UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 20-1787

UNITED STATES,
Plaintiff - Appellee,

v.

SHELLEY M. RICHMOND JOSEPH,
Defendant - Appellant.

No. 20-1794

UNITED STATES,
Plaintiff - Appellee,

v.

WESLEY MACGREGOR,
Defendant - Appellant.

On Appeal from the United States District Court for the District of Massachusetts, No. 1:19-cr-10141-LTS, Judge Leo T. Sorokin

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Brief of *Amicus Curiae* The Ad Hoc Committee For Judicial Independence In Support of Defendants-Appellants And Reversal

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Rules and Regulations

Administrative Decisions

CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1, the *amicus curiae* certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since 1785, the seal of the Massachusetts Supreme Judicial Court has depicted scales of justice resting in perfect balance.[1] The scales symbolize the need for courtroom proceedings to be neutral, so that cases will be decided not by undue influence, but by law and fact. Yet these scales do not balance themselves; judges are supposed to do that. And they are impelled to do so not simply by a seal, but also by a complex legal framework—including constitutional guarantees of due process and fair and public trials—that requires judges to tailor the courthouse environment to the goal of neutral justice. For that reason, "the courtroom and courthouse premises are subject to the control of the court." *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966).

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[1] *See* Supreme Judicial Court Mission Statement, available at https://www.mass.gov/service-details/about-the-supreme-judicial-court. The historic seal appears below:

Yet the district court's order denying the motions to dismiss the indictment in this case, if allowed to stand, would upset that balance and imperil neutral justice. The federal government alleges that a Massachusetts judge, Shelley Richmond Joseph, and a former Massachusetts court officer, Wesley MacGregor, obstructed justice and a federal proceeding by mismanaging the physical movements of a criminal defendant who had been targeted for federal civil arrest inside a state courthouse. The district court concluded that Judge Joseph is not entitled to immunity because the indictment alleges that she acted *corruptly*. *See* Joseph Add. 5. But Judge Joseph has persuasively shown that judicial immunity does not hinge on whether the government characterizes something as corrupt, and also that she is entitled to immunity because the allegedly corrupt actions "lie at the heart of the judicial task." *See* Joseph Op. Brief 10-26.

This amicus brief, submitted on behalf of a group of retired Massachusetts judges who have come together as the Ad Hoc Committee for Judicial Independence, seeks to make two additional points concerning judicial immunity.

First, judicial control of the courtroom and courthouse premises is not ministerial; judges *must* retain this control so they can discharge their constitutional duties and ethical obligations. Courtroom governance often requires "difficult judgments"—so difficult, in fact, that this Court is "hesitant to displace" them on appeal, *United States v. DeLuca*, 137 F.3d 24, 34 (1st Cir. 1998), let alone permit them to be prosecuted as crimes.

Second, Judge Joseph's alleged conduct was a quintessential exercise of court control over the courtroom and courthouse premises. When deciding how to respond to a federal officer's attempt to arrest a party at a courthouse, a judge *must* weigh multiple constitutional considerations, including whether facilitating the arrest would impair the targeted person's due process right to be treated fairly, and whether the law enforcement officer's attempts to arrest someone inside a courthouse could chill other people's access to our courts, and thus impair both the targeted person's Sixth Amendment right to a public trial and the public's First Amendment right to access court proceedings.

Judicial decisions concerning courtrooms and courthouse premises are not, of course, infallible. But when judges make those decisions incorrectly, they abuse authority dedicated exclusively to the judiciary, and thus it falls exclusively to *the judiciary* to remedy those errors through appellate or disciplinary proceedings. It is not for *the executive* to say that a judge's exercise of control over courtrooms and courthouses—including the physical movements of parties—has criminally obstructed executive officials. Occasionally frustrating the preferences of those officials is a core function of an independent judiciary. Doing so, while performing judicial functions, is not a crime. If it were, then federal or state prosecutors could prosecute judges they deem to have stymied law enforcement, and members of the public could reasonably conclude that their rights to due process, and to fair and public trials, will yield to the judiciary's interest in avoiding imprisonment.

As retired judges, the Committee's members can state with confidence that, if this prosecution is permitted to proceed, the practical consequences for the Massachusetts judiciary will be devastating, even if Judge Joseph is ultimately acquitted.

INTERESTS OF *AMICUS CURIAE*

The Ad Hoc Committee for Judicial Independence is a group of retired Massachusetts judges committed to the fair and independent administration of justice.[2] As retired judges, unencumbered by the restraints on the speech of sitting judges, the Committee's members may speak openly in defense of an independent judiciary. Based on their decades of collective experience in managing the day-to-day challenges encountered in the pursuit of equal justice under the law, the Committee's members believe that an independent judiciary is essential to that task. The judge's ability to dispense the simple justice sought in the myriad encounters with litigants from all walks of life requires a strict adherence to and respect for the long-standing and well-established principle that our courts must be free to exercise that

[2] Members of the Committee are listed in the appendix to this brief. No party or its counsel authored this brief in whole or in part, nor did any person besides the amicus, its members, or their counsel contribute money intended to fund its preparation or submission. Fed. R. App. P. 29(a)(4)(e). All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(2).

independence without undue interference, including from the federal government.

The federal prosecution of a sitting Massachusetts state court judge, premised on acts undertaken in the normal course of the judge's exercise of judicial discretion and in furtherance of the constitutional obligation to protect the rights of the individual who stands before her, poses a serious and unwarranted threat to the independence of state court judges. The Committee's members believe that such a prosecution portends an unacceptable risk of criminal jeopardy that inevitably will chill the ability of state court judges to ensure equal justice under the law without fear or favor to any person or point of view.

ARGUMENT

The indictment in this case centers on actions undertaken by a state judge and court security officer inside a courthouse where the judge, and therefore the security officer, were required to administer neutral justice by avoiding favoritism both for the accused and for the government. The core criminal allegation seems to be that Judge Shelley Joseph had reason to know that a federal

immigration officer was waiting outside the courtroom doors (in or near the lobby), and nevertheless authorized a criminal defendant to return to the lockup where he might ultimately leave via a different exit. There is no allegation that Judge Joseph engaged in public corruption or had any personal financial interests or relationships that conflicted with her judicial obligations. There is also no allegation that Judge Joseph ordered the court officer to release the defendant through any particular door, or that traffic through the rear door was forbidden.

Prosecuting this alleged conduct contravenes the inherent legal authority that resides with state judges by virtue of their obligation to administer neutral justice. Fealty to constitutional and ethics provisions requires judges to retain authority over the courtroom and courthouse environment. Moreover, because judicial immunity is an immunity from suit rather than a mere defense to liability, its protection will be lost if this case is erroneously permitted to go to trial.

I. Our legal system requires judges to control courtroom and courthouse environments.

"[T]he courtroom and courthouse premises are subject to the control of the court." *Sheppard*, 384 U.S. at 358. But why? The answer is not simply that judges like being in control. It's also that judges *must* control these environments so they can meaningfully fulfill their constitutionally-prescribed responsibilities to parties and to the public, and balance the complex legal and practical considerations that often operate in tension with one another.

A. Broad inherent powers necessarily arise from the judiciary's duty of neutrality.

The need for judicial control over the courtroom environment starts with a judge's duty to be impartial to litigants. Under the due process protections of the Fifth and Fourteenth Amendments to the U.S. Constitution, every litigant is entitled to an impartial judge. *See Tumey v. State of Ohio*, 273 U.S. 510, 523 (1927) (due process violated where judge failed to be impartial); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-825 (1986) (same); *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 883-884; 886 (2009) (same).

For Massachusetts judges, these principles are also enshrined in the Massachusetts Declaration of Rights, which recognizes that "[i]t is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice." Mass. Const., Part I, art. 29. Accordingly, "[i]t is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit." *Id.*; *see also In re Enforcement of a Subpoena*, 463 Mass. 162, 169-172 (2012) (explaining "the imperative of the Massachusetts Constitution that judges act free from outside or distracting influences or apprehensions on matters that come before them"). The Declaration of Rights also guarantees the right to "obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws." *First Justice of Bristol Div. of Juvenile Court Dep't v. Clerk-Magistrate of Bristol Div. of Juvenile Court Dep't*, 438 Mass. 387, 396-97 (2003) (citing Mass. Const., Part I, art. 11). The Massachusetts Constitution also protects the separation of powers:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Mass. Const., Part I, art. 30.

Massachusetts courts have recognized that "from these lofty principles . . . flows the concept of inherent judicial powers, whose exercise is essential to the function of the judicial department, to the maintenance of its authority, [and] to its capacity to decide cases." *First Justice*, 438 Mass. at 397 (quotation marks omitted). This "[i]nherent judicial authority is 'not limited to adjudication, but includes certain ancillary functions such as rule-making and judicial administration,'" because *all* of those authorities "'are essential if the courts are to carry out their constitutional mandate.'" *Id.*; *see also O'Coin's, Inc. v. Treasurer of the County of Worcester*, 362 Mass. 507, 510 (1972). Thus, the notion of "inherent" authorities is not a judicial power grab. It is the recognition that judges *must* possess certain authorities so they can fulfill their

constitutional obligations, and these authorities necessarily include not only adjudication but also administrative matters.

B. Judicial control over the courthouse environment is compelled by a judge's constitutional and ethical duties to regulate the conduct of third parties.

The judiciary's inherent authorities must include control of the courthouse environment, particularly given various constitutionally-prescribed duties concerning third parties. For example, due process "requires that the accused receive a trial by an impartial jury free from outside influences." *Sheppard*, 384 U.S. at 362. "Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." *Id.* at 363; *Wood v. Georgia*, 370 U.S. 375, 383 (1962) ("[T]he right of courts to conduct their business in an untrammeled way lies at the foundation of our system of government . . . ."); *Berner v. Delahanty*, 129 F.3d 20, 26-27 (1st Cir. 1997) ("Within this staid environment [of the courtroom], the presiding judge is charged with the responsibility of maintaining proper order and decorum").

Judges must also exercise authority over third parties to safeguard both the Sixth Amendment right to a public trial for criminal defendants, *Waller v. Georgia*, 467 U.S. 39 (1984), and the First Amendment right of the public and press to attend such trials. *Globe Newspaper Co. v. Super. Ct. of the County of Norfolk*, 457 U.S. 596, 603-04 (1982). As the Second Circuit has said, "[c]ontrol by the courts is essential, because the judiciary is uniquely attuned to the delicate balance between defendants' Sixth Amendment rights to public trial, the public and press's First Amendment rights to courtroom access, and the overarching security considerations that are unique to the federal facilities containing courtrooms." *United States v. Smith*, 426 F.3d 567, 576 (2d Cir. 2005); *see also Commonwealth v. Maldonado*, 466 Mass. 742, 748 (2014) ("[O]thers may have chosen not to enter the court room to avoid the need to identify themselves, perhaps because they feared that identifying themselves might bring them to the attention of the police or immigration authorities . . . .").

Judicial ethics also require a judge to control the courtroom environment "[i]n keeping with th[e] *constitutional imperative*" to

assure the neutral administration of justice, and these rules cover matters that extend well beyond adjudication. *See* Mass. SJC, Com. on Jud. Ethics, *Public Outreach in Support of the Rule of Law and Judicial Independence*, 2017 WL 770139, at *1 (Feb. 21, 2017) (emphasis added); *see also* Mass. SJC, Com. On Jud. Ethics, *Speaking at Community Family Day*, 2016 WL 4720474, at *1 (June 8, 2016) ("[Y]ou must be careful to avoid conveying . . . that law enforcement personnel are in a special position to influence you."). In Massachusetts, as elsewhere, judges must "promote[] public confidence in the independence, integrity, and impartiality of the judiciary," S.J.C. Rule 3:09, Canon 1, Rule 1.2. Ethics rules consequently forbid judges from "convey[ing] or permit[ting] others to convey the impression that any person or organization is in a position to influence the judge," *id.* at Canon 2, Rule 2.4(C).[3] Massachusetts judges must "perform the duties of judicial office,

[3] *See also* S.J.C. Rule 3:09, Canon 2, Rule 2.6 (judge must ensure the right to be heard); Canon 3, Rule 3.1 (judges shall not engage in extrajudicial activities that would appear to undermine their judicial duties); Canon 3, Rule 3.12 (judges shall not accept compensation for extrajudicial activity if it would undermine judicial independence, integrity, or impartiality).

including administrative duties, without bias, prejudice, or harassment." Canon 2, Rule 2.3(A) (emphasis added). Judges must also "require court personnel and others subject to the judge's direction and control"—i.e., court personnel—"to act in a manner consistent with the judge's obligations under this Code." *Id.* at Canon 2, Rule 2.12(A).

These rules appropriately acknowledge that judges must exercise authority throughout the courthouse environment. As the American Bar Association has recognized, judges should "establish such *physical surroundings* as are appropriate to the administration of justice."[4]

[4] American Bar Ass'n, *ABA Standards for Criminal Justice: Special Functions of the Trial Judge*, Standard 6-1.1(b) (3d ed., 2000) (emphasis added); *id.* at 6-1.2(a) ("in endeavoring to educate the community, the judge should avoid activity which would give the appearance of impropriety or bias"); *id.* at 6-3.2 ("The trial judge should endeavor to maintain secure court facilities. In order to protect the dignity and decorum of the courtroom, this should be accomplished in the least obtrusive and disruptive manner, with *an effort made to minimize any adverse impact*.") (emphasis added).

II. The conduct alleged in this case cannot, as a matter of law, be prosecuted as obstruction.

The principles above contradict the district court's conclusion that Judge Joseph lacks immunity in this case. Although the Supreme Court has suggested in dicta that a judge is normally "not absolutely immune from criminal liability," *Mireles v. Waco*, 502 U.S. 9, 9 n.1 (1991); *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974), Judge Joseph persuasively argues that a state judge's immunity from criminal prosecution can be overcome only by allegations of public corruption, abuse of office for personal gain, or violation of a statute enacted pursuant to Section 5 of the Fourteenth Amendment. There are no such allegations here. Thus, to the extent discipline is appropriate, it must come from the judiciary itself, and not from charges, trial, and the possibility of imprisonment instigated by the executive.

A. Judge Joseph's alleged conduct was a quintessential exercise of court control over the courtroom and courthouse premises.

This case does not require the Court to define the outer boundaries of judicial immunity, or the Tenth Amendment anti-commandeering doctrine, or the other potential protections against

prosecution. Whatever the outer limits of those protections, at their core they must protect a state judge from being prosecuted for "obstruction" because she exercised judicial control of a state courthouse in a manner that was inconsistent with federal executive preferences. Given the Supreme Court's clear pronouncement that "the courtroom and courthouse premises are subject to the control of the court," *Sheppard*, 384 U.S. at 358, and given the showing in Part I above that this control is *required* by constitutional principles and their attendant rules of ethics, a state judge cannot permissibly be prosecuted for obstruction for managing her courtroom in a way that allegedly made a party's federal civil arrest less likely rather than more likely.[5]

When a law enforcement officer seeks to arrest a party at a state courthouse, a judge's handling of that party's physical movements implicates the judge's constitutional duty of impartiality. *See Tumey*, 273 U.S. at 523; *Aetna Life Ins. Co.*, 475

[5] Because a judge is empowered to control the courthouse environment, a court officer likewise cannot commit "obstruction" by carrying out orders issued by a judge in the exercise of those powers. *See* S.J.C. Rule 3:09, Canon 2, Rule 2.12 (judges required to control conduct of court personnel).

U.S. at 821-825; *Caperton*, 556 U.S. at 883-884, 886. In fulfilling this duty, a judge may feel that she cannot take any action that could be construed as supporting, favoring, or facilitating the arrest of a party. For example, if the courtroom has two exits, the judge might conclude that she must not take any action that effectively requires the targeted party to use the exit at where the law enforcement officer is stationed. In Massachusetts and elsewhere, a judge might be particularly wary of facilitating the arrest of a party pursuant to an immigration detainer because doing so could violate state law. *See Lunn v. Commonwealth*, 477 Mass. 517 (2017); *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518, 529 (App. Div. 2018) (concluding that New York statutes do not authorize state and local law enforcement officers to make warrantless arrests for civil immigration violations); *Esparza v. Nobles County*, No. 53-CV- 18-751, 2018 WL 6263254, at *10 (Minn. Dist. Ct. Oct. 19, 2018) (concluding that Minnesota Statutes do not empower Minnesota peace officers to arrest a person for a federal civil offense at the request of ICE officers); *C.F.C. v. Miami-Dade Cty.*, 349 F.

Supp. 3d 1236, 1262 (S.D. Fla. 2018) (noting that Florida law did not empower local officers to arrest for civil immigration violations).

Additionally, a judge's decisions about how to handle the physical movements of someone targeted for arrest squarely implicate her constitutional duties to safeguard the target's right to a fair and public trial, and the public's right to access courtroom proceedings. These decisions would not be "immune from Sixth Amendment inquiry," because any apparent ratification of or acquiescence to law enforcement could be understood to chill parties and members of the public from attending court proceedings. *See Smith*, 426 F.3d at 572.[6] How to handle this circumstance is therefore exactly the kind of "difficult judgment[]" about "matters of courtroom governance" that *must* be made by the judge because it "require[s] 'a sensitive appraisal of the climate surrounding a trial and a prediction as to the potential security or

[6] *See also DeLuca,* 137 F.3d at 33-34 (discussing potential chilling effect of partial closure of courtroom); *United States v. Brazel*, 102 F.3d 1120, 1155-1156 (11th Cir. 1997) (identification procedure constituted partial closure of courtroom).

publicity problems that may arise during the proceedings.'" *DeLuca*, 137 F.3d at 34.

B. Judicial immunity includes immunity from prosecution, not just the mere possibility of an acquittal.

Judicial immunity questions should be resolved at the earliest possible stage in litigation, because immunity is not simply a defense to liability but also an *immunity from the proceeding*. Avoiding the need for judges to explain their actions and decisions during pretrial proceedings, in all but the narrowest set of cases, is a major purpose of judicial immunity. *See Mireles*, 502 U.S. 9 at 11 ("Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages."); *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) ("For officials whose special functions or constitutional status requires complete protection from suit, we have recognized the defense of 'absolute immunity.'"). The district court, however, gave judicial immunity an unduly narrow reading by ruling that any such immunity evaporates when a criminal indictment alleges corrupt intent. *See* Joseph Add. 5-6; *Zenon v. Guzman*, 924 F.3d 611, 616

(1st Cir. 2019) (recognizing that the "breadth" of judicial immunity "[shields] judges even when their actions are malicious, corrupt, mistaken, or taken in bad faith"); *Nystedt v. Nigro,* 700 F.3d 25, 33 (1st Cir. 2012) ("The law is clear that even bad faith or malice will not divest the cloak of judicial immunity."); *Cok v. Cosentino*, 876 F.2d 1, 4 (1st Cir. 1989) (holding that "negligent performance" or "dereliction of duty" does not divest an individual of authority granted by the court). That reasoning was not only incorrect, but also risks chilling future state judges from discharging their duties effectively, for fear of protracted litigation that a judicial immunity defense may fail to protect them against.

As retired judges, the Committee's members can state with confidence that, if this prosecution is permitted to proceed, the practical consequences for the Massachusetts judiciary will be devastating. Judges will by stymied by the threat that an action they must take "might lead to a requirement that the judge detail his internal thought processes weeks, months, or years after the fact would amount to an enormous looming burden . . . ." *In re Enforcement of Subpoena*, 463 Mass. 162 at 1031-32. Moreover,

saying "no" to executive actors is part of every judge's job. Yet, if Judge Joseph must stand trial, every Massachusetts judge in every Massachusetts courthouse will feel external pressure to refrain from actions that might antagonize federal officials. Any resulting timidity will be "hard to detect or control," *see Forrester v. White*, 484 U.S. 219, 226-27 (1988), and pressure will be most acute in cases where noncitizens are before the court as parties or witnesses. Judges cannot be impartial in the execution of their judicial duties if they are under pressure to ingratiate themselves to federal officials.

C. Judges who mishandle the courtroom environment can still be subjected to discipline.

To say that the judiciary retains full authority to manage the physical movements of a party targeted for arrest is *not* to say that any action a judge takes in this regard is necessarily correct. If the executive believes that a particular judge has exercised his or her powers inappropriately, it has remedies within the court system, such as appeal or judicial misconduct procedures.

In Massachusetts, for example, complaints of judicial misconduct are investigated through the Commission on Judicial

Conduct. The Commission's proceedings may result in penalties ranging from a written reprimand to the judge's removal. *See* G.L. c. 211C, § 8. These disciplinary systems are well established and highly effective. And unlike the prosecution here, they do not threaten the separation of powers, the independent judiciary, and the federalist structure of the United States.[7]

CONCLUSION

Judges are invested with the power to control their courthouses and courts. They are also invested with the power to check, limit, and reject the actions of the executive. If a judge errs in exercising those powers, there are remedies. But federal prosecution and imprisonment are not among them. The

[7] *Cf. In re Enforcement of a Subpoena*, 463 Mass. at 172 & n.5 (explaining that, if a prosecutor could bring about "an intrusive examination" of a judge's thought processes in making a decision, the resulting pressure "would amount to an enormous looming burden that could not help but serve as an 'external influence or pressure,' inconsistent with the value we have placed on conscientious, intelligent, and independent decision making"); *see also In re: Shelley M. Joseph*, No. OE-140, slip op. at 33 (Mass. Aug. 13, 2019) (Kafker, J, concurring) ("I cannot rule out the possibility that the independence of the State judiciary itself may be implicated by the prosecution [of Judge Joseph].").

Committee therefore respectfully submits that the district court's ruling should be reversed.

December 2, 2020

Respectfully Submitted,

THE AD HOC COMMITTEE FOR JUDICIAL INDEPENDENCE,

By Their Attorneys,

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APPENDIX

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,138 words, excluding 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 Century Schoolbook in 14-point type.

Dated: December 2, 2020

/s/ Matthew R. Segal
Matthew R. Segal

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed through the Electronic Court Filing system on December 2, 2020 and will be sent electronically to the registered recipients as identified on the Notice of Electronic Filing.

/s/ Matthew R. Segal
Matthew R. Segal