

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, ss.

SJC-12276

COMMONWEALTH OF MASSACHUSETTS,

Respondent-Appellee,

v.

SREYNUON LUNN,

Petitioner-Appellant.

PETITION PURSUANT TO G.L. c. 211, § 3
AS RESERVED AND REPORTED BY JUSTICE LENK

**BRIEF FOR AMICI CURIAE BRISTOL COUNTY BAR ADVOCATES,
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FOR JUSTICE, INC. IN SUPPORT OF PETITIONER-APPELLANT**

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INTRODUCTION

Massachusetts law enforcement officers cannot arrest people merely because someone else asks them to, even if that someone else is the federal government. Yet this is happening across the Commonwealth.

Local and state law enforcement officials routinely hold Massachusetts residents for hours or days based only on "detainer" requests issued by agents of United States Immigration and Customs Enforcement ("ICE"), an agency within the Department of Homeland Security ("DHS"). These "ICE detainers" ask state and local officers to keep people in state custody for up to 48 hours after they would otherwise be released--in the absence of any new criminal charges or state-law basis for custody--so that ICE may take them into federal immigration custody.

Each of these detentions violates the Massachusetts and United States Constitutions. State and local officers who arrest people based solely on ICE detainers undertake unreasonable seizures prohibited by article 14 of the Massachusetts Declaration of Rights. This is true for several reasons, including that Massachusetts officers generally cannot make warrantless arrests for civil immigration offenses. In addition, because ICE detainers do not supply particularized probable cause

to believe that someone is removable and likely to escape, officers who arrest people based solely on ICE detainers also undertake unreasonable seizures prohibited by the Fourth Amendment to the United States Constitution.

Meanwhile, under the new administration of President Donald J. Trump, ICE enforcement activities have intensified. The President has repeatedly said that those born in certain countries or who practice a certain religion pose a threat that must be urgently addressed through immigration enforcement. His administration has "take[n] the shackles off" ¹ ICE officers and given them expansive and unreviewed discretion to target people for detention and deportation, throwing the door open to racial, ethnic, and religious profiling.

When State and local law enforcement officials are asked to carry out orders issued under these immigration policies, they are being asked to act without respect for the due process and equal protection rights enshrined in the Massachusetts and United States Constitutions. State and local actors

¹ Spicer, White House Press Briefing (Feb. 21, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/21/press-briefing-press-secretary-sean-spicer-2212017-13>.

cannot volunteer to enforce blindly federal requests that are ripe for unconstitutional abuse.

Accordingly, for the reasons stated below, amici curiae Bristol County Bar Advocates, Inc., Massachusetts Association of Criminal Defense Lawyers, Pilgrim Advocates, Inc., and Suffolk Lawyers for Justice, Inc. respectfully ask this Court to rule that arrests based solely on ICE detainers are unconstitutional, and to use its superintendence authority to safeguard Massachusetts state and local authorities from entanglement with federal detainer-related practices that are increasingly likely to discriminate.

ISSUES PRESENTED FOR REVIEW

1. Does the practice of Massachusetts officers holding individuals based solely on ICE detainers violate the prohibitions on unreasonable seizures in article 14 of the Massachusetts Declaration of Rights?

2. Do arrests by Massachusetts officers based solely on ICE detainers violate the Fourth Amendment to the United States Constitution?

3. Through public promises, executive orders, and departmental memoranda, the President and his administration have established an immigration enforcement regime that appears to be infected with anti-Mexican and anti-Muslim animus and permits individual ICE officers to choose to treat nearly any

noncitizen as a detention “priority” at the officer’s sole and unreviewed discretion. Under these circumstances, should this Court exercise its superintendence power to guide or limit the assistance that Massachusetts courts and court officers may provide to federal immigration authorities?

INTEREST OF AMICI CURIAE

Bristol County Bar Advocates, Inc., Massachusetts Association of Criminal Defense Lawyers, Pilgrim Advocates, Inc., and Suffolk Lawyers for Justice, Inc. are organizations whose members are criminal defense attorneys in the Commonwealth. Amici help their member attorneys provide constitutionally effective and efficient representation to their clients. Many of these attorneys represent noncitizens subject to detainers issued by ICE. When these clients are held in state custody pursuant to an ICE detainer, or decline to post bail because of the threat of an ICE detainer, amici’s attorney members are compelled to expend scarce resources in securing access to their clients, and those clients are hindered in their ability to assist counsel in their own defense. For these reasons, amici have a significant interest in the outcome of this case.

BACKGROUND

The facts set forth below concern President Trump’s immigration enforcement regime and how ICE

detainers are being enforced by state and local law enforcement in the Commonwealth.

I. The Trump Administration has expressed animus against Mexican nationals and Muslims, and has adopted aggressive immigration enforcement policies consistent with that animus.

The Trump Administration's statements and policies provide crucial context for understanding the purpose, scope, and effect of ICE detainer enforcement.

A. The Trump Administration has expressed discriminatory views about Mexican nationals and Muslims.

President Trump, whose administration directs this country's immigration enforcement system, has frequently expressed discriminatory views about certain people who are targeted by that system. He has singled out Mexican nationals and Muslims for particular scorn.

From the start of his candidacy, President Trump disparaged Mexican nationals, proclaiming during his campaign announcement that "[w]hen Mexico sends its people, they're not sending their best. . . . They're sending people that have lots of problems. . . . They're bringing drugs. They're bringing crime. They're rapists."² The following day, President Trump

² Here's Donald Trump's Presidential Announcement Speech, Time (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/>.

stated that "if I were . . . Mexico, I'd be sending the killers, the drug dealers, the rapists."³ Later that summer, President Trump stated, "the Mexican government forces many bad people into our country."⁴ In the first Republican presidential debate, President Trump asserted that "the Mexican government . . . send[s] the bad ones over."⁵ In the third presidential debate, President Trump used the Spanish word for "men" to signal people he would target: "We have some bad hombres and we're going to get them out."⁶

President Trump's hostility towards people of Mexican descent has not been limited to those who lack U.S. immigration status, or even to Mexican nationals. He referred to United States District Judge Gonzalo Curiel as a "hater" who was being unfair to then-

³ Exclusive: Donald Trump on What Made Him Run for President on 'Hannity,' Fox News (June 18, 2015), <http://www.foxnews.com/transcript/2015/06/18/exclusive-donald-trump-on-what-made-him-run-for-president-on-hannity/>.

⁴ Donald Trump talks Immigration, Hillary and ISIS, MSNBC (July 8, 2015), <http://www.msnbc.com/msnbc/watch/trump-talks-immigration-hillary-and-isis-480290883935>.

⁵ Transcript: Read the Full Text of the Primetime Republican Debate, Time (Aug. 11, 2015), <http://time.com/3988276/republican-debate-primetime-transcript-full-text/>.

⁶ Trump: 'We have some bad hombres and we're going to get them out,' CNBC (Oct. 19, 2016), <http://www.cnn.com/2016/10/19/trump-we-have-some-bad-hombres-and-were-going-to-get-them-out.html>.

candidate Trump because the judge was "Mexican."⁷ Judge Curiel is a U.S. citizen; he was born in Indiana.

President Trump has also expressed hostility toward Muslims. In December 2015, President Trump called for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."⁸ In an interview the next day, he explained how this ban would operate: Immigration agents would ask individuals whether they were Muslim and prevent those who answered affirmatively from entering the country.⁹ Later in his candidacy, President Trump said he would no longer "use the word Muslim" because "[p]eople were so upset when I used the word Muslim."¹⁰ See also *Int'l Refugee Assistance Project vs. Trump*, U.S. Dist. Ct., No. TDC-17-0361, slip op. at 8-10, 27-30 (D. Md.

⁷ Epstein, *Trump Attacks Federal Judge in Trump U Case*, Wall St. J. (May 27, 2016), <http://blogs.wsj.com/washwire/2016/05/27/trump-attacks-federal-judge-in-trump-u-case/>.

⁸ Press Release, Donald J. Trump for President, Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>.

⁹ Gass, *Trump not bothered by comparisons to Hitler*, Politico (Dec. 8, 2015), <http://www.politico.com/trump-muslims-shutdown-hitler-comparison>.

¹⁰ Meet the Press (NBC television broadcast July 24, 2016), transcript available at <http://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706>.

Mar. 16, 2017) (collecting examples of "President Trump's animus towards Muslims"); *Hawaii vs. Trump*, U.S. Dist. Ct., No. 17-00050 DKW-KSC, slip op. at 33-35 (D. Haw. Mar. 15, 2017) (collecting statements of President Trump and his administration as "significant and un rebutted evidence of religious animus").

B. The Trump Administration has intensified federal immigration enforcement.

Consistent with his openly expressed animus, President Trump's administration has set in motion a radical intensification of federal immigration enforcement. Within a week of taking office, President Trump signed three executive orders: Exec. Order No. 13,767, *Border Security and Immigration Enforcement Improvements*, 82 Fed. Reg. 8,793 (Jan. 30, 2017) ("Border Security EO"); Exec. Order No. 13,768, *Enhancing Public Safety in the Interior of the United States*, 82 Fed. Reg. 8,799 (Jan. 30, 2017) ("Public Safety EO"); and Exec. Order No. 13,769, *Protecting the Nation From Foreign Terrorist Entry Into the United States*, 82 Fed. Reg. 8977 (Feb. 1, 2017) ("First Travel Ban EO"). On February 20, 2017, DHS issued memoranda implementing two of these executive orders: *Implementing the President's Border Security and Immigration Enforcement Improvements Policies* ("DHS Border Security Memo"), and *Enforcement of the*

Immigration Laws to Serve the National Security Interest ("DHS Public Safety Memo").¹¹

On March 6, 2017, President Trump signed yet another executive order, replacing the First Travel Ban EO with another bearing the same exact name: Exec. Order No. 13,780, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 13,959 (March 6, 2017) ("Second Travel Ban EO").

These executive orders and memos envision large-scale exclusion and detention, especially along the nation's border with Mexico, enforced at the discretion of ICE officers. Widespread detention will be facilitated by hiring 10,000 additional ICE officers¹² and 5,500 additional Customs and Border Patrol ("CBP") agents and officers,¹³ as well as deputizing more local law enforcement officers as

¹¹ See U.S. Dep't of Homeland Security, Memorandum: Implementing the President's Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf; U.S. Dep't of Homeland Security, Memorandum: Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

¹² Public Safety EO at Sec. 7; DHS Public Safety Memo at Sec. E.

¹³ Border Security EO at Sec. 8; DHS Border Security Memo at Sec. B.

immigration enforcement agents.¹⁴ Under Section 287(g) of the Immigration and Naturalization Act, codified at 8 U.S.C. § 1357(g), local law enforcement officers are authorized to double as federal immigration agents and, once armed with federal powers, to investigate, arrest, and detain persons who may be in violation of the immigration laws. The Public Safety EO and the DHS Public Safety Memo both address expanding the Section 287(g) program.¹⁵

The Public Safety EO also directs the Secretary to “make public a comprehensive list of . . . jurisdiction[s]” that “ignore[] or otherwise fail[] to honor [ICE] detainers.”¹⁶ The DHS Public Safety Memo implements this directive by ordering the ICE Director to develop a weekly report listing states and cities failing to enforce ICE detainers and “an explanation concerning why the detainer . . . was not honored.”¹⁷

The Trump Administration’s new guidance supplies immigration agents with essentially unbridled discretion to treat nearly any noncitizen as an enforcement priority. First, while calling for the

¹⁴ Border Security EO at Sec. 2(e); DHS Border Security Memo at Sec. D.

¹⁵ Public Safety EO at Sec. 8(a)–(c); DHS Public Safety Memo at Sec. B; see also Border Security EO at Sec. 2(e), Sec. 10(a)–(c); DHS Border Security Memo at Sec. D.

¹⁶ See Public Safety EO at Sec. 8(a), 9(a)–(b).

¹⁷ DHS Public Safety Memo at Sec. H.

enforcement of the "immigration laws . . . against all removable aliens," Public Safety EO at Sec. 4, the Public Safety EO and the DHS Public Safety Memo announce that DHS will prioritize the removal of aliens who have committed, been convicted of, or simply been charged with any "criminal offense." Public Safety EO at Sec. 5(a)-(c); DHS Public Safety Memo at Sec. A. Critically, these documents also include a catch-all provision that gives ICE officers discretion to remove those who, in their opinion, "otherwise pose a risk to public safety or national security." Public Safety EO at Sec. 5(g); DHS Public Safety Memo at Sec. A.

In addition, the DHS Public Safety Memo includes language emphasizing that ICE officers have full authority to "initiate enforcement actions against removable aliens encountered during the performance of their official duties" and "full authority to initiate removal proceedings against any alien who is subject to removal under any provision of the Immigration and Naturalization Act, and to refer appropriate cases for criminal prosecution." DHS Public Safety Memo at Sec. C. During Trump's presidency, ICE officers have

increased enforcement activities, including, for example, "stalking" persons at state courthouses.¹⁸

Meanwhile, implementing his promise to ban Muslims from entering this country without using the word "Muslim," both the First Travel Ban EO and the Second Travel Ban EO specifically target Muslims. The First Travel Ban EO barred persons from seven Muslim-majority nations from receiving new visas to enter the United States and halted refugee admissions. First Travel Ban EO at Sec. 3(c). The First Travel Ban EO also included a carve-out for the admission of some refugees explicitly intended to aid Christians;¹⁹ that provision and others were revoked only after the First Travel Ban was enjoined. *Washington vs. Trump*, U.S. Dist. Ct., No. C17-014JLR (W.D. Wa. Feb. 3, 2017),

¹⁸ See Letter from Chief Justice Tani G. Cantil-Sakauye, Supreme Court of California, to Attorney General Jeff Sessions and John F. Kelly, U.S. Department of Homeland Security (Mar. 16, 2017), <http://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses>; see also Queally, ICE agents make arrests at courthouses, sparking backlash from attorneys and state supreme court, *Los Angeles Times* (Mar. 16, 2017), <http://www.latimes.com/local/lanow/la-me-ln-ice-courthouse-arrests-20170315-story.html>.

¹⁹ *Id.* at Sec. 5(b); Brody, Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees, *CBN News* (Jan. 27, 2017), <http://www1.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees>.

S.C., 847 F.3d 1151 (9th Cir. 2017). The Second Travel Ban barred persons from six of the original seven Muslim-majority nations from receiving visas to enter the U.S., Second Travel Ban EO at Secs. 1(f), 3(a), and imposed additional onerous requirements on visa applicants from the seventh Muslim-majority country. Id. at Sec. 4. It was enjoined before taking effect. Int'l Refugee Assistance Project, slip op. at 38 (holding plaintiffs had shown likelihood of success on merits of establishment clause claim); Hawaii, slip op. at 28 (same).

Trump Administration advisor Rudolph W. Giuliani explained that the First Travel Ban EO implemented President Trump's request to do a "Muslim ban . . . legally."²⁰ Indeed, when signing it, President Trump read the title, "Protecting the Nation from Foreign Terrorist Entry into the United States," looked up, and said, "We all know what that means."²¹ Top White House aide Stephen Miller explained that the Second Travel Ban EO would "[f]undamentally" lead to "the

²⁰ Wang, Trump asked for a 'Muslim ban,' Giuliani says --and ordered a commission to do it 'legally', Wash. Post (Jan. 29, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.3e6f7d50e1d7.

²¹ Trump Signs Executive Orders at Pentagon, ABC News (Jan. 27, 2017), <http://abcnews.go.com/Politics/video/trump-signs-executive-orders-pentagon-45099173>.

same, basic policy outcome for the country.”²² As one federal court held, “a reasonable, objective observer --enlightened by the specific historical context, contemporaneous public statements, and specific sequence of events leading to its issuance--would conclude that the [Second Travel Ban EO] was issued with a purpose to disfavor a particular religion[.]” Hawaii, slip op. at 28.

II. State and local officers are enforcing ICE detainers across the Commonwealth.

State and local communities and law enforcement agencies across the Commonwealth (“State Authorities”) have taken divergent positions on whether to incarcerate people based on ICE detainers. Some municipalities limit cooperation with ICE.²³ Other

²² Link, Stephen Miller admits the new executive order on immigration ban is same as the old, Salon.com (Feb. 22, 2017), <http://www.salon.com/2017/02/22/stephen-miller-admits-the-new-executive-order-on-immigration-ban-is-same-as-the-old/>.

²³ The cities of Boston, Lawrence, and Somerville, among others, have adopted policies limiting local law enforcement’s entanglement with ICE. See Nova-Salcedo, Lawrence City Council Approves Trust Act, CBS Boston (Aug. 27, 2015), available at <http://boston.cbslocal.com/2015/08/27/lawrence-city-council-approves-trust-act/>; Ortega, City Council Oks measure limiting immigration holds, Boston Globe (Aug. 20, 2014), available at <http://www.bostonglobe.com/metro/2014/08/20/boston-city-councilapproves-ordinance-limiting-immigration-holds/8e1MVYhU1aP1RiFr7AkkiK/story.html>; Allen, Somerville ends participation in Secure Communities, Boston Globe (May 21, 2014), available at <http://www.bostonglobe.com/metro/2014/05/21/somerville-mayor-joseph-curtatone-ends-city-participation->

State Authorities, however, have been holding individuals on ICE detainers,²⁴ and some have recently entered into Section 287(g) agreements with ICE deputizing local law enforcement agents to enforce federal immigration law. One Massachusetts sheriff has even announced a “formal offer” to have people in his custody help build the Mexico border wall.²⁵

When State Authorities agree to ICE detainer requests, the persons named in these requests often remain in extended custody, either because they are held by the Commonwealth after posting bail (and are then transferred to federal custody), or because the

federal-secure-communitiesprogram/AmDY0zNPDk5b7YsnbSrJeO/story.html.

²⁴ At minimum, the following State Authorities appear to honor ICE detainers: Bristol Sheriffs, see Motion to Intervene, Dkt. No. 9, Caramanica Aff. ¶ 16, Sunderland Aff. ¶ 2-3, Werner Aff. ¶ 2-3, 7; Middlesex Sheriffs, see Spetter Aff. ¶ 2-3; Plymouth Court Officers, see Sunderland Aff. ¶ 2-3, Wood Aff. ¶ 16; Plymouth Sheriffs, see Sunderland Aff. ¶ 11, Ward Aff. ¶ 3-7, Wood Aff. ¶ 16; and Suffolk Sheriffs, see Page Aff. ¶ 4, 7. The Massachusetts State Police also honors ICE detainers. See Rosen & Ellement, After policy shift, State Police can now detain immigrants for ICE, Boston Globe (June 2, 2016), <https://www.bostonglobe.com/2016/06/02/baker-administration-changes-rules-and-will-detain-people-wanted-for-immigration-violations/> V21k326D0oxGz4G5kyq4qI/story.html.

²⁵ Arsenault & Andersen, Bristol Sheriff offers inmates to build Trump’s Mexico Wall, Boston Globe (Jan. 5, 2017), <https://www.bostonglobe.com/metro/2017/01/04/bristol-sheriff-offers-trump-inmates-help-build-wall/> IcRa1ELU9IotLlyjXFxvwK/story.html.

threat of such enforcement causes them to stay in pretrial detention rather than post bail.²⁶

SUMMARY OF THE ARGUMENT

When State Authorities hold people on ICE detainers, the rights of individuals throughout the Commonwealth under the Massachusetts and Federal Constitutions are violated. State Authorities also engage in other forms of cooperation with ICE regarding individuals subject to ICE detainers, despite conditions suggesting that those detainers may be enforced in a discriminatory manner.

I. Arrests based on ICE detainers violate the right to be free from unreasonable seizures under article 14 of the Massachusetts Declaration of Rights. ICE detainers do not satisfy the requirement of establishing probable cause that the individual has committed a criminal offense, fail to provide particularized information, involve no judicial determination of probable cause within 24 hours of a warrantless arrest, and fail to meet article 14's requirement that an arrest be supported by a grant of arrest authority.

²⁶ See Motion to Intervene, Dkt. No. 9, Caramanica Aff. ¶¶ 8, 16, Graber Aff. ¶ 24, Page Aff. ¶ 4, Hussey Aff. ¶¶ 9-10, Sack & Demissie Aff. ¶ 7, Spetter Aff. ¶ 3, Sunderland Aff. ¶¶ 3-4, Ward Aff. ¶¶ 4-7, Werner Aff. ¶ 3, Wood Aff. ¶ 8.

II. Arrests based on ICE detainers also violate the right to be free from unreasonable seizures under the Fourth Amendment of the United States Constitution. The Fourth Amendment requires particularized information to support a warrantless arrest, but detainers fail to provide particularized information establishing probable cause that a person has committed a crime.

III. Because this case arises from the enforcement of an ICE detainer by court officers, this Court should exercise its superintendence powers under G.L. c. 211, § 3, to advance safeguards against court officers and officials engaging in discriminatory enforcement of federal immigration laws. At present, State Authorities cooperate with ICE under conditions that risk discriminatory enforcement. The standards governing the issuance of ICE detainers are vague, granting ICE officers unfettered discretion to issue detainers and risking that they will do so in a discriminatory manner. Moreover, President Trump has repeatedly stated his intention to use federal immigration law as a basis for excluding and removing Muslims and Mexican nationals--flying in the face of the constitutional values of due process and equal protection. It would therefore be appropriate for this Court to issue guidance designed to safeguard

against the risk of discriminatory immigration enforcement by State Authorities.

ARGUMENT

ICE detainers ask State Authorities to “maintain custody” of people whom they “would otherwise have [to] releas[e].” R.A. 16-19 (DHS Form I-247D). Detaining someone who is otherwise entitled to freedom is, by definition, a new seizure requiring a constitutionally adequate justification. Morales v. Chadbourne, 793 F.3d 208, 217 (1st Cir. 2015). Because ICE detainers call for up to 48 hours of custody, seizing someone on an ICE detainer triggers constitutional protections attending warrantless arrests. Id. at 215-216.²⁷ Accordingly, Massachusetts officials cannot detain people based on ICE detainers unless doing so complies with the protections against warrantless arrest in both article 14 of the Massachusetts Declaration of Rights and the Fourth Amendment of the United States Constitution.²⁸ As

²⁷ See also Orellana vs. Nobles County, U.S. Dist. Ct., No. 15-cv-03852 ADM/SER (D. Minn. Jan. 6, 2017) (detention under an ICE detainer is “properly viewed as a new arrest”); Miranda-Olivares vs. Clackamas County, U.S. Dist. Ct., No. 3:12-cv-02317-ST, slip op. at 17 (D. Or. Apr. 11, 2014) (detention under an ICE detainer “constituted a new arrest”).

²⁸ Article 14 and the Fourth Amendment apply to all persons, regardless of immigration status. See United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (the Fourth Amendment “refers to a class of persons who are part of a national community or who have

explained below, it complies with neither. Moreover, any State Authority who facilitates the ICE detainer regime runs the serious risk of becoming party to discriminatory enforcement.

I. Arrests based solely on ICE detainees violate article 14 of the Massachusetts Declaration of Rights.

Article 14 of the Massachusetts Declaration of Rights permits warrantless arrests only in certain limited circumstances: The arresting officer must have probable cause of the commission of a criminal offense, Commonwealth v. Jackson, 464 Mass. 758, 761 (2013); probable cause must be determined with particularity, Commonwealth v. Stephens, 451 Mass. 370, 385 (2008); the person arrested must be presented to a magistrate within 24 hours, Jenkins v. Chief Justice, 416 Mass. 221, 239 (1993); and the arresting officer must have legal authority to make the arrest. Commonwealth v. Craan, 469 Mass. 24, 33 (2014).²⁹ All of those circumstances are absent when a Massachusetts official arrests someone based on an ICE detainer.

otherwise developed sufficient connection with this country to be considered part of that community"); Commonwealth v. Kotlyarevskiy, 59 Mass. App. Ct. 240, 240, 242-243 (2003) (applying article 14 to individual without legal status in the United States).

²⁹ Article 14's requirements often go beyond the requirements of the Fourth Amendment. See Commonwealth v. Rodriguez, 430 Mass. 577, 584 n.7 (2000) (collecting cases).

A. Arrests based solely on ICE detainers violate article 14's probable cause requirement, prohibiting warrantless arrests for civil infractions.

Article 14 "require[s] that an arrest . . . be based on probable cause." Commonwealth v. Santaliz, 413 Mass. 238, 240 (1992). Not just any probable cause will do. Generally speaking, an arresting officer must have "probable cause to believe that the individual arrested is committing or has committed a criminal offense" (emphasis added). Commonwealth v. Jackson, 464 Mass. 758, 761 (2013); see also Moscoso vs. A Justice of the East Boston Division of the Boston Municipal Court, No. SJ-2016-0168, slip op. at 1 (May 26, 2016) (single justice allowing petition because state and local officials are "without authority to hold [a person], or otherwise order him held, on a civil [ICE] detainer."); Commonwealth v. Rodriguez, 472 Mass. 767 (2015) (stop of vehicle not warranted because it was based only on reasonable suspicion of civil marijuana infraction).

An arrest based on an ICE detainer does not satisfy article 14's general requirement of probable cause involving a criminal offense because ICE detainers are an enforcement tool of immigration law, which is civil in nature. See Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely

civil action to determine eligibility to remain in this country, not to punish an unlawful entry"); see also Arizona v. United States, 132 S. Ct. 2492, 2505 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States. . . . If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent." [citation omitted]). Consistent with that limitation, ICE detainers are lodged based only on suspected removability; they do not purport to supply reason to believe that the prospective detainee has committed a criminal violation of immigration law. R.A. 16-19 (DHS Form I-247D).

Nor do ICE detainers resemble the Commonwealth's civil commitment statutes, which permit detention without an arrest warrant. These laws require prior judicial approval and some demonstration of risk of harm. See, e.g., G.L. c. 123, § 12(a) & (e) (allowing civil commitment of "a mentally ill person" only after showing, in court, that "failure to hospitalize . . . will create a likelihood of serious harm"); G.L. c. 123A, § 12(e) (allowing temporary civil commitment of alleged sexually dangerous person based upon sufficient showing, in court, that individual is likely to engage in sexual offenses); G.L. c. 123, § 35 (allowing temporary civil commitment if court finds

"a likelihood of serious harm as a result of the person's alcohol or substance use disorder").³⁰ ICE detainers, in contrast, involve no judicial approval of any kind, let alone one based on a finding of harm.

Because ICE detainers request that persons be held based on an ICE officer's assertion of probable cause concerning only a civil infraction, and do not involve judicial approval, article 14 prohibits State Authorities from using ICE detainers as grounds to detain anyone. See Jackson, 464 Mass. at 761.

B. Arrests based solely on ICE detainers violate article 14's particularity requirement.

Even if article 14 permitted warrantless arrests for civil immigration infractions, ICE detainers do not provide particularized information establishing probable cause of any such infraction. "[P]robable cause exists where, at the moment of arrest, the facts

³⁰ General Laws chapter 85, section 11 may be read as allowing officers to make warrantless arrests for speeding violations, which are civil infractions. However, that this statute "appears to be inoperative and may have been repealed by implication by virtue of the comprehensive regulation of the subject matter in G.L. c. 90." Commonwealth v. Suggs, 70 Mass. App. Ct. 1104, at *3 n.7 (2007). General Laws chapter 90 allows for warrantless arrests for motor-vehicle offenses in some circumstances, clarifying that "[a]ny arrest made pursuant to this paragraph shall be deemed an arrest for the criminal offense or offenses involved and not for any civil motor vehicle infraction arising out of the same incident" (emphasis added). G.L. c. 90, § 21.

and circumstances within the knowledge of the police are enough to warrant a prudent person in believing that the individual arrested has committed or was committing an offense.” Commonwealth v. Stephens, 451 Mass. 370, 385 (2008) (quoting Santaliz, 413 Mass. at 241.

DHS Form I-247D baldly asserts that “probable cause exists that the subject is a removable alien,” and provides four checkboxes to indicate the basis of removability: (1) a final order of removal; (2) the pendency of ongoing removal proceedings; (3) confirmation of the subject’s identity indicating removability; and (4) voluntary statements or other reliable evidence indicating removability. R.A. 16-19 (DHS Form I-247D); see also Pet.-Appellant’s Br. 6.

These bare boilerplate assertions do not meet the standard of “particularized suspicion” that is central to determining probable cause. See Maryland v. Pringle, 540 U.S. 366, 371 (2003) (citing Ybarra v. Illinois, 444 U.S. 85, 91 (1979)) (observing that “the belief of guilt must be particularized with respect to the person to be searched or seized”); Morales vs. Chadbourne, U.S. Dist. Ct., No. CV 12-301-M-LDA, slip op. at 9-15 (D.R.I. Jan. 24, 2017) (denying qualified immunity to ICE officer who issued detainer to hold U.S. citizen based on plaintiff’s foreign birthplace and lack of database results showing her legal

status); *Vohra vs. United States*, U.S. Dist. Ct., No. SA CV 04-00972 (C.D. Cal. Feb. 4, 2010) (expressing skepticism that admission of foreign birth and lack of database results showing legal status amounted to probable cause for immigration arrest). Indeed, the fact-specific, individualized probable cause analysis is simply not amenable to the kind of check-box system on which ICE detainers rely. See, e.g., *Morales*, slip op. at 12-13 (explaining that ICE officer could not rely on lack of database results for plaintiff's married name because he knew from jail records that plaintiff was married, and that women often change their names when they marry).

Moreover, there is evidence that ICE officials issue detainers without knowledge of particularized facts supporting probable cause of removability. ICE did not add the boilerplate probable cause language to its forms until 2015. Add.252 (*Gonzalez vs. ICE*, U.S. Dist. Ct., No. 12-09012 (C.D. Cal. filed July 10, 2013), Deposition of Marc Rapp, Mar. 10, 2016, p. 86). However, an ICE official acknowledged that, despite updates to its form, ICE has not changed its procedures for determining if or when to issue a detainer. *Id.* p. 109 ("[T]he level of information that was required for an officer to lodge a detainer . . . really has not changed. They continue to essentially run the same checks to ensure that that

individual is subject to removal.”). Merely changing the language of DHS Form I-247D, without any attendant change in procedure, does not provide the particularized probable cause required by article 14.

C. Arrests based solely on ICE detainers violate article 14’s rule requiring presentment to a magistrate within 24 hours.

Even if a detainer could establish the requisite probable cause, article 14 would still prohibit State Authorities from arresting someone on an ICE detainer because unlike the Fourth Amendment, article 14 requires someone arrested without a warrant to be presented to a judge within 24 hours absent “extraordinary circumstances.” Compare Jenkins, 416 Mass. at 239 (24-hour rule under article 14), with County of Riverside v. McLaughlin, 500 U.S. 44, 46-47 (1991) (48-hour rule under the Fourth Amendment). Warrantless arrests based on ICE detainers violate this 24-hour rule because the detainers call for detention of up to 48 hours--or more, if detention lasts into a weekend--as a matter of course.

While the actual period of detention will of course vary from case to case, the mere possibility of detention for fewer than 24 hours cannot cure the article 14 problem. Cf. Commonwealth v. Valerio, 449 Mass. 562, 568 (2007) (where search warrant is insufficient on its face, but officers conducted

search pursuant to affidavit that meets particularity requirement, affidavit may cure deficiency in warrant only if presented when search is executed); Commonwealth v. Frodyma, 386 Mass. 434, 447-448 (1982) (search warrant was invalid because it lacked particularity, and suppressing evidence was proper even though seizure was limited to documents that would have fallen within narrower, valid warrant). Detention will exceed 24 hours in some cases, and an impermissible threat to exceed 24 hours--which occurs when the detainee is handed a DHS Form I-247D threatening detention for 48 hours--is present in every case. Cf. Miranda-Olivares, slip op. at 17 (concluding that period after court set bail at amount plaintiff could post and before criminal case was resolved constituted new seizure because plaintiff remained in custody solely due to threat of further detainment).

D. Arrests based on ICE detainers violate article 14's requirement that an arrest be supported by a statutory or common law grant of arrest authority.

Finally, in addition to the deficiencies above, State Authorities may not make warrantless arrests based on ICE detainers because no Massachusetts statute or common law authorizes them to do so. Undertaking these arrests without state legal authority is an independent violation of article 14.

1. A warrantless arrest lacking statutory or common law authority violates article 14.

As Appellant notes, see Pet.-Appellant's Br. 16-17, "State and local law enforcement authorities are the creatures of statute," and thus their authority to make warrantless arrests is determined by reference to state law. Craan, 469 Mass. at 33; cf. Miller v. United States, 357 U.S. 301, 305 (1958). A warrantless arrest that does not comply with state law violates article 14 even if the arresting officer arguably had probable cause to believe that the arrestee broke a federal criminal law. Craan, 469 Mass. at 33.

For example, in Craan, a police officer arguably possessed probable cause to believe that a suspect had violated the federal prohibition against marijuana possession. This Court nevertheless suppressed evidence on article 14 grounds because the officer lacked state statutory or common law authority to make an arrest for that particular federal offense. Craan, 469 Mass. at 33; see also Commonwealth v. Hernandez, 456 Mass. 528, 531-532 (2010) (where police lack authority to make warrantless arrest for motor vehicle violation, evidence seized must be suppressed under article 14). The same article 14 violation occurs when State Authorities make arrests based on ICE detainers because, as explained below, state law has

not given State Authorities any authority to make warrantless arrests for civil immigration offenses.

2. Massachusetts and federal law do not supply arrest authority for federal civil immigration offenses.

"[A]lthough the general rule is that local police are not precluded from enforcing federal statutes, their authority to do so derives from State law" (citations and internal quotation marks omitted). Craan, 469 Mass. at 33. Thus, the federal statute granting arrest authority to federal immigration officers, 8 U.S.C. § 1357(a)(2), does not, without more, authorize Massachusetts officials to make those same arrests. To make those arrests, State Authorities would need both (1) Massachusetts law authorizing their enforcement of Section 1357(a)(2), and (2) a federal law allowing them to enforce Section 1357(a)(2). Neither requirement is met here.

First, warrantless arrests for civil immigration offenses do not fit within any of the Commonwealth's traditional warrantless arrest authorities. At common law, an officer may make a warrantless arrest based on probable cause to believe that the suspect committed a felony. Commonwealth v. Holmes, 344 Mass. 524, 525 (1962). An officer also has common law authority to make a warrantless arrest for certain criminal misdemeanors involving a breach of the peace.

Commonwealth v. Howe, 405 Mass. 332, 334 (1989). By statute, officers may make warrantless arrests for specific misdemeanors.³¹ None of these authorities reaches civil immigration laws, which are neither felonies, nor criminal misdemeanors involving a breach of the peace, nor misdemeanors enumerated by statute.

Second, even if Massachusetts purported to authorize State Authorities to make warrantless arrests for violations of federal immigration laws, that alone would not be sufficient. Because "the Federal Government has occupied the field" of immigration, and because "the removal process is entrusted to the discretion of the Federal Government," a grant of enforcement authority from the federal government to the Commonwealth is also required. Arizona, 132 S. Ct. at 2505-2507 (striking down state law provision authorizing civil immigration arrests); see also Santos v. Frederick Cty. Bd. of Comm'rs, 725 F.3d 451, 457 (4th Cir. 2013) ("[L]ocal and state law enforcement officers may not detain or arrest an individual based on a civil immigration warrant."); Pet.-Appellant's Br. 22-24 (explaining

³¹ For example: failure to have operator's license or improperly equipped vehicle in certain instances, G.L. c. 90, § 21; trespassing on enclosed land after being forbidden, G.L. c. 266, § 120; morals offenses, G.L. c. 272, § 10; cruelty to animals, G.L. c. 272, § 82; larceny, G.L. c. 276, § 28; abuse in domestic violence cases, G.L. c. 276, § 28.

Congressional authorization is needed for state and local law enforcement officials to make civil immigration arrests, and describing the circumstances under which those officials may do so).

Under federal law, the only grant of authority for State Authorities to make civil immigration arrests is the 287(g) program, under which State Authorities are deputized to make immigration arrests. State Authorities in the 287(g) program may "perform a function of an immigration officer," but (1) only pursuant to "a written agreement" with the United States Attorney General, and, crucially, (2) only if the immigration functions authorized by that agreement are "consistent with State and local law."³² 8 U.S.C.

³² These conditions are reflected in 287(g) agreements that have been signed by the sheriffs in Plymouth and Bristol counties and the Massachusetts Department of Correction. See Memorandum of Agreement, ICE & Bristol County Sheriff's Office, at 7 (Jan. 18, 2017) available at https://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/Bristol_MOA_01182017.pdf ("[W]hen engaged in immigration enforcement activities, no participating BCSO personnel will be expected or required to violate or otherwise fail to maintain the BCSO's rules, standards, or policies, or be required to fail to abide by restrictions or limitations as may otherwise be imposed by law."); Memorandum of Agreement, ICE & Plymouth County Sheriff's Department, at 7 (Jan. 18, 2017), available at https://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/Plymouth_MOA_01182017.pdf (same); Memorandum of Agreement, ICE & Massachusetts Department of Correction, at 7 (June 23, 2016), available at <https://www.ice.gov/doclib/foia/>

§ 1357(g) (1). As explained supra, that condition is not met when State Authorities enforce ICE detainers. Thus, rather than authorizing arrests by local law enforcement under Section 1357(a) (2), the narrow authorization of the 287(g) program actually precludes Massachusetts officers from making such arrests.

II. Arrests based solely on ICE detainers violate the Fourth Amendment of the United States Constitution.

Many of the article 14 principles described above are based on protections provided by the Commonwealth's Constitution that go beyond the protection provided under the Fourth Amendment of the United States Constitution. See Commonwealth v. Rodriguez, 430 Mass. 577, 584-585 & n.7 (2000). In at least one respect, however, article 14 and Fourth Amendment principles speak with a single voice. Just as ICE detainers do not provide particularized information to support probable cause under article 14, see Part I.B supra, they also do not satisfy the relevant particularity requirement under the Fourth Amendment.

A. ICE detainers do not provide particularized probable cause.

Under the Fourth Amendment, probable cause determinations require a particularized assessment of

memorandumsofAgreementUnderstanding/massachusettsdepar
tmentofcorrections.pdf (same).

the facts and circumstances of the case. See Pringle, 540 U.S. at 373 (“Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person.”); Illinois v. Gates, 462 U.S. 213, 232 (1983) (“[P]robable cause is a fluid concept --turning on the assessment of probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules.”).

Courts have typically rejected categorical determinations, instead requiring an individualized assessment of the totality of the circumstances prior to finding probable cause or reasonable suspicion. See, e.g., Ybarra, 444 U.S. at 91 (noting that probable cause must be “particularized with respect to” the person seized); cf. Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (“An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.”); United States v. Am, 564 F.3d 25, 30 (1st Cir. 2009) (noting that the character of a location, on its own, “is insufficient to create reasonable suspicion”); Reid v. Georgia, 448 U.S. 438, 440-441 (1980) (reasonable suspicion cannot be based solely on an officer’s conclusion that a suspect fits a drug-courier profile because most of the factors the

officer relied upon did not “relate[] to [the defendants’] particular conduct”); United States v. Walden, 146 F.3d 487, 490 (7th Cir. 1998) (“Reasonable suspicion of criminal activity cannot be based solely on a person’s prior criminal record.”); United States v. Davis, 94 F.3d 1465, 1469 (10th Cir. 1996) (same).

As explained above, see Parts I.A. and I.B. supra, ICE detainers do not contain specific facts that would allow a local law enforcement authority to engage in an inquiry based on the particular facts of a case. They provide only a check-box conclusory assertion that probable cause exists, with no further explanation. Thus, the ICE detainers, standing alone, do not provide probable cause justifying further detainment.

B. ICE detainers do not provide the particularized facts required for an arrest under Section 1357.

Even assuming an ICE detainer supplies the necessary probable cause, it cannot authorize an arrest consistent with Section 1357(a)(2) because it makes no assertion about escape, contrary to the requirements of that statute. 8 U.S.C. § 1357(a)(2) (requiring determination of likelihood of escape in order to issue ICE detainer). Orellana, slip op. at 18-19 (without “particularized assessment of [subject’s] likelihood of escaping,” detainer “does

not provide a constitutionally sufficient basis to further detain [the subject]"); Moreno vs. Napolitano, U.S. Dist. Ct., No. 11 C 5452, slip op. at 1 (N.D. Ill. Sept. 30, 2016) (immigration detainers are "void" without "particularized inquiry" into flight risk as required under Section 1357(a)(2)).

Accordingly, an arrest based solely on an ICE detainer violates the Fourth Amendment.

III. This Court should exercise its superintendence powers to issue safeguards governing any assistance court officers may provide to immigration enforcement.

This case arises from a petition invoking this Court's superintendence powers, see G.L. c.211, § 3, and from an arrest by Massachusetts court officers made with a Massachusetts court's approval. Accordingly, whether or not this Court rules that the judiciary's actions in this case violated the Massachusetts and United States Constitutions, the Court may exercise its superintendence power to articulate rules that will govern the Massachusetts judiciary's future involvement in immigration enforcement. See Commonwealth v. O'Brien, 432 Mass. 478, 584 (2000) (Court may use superintendence powers to "impose requirements (by order, rule or opinion) that go beyond constitutional mandates").

The Court should articulate such rules here. Because the Trump Administration has supplied

individual federal officers with nearly unfettered discretion to set the nation's immigration arrest priorities, and because explicit anti-Mexican and anti-Muslim sentiment informs those priorities, unguided entanglement with immigration enforcement risks turning Massachusetts court officers into agents of discrimination. As explained below, this Court should therefore exercise its superintendence authority to bar the enforcement of ICE detainers by Massachusetts court officers, and to issue rules safeguarding those court officers against participation in discriminatory immigration enforcement.

A. This Court's superintendence authority necessarily includes the power to supervise the facilitation of immigration enforcement by Massachusetts court officers.

This Court has the power to "protect and preserve the integrity of the judicial system." Matter of Troy, 364 Mass. 15, 21 (1973). This power is vital to the judiciary, and it should be exercised here.

The Court's superintendence authority includes the power to advance the judiciary's mission to "further[] justice and [ensure] the regular execution of the laws." G.L. c. 211, § 3. That power "extends beyond traditional adjudication to include certain ancillary functions such as . . . judicial administration . . . including the authority to

control and supervise personnel within the judicial system and the power to control the actions of officers of the court and the environment of the court" (citations and internal quotation marks omitted). Campatelli v. Chief Justice of Trial Court, 468 Mass. 455, 459, 476 (2014).

This Court's supervisory authority of the entire judiciary necessarily includes the power to supervise Massachusetts court officers, who are hired and supervised by the Security Department of the Office of Court Management, within the Executive Office of the Massachusetts Trial Court. It also includes the power to issue guidance governing such officers. See In re McDonough, 457 Mass. 512, 513 (2010) (exercising superintendence powers to issue guidelines for trial courts "because of the absence of adequate existing guidance"); In re Zita, 455 Mass. 272, 278-279 (2009) (reviewing interlocutory ruling under superintendence powers because issues were "significant not only for the[] parties, but also because . . . resolution of them w[ould] provide needed guidance for future cases as well").

The Court's superintendence authority is implicated here because Massachusetts court officers have been involved in facilitating immigration enforcement, and that facilitation risks hindering the delivery of justice. Although this case involves

court personnel holding someone based on an ICE detainer, State Authorities--including court personnel--can also cooperate with ICE in myriad other ways. Some notify ICE of impending releases from custody to enable immediate detention by ICE. Some facilitate ICE "interviews" with incarcerated defendants, in which ICE officers determine whether to issue detainers, serve immigration charging documents, and request stipulation to removal orders. And some transfer defendants with "ICE holds" to federal custody. Statement of Agreed Upon Facts ¶ 20; Motion to Intervene, Dkt. No. 9, Sunderland Aff. ¶ 3 ("the Bristol County Sheriff's department took [client] to the ICE detention facility"), Werner Aff. ¶ 3 (client "was transferred to ICE custody because the Bristol County Sheriff honored" an ICE detainer).

Each of these modes of cooperation advances the goal of an ICE detainer: to enlist the help of State Authorities in ensuring the detention of people the Commonwealth "would otherwise have to releas[e]," R.A. 16-19 (DHS Form I-247D), and enabling their transfer to ICE custody for removal proceedings. In practice, these actions may undercut any holding by this Court prohibiting warrantless arrests pursuant to ICE holds.

Moreover, when undertaken by court personnel, each of these actions diverts time and resources toward federal immigration enforcement and away from

other administrative and judicial tasks. When court personnel hold a defendant pursuant to an ICE detainer, locate the subjects of ICE holds, or provide information to ICE about hearing times and locations, they are not doing other aspects of their jobs. These actions also expend judicial resources. For example, if a defendant posts bail and is taken into ICE custody, the court likely must consider and issue a writ of habeas corpus just to enable the defendant to appear. Motion to Intervene, Dkt. No. 9, Page Aff. ¶ 5. Even assuming these immigration enforcement tasks are worthy uses of the judiciary's time and resources in normal circumstances, the current circumstances are far from normal, as described below.

B. State Authorities' cooperation in the current detainer process risks discriminatory immigration enforcement.

Amici do not argue that each instance of a court officer assisting with immigration enforcement, without more, violates the Massachusetts and United States Constitutions. But, at present, such assistance raises two constitutionally significant concerns: unduly vague standards and, relatedly, discriminatory enforcement. Without guidance or appropriate limits, these concerns could emerge as concrete constitutional violations in future cases.

1. State Authorities' cooperation with ICE detainers raises significant due process concerns.

The complete lack of standards guiding either the issuance of ICE detainers or the assistance State Authorities provide to ICE creates a thoroughly vague ICE detainer regime. Much like a law that is void for vagueness under the due process clause,³³ this standardless regime--as applied by the DHS Public Safety Memo--fosters a substantial risk of arbitrary or discriminatory enforcement. Hill v. Colorado, 530 U.S. 703, 705 (2000). The Supreme Court has recognized that "[p]recision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." F.C.C. v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012). Both are lacking here.

³³ Due process protects all persons within the United States, even those without lawful immigration status. Zadyvdas v. Davis, 533 U.S. 678, 693 (2001) ("the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent" (citing Plyler v. Doe, 457 U.S. 202, 210 (1982)); Mathews v. Diaz, 426 U.S. 67, 77 (1976); Kwong Hai Chew v. Colding, 344 U.S. 590, 596-598, and n.5 (1953); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)); Universal Adjustment Corp. v. Midland Bank, Ltd., of London, England, 281 Mass. 303, 321 (1933) ("Whether the plaintiff is an alien or a citizen . . . it may invoke the rights established by" the "right to due process of law and the equal protection of the laws" [order of quotations reversed]).

The DHS Public Safety Memo governing ICE detainees offers neither precision nor guidance, making virtually any noncitizen a potential enforcement priority at any individual ICE officer's discretion. Its list of "priorities" includes anyone who has "committed" any crime, regardless of whether they have been convicted, or even charged, or who, "in the judgment of an immigration officer, otherwise pose[s] a risk to public safety" (emphasis added), which could include almost any adult resident of the United States. DHS Public Safety Memo at Sec. A. At the same time, the memo disclaims any principled approach to the exercise of this discretion, barring the creation of non-priority categories and opting instead for "case-by-case" determinations. Public Safety Memo at Sec. C. This untethered discretion, under which anyone and everyone's removal can be prioritized, is "so standardless that it authorizes or encourages seriously discriminatory enforcement."

United States v. Williams, 553 U.S. 285, 304 (2008).³⁴

³⁴ This starkly contrasts with the previous guidance, which established three specific enforcement priorities. U.S. Dep't of Homeland Security, Memorandum: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, at Sec. A (Nov. 20, 2014) (other immigration violations), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

The absence of instruction is just as glaring within the Commonwealth. There are no state guidelines governing or constraining State Authorities' engagement in the ICE detainer process. This "delegat[ion] [of] basic policy matters to [law enforcement officers] for resolution on an ad hoc and subjective basis" carries the "danger[] of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972).

These dangers are not hypothetical. Even before the Trump Administration began to reshape the federal immigration regime, studies demonstrated that ICE detainees were subject to arbitrary and discriminatory enforcement.³⁵ But now arbitrariness is the point. As the DHS Public Safety Memo demonstrates, and as the

³⁵ See, e.g., ICE Out of LA Coalition & UCLA School of Law International Human Rights Clinic, *The Human Rights Consequences of LASD-ICE Collaboration: A Toxic Entanglement* (Jan. 12, 2017), <http://iceoutofla.org/wp-content/uploads/2017/01/ICEoutofLA-UCLA-HR-Clinic-1-12-2017.pdf>; American Immigration Lawyers Association & National Immigrant Justice Center, *Immigration and Customs Enforcement's Detainer Program Operates Unlawfully Despite Nominal Changes* (Jan. 11, 2017), <http://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2017-01/ICE%20detainer%20program%20unlawful%20-policy%20brief%20NIJC%20%26%20AILA%202016%2001%2018.pdf>; Kohli et al., *Secure Communities by the Numbers* (Oct. 11, 2011), https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf (describing evidence of racial profiling associated with the activation of Secure Communities).

Trump Administration has confirmed, the new enforcement regime is designed to “take the shackles off” immigration enforcement officers.³⁶

2. State Authorities’ cooperation with ICE detainees raises significant equal protection concerns.

The new standardless, aggressive enforcement regime is not operating in a vacuum. President Trump’s repeated discriminatory statements against Mexican nationals and Muslims raises serious concerns that enforcement powers will be applied not just at random, but also in a discriminatory manner. Several courts have restrained or enjoined the Travel Ban EOs because they appear to have been motivated by animus against Muslims. See Int’l Refugee Assistance Project, slip op. at 38 (holding plaintiffs had shown likelihood of success on merits of establishment clause claim); Hawaii, slip op. at 31-39 (same); Aziz vs. Trump, U.S. Dist. Ct., No. 1:17-cv-116 (E.D. Va. Feb. 13, 2017) (same); Washington, 847 F.3d at 1168 (“The States’ claims [of religious discrimination] raise serious allegations and present significant constitutional questions.”).

³⁶ Spicer, White House Press Briefing (Feb. 21, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/21/press-briefing-press-secretary-sean-spicer-2212017-13>.

Like the Travel Ban EOs, the Border Security EO and DHS Border Security Memo can be understood only through the lens of the President's expressions of animus. See Border Security EO at Secs. 1-5, 9; DHS Border Security Memo at Secs. C, F, J, N. These policies rest on the irrational and prejudiced view that Mexican nationals and Muslims are somehow dangerous merely by virtue of their identities. This "bare . . . desire to harm" two particular groups "cannot constitute a legitimate governmental interest." Romer v. Evans, 517 U.S. 620, 634 (1996). The expressly discriminatory aims of the Trump Administration's immigration policies exacerbate the dangers inherent in the unlimited discretion described above, encouraging ICE agents to exercise their authority in a discriminatory manner.

The results are predictable. ICE officers have recently issued detainers for individuals based on nothing more than traffic infractions, even though those individuals had previously been granted legal status by DHS.³⁷ In recent weeks ICE officers have

³⁷ See, e.g., Smith, Dallas County 'Dreamer's' arrest puts scare in immigration rights community, Fort Worth Star-Telegram (Feb. 22, 2017), <http://www.star-telegram.com/news/local/community/dallas/article134325919.html>; Gomez, Judge bashes Miami-Dade for helping federal immigration agents, USA Today (Mar. 3, 2017), <http://www.usatoday.com/story/news/nation/>

reportedly arrested noncitizens who had been granted work permits or deferred action status by DHS;³⁸ a noncitizen in a county courthouse while she was seeking protection from a domestic abuser;³⁹ a noncitizen who had just dropped his daughter off at school, and whose other daughter was in the car;⁴⁰ and a noncitizen with no criminal record immediately after a news conference where she spoke against the Trump Administration's immigration enforcement policies.⁴¹

The Administration's recent statements, orders and memos also send a message to State Authorities that they, too, are welcome to discriminate while cooperating in the detainer process. Numerous sources have documented local law enforcement agencies'

2017/03/03/federal-judge-bashes-miami-dade-county-immigration-policy-sanctuary-cities/98692200/.

³⁸ See, e.g., Carter, Seattle 'Dreamer' sues over his detention under Trump's immigration actions, Seattle Times (Feb. 14, 2017), <http://www.seattletimes.com/seattle-news/seattle-dreamer-sues-over-detention-under-trump/>; Hauser, A Young Immigrant Spoke Out About Her Deportation Fears. Then She Was Detained, New York Times (Mar. 2, 2017), <https://www.nytimes.com/2017/03/02/us/immigrant-daca-detained.html>.

³⁹ Schladen, ICE detains alleged domestic violence victim, El Paso Times (Feb. 15, 2017), <http://www.elpasotimes.com/story/news/2017/02/15/ice-detains-domestic-violence-victim-court/97965624/>.

⁴⁰ Castillo, Immigrant arrested by ICE after dropping daughter off at school, sending shockwaves through neighborhood, Los Angeles Times (March 3, 2017), <http://www.latimes.com/local/lanow/la-me-immigration-school-20170303-story.html>.

⁴¹ Hauser, supra note 38.

increased discriminatory behavior when they increased cooperation with ICE.⁴² A choice by State Authorities to cooperate voluntarily with ICE practices that discriminate could thus lead to serious equal protection issues. See Finch v. Commonwealth Health Ins. Connector Auth., 461 Mass. 232, 242-243 (2012) (citing Ehrlich v. Perez, 394 Md. 691, 731 & n.23 (2006) and Aliessa ex rel. Fayad v. Novello, 96 N.Y.2d 418, 435 (N.Y. Ct. App. 2001)) (concluding Massachusetts failed to meet its burden to show that

⁴² Law enforcement in Georgia acted in discriminatory ways after entering into a Section 287(g) agreement, and law enforcement in Texas did so when cooperating with ICE through the Criminal Aliens Program. See American Civil Liberties Foundation of Georgia, *Terror and Isolation in Cobb, How Unchecked Police Power under 287(g) Has Torn Families Apart and Threatened Public Safety* (Oct. 2009), <https://www.aclu.org/other/terror-and-isolation-cobb-how-unchecked-police-power-under-287g-has-torn-families-apart-and>; Gardner II & Kohli, University of California, Berkeley Law School, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program* (Sept. 2009), http://www.motherjones.com/files/policybrief_irving_FINAL.pdf (reporting "dramatic rise" in "discretionary arrests of Hispanics for petty offenses" after Irving, Texas law enforcement was given constant access to ICE); Gutin, American Immigration Council, *The Criminal Alien Program Immigration Enforcement in Travis County, Texas* (Feb. 2010), https://www.americanimmigrationcouncil.org/sites/default/files/research/Criminal_Alien_Program_021710.pdf; Cantor, Noferi, & Martinez, American Immigration Council, *Enforcement Overdrive: A Comprehensive Assessment of ICE's Criminal Alien Program*, at 5, 17 (2015) (reporting that ICE has disproportionately removed Mexican and Central American nationals through Criminal Aliens Program).

its program was narrowly tailored where it discriminated on basis of immigrant status and national origin).

C. The Court should exercise its superintendence powers to protect against the substantial risk of discriminatory enforcement posed by ICE detainees.

Given these reasons for concern, this Court should not only hold that all officers in Massachusetts are constitutionally prohibited from making arrests based solely on ICE detainees, but also exercise its superintendence authority to issue guidance to Massachusetts court officers that limits their broader involvement with immigration enforcement. It could do so in several ways.

First, to head off any circumvention of the Court's disposition of this case, the Court might bar court officers from undertaking actions--such as alerting ICE when someone in court custody is scheduled to be released--that have effects similar to ICE detainees. Second, the Court could bar the use of court resources to assist ICE detention efforts outside the detainer context. Such assistance might include lending holding cells, even fleetingly, or by using time and equipment to call ICE or otherwise affirmatively assist ICE in locating and arresting persons. Third, even if the court does not bar court officers from facilitating federal immigration

enforcement, it could issue rules or safeguards designed to guide that facilitation. For example, the Court could require that court officers provide assistance to federal law enforcement authorities only when doing so would serve a constitutionally legitimate law enforcement purpose distinct from enforcing federal immigration laws.

Beyond guiding court officers, such guidance could supply a powerful example for other state actors and a vital reminder of the judiciary's ideals. Chief Justice Tani Cantil-Sakauye of the Supreme Court of California recently objected in the strongest of terms to the practice of ICE agents making arrests by "stalking" noncitizens in state courthouses. She reminded the United States Attorney General and the Secretary of DHS that courthouses are vital forums for the most vulnerable members of society in times of anxiety, stress and crisis. Crime victims, victims of sexual and domestic abuse and witnesses assisting police in prosecuting crimes--including undocumented immigrants in all of these categories--are entitled to and deserve free and fair access to the courts. She declared, "enforcement policies that include stalking courthouses and arresting undocumented immigrants, the vast majority of whom pose no risk to public safety, are neither safe nor fair." Such policies "not only compromise our core value of fairness but they

undermine the judiciary's ability to provide equal access to justice."⁴³

What Chief Justice Cantil-Sakauye sees happening in California is also happening in the Commonwealth. And while it may be that state courts can only make requests of federal officers, they can give instructions to their own personnel. The Commonwealth's courts and court officers should not become instruments of discrimination, even--or especially--if the provenance of that discrimination is the federal government.

⁴³ Letter from Chief Justice Tani G. Cantil-Sakauye, Supreme Court of California, to Attorney General Jeff Sessions and John F. Kelly, supra note 18.

CONCLUSION

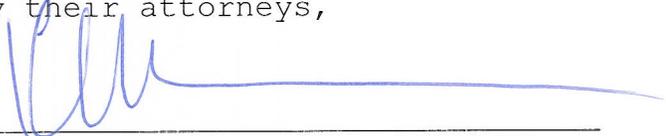
For the reasons stated above, amici curiae respectfully request that this Court hold that detention based solely on an ICE detainer violates the Massachusetts and Federal Constitutions, and that this Court use its superintendence authority to issue guidance concerning the cooperation of Massachusetts state and local authorities with ICE on detainer-related matters.

Dated: Boston, Massachusetts
March 20, 2017

Respectfully submitted,

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Certification of Compliance

Pursuant to Mass. R. App. P. 16(k), I hereby certify that this brief complies in all material respects with the Massachusetts Rules of Appellate Procedure pertaining to the filing of briefs.



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Certificate of Service

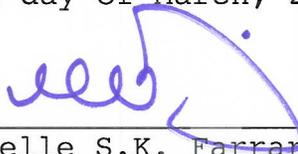
I, Isabelle S.K. Farrar, certify that on this day an original copy of the foregoing motion was served with the clerk of this Court. I further certify that two copies of the foregoing motion were served on counsel for each party separately represented in this matter by sending such copies by overnight courier service to:

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