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 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 (Talwani, J.)

# BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amicus curiae* Constitutional Accountability Center has no parent corporation and does not issue stock.

Dated: May 22, 2020

/s/ Dayna J. Zolle
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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

CASES

## TABLE OF AUTHORITIES – cont'd

## TABLE OF AUTHORITIES – cont'd



STATUTES AND LEGISLATIVE MATERIALS

## TABLE OF AUTHORITIES – cont'd

## INTEREST OF *AMICUS CURIAE*[1]

*Amicus* Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees. CAC has a strong interest in ensuring that this Court is aware of the long-standing and well-established history of courts recognizing a privilege against civil arrests in and around courthouses and ensuring that this Court adopts the proper interpretation of the Immigration and Nationality Act of 1952.

## INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress passed the Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163, it gave immigration officers statutory authority to carry out civil arrests, with or without a warrant, to enforce the nation's immigration laws. *See* 8 U.S.C. §§ 1226(a), 1357(a). In doing so, Congress incorporated a long-standing and well-established common law privilege against courthouse civil arrests that dates back to English law. *See United States v. Texas*, 507 U.S. 529, 534 (1993)

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

("[S]tatutes 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." (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952))).

Nevertheless, in 2018, U.S. Immigration and Customs Enforcement (ICE) promulgated a "Courthouse Civil Arrest Directive," which authorized ICE agents to make civil immigration arrests inside courthouses in a variety of circumstances. Mem. Op. 8. Plaintiffs—a group of Massachusetts district attorneys and immigrant advocacy organizations—filed suit challenging this Directive on the ground that ICE lacks the authority to carry out these arrests because of the common law privilege that Congress incorporated in passing the INA. Plaintiffs filed a motion for a preliminary injunction, seeking to prevent the government "from civilly arresting parties, witnesses, and others attending Massachusetts courthouses on official business while they are going to, attending, or leaving the courthouse." *Id.* at 3. The district court granted plaintiffs' motion for a preliminary injunction, and this Court should affirm.

The common law privilege against civil arrests in and around courthouses has a long history, and was well established by 1952 when Congress passed the INA. Indeed, it dates back to the days of English common law, when Blackstone 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." 1 William Blackstone, Commentaries on the Laws of England, Book III, ch. 19, 289 (1st ed. 1765-69). As both English and American courts went on to explain, the privilege serves two important purposes: it maintains the decorum of courthouses so that the judiciary can carry out its important tasks without interruption or distraction, and it ensures that witnesses and parties are not deterred from attending court proceedings because of the threat of arrest. And American courts throughout the nineteenth and early twentieth centuries applied the privilege broadly to prevent civil arrests in and around courthouses. As a Massachusetts court explained in 1882, "[i]t has long been settled that parties and witnesses attending in good faith any legal tribunal, with or without a writ of protection, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning." *Larned v. Griffin*, 12 F. 590, 592 (C.C.D. Mass. 1882).

Indeed, by the time the INA was passed in 1952, even the Supreme Court had repeatedly referenced a broad privilege against any civil process in and around courthouses. As the Court explained, "witnesses, suitors, and their attorneys, while in attendance in connection with the conduct of one suit, are immune from service of process in another," and it explained that the rule was meant to avoid "interference with the progress of a cause pending before [a court], 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 v. Schmitt*, 285 U.S. 222, 225 (1932); *see Long v. Ansell*, 293 U.S. 76, 83 (1934) (noting the "common-law rule that witnesses, suitors, and their attorneys, while in attendance in connection with the conduct of one suit, are immune from service in another," a practice that "is founded upon the needs of the court").

Given this long and well-established history, Congress should be presumed to have incorporated this privilege into the civil-arrest provisions of the INA unless the statute's text, history, and purpose make clear that the prevailing common law rule should not be incorporated. As the Supreme Court has explained, "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Texas*, 507 U.S. at 534 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). But the INA is silent as to whether courthouse arrests are permitted. Put simply, Congress has not come close to "speak[ing] directly" to the question here, and so this Court should hold that the INA's authorization for civil arrests incorporates the privilege against civil courthouse arrests, and the government may not make civil immigration arrests in and around courthouses.

## ARGUMENT

### I. WHEN CONGRESS CODIFIES A COMMON LAW POWER WITHOUT SPECIFYING ITS SCOPE, CONGRESS IS PRESUMED TO INCLUDE THE LIMITATIONS THAT ACCOMPANIED THAT POWER AT COMMON LAW.

The Supreme Court has long held that "[s]tatutes 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 (quoting *Isbrandtsen Co.*, 343 U.S. at 783). Said another way, "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Id.* (quoting *Mobil Oil Corp.*, 436 U.S. at 625); *see Samantar v. Yousuf*, 560 U.S. 305, 320 n.13 (2010) ("[W]hen a statute covers an issue previously governed by the common law, we interpret the statute with the presumption that Congress intended to retain the substance of the common law.").

The Supreme Court has repeatedly applied this principle to limit otherwise broad statutory language. For instance, in *Lexmark International, Inc. v. Static Control Components, Inc.*, the Court held that although the Lanham Act's text broadly authorizes suit by "any person who believes that he or she is or is likely to be damaged" by false advertising, 15 U.S.C. § 1125, the Act's scope is limited by the centuries-old principle of proximate causation, 572 U.S. 118, 132-34 (2014). As the Court explained, "Congress, we assume, is familiar with the common-law rule and

does not mean to displace it *sub silentio*." *Id.* at 132; *see Bank of Am. Corp v. City of Miami*, 137 S. Ct. 1296, 1305 (2017) (reaching the same conclusion regarding the Fair Housing Act).

Similarly, in *Meyer v. Holley*, the Court held that the Fair Housing Act's prohibition on housing discrimination includes the common law principle of vicarious liability, reasoning that "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." 537 U.S. 280, 285 (2003). And in *Norfolk Redevelopment & Housing Authority v. Chesapeake & Potomac Telephone Co.*, the Court held that the Uniform Relocation Act's provision of relocation benefits to any "displaced person" did not include utility companies—despite utility companies "no doubt" qualifying as "displaced person[s]" under the statutory text—because "[u]nder the traditional common law rule, utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities." 464 U.S. 30, 35 (1983).

This principle applies even where Congress *has* legislated on issues closely related to a common law principle. For instance, in *United States v. Texas*, the Court held that even though the Debt Collection Act explicitly exempted states from having to pay certain mandatory interest under the Act, the Act did not speak directly to the federal government's right to collect prejudgment interest on debts owed to it by

the states—a right the federal government had at common law, and which was not specifically limited by statute. 507 U.S. at 534-35. The Court agreed with the Solicitor General that "Congress's mere refusal to legislate with respect to the prejudgment-interest obligations of state and local governments falls far short of an expression of legislative intent to supplant the existing common law in that area." *Id.* at 535 (quoting Pet'rs Br. 16).

To be sure, the Court has cautioned that "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp.*, 436 U.S. at 625. Thus, in *Astoria Federal Savings & Loan Ass'n v. Solimino*, the Court held that Congress did not intend to apply the common law doctrine of collateral estoppel to preclude Age Discrimination in Employment Act (ADEA) claims in federal court following state administrative findings on the same issues because other provisions of the ADEA "plainly assume the possibility of federal consideration after state agencies have finished theirs." 501 U.S. 104, 111 (1991). Specifically, other provisions of the ADEA that require claimants to exhaust state remedies before filing a federal suit, and which require filing a federal claim within 30 days of the termination of state proceedings, would "be left essentially without effect" if the statute were interpreted to give state agency decisions preclusive effect in federal court. *Id.* at 111-12.

Furthermore, the Court has held that a common law rule must be well-established at the time that Congress passes a statute for it to be relevant to the proper interpretation of the statute. Thus, in *Pasquantino v. United States*, the Court held that the wire fraud statute is not limited by the so-called revenue rule—which at common law barred courts from enforcing the tax laws of foreign sovereigns—because the Court was "aware of no common-law revenue rule case decided as of 1952 that held or clearly implied that the revenue rule barred the United States from prosecuting a fraudulent scheme to evade foreign taxes." 544 U.S. 349, 360 (2005). Moreover, the Court noted the prosecution in that case "pose[d] little risk of causing the principal evil against which the revenue rule was traditionally thought to guard: judicial evaluation of the policy-laden enactments of other sovereigns"—that is, it "creates little risk of causing international friction through judicial evaluation of the policies of foreign sovereigns." *Id.* at 368-69.

However, where a common law principle applies squarely and was well established by the time Congress passed a statute, Congress is presumed to have incorporated the common law rule into the statutory scheme unless statutory text, history, and purpose clearly indicate otherwise.

## II. BY 1952, ENGLISH AND AMERICAN COURTS HAD WIDELY RECOGNIZED A BROAD PRIVILEGE AGAINST CIVIL ARRESTS IN AND AROUND COURTHOUSES.

The privilege against courthouse civil arrests was long-standing and well-established in 1952 when Congress passed the INA. *Cf. Pasquantino*, 544 U.S. at 360 (considering common law "as it existed in 1952, the year Congress enacted [the statute at issue]"); *Neder v. United States*, 527 U.S. 1, 22 (1999) (considering common law "at the time of the . . . statute's original enactment in 1872"). "From early times parties and witnesses in any form of judicial proceeding have been privileged from arrest on civil process, *eundo, morando, et redenndo*"—that is, going to, remaining at, and returning from court. Note, *Privilege of Non-Resident Parties and Witnesses from Service of Process*, 23 Harv. L. Rev. 474, 474 (1910) ("*Privilege of Non-Resident Parties*"). Indeed, the privilege dates back to English common law. According to Blackstone,

> Suitors, 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. And no arrest can be made in the king's presence, nor within the verge of his royal palace, nor in any place where the king's justices are actually sitting.

1 William Blackstone, Commentaries on the Laws of England, Book III, ch. 19, 289 (1st ed. 1765-69).

English and American case law have repeatedly and consistently explained the two purposes this privilege serves. First, the privilege is intended to preserve the

decorum of the court, as courthouse arrests may be violent or otherwise disruptive. *See Parker v. Marco*, 136 N.Y. 585, 589 (1893) ("It is not simply a personal privilege, but it is also the privilege of the court, and is deemed necessary for the maintenance of its authority and dignity."); *Parker v. Hotchkiss*, 18 F. Cas. 1137, 1138 (C.C.E.D. Pa. 1849) (privilege "founded in 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"); *Orchard's Case*, 38 Eng. Rep. 987, 987, 5 Russ. 159, 159 (1828) ("To permit arrest to be made in the Court would give occasion to perpetual tumults, and was altogether inconsistent with the decorum which ought to prevail in a high tribunal.").

Second, the privilege ensures that parties and witnesses are not deterred from attending court proceedings for fear of arrest. *See Hale v. Wharton*, 73 F. 739, 741 (C.C.W.D. Mo. 1896) (noting that "courts are established for the ascertainment of the whole truth" and "every extraneous influence which tends to interfere with or obstruct the trial . . . should be resisted"); *Parker*, 18 F. Cas. at 1138 ("Witnesses would be chary of coming within our jurisdiction . . . and even parties in interest, whether on the record or not, might be deterred from the rightfully fearless assertion of a claim or the rightfully fearless assertion of a defense."); *Walpole v. Alexander*, 99 Eng. Rep. 530, 531, 3 Dougl. 45, 46 (1782) (explaining that the privilege exists

"in order to encourage witnesses to come forward voluntarily"). In short, the privilege "protects the court from interruption and delay" and "takes away a strong inducement to disobey its 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." *Halsey v. Stewart*, 4 N.J.L. 366, 369 (1817).

To further these purposes, eighteenth and nineteenth century English cases made clear that the privilege applies broadly. *See, e.g.*, *Ex Parte Jackson*, 15 Ves. Jun. 117, 699 (1808) (citing *Meekins v. Smith*, 126 Eng. Rep. 363, 1 H. Bl. 636 (1791)) (recognizing that "*all* persons, having a relation to a suit, calling for their attendance, *whether compelled by process, or not*, including bail, are entitled to protection" (emphasis added)); *Walpole*, 99 Eng. Rep. at 531, 3 Dougl. at 46 (explaining that all witnesses "are privileged from arrest . . . in coming, in staying, and in returning, provided they act *bona fide*, and without delay"). For instance, in *Cole v. Hawkins*, the King's Bench held that an attorney attending court could not be arrested on the courthouse steps because "service of process in the sight of the Court is a great contempt." 95 Eng. Rep. 396, 396, Andrews 275, 275 (1738). *Spence v. Stuart* went further, holding that the privilege "clearly" protects a witness giving a voluntary deposition to an arbitrator at a coffee house. 102 Eng. Rep. 530, 3 East. 89, 90 (1802). Later, in *Orchard's Case*, the court explained that "*every* place, in which the Judges of the King's superior courts were sitting, was privileged, and that no

arrest could be made in their presence or within the local limits of the place where they were administering justice." 38 Eng. Rep. at 987, 5 Russ. at 159 (emphasis added). The defendant was therefore immune from arrest despite not being "in court for the purpose of professional attendance, or of discharging any professional duty." *Id.*

Early American case law similarly made clear that the privilege was broad enough to ensure that it could fulfill its important purposes. An early New York decision noted that courts "have [the] power to compel the attendance of witnesses, and when they do attend, [courts] are bound to protect them *redeundo*." *Norris v. Beach*, 2 Johns. 294, 294 (1807). Similarly, an early New Jersey case held that "[t]he service of process, whether [an arrest] or summons, in the actual or constructive presence of the court, is a contempt, for which [an] officer may be punished," and it applied this privilege to "a suitor or witness" who faced "arrest." *Blight v. Fisher*, 3 F. Cas. 704, 704-05 (C.C.D.N.J. 1809); *see Miles v. M'Cullough*, 1 Binn. 77, 77 (Pa. 1803) (holding that the privilege applies not only to arrests but also to other forms of service). These cases were later cited in Greenleaf's "influential treatise on evidence," Christopher N. Lasch, *A Common-Law Privilege To Protect State and Local Courts During the Crimmigration Crisis*, 127 Yale L.J. Forum 410, 425 (2017), which explained that "[w]itnesses as well as parties are *protected from arrest* while going to the place of trial, while attending there for the purpose of testifying in the

cause, and while returning home," Simon Greanleaf, A Treatise on the Law of Evidence, pt. III, ch. 1, § 316, at 407 (14th ed. 1888). According to Greenleaf, the privilege "is granted *in all cases* where the attendance of the party or witness is given in any matter pending *before a lawful tribunal* having jurisdiction of the cause," and courts should be "liberal" in applying the privilege for the entire time it takes to go to and return from a court proceeding. *Id.* §§ 316-17, at 408-09 (emphasis added). A Massachusetts court decision from 1882 similarly explained that "[i]t has long been settled that parties and witnesses attending in good faith *any legal tribunal*, with or without a writ of protection, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning." *Larned*, 12 F. at 592 (emphasis added); *see Whited v. Phillips*, 126 S.E. 916, 916-17 (W. Va. 1925) ("The rule that parties to judicial proceedings, as well as witnesses and court officials, shall be immune from service of process while attending court, is of very ancient origin.").

Given the prevalence of this privilege's application in both English and American law, it is unsurprising that the Supreme Court routinely referenced it, especially in the decades before the passage of the INA in 1952. In 1908, in construing the similar privilege from arrest afforded legislators under the U.S. Constitution, the Court analogized that privilege to the common law privilege from arrest at a courthouse, quoting Joseph Story for the proposition that the latter privilege applies "to

the humblest suitor and witness in a court of justice." *Williamson v. United States*, 207 U.S. 425, 443 (1908) (quoting 2 Joseph Story, Commentaries on the Constitution of the United States § 435, ch. 12, at 307 (1833)). Over the ensuing years, the Court made clear that the privilege prevents all civil process, not just civil arrests, in and around courthouses. *See generally Whited*, 126 S.E. at 917 (though the rule was "[a]nciently . . . limited to exemption of a defendant from arrest . . . the rule was enlarged so as to afford full protection . . . from all forms of process"). In 1916, for instance, the Court addressed the privilege in a case involving an out-of-state witness, noting the "true rule, well founded in reason and sustained by the greater weight of authority, . . . 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) ("*Stewart*").

In 1932, the Court described the rule even more broadly, explaining that "witnesses, suitors, and their attorneys, while in attendance in connection with the conduct of one suit, are immune from service of process in another," and stated that the rule was meant to avoid "interference with the progress of a cause pending before [a court], 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. Finally, in 1934, just 18 years before the passage of the INA, the Court reiterated that there is a "common-law rule that witnesses, suitors, and their attorneys, while in attendance in connection with the conduct of one suit, are immune from service in another," a practice that "is founded upon the needs of the court." *Long*, 293 U.S. at 83.

The government argues that the privilege no longer exists, Appellants Br. 26-27, but that is irrelevant and, in any event, wrong. To start, the question is not whether the privilege exists today; it is whether it existed when Congress passed the INA in 1952. Notably, every case the government cites suggesting that the privilege may no longer apply today are from long after the Act's passage in 1952. *See id.* In any event, the suggestion that the privilege no longer exists is wrong. To be sure, the privilege has been applied less commonly in recent years, but that does not mean that it has been "superseded." *Id.* To the contrary, more general changes to the processes of civil procedure have simply made the privilege less relevant than it once was. After all, until modern service-of-process rules came into place, "civil process did not differ materially from what we know today as criminal arrest." John Martinez, *Discarding Immunity from Service of Process Doctrine*, 40 Ohio N. Univ. L. Rev. 87, 90 (2013). That is, to carry out civil service of process, a "sheriff physically restrained the person served and jailed him or her while he or she awaited disposition of the action." *Id.*; *see Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S.

344, 350 (1999) ("At common law, the writ of *capias ad respondendum* directed the sheriff to secure the defendant's appearance by taking him into custody."); *see generally* Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 Yale L.J. 52, 61-68 (1968) (describing history of this civil arrest procedure). By contrast, under modern civil procedure rules, "to give the court jurisdiction, the defendant need only be notified, not haled into court," so civil arrests have become "the rare exception, and the summons the normal original process." *Privilege of Non-Resident Parties*, 23 Harv. L. Rev. at 475.[2]

The government also argues that the privilege is limited to "when a person enters a jurisdiction solely to attend a court proceeding as a witness or party." Appellants Br. 24. To be sure, as the government points out, the *facts* of many cases in which the privilege has been invoked concern an individual being arrested while he enters another jurisdiction solely to attend a court proceeding. But that is not surprising: for individuals that reside within the jurisdiction of a court in which they are sued, it would be easy to civilly arrest or otherwise serve them without relying on

[2] Moreover, cases after 1952 continued to recognize the privilege in certain contexts. *See, e.g.*, *Valley Bank & Trust Co. v. Marrewa*, 237 N.E.2d 677, 404-05 (Mass. 1968) (explaining that "a nonresident actually attending court here for the purpose of testifying in cases to which he was a party could not lawfully be served with civil process issuing from our courts in an action against him as a defendant" because "justice requires the attendance of witnesses cognizant of material facts, and hence . . . no unreasonable obstacles ought to be thrown in the way of their freely coming into court to give oral testimony").

their attendance at a judicial proceeding, so there would be little reason to carry out the arrest at or around a courthouse or while they are traveling to or from a judicial proceeding. Even though civil arrests rarely take place at courthouses for within-jurisdiction individuals, however, courts have made clear that the privilege "afford[s] *full protection* to suitors and witnesses from all forms of process of a civil character during their attendance before *any judicial tribunal*, and for a reasonable time in going and returning," *Larned*, 12 F. at 592; *see, e.g.*, *In re Greene*, 35 R.I. 67, 552 (1913) ("[P]arties and witnesses attending in good faith any legal tribunal . . . are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning, *whether residents or nonresidents of the state*." (emphasis added)); *In re Thompson*, 122 Mass. 428, 429 (1877) ("Parties and witnesses, attending in good faith any legal tribunal, . . . are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning, *whether they are residents of this state or come from abroad*." (emphasis added)); *Walpole*, 99 Eng. Rep. at 531, 3 Dougl. at 46 (applying the privilege to "witnesses coming from abroad, *as well as to those who are resident in this country* [England]" (emphasis added)). Indeed, the reasons for applying the privilege—that the "administration of justice would in a variety of ways be obstructed if parties and witnesses were liable to be served with process while actually attending the court," *Stewart*, 242 U.S. at 129 (quoting *Halsey*, 4 N.J.L. at 366)—indicate that the

privilege should apply no less to parties and witnesses from within a particular jurisdiction than it does to out-of-jurisdiction parties and witnesses.

In short, at the time the INA was passed in 1952, there was a well-established privilege against civil arrests in and around courthouses that both state and federal courts in the United States had long recognized. Congress incorporated that common law privilege into the INA when it authorized immigration civil arrests in that statute, as the next Section discusses.

## III. BECAUSE CONGRESS DID NOT SPEAK DIRECTLY TO WHETHER CIVIL IMMIGRATION ARRESTS MAY BE CARRIED OUT AT COURTHOUSES, CONGRESS SHOULD BE PRESUMED TO HAVE INCORPORATED THE PRIVILEGE AGAINST COURTHOUSE CIVIL ARRESTS INTO THE INA.

In 1952, Congress passed two provisions authorizing federal officials to make civil immigration arrests. Under 8 U.S.C. § 1226(a), "[o]n a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." And under 8 U.S.C. § 1357(a), an immigration officer "shall have power without warrant . . . to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens . . . 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."

Because the privilege against civil arrests in and around courthouses was well established and widely accepted in 1952, Congress should be presumed to have incorporated that privilege into its grant of authority to conduct civil arrests unless it spoke directly to the question and indicated an intent not to incorporate the common law privilege. It did not clearly indicate such an intent. Neither Section 1226(a) or Section 1357(a), nor any other provision of immigration law, says anything about whether civil arrests may take place at or around courthouses, let alone indicates an intent not to incorporate the common law privilege against courthouse arrests.

The government suggests that the privilege against civil arrests at courthouses applied at common law only in private suits, Appellants Br. 29, so Congress could not have meant to incorporate it when it granted the government the authority to conduct civil arrests for immigration purposes in the INA. To be sure, historically most civil arrests were a method of process in private civil suits, *see supra* at 15-16, but that does not help the government's argument here. Even in private suits, a civil arrest was carried out by a public officer, *see, e.g.*, *Orchard's Case*, 38 Eng. Rep. at 987, 5 Russ. at 159 (referring to an "officer" who made the civil arrest), so the privilege has always worked to restrain *government* action. And if the common law privilege did not apply to arrests for government proceedings as it did to arrests for private proceedings, it would create a substantial loophole, undermining the legal system's ability to avoid "the principal evil against which the [privilege] was

traditionally thought to guard," *Pasquantino*, 544 U.S. at 368. Indeed, "[t]he prospect of arrest and jail—whether in the hands of an eighteenth-century English or American lawman or a twenty-first-century ICE officer—provides a powerful deterrent to the attendance of parties and witnesses in court." Lasch, *supra*, at 435. In short, the 1952 Congress gave no indication—let alone a clear one—that civil immigration arrests could be conducted at courthouses notwithstanding the well-established common law privilege against courthouse civil arrests.

The government makes several arguments to suggest that Congress somehow sought to override the traditional common law privilege from courthouse arrests despite failing to speak directly to the issue, but none is convincing. First, the government argues that "[t]he INA's comprehensive statutory scheme shows that Congress has spoken completely to ICE's arrest authority and provided no limitations on courthouse arrests." Appellants Br. 38. But the simple grant of arrest authority to ICE does not speak, one way or the other, to the question of whether such arrests can be carried out at courthouses, and it is thus insufficient to override the long-standing and well-established common law privilege against courthouse civil arrests.[3]

[3] For the same reason, the government's repeated insistence that immigration authority is vested solely in the federal government and that "[a]ny State attempt to alter this comprehensive removal scheme" is preempted by federal law, Appellants Br. 37, is beside the point. The question in this case is whether *Congress* incorporated a well-established limitation on civil arrests when it granted immigration officers the authority to conduct immigration arrests. This is not a case about preemption; it is a case about statutory interpretation.

Second, the government points to two other provisions that it says indicate Congress's intent to permit courthouse arrests because Congress explicitly imposed other limitaitons on certain immigration-enforcement activity. First, 8 U.S.C. § 1357(a)(3) provides that immigration officers "within a distance of twenty-five miles from any . . . external boundary [of the United States] [can] access . . . private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States." The government argues that Congress's limitation of this patrol authority in "dwellings" is evidence that "[w]hen Congress wanted to restrict immigration officers' powers, it did so explicitly," and that the INA, "by negative implication, did not preclude courthouse arrests." Appellants Br. 39. But Congress needed to expressly limit immigration officers' authority to access private dwellings because there was no common law privilege that would have prevented patrolling in dwellings where patrolling on private lands was otherwise permitted. The fact that Congress allowed officers to patrol on private lands, but prevented officers from patrolling in dwellings, says nothing at all about whether Congress intended to incorporate the common law privilege from courthouse arrests in its immigration-arrest authorization, and it certainly does not mean that Congress spoke directly to that issue.

In a similar vein, the government points to a provision that prevents immigration officers from taking into custody certain immigrants who are currently serving

a criminal sentence, requiring them to wait until they are released. 8 U.S.C. § 1226(c). But again, the government has pointed to no common law privilege against civil arrests of convicted individuals currently serving a criminal sentence, so Congress would have had to specify this exception from the government's arrest powers in the text of the statute. The existence of this provision says nothing one way or another about whether immigration officers can conduct arrests at or around courthouses. Congress is required to speak far more clearly than that if it wishes to override a well-established common law principle.

Finally, the government cites a provision of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 825(b), 119 Stat. 2960, 3065 (2006), which says that when there is an "enforcement action leading to a removal proceeding" against a victim of abuse at various locations, including at "a courthouse," the government must affirm in its Notice to Appear that the information leading to the enforcement action did not come from the abuser. 8 U.S.C. § 1229(e); *id.* § 1367. In short, the provision prohibits the government from enforcing immigration laws against victims of abuse based solely on information learned from the abuser.

According to the government, this stray reference to "a courthouse" in the 2006 Act protecting victims of abuse evinces Congress's intent to "authorize[] ICE to arrest aliens at courthouses" in the INA, fifty years earlier. Appellants Br. 41.

But the Supreme Court has been clear that the "views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 840 (1988) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). That is especially true here, where the purported clarification resides in a piece of legislation passed more than half a century after the INA, and where there is no indication in the text of the statute or in the legislative history of the 2006 Act that Congress was considering the scope of the civil-arrest provisions at all, let alone seeking to expand their scope.

To be sure, a future Congress can *amend* an act of Congress to alter the federal government's civil-arrest power; thus, Congress in 2006 could have amended the INA to permit civil immigration arrests at courthouses if it so desired. But there is no evidence—and the government has not provided any—that suggests that Congress intended to expand the government's civil-arrest power when it passed Section 1229(e), the provision of the 2006 Act at issue. Indeed, the government's theory would require this Court to believe that Congress intended to carry out a major amendment to the INA permitting immigration officers to conduct civil arrests in and around courthouses simply by including the phrase "a courthouse" in a separate provision concerning the protection of victims of abuse. Yet Congress did not even reference the civil-arrest provisions in Section 1229(e), let alone purport to amend the scope of civil-arrest authority. And the House Report accompanying the 2006

Act makes clear that Section 1229(e) is about "establish[ing] a system to verify that removal proceedings are not based on information prohibited by section 384 of [the Illegal Immigration Reform and Immigrant Responsibility Act]," H.R. Rep. 109-233, at 121 (2005), not about amending the government's civil-arrest authority. Simply put, "Congress would not enact so significant a change without a clear indication of its purpose to do so." *United States v. O'Brien*, 560 U.S. 218, 235 (2010).

On top of that, there is another problem with the government's argument: Section 1229(e) refers to "enforcement action[s]," not civil arrests. And civil arrests are not the only types of enforcement actions that could take place at courthouses, given the proper authorization. For example, a *criminal* immigration arrest is a type of "enforcement action" that immigration officers could carry out at a courthouse. *See* 8 U.S.C. § 1357(a)(4) (permitting immigration officers to make warrantless "arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens, if he has reason to believe that the person so arrested is guilty of such felony"); *id.* § 1357(a)(5) (permitting immigration officers to make warrantless "arrests . . . for any offense against the United States, if the offense is committed in the officer's or employee's presence . . . if the officer or employee is performing duties relating to the enforcement of the immigration laws at the time of the arrest"); *id.* § 1357(a) (referring to these criminal arrest authorities as "enforcement activities"); Appellees

Br. 3 ("Plaintiffs have never disputed ICE's authority to criminally arrest those attending court."). Moreover, by authorizing "enforcement actions," Congress also permitted the civil immigration arrest of parties who were brought to a courthouse in state or federal custody—another category of arrests that was never privileged at common law. *See* Mem. Op. 21 n.5 ("Plaintiffs offer no authority for the proposition that this privilege extends to individuals who are brought to the courthouse in federal or state custody."). In short, the text of Section 1229(e) simply cannot bear the weight the government places on it.

In sum, Congress never spoke directly to the issue of courthouse civil arrests in the INA, or in any subsequent statute. It must therefore be presumed to have incorporated the long-standing and well-established privilege against courthouse civil arrests in the INA.

## CONCLUSION

For the forgoing reasons, this Court should affirm.

Respectfully submitted,

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Dated: May 22, 2020

## CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies compliance of the foregoing amicus brief with the following requirements of the Federal Rules of Appellate Procedure and the Local Rules of this Court.

1. This brief complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B) and 29(a)(5), because this brief contains 6,314 words, including footnotes, but excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: May 22, 2020

By: /s/ Dayna J. Zolle
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## CERTIFICATE OF SERVICE

I hereby certify that on May 22, 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.

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