

**19-1838**

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**United States Court of Appeals  
for the First Circuit**

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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 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.*

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On Appeal from the United States District Court  
for the District of Massachusetts, Boston

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**BRIEF FOR AMICI CURIAE STATES OF NEW YORK, CONNECTICUT,  
ILLINOIS, MARYLAND, MINNESOTA, NEW JERSEY, NEW MEXICO,  
OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA,  
WASHINGTON, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF  
THE PETITION FOR PANEL REHEARING OR REHEARING EN BANC**

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF AMICI CURIAE AND PRELIMINARY STATEMENT.....	1
ARGUMENT .....	3
POINT I	
ICE’S POLICY DISRUPTS STATE COURTS AND INTERFERES WITH STATES’ SOVEREIGN INTERESTS .....	3
POINT II	
ICE’S POLICY IS UNLAWFUL .....	7
A. ICE’s Policy Contravenes the Immigration and Nationality Act, which Incorporates the Privilege Against Courthouse Civil Arrests. ....	7
B. The Panel Misconstrued the Privilege and Disregarded Important Federalism Principles.....	11
CONCLUSION .....	14

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>Arizona v. United States</i> , 567 U.S. 387 (2012) .....	9
<i>Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng’rs</i> , 398 U.S. 281 (1970) .....	3
<i>Bishop v. Vose</i> , 27 Conn. 1 (1858) .....	8
<i>Bolgiano v. Gilbert Lock Co.</i> , 73 Md. 132 (1890).....	8, 11
<i>Greer v. Young</i> , 120 Ill. 184 (1887) .....	8
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991) .....	3, 10
<i>Halsey v. Stewart</i> , 4 N.J.L. 366 (N.J. 1817).....	13
<i>Hayes v. Shields</i> , 2 Yeates 222 (Pa. 1797).....	8
<i>Heath v. Alabama</i> , 474 U.S. 82 (1985).....	3, 5
<i>In re Healey</i> , 53 Vt. 694 (1881) .....	8, 11
<i>Larned v. Griffin</i> , 12 F. 590 (C.C.D. Mass 1882) .....	8
<i>Lester v. Bennett</i> , 1 Va. App. 47 (Ct. App. 1985) .....	8
<i>Long’s Case</i> (1676-77), 86 Eng. Rep. 1012.....	12

<b>Cases</b>	<b>Page(s)</b>
<i>Murphy Bros. v. Michetti Pipe Stringing, Inc.</i> , 526 U.S. 344 (1999) .....	12
<i>New York v. ICE</i> , 431 F. Supp. 3d 377 (S.D.N.Y. 2020).....	8, 9
<i>New York v. ICE</i> , No. 19-cv-8876, 2020 WL 3067715 (S.D.N.Y. June 10, 2020).....	10, 11
<i>Orchard’s Case</i> (1828), 38 Eng. Rep. 987 .....	12
<i>Parker v. Marco</i> , 136 N.Y. 585 (1893).....	8, 11, 13
<i>Person v. Grier</i> , 66 N.Y. 124 (1876).....	8
<i>Stewart v. Ramsey</i> , 242 U.S. 128 (1916) .....	9
<i>United States v. Shabani</i> , 513 U.S. 10 (1994).....	10
<i>United States v. Texas</i> , 507 U.S. 529 (1993) .....	10
<i>Walpole v. Alexander</i> (1782) 99 Eng. Rep. 530 .....	7
<i>Wemme v. Hurlburt</i> , 133 Or. 460 (1930).....	8, 13
 <b>Federal Statutes</b>	
8 U.S.C.	
§ 1325.....	12
§ 1326.....	12

<b>Miscellaneous Authorities</b>	<b>Page(s)</b>
Christopher N. Lasch, <i>A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis</i> , 127 Yale L.J. Forum 410 (2017) .....	7
Immigrant Defense Project, <i>Safeguarding the Integrity of Our Courts</i> (2019), <a href="https://tinyurl.com/y5v8pmqs">https://tinyurl.com/y5v8pmqs</a> .....	6
Jason Nguyen, <i>Monday morning vigil aims to bring transparency to ICE arrests</i> , KATU (Sept. 18, 2017), <a href="https://katu.com/news/local/monday-morning-vigil-aims-to-bring-transparency-to-ice-arrests">https://katu.com/news/local/monday-morning-vigil-aims-to-bring-transparency-to-ice-arrests</a> .....	4
Katy Barnitz, <i>ACLU seeks video of ICE arrest at courthouse</i> , Albuquerque J. (Aug. 14, 2019), <a href="https://tinyurl.com/y3hy6qt7">https://tinyurl.com/y3hy6qt7</a> .....	4
Letter from Att’y Gen. Barr and Acting DHS Sec’y Wolf to the Chief Justices of Oregon and Washington (Nov. 21, 2019), <a href="https://www.justice.gov/ag/page/file/1219556/download">https://www.justice.gov/ag/page/file/1219556/download</a> .....	6
Make the Road N.J., <i>ICE in the New Jersey Courts</i> (Dec. 2017), <a href="https://tinyurl.com/y57t7b2s">https://tinyurl.com/y57t7b2s</a> .....	4, 6
Paul Bass & Sam Gurwitt, <i>Another ICE Courthouse Arrest Interrupted</i> , New Haven Indep. (Dec. 19, 2019), <a href="https://tinyurl.com/y3ecv9zh">https://tinyurl.com/y3ecv9zh</a> .....	4
William Blackstone, <i>Commentaries on the Laws of England</i> , vol. 3 (1768) .....	7, 13

## **INTEREST OF AMICI CURIAE AND PRELIMINARY STATEMENT**

Since 2017, Defendant U.S. Immigration and Customs Enforcement (ICE)<sup>1</sup> has authorized federal immigration agents to conduct virtually unlimited civil immigration arrests in and around state courthouses. The soaring number of courthouse arrests under ICE's policy has disrupted the functioning of state courts; hindered criminal and civil proceedings; and terrorized witnesses, parties, and crime victims who would otherwise attend court to testify and seek justice.

Amici States of New York, Connecticut, Illinois, Maryland, Minnesota, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia have a compelling interest in providing access to justice for all our residents and ensuring the orderly operation of our court systems, consistent with the States' sovereign status in our system of federalism. That interest is directly implicated by this litigation over the lawfulness of ICE's incursion into our state court systems.

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<sup>1</sup> For simplicity, Amici refer to all defendants as "ICE" throughout this brief.

Three different federal courts (the district court here, and two district courts in New York) have now held that ICE's arrest policy violates the Immigration and Nationality Act (INA), because that statute incorporates the longstanding common-law privilege against civil arrests at or near state courthouses. The conflicting conclusion of the panel here warrants further review.

Amici States' experience demonstrates the practical and constitutional importance of the issues in this case. As Amici States have directly experienced, ICE's insistence on conducting civil immigration arrests in and around state courthouses undermines the operations of our judicial systems and threatens the States' core sovereign interests in administering justice. This Court should grant rehearing or rehearing en banc to ensure that ICE comports not only with its own statutory authority but also with bedrock principles of federalism and respect for the States' prerogatives to run their own judicial systems free from federal interference.

## ARGUMENT

### POINT I

#### **ICE’S POLICY DISRUPTS STATE COURTS AND INTERFERES WITH STATES’ SOVEREIGN INTERESTS**

Whether ICE may target state courthouses for civil immigration enforcement operations is a matter of exceptional importance. Among the powers reserved to the States as sovereigns in our federalist system is “the maintenance of state judicial systems for the decision of legal controversies.” *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng’rs*, 398 U.S. 281, 285 (1970); *see also, e.g., Heath v. Alabama*, 474 U.S. 82, 93 (1985). Maintaining a judicial system is “essential to [a State’s] separate and independent existence.” *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (quotation marks omitted). Amici States’ court systems adjudicate millions of cases each year that affect the health and safety of our residents. But ICE’s campaign of civil immigration arrests in and around state courthouses has deterred participation in the justice system and forced our courts to delay or dismiss cases.

Since 2017, ICE has targeted state courthouses with aggressive tactics that threaten the safety of court officials and terrorize parties and witnesses. In New York, Washington, and elsewhere, ICE agents—often



in plainclothes and virtually always without any warrant—have tackled, dragged, and slammed arrestees to the ground; shoved them into unmarked cars; and, in one case, even broke a courthouse door while arresting a noncitizen who was due in court for a scheduled appearance.<sup>2</sup> Courthouse observers, including local judges, have described these arrests as looking like “kidnapping[s].”<sup>3</sup> Such incidents have occurred across the country.<sup>4</sup>

ICE’s decision to ramp up civil immigration arrests in or near state courts deters crime victims, witnesses, defendants, and family members

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<sup>2</sup> See Pls.’ Mem. of Law in Supp. of Mot. for Summ. J. (“Pls.’ Mem.”) at 5-6, *New York v. ICE*, No. 19-cv-8876 (S.D.N.Y. Mar. 13, 2020), ECF No. 94; Pls.’ R. 56.1 Stmt ¶ 138, *New York* (S.D.N.Y. Mar. 13, 2020), ECF No. 92; Compl. ¶¶ 2, 21, 50-51, 88, *Washington v. DHS*, No. 19-cv-2043 (W.D. Wash. Jan. 23, 2020), ECF No. 1; Pl.’s Mot. for Prelim. Inj. at 4, 20, *Washington* (W.D. Wash. Dec. 18, 2019), ECF No. 6.

<sup>3</sup> Pls.’ Mem. at 6-8, *New York*; Decl. of Judge Brett Buckley ¶ 6, *Washington* (W.D. Wash. Dec. 18, 2019), ECF No. 13.

<sup>4</sup> See, e.g., Paul Bass & Sam Gurwitt, *Another ICE Courthouse Arrest Interrupted*, New Haven Indep. (Dec. 19, 2019) (internet); Make the Road N.J., *ICE in the New Jersey Courts* 3 (Dec. 2017) (internet); Katy Barnitz, *ACLU seeks video of ICE arrest at courthouse*, Albuquerque J. (Aug. 14, 2019) (internet); Jason Nguyen, *Monday morning vigil aims to bring transparency to ICE arrests*, KATU (Sept. 18, 2017) (internet). Full URLs for internet sources appear in the Table of Authorities.

from attending court. The arrests often occur as “scared and bewildered” members of the public look on, sometimes in packed courtrooms or in front of families and children.<sup>5</sup> They occur not just at criminal courts, but at family courts and local town courts.<sup>6</sup> A scientific survey—conducted as part of New York’s litigation challenging the same arrest policy—confirmed that ICE’s actions have meaningfully chilled participation in the legal process.<sup>7</sup>

ICE’s policy has moreover specifically impeded the administration of criminal justice in state courts, a crucial sovereign prerogative of the States. *E.g.*, *Heath*, 474 U.S. at 93. For example, ICE has arrested criminal defendants and then failed to produce them for scheduled court appearances, even when requested to do so—preventing criminal trials from proceeding. In one case in New York, ICE arrested a criminal defendant minutes before he was due to plead guilty on felony sexual

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<sup>5</sup> *See, e.g.*, Pls.’ Mem. at 6-8, *New York*; Decl. of Matthew Colangelo, Ex. 6 ¶¶ 8-16, *New York* (S.D.N.Y. Mar. 13, 2020), ECF No. 91-6; *id.*, Ex. 14 ¶¶ 7-8, ECF No. 91-14; *id.*, Ex. 16 ¶ 7, ECF No. 91-16.

<sup>6</sup> *See, e.g.*, Pls.’ Mem. at 5, 8, *New York*.

<sup>7</sup> *Id.* at 10; *see generally* Colangelo Decl., Ex. 25, *New York*, ECF No. 91-25.

violence charges. ICE deported him, and the defendant continued to harass the victim on social media from afar.<sup>8</sup> ICE's actions have also undermined active criminal cases in Washington State,<sup>9</sup> New Jersey,<sup>10</sup> and many others.

Notably, the States have repeatedly asked ICE to respect our judiciaries rather than interfere with their operations. *See, e.g.*, Immigrant Defense Project, *Safeguarding the Integrity of Our Courts* 69 & nn.304–05 (2019) (internet) (letters of state judges and attorneys general to federal DHS). ICE has rejected such entreaties, taking the bottom-line position that it is simply “not subject to state rules that purport to restrict” its operations in or near state courthouses.<sup>11</sup> ICE's extreme view—that States have no right to protect the orderly operation of their judicial systems—highlights the grave threat to federalism at stake in this case.

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<sup>8</sup> Pls.' R. 56.1 Stmt. ¶¶ 147-162, *New York*; *see also id.* ¶¶ 142-179, 186-215

<sup>9</sup> *See* Pl.'s Mot. for Prelim. Inj. at 5, 20, *Washington*.

<sup>10</sup> *E.g.*, *Make the Road N.J.*, *supra*, at 2–3.

<sup>11</sup> *See* Letter from Att'y Gen. Barr and Acting DHS Sec'y Wolf to the Chief Justices of Oregon and Washington (Nov. 21, 2019) (internet).

## POINT II

### ICE'S POLICY IS UNLAWFUL

#### **A. ICE's Policy Contravenes the Immigration and Nationality Act, which Incorporates the Privilege Against Courthouse Civil Arrests.**

The district court here, like other courts around the country, correctly concluded that ICE's policy of conducting courthouse civil arrests exceeds the agency's statutory authority under the INA, which incorporates the longstanding common-law privilege against courthouse civil arrests.

The privilege originated in fifteenth century England, at a time when civil litigation was initiated by arrest.<sup>12</sup> Civil litigants (and sheriffs acting for them) would stake out courthouses to catch opposing parties on unrelated court business. *E.g.*, *Walpole v. Alexander* (1782) 99 Eng. Rep. 530. The privilege developed in response, to ensure that parties and witnesses could attend court in peace. *See, e.g.*, 3 William Blackstone, *Commentaries on the Laws of England* 289 (1768).

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<sup>12</sup> *See* Christopher N. Lasch, *A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis*, 127 Yale L.J. Forum 410 (2017).

The privilege was then “incorporated into American law in the early years of our republic by virtually all state and federal courts.” *New York v. ICE*, 431 F.Supp.3d 377, 380 (S.D.N.Y. 2020); *see also id.* at 389-91 (collecting and discussing cases); *Person v. Grier*, 66 N.Y. 124, 125 (1876). The privilege is broad. In New York, for example, the Court of Appeals has stated that “[i]t has always been held to extend to every proceeding of a judicial nature taken in or emanating from a duly constituted tribunal.” *Parker v. Marco*, 136 N.Y. 585, 589 (1893). In Connecticut, the privilege similarly applies such that “in all ... cases of parties or witnesses, they cannot be arrested or detained, and will be discharged at once on motion to the court.” *Bishop v. Vose*, 27 Conn. 1, 12 (1858). The law is the same in Massachusetts and in States across the country.<sup>13</sup> Indeed, the Supreme Court also “recognized th[e] privilege as a matter of federal common law ... in part because of its ubiquity among the common laws of the states.” *New York*, 431 F.Supp.3d at 390 n.9 (discussing

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<sup>13</sup> *E.g.*, *Larned v. Griffin*, 12 F. 590, 590 (C.C.D. Mass 1882); *see also Greer v. Young*, 120 Ill. 184, 187–88 (1887); *Bolgiano v. Gilbert Lock Co.*, 73 Md. 132 (1890); *Wemme v. Hurlburt*, 133 Or. 460, 462 (1930); *Hayes v. Shields*, 2 Yeates 222, 222 (Pa. 1797); *In re Healey*, 53 Vt. 694, 695 (1881); *Lester v. Bennett*, 1 Va. App. 47, 50 (Ct. App. 1985); *see also* Opinion (Op.) at 18-22, *Ryan v. ICE*, No. 19-1838 (1st Cir. Sept. 1, 2020).

*Stewart v. Ramsey*, 242 U.S. 128 (1916)). The near-universal recognition of this ancient privilege reflects broad agreement that courthouse business must be shielded from the interference that would be caused by civil arrests, in order to ensure participation in the justice system and to protect the dignity and integrity of the court (and thus the sovereign interests that the court serves) by “enabl[ing] courts to function properly,” *id.* at 389.

Thus, by the time Congress enacted the INA in 1952, the privilege against courthouse civil arrests was a settled common-law rule across the Nation.<sup>14</sup> That consensus was the backdrop against which Congress established “new forms of civil arrest,” including civil immigration arrests under the INA. *New York*, 431 F.Supp.3d at 389 (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984)); *see also Arizona v. United States*, 567 U.S. 387, 396 (2012).

In enacting the INA and opting to make civil arrests the mechanism for initiating a removal proceeding, Congress necessarily adopted the

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<sup>14</sup> As service of process replaced civil arrest as the dominant mode of initiating a civil action, States *extended* the ancient privilege, to varying degrees, but did not disturb the privilege’s original function or purpose. *New York*, 431 F.Supp.3d 377 at 389-90 (collecting cases).

specific constraints imposed by the common law on making such arrests in and around the courthouse. *See, e.g., United States v. Shabani*, 513 U.S. 10, 13 (1994) (following the “settled principle” that “absent contrary indications, Congress intends to adopt the common law definition of statutory terms”). Congress certainly did nothing to demonstrate any intent, let alone an “unmistakably clear” intent, *Gregory*, 501 U.S. at 460 (quotation marks omitted), to preempt the privilege as it existed in the law of Amici States, Massachusetts, and others, *United States v. Texas*, 507 U.S. 529, 534 (1993).<sup>15</sup>

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<sup>15</sup> The panel remanded for further record development as to petitioners’ so-called “backup argument” regarding the presumption against the preemption of state laws under cases like *Gregory*. *See Op.* at 5, 36. While Amici States focus on petitioners’ primary, “non-derogation” argument here, both arguments provide grounds to invalidate ICE’s courthouse civil arrest policy. *See New York v. ICE*, No. 19-cv-8876, 2020 WL 3067715, at \*4 (S.D.N.Y. June 10, 2020) (granting summary judgment on anti-pre-emption theory in light of New York law).

**B. The Panel Misconstrued the Privilege and Disregarded Important Federalism Principles.**

The panel erroneously concluded otherwise. The panel accepted the premise that Congress is presumed to incorporate “long-established and familiar” common-law rules into federal law. Op. at 17 (quoting *Pasquantino v. United States*, 544 U.S. 349, 359-60 (2005)). It recited the privilege’s centuries-long history. *Id.* at 19-22. But it then held that plaintiffs here had “not demonstrated that there was a long-established and familiar common law rule protecting against civil arrests *on behalf of the sovereign.*” *Id.* at 23-24 (emphasis added); *see id.* at 24-36.

As plaintiffs have shown (Pet. for Reh’g (Pet.) at 8-13) the panel’s distinction between courthouse civil arrests by private parties as opposed to government entities is not well supported. The privilege is consistently expressed in categorical terms: it “extend[s] to every proceeding of a judicial nature,” *Parker*, 136 N.Y. at 589, and applies to “arrest on any civil process,” *Bolgiano v. Gilbert Lock Co.*, 73 Md. 132, 132, 20 A. 788, 788 (1890), and to “all persons who have any relation to a cause which calls for their attendance in court,” *In re Healey*, 53 Vt. 694, 695 (1881); *see also New York v. ICE*, No. 19-cv-8876, 2020 WL 3067715, at \*5 (S.D.N.Y. June 10, 2020). Indeed, a classic application of the privilege has



been to prevent sheriffs and similar governmental officers from making arrests to execute *capias* writs, which are used “to secure the defendant’s appearance” in a civil suit, *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999). See *Orchard’s Case* (1828), 38 Eng. Rep. 987, 987-988 (admonishing sheriff who arrested court attendee); *Long’s Case* (1676-77), 86 Eng. Rep. 1012, 1012 (same). This history rebuts the notion that the common-law privilege did not cover civil arrests by governmental entities.

To be sure, the common-law privilege has not extended to one particular type of governmental arrest—criminal arrests. But Congress consciously chose to make removal proceedings civil in nature, and to make immigration arrests, conducted in contemplation of removal, civil arrests. Congress knew how to use criminal law for immigration enforcement, and in some cases it did so. See, e.g., 8 U.S.C. §§ 1325, 1326. Its deliberate decision to categorize ICE arrests in anticipation of removal as civil rather than criminal incorporated the well-established limitation on civil (as opposed to criminal) arrests in or near state courthouses.

The panel’s decision to exempt civil immigration arrests from the common-law privilege on the basis of some purported sovereign exception

was also misplaced because it improperly elevates the concerns of the federal sovereign over the States. The linchpin of the panel’s reasoning was that “civil immigration arrests are initiated by the sovereign to vindicate uniquely sovereign interests” and that therefore, because of those sovereign interests, “courts would have treated such arrests more like criminal arrests.” Op. at 32. But the panel ignored that there is sovereignty—and sovereign interests—on both sides here. The common-law privilege protects not only private individuals but also the dignity and proper functioning of state courts—a distinct sovereign prerogative of the States. *See, e.g., Wemme v. Hurlburt*, 133 Or. 460, 462, 289 P. 372, 373 (1930); *Parker*, 136 N.Y. at 589; *Halsey v. Stewart*, 4 N.J.L. 366, 367 (N.J. 1817); *see also generally* Blackstone, *supra*, at 289. Yet even though it is *the States’* sovereign interests that the privilege has always protected, the panel never considered those interests. Nor if it had could the panel have validly concluded that federal sovereignty categorically overrides state sovereignty in this context, where the States’ essential ability to maintain an independent judiciary is at stake. Our system of federalism protects the States against such undue federal interference.

## CONCLUSION

This Court should grant the petition for rehearing or rehearing en banc.

Dated: New York, New York  
October 23, 2020

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, William P. Ford, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 2,593 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7).

*/s/ William P. Ford*

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the accompanying Brief for Amici Curiae States of New York et al. by using the CM/ECF system on October 23, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: October 23, 2020  
New York, NY

/s/ Ari J. Savitzky