Y. Sup. Ct. 1807) (Connecticut resident arrested in New York); *Halsey v. Stewart*, 4 N.J.L. 366, 367-68 (N.J. 1817) (New York resident in New Jersey); *Hopkins*, 1 Wend. 292(citizen of one county attending court in another county).[6] Massachusetts cases that Plaintiffs cite are no different. *See, e.g.*,

[6] *See Gruber v. Wilson*, 276 N.Y. 135, 137 (N.Y. 1937) (under the New York State Constitution, a county court has no jurisdiction over a person outside that county).

Valley Bank & Trust Co. v. Marrewa, 354 Mass. 403, 406-07 (1968) (citing *Thompson's Case*, 122 Mass. 428, 429 (1877)) (applying a privilege to non-residents and noting that *Thompson's Case* involved "an inhabitant of another State"); *Diamond v. Earle*, 217 Mass. 499, 501 (1914) (privilege applies to "suitors and witnesses from a foreign jurisdiction" to protect them from the "hazard that [they] may become entangled in litigation in foreign courts"). Plaintiffs misstate that *Matter of C. Doe*, No. SJ-2018-119 (Mass. Sup. Jud. Ct. Sept. 18, 2018), JA139, proclaims the privilege to be "well settled" and "broad enough to include [civil] arrests by Federal officers." Appellees' Br. 25 (alteration in original). It merely states that, even if a court "could say" that such a privilege exists, "Federal questions" exist, without making a pronouncement on that issue. JA146. Thus, the weight of state authorities accorded with the federal privilege for service of process, *Stewart*, 242 U.S. at 131, and it cannot be assumed that Congress meant to incorporate a broader rule based on ancient, disparate state cases that were out of line with federal authority. Even if Massachusetts common law did not accord with the common-law rule recognized by federal cases, it could not be used to "re-write a federal statute." *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986).

Because the federal common-law rule applied only to transient jurisdiction, the district court erred in expanding it beyond that scope.

II. In the Alternative, Even if a Privilege Existed, the INA Displaces It.

As the government explained, Gov't Br. 35-43, even if a state-court privilege existed, the INA displaced it as of 1952 and in the present day. Plaintiffs' contrary arguments are unavailing. Appellees' Br. 40-48.

Plaintiffs argue that standard statutory interpretation principles requiring interpretation of a statue as a whole should not apply to "centuries-old" common law, but only apply to a "post-*Erie* federal common-law rule that addressed a uniquely federal concern." *Id.* at 40 (citing *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 312 (1981), & *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011)). That is wrong. As the government explained, "'a specific policy embodied in a later federal statute should control ... construction of the [earlier] statute, even though it ha[s] not been expressly amended.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted). No "clear and manifest congressional purpose" to displace federal common law is required. *Am. Elec. Power Co.*, 564 U.S. at 423. Plaintiffs' attempt to distinguish *Milwaukee* and *American Electric Power Co.* fails as both cases involve federal common law created before *Erie* that the challengers, like Plaintiffs here, sought to apply to a new context. *See Milwaukee*, 451 U.S. at 311 (EPA displaced "federal common law" of "nuisance"); *Am. Elec. Power Co.*, 564 U.S. at 421 (EPA displaced potential expansion of federal common law on pollution abatement that existed pre-*Erie*). And, as the government

explained *supra* Part I, the INA was enacted after *Erie*, so Congress would not have relied on the courts' creation of common law in a new context.

Plaintiffs contend that "[n]othing about the INA's generic authorization of civil immigration arrests speaks *at all* — let alone directly — to the issue of civil courthouse arrests," and, as such, Congress could not have authorized courthouse arrests in contravention of state common law. Appellees' Br. 37, 37-48. That is incorrect. As the government explained, Gov't Br. 37-43, the INA provides broad arrest authority, limiting that authority only in explicit circumstances. For instance, 8 U.S.C. § 1357(a)(2) & (3) provide officers broad authority to arrest any person who is entering the United States illegally, extends that broad authority to permit access to "private lands," which would normally require a warrant in the criminal context, but then limits that authority to prohibit officers from entering "dwellings" notwithstanding that broad authority. Title 8 U.S.C. § 1229(e) states that when an "enforcement action leading to a removal proceeding" is taken "[a]t a courthouse," certain information-limiting procedures apply *if* that alien has been subjected to certain offenses — meaning that no limitations so apply to general enforcement actions taken at courthouses. Thus, § 1229(e) recognizes and authorizes general arrest authority at courthouses and puts limits on what information can be used to facilitate those arrests.

Plaintiffs claim that 8 U.S.C. § 1229(e)'s reference to an "enforcement action

leading to a removal proceeding" does not include civil arrests generally but refers in part to civil arrests of persons in criminal custody. Appellees' Br. 45-47. That reads a limitation into the text that is not there. Section 1229 is entitled "[i]nitiation of removal proceedings," clearly showing that it describes initiation of civil process. As immigration enforcement is *always* a civil process, it does not follow that Congress would have used "enforcement action" as shorthand for the service of a Notice to Appear or a criminal arrest without so specifying. While some DHS officers may have authority to engage in criminal arrest, those arrests are for *criminal* violations, not immigration enforcement; any immigration enforcement following prosecution would require separate civil process or civil arrest. Thus, Congress could not have used that phrase to exclude civil arrest. Congress clearly permitted DHS agents to arrest in courthouses, preempting any state common law to the contrary.

Plaintiffs' interpretation of the phrase "enforcement action leading to a removal proceeding" is inherently contradictory. Appellees' Br. 45-47. They claim that the INA prohibits civil arrests in courthouses. But they then contend that "a civil arrest of a party brought to court in state custody" is an "enforcement action leading to a removal proceeding" to which Congress must have spoken in § 1229(e), which they do not challenge. Appellees' Br. 44. Under Plaintiffs' argument, a civil arrest should be foreclosed whether or not a person is in custody, because it is the civil nature of the arrest that controls whether the privilege applies. *See* Appellees' Br.

34-37. Plaintiffs' creation of carve-outs does not follow. *See id.* at 34. Plaintiffs thus attempt to dictate which aliens warrant civil arrest.

Plaintiffs admit that their "primary argument … has nothing to do with the preemption of state law" but rely on preemption standards throughout the brief and in discussing § 1229(e). *See* Appellants' Br. 41, 43, 47. But the federal government has plenary authority over immigration, and states may not dictate to the federal government their enforcement priorities. *Arizona*, 567 U.S. at 411; *State*, 951 F.3d at 113 (states may not dictate "immigration policies *contrary* to those preferred by the federal government"). Plaintiffs attempt to do just that by selectively permitting ICE to engage in some civil arrests at courthouses that they deem permissible as a matter of policy while blocking others. Any attempt to directly block the federal government from courthouses' public spaces and public lands outside of courthouses would raise intergovernmental immunity concerns. *United States v. California*, 921 F.3d 865, 878 (9th Cir. 2019) ("The doctrine of intergovernmental immunity … mandates that the activities of the Federal Government are free from regulation by any state" and prohibits "discriminat[ion] against the Federal Government … .").

Thus, in the alternative, the INA displaced state common law.

III. Equitable Factors Do Not Support the Injunction.

The district court erred in holding that equitable factors supported the injunction. Gov't Br. 43-47. Plaintiffs allege attenuated diversion-of-resources harms, while the government is foreclosed from lawfully executing the immigration laws, a significant harm to the government and the public interest. Gov't Br. 43-47. Plaintiffs' arguments cannot overcome these issues. Appellees' Br. 48-54.

Plaintiffs argue that irreparable harm is established by allegations of harm in preparing for hearings that never happen and in needing to respond to clients' fears of arrest by switching to mediation programs. Appellees' Br. 49-50. Even taking those allegations as true, as the government explained, Gov't Br. 44-46, those injuries cannot outweigh the harms caused by the injunction to the Executive's ability to lawfully execute the immigration laws. Plaintiffs allege that *Department of Commerce v. New York*, 129 S. Ct. 2551 (2019), forecloses the government's argument that third-party failures to voluntarily appear are not traceable to courthouse arrests, but that case involved standing, not preliminary-injunction harms, and more directly traceable harms. *Id.* at 2555.

Plaintiffs also dismiss the effect of *Lunn v. Commonwealth*, 477 Mass. 517 (2017), claiming that because the injunction does not block arrests of persons in state custody, courthouse arrests do not respond to the conditions created by *Lunn*. Appellees' Br. 12 n.4. That is incorrect. Because persons serving criminal sentences

are usually released from prisons or jails, not at courthouses, *Lunn* requires ICE to arrest those aliens at large, at threat to officer, alien, and public safety. Because courthouses screen persons who enter for weapons, arrests there will likely be safer for everyone involved. Contrary to Plaintiffs' argument, Appellees' Br. 53, criminal arrests cannot cover the gap in enforcement made by blocking immigration arrests, because criminal arrests are for *criminal prosecution*, not for removal. Plaintiffs attempt to argue that the Massachusetts court policy evinces a desire not to cooperate with federal law enforcement, but Plaintiffs do not represent the courts, and the policy itself sets out cooperation. JA202-08. Thus, the balance of the equities weighs against the district court's injunction.

IV. The Injunction is Overbroad.

Finally, the injunction is overbroad. *See* Gov't Br. 47-52.

Plaintiffs fail to acknowledge this Court's binding decision of *Northern Light Technology*, which forecloses the "fashion[ing of] a broad, *per se* rule" in light of "admonitions in *Lamb* and other cases that process immunity should be meted out sparingly," *N. Light Tech.*, 236 F.3d at 63, and *Matter of C. Doe*'s statement that under Massachusetts law there is "no authority" for the proposition that a common-law writ can act like a preliminary injunction, rather than being issued in individual cases for individual persons. JA139-47. And indeed, Plaintiffs' authorities hold that the arrest privilege applies to receive individual protection from individual writs

from individual courts, such that persons can waive their privilege.

The APA does not provide for preliminary injunctive relief here. *See* Gov't Br. 49-52. Even if it did, the only proper relief under the APA — the sole claim on which they sought an injunction — would be to set aside the Directive. *See* Gov't Br. 49-52. It is well-settled that where one policy is set aside, the most recent prior policy remains in effect. *Sierra Club v. Wagner*, 555 F.3d 21, 27 (1st Cir. 2009) (under APA, "where one agency rule is invalidated the previous rule in force applies"). The district court did not just set aside the Directive; instead, it enjoined ICE arrests at courthouses even under prior policies.

Plaintiffs contend that no policy authorizing courthouse arrests previously existed and argue that a court may enjoin even unchallenged policies. Appellees' Br. 6-7, 56. That is wrong. The 2014 policy that the 2018 Directive revised explicitly authorized courthouse arrests of aliens who engage in criminal activity, are in gangs, or are national security threats. *See* Enforcement Actions at or Near Courthouses (Mar. 19, 2014), JA197. Prior guidance likewise governed courthouse arrests, including 2007 guidance implementing § 1229(e)(2)'s limitations on "enforcement actions" initiated at courthouses. Gov't Br. 10-15. But they expressly challenge only the 2018 Directive, JA38-46, JA91, so under the APA, the district court lacks any authority to enjoin prior policies authorizing courthouse arrests.

Even if injunctive relief were available, an injunction limited to persons who

are necessary to actual litigation, or, at the very least, the courthouses in which Plaintiffs bring and defend cases, would suffice to completely remedy the harms that they allege, as they would be able to accurately inform the persons whose voluntary attendance they require that they will not be arrested. Thus, at a minimum, this Court should narrow the injunction.

CONCLUSION

For the foregoing reasons and the reasons set forth in the government's opening brief, this Court should vacate the injunction, or narrow it at minimum.

Respectfully submitted,

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Dated: June 5, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of First Circuit Rule 32(a)(7) because it contains 6,486 words. This brief complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 28 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2020, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the First Circuit by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system to the following:

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