

The Honorable Thomas S. Zilly

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

STATE OF WASHINGTON,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND  
SECURITY, et al.,

Defendants.

Case No. 2:19-cv-02043-TSZ

**MOTION OF THE STATE OF NEW  
YORK FOR LEAVE TO FILE *AMICUS  
CURIAE* BRIEF IN SUPPORT OF  
PLAINTIFF’S MOTION FOR  
PRELIMINARY INJUNCTION**

NOTE ON MOTION CALENDAR:  
January 31, 2020

The State of New York respectfully moves for leave to file an *amicus curiae* brief in support of Plaintiff the State of Washington’s Motion for Preliminary Injunction. (Dkt. No. 6.) A copy of the proposed brief, which is joined by the states of Connecticut, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and the District of Columbia<sup>1</sup> (the “Amici States”), is attached as Exhibit A to this motion and includes a statement of Amici States’ interest in the matter. The Amici States respectfully submit that the proposed *amicus curiae* brief will assist the Court in addressing the question of whether federal and Washington law recognize and establish a privilege against civil arrest in and around state courthouses and while coming and going to court proceedings.

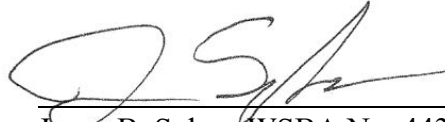
<sup>1</sup> For ease of reference, the District of Columbia shall be referred to herein as a “State.”

1 Undersigned counsel for the State of New York contacted counsel for the parties by phone  
2 and email on January 16, 2020, to inquire whether their clients had a position on this motion.  
3 Counsel for the State of Washington replied that the State consents to the motion. Counsel for  
4 Defendants indicated that Defendants would wait to review the motion and proposed brief before  
5 deciding whether to oppose this motion.

6  
7 Dated: January 16, 2020

Respectfully submitted,

8  
9 **NEWMAN DU WORS LLP**

10 

11 Jason B. Sykes, WSBA No. 44369

12 *jason@newmanlaw.com*

13 Rachel Horvitz, WSBA No. 52987

14 *rachel@newmanlaw.com*

15 2101 Fourth Avenue, Suite 1500

16 Seattle, WA 98121

17 (206) 274-2800

18 **STATE OF NEW YORK**

19 Steven C. Wu (*pro hac vice pending*)

20 *Deputy Solicitor General*

21 Matthew Colangelo (*pro hac vice pending*)

22 *Chief Counsel for Federal Initiatives*

23 Daniela Nogueira (*pro hac vice pending*)

24 *Assistant Attorney General*

25 Office of the Attorney General

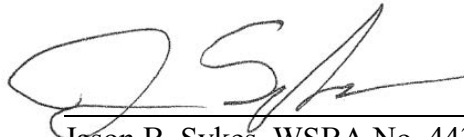
26 28 Liberty Street

27 New York, NY 10005

28 *Counsel for the State of New York*

**CERTIFICATE OF SERVICE**

1  
2 The undersigned certifies under penalty of perjury under the laws of the United States of  
3 America and the laws of the State of Washington that all participants in the case are registered  
4 CM/ECF users and that service of the foregoing documents will be accomplished by the  
5 CM/ECF system on January 16, 2020.

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9 Jason B. Sykes, WSBA No. 44369  
10 *jason@newmanlaw.com*  
11 2101 Fourth Ave., Ste. 1500  
12 Seattle, WA 98121  
13 (206) 274-2800  
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# Exhibit A

The Honorable Thomas S. Zilly

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**UNITED STATES DISTRICT COURT  
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STATE OF WASHINGTON,

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U.S. DEPARTMENT OF HOMELAND  
SECURITY, et al.,

Defendants.

Case No. 2:19-cv-02043-TSZ

**BRIEF OF AMICI STATES NEW YORK,  
CONNECTICUT, ILLINOIS,  
MARYLAND, MASSACHUSETTS,  
MINNESOTA, NEW JERSEY, NEW  
MEXICO, OREGON, PENNSYLVANIA,  
RHODE ISLAND, VERMONT,  
VIRGINIA, AND THE DISTRICT OF  
COLUMBIA IN SUPPORT OF  
PLAINTIFF’S MOTION FOR  
PRELIMINARY INJUNCTION**

NOTE ON MOTION CALENDAR:  
January 31, 2020

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Interests of Amici..... 1

Argument ..... 2

    A. The Defendants’ policy has significantly impaired Amici states’ ability to dispense justice through their courts..... 2

        1. Civil immigration arrests pursuant to the Defendants’ policy have seriously disrupted state judicial proceedings. .... 3

        2. The Defendants’ policy has impeded prosecutions and deterred our residents’ access to state courts. .... 8

        3. The Defendants have disregarded Amici states’ good-faith efforts to work cooperatively to avoid undue federal interference. .... 10

    B. The Defendants’ policy runs counter to a long-established nationwide consensus against disrupting courthouses with civil arrests..... 13

Conclusion ..... 16

**INTERESTS OF AMICI**

1  
2 Like the State of Washington, Amici States—New York, together with, Connecticut,  
3 Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Pennsylvania,  
4 Rhode Island, Vermont, Virginia, and the District of Columbia<sup>1</sup> —have a compelling interest in  
5 protecting their sovereign prerogative to provide access to justice for our residents and ensure the  
6 orderly operation of our court systems. An effective court system is a critical aspect of state  
7 sovereignty—one that is essential to ensuring that crimes are prosecuted, victims receive relief,  
8 and justice is done on behalf of the States’ residents.

9 In 2017, the Defendants implemented a policy, later memorialized in ICE Directive  
10 Number 11072.1, that threatens these sovereign interests by authorizing federal immigration  
11 agents and officers to conduct civil immigration arrests in and around state courthouses. As a  
12 result of that policy, the number of arrests at or near Amici States’ courthouses has soared. The  
13 practical effect has been to disrupt the effective functioning of our state courts and hinder both  
14 criminal and civil proceedings. Due both to detentions and their terrorizing effect, witnesses and  
15 parties miss court appearances, victims are afraid to seek judicial relief or cooperate with  
16 prosecutors and police, and prosecutors are unable to obtain justice for the residents we serve.

17 One federal court has already issued a preliminary injunction to stop these disruptive  
18 arrests. Another has held that the disruptions suffered by the States, if proven at trial, would  
19 support claims under both the Administrative Procedure Act and the Tenth Amendment. As both  
20 these courts have recognized, Congress did not authorize federal immigration agents and officers  
21 to conduct civil immigration arrests because the Immigration and Nationality Act’s arrest  
22 authorization incorporated the long-standing common law privilege against civil arrests at or  
23 near courthouses. And as the latter court explained, the serious interference States have suffered  
24 from such civil immigration arrests invades core sovereign interests in a way that implicates the  
25 protections of the Tenth Amendment.

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<sup>1</sup> For ease of reference, the District of Columbia shall be referred to herein as a “State.”

1 This amicus brief supports Washington’s motion for a preliminary injunction by explaining  
2 how, like Washington, Amici States have experienced direct interference with their criminal  
3 prosecutions and civil proceedings as a result of the Defendants’ courthouse-arrest policy. The  
4 brief further explains that the common law privilege that has already informed two other courts’  
5 rulings in this area reflects a long-standing, nationwide consensus about the unique importance  
6 of preserving the dignity and security of state courts so that they may continue to dispense  
7 justice. For these reasons and those provided in Washington’s motion, this Court should issue a  
8 preliminary injunction here.

### 9 ARGUMENT

#### 10 **A. The Defendants’ policy has significantly impaired Amici states’ ability to dispense** 11 **justice through their courts.**

12 Under the U.S. Constitution, as reflected in part by the Tenth Amendment, the States  
13 “retain a significant measure of sovereign authority.” *New York v. United States*, 505 U.S. 144,  
14 156 (1992) (alteration and quotation marks omitted). Among the sovereign powers reserved to  
15 the States is “the maintenance of state judicial systems for the decision of legal controversies.”  
16 *Atl. Coast Line R.R. v. Bhd. of Locomotive Eng’rs*, 398 U.S. 281, 285 (1970). Federal  
17 interference with that power threatens “the fundamental constitutional independence of the  
18 States.” *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988).

19 Since 2017, however, civil immigration arrests in and around state courthouses have  
20 interfered with Amici States’ operation of state judicial proceedings and their ability to pursue  
21 criminal prosecutions and civil proceedings in a way that injures the States’ core sovereign  
22 interests. Arrests have forced courts to adjourn proceedings, postpone hearings, administer trials  
23 without witnesses, and delay or dismiss cases. Investigating and prosecuting crime and other  
24 legal violations has become increasingly difficult as victims and witnesses from immigrant  
25 communities have either been directly detained by federal authorities, or become afraid to report  
26 crimes, testify in court, or cooperate with law enforcement or prosecutors. In short, these arrests  
27 have made it increasingly difficult, and sometimes impossible, for Amici States to maintain the  
28



1 open, safe, and fair courts that are necessary for the orderly administration of justice and the  
2 preservation of public safety.

3 **1. Civil immigration arrests pursuant to the Defendants' policy have seriously**  
4 **disrupted state judicial proceedings.**

5 State courts are part of complex judicial systems responsible for protecting the rights of  
6 state residents and visitors. Amici States' court systems include not only trial courts, appellate  
7 courts, and courts of last resort, but also specialized courts and alternative justice programs.  
8 Together, these courts and programs adjudicate millions of disputes each year that touch on a  
9 wide range of matters critical to the health and safety of state residents—including crime, child  
10 custody, domestic violence, housing, wills and estates, health care, and human trafficking.<sup>2</sup> As in  
11 Washington, immigration arrests at or near state courthouses in Amici States have interfered with  
12 state judicial proceedings and prevented our residents from getting timely and much-needed  
13 judicial relief.

14 In New York, ICE agents have been conducting enforcement activities at or near  
15 courthouses on a weekly basis since 2017—amounting to hundreds of civil arrests.<sup>3</sup> Often, these  
16 enforcement activities have been accompanied by aggressive tactics that threaten the safety of  
17 court officials and attendees. For example, in July 2019, ICE agents shattered a glass door of the  
18 Yonkers City Court when they apprehended a man opening the courthouse door.<sup>4</sup> Court officers  
19 had to restrict entry into the building temporarily to ensure public safety.<sup>5</sup> In April 2019, agents  
20 arrested a pregnant mother coming out of a preliminary custody hearing for her two U.S. citizen  
21 children in Family Court in Queens.<sup>6</sup> She was detained at the ICE Bergen County Detention  
22 Center, where she received no health care treatment for her pregnancy despite acute symptoms.<sup>7</sup>

24 <sup>2</sup> See, e.g., *2018 Annual Report*, New York State Unified Court System, 37–39 (2018),  
[https://www.nycourts.gov/legacypdfs/18\\_UCS-Annual\\_Report.pdf](https://www.nycourts.gov/legacypdfs/18_UCS-Annual_Report.pdf).

25 <sup>3</sup> See *State of New York v. U.S. Immigration & Customs Enf't*, No. 19 Civ. 8876, 2019 WL 6906274, at \*1  
26 (S.D.N.Y. Dec. 19, 2019) (discussing number of arrests in 2017 and 2018); see also *The Courthouse Trap*,  
Immigration Defense Project, 6 (Jan. 2019), [https://www.immigrantdefenseproject.org/wp-](https://www.immigrantdefenseproject.org/wp-content/uploads/TheCourthouseTrap.pdf)  
27 [content/uploads/TheCourthouseTrap.pdf](https://www.immigrantdefenseproject.org/wp-content/uploads/TheCourthouseTrap.pdf).

28 <sup>4</sup> Compl. ¶ 69, *State of New York*, 2019 WL 6906274.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* ¶ 76.

<sup>7</sup> *Id.*

1 Lawyers eventually secured her release.<sup>8</sup> In September 2018, plainclothes ICE officers  
 2 surrounded a defendant leaving Kings County Supreme Court, threw him against a wall, then  
 3 pulled him into an unmarked car with no plates.<sup>9</sup> The tumult prompted one bystander to call 911,  
 4 believing she had witnessed a kidnapping.<sup>10</sup>

5 ICE agents making civil immigration arrests have also disrupted judicial proceedings by  
 6 preventing people from attending their hearings or trials in New York. In April, March, and  
 7 January 2019, ICE officers arrested individuals who were scheduled for court business at the  
 8 Westchester and Bronx County courts before they could even appear in court.<sup>11</sup> And in  
 9 November 2018, a defendant on his way into the Queens County Criminal Court was arrested,  
 10 detained at the Bergen detention center, transferred to another facility in Oklahoma, and quickly  
 11 deported. Although his case was on track to be resolved by a noncriminal disposition, he was  
 12 never able to resolve his case.<sup>12</sup>

13 Other States have experienced similar disruptions to the orderly administration of justice as  
 14 a result of civil immigration arrests by federal officers and agents. In Connecticut, standoffs with  
 15 ICE agents have disrupted entire days of proceedings at state courthouses. In December 2019, a  
 16 recipient of Deferred Action for Childhood Arrivals (“DACA”) accompanied a friend to court in  
 17 Milford to provide moral support.<sup>13</sup> In the courthouse lobby, the DACA recipient was confronted  
 18 by ICE agents, cuffed, and threatened with arrest. After proving that she was lawfully present  
 19 under DACA, she was released, but not before the incident had provoked a disruptive faceoff  
 20 between ICE agents and immigration advocates at the courthouse.

21 Similarly, in October 2019, ICE agents entered a courthouse in Derby, Connecticut, in  
 22 search of a Jamaican citizen who had overstayed his tourist visa.<sup>14</sup> The man took shelter in the  
 23

24 <sup>8</sup> *Id.*

25 <sup>9</sup> *Id.* ¶ 81.

26 <sup>10</sup> *Id.*

27 <sup>11</sup> *Id.* ¶¶ 75, 77, 86.

28 <sup>12</sup> *Id.* ¶ 83.

<sup>13</sup> See Paul Bass & Sam Gurwitt, *Another ICE Courthouse Arrest Interrupted*, New Haven Independent (Dec. 19, 2019 12:39 p.m.), [https://www.newhavenindependent.org/index.php/archives/entry/ice\\_courthouse\\_arrest\\_thwarted](https://www.newhavenindependent.org/index.php/archives/entry/ice_courthouse_arrest_thwarted).

<sup>14</sup> Eugene Driscoll & Thomas Breen, *ICE Folds in Immigrant Standoff*, New Haven Independent (Oct. 31, 2019 4:23 p.m.), [https://www.newhavenindependent.org/index.php/archives/entry/derby\\_courthouse](https://www.newhavenindependent.org/index.php/archives/entry/derby_courthouse).

1 public defender’s office, which refused to allow ICE agents to enter. A daylong standoff ensued,  
 2 in which ICE agents and immigration advocates faced off in and around the courthouse,  
 3 disrupting the day’s proceedings.

4 The Administrative Office of Illinois Courts have also documented dozens of arrests at  
 5 Illinois courthouses since 2017, including inside courtrooms in Skokie, Cook, Champaign, and  
 6 Kane counties. In one April 2017 incident, ICE agents arrested a father who was attempting to  
 7 finalize an adoption at the DuPage County Courthouse.<sup>15</sup> Instead, the father was deported to  
 8 Mexico.

9 In Massachusetts, arrests and interrogations have disrupted proceedings as well. At the  
 10 Somerville District Court, court security officers had to interfere after “a fistfight had broken  
 11 out” between ICE agents and their target for arrest.<sup>16</sup> At the Lynn District Court, an ICE officer  
 12 was observed verbally harassing a court interpreter regarding a communication she had  
 13 interpreted between a defendant and counsel, prompting onlookers to intervene to force the  
 14 officer to leave the interpreter alone.<sup>17</sup> At the Middlesex Superior Court, a criminal defendant  
 15 and his uncle were waiting in a conference room for a hearing to begin, when ICE agents entered  
 16 the room and promptly handcuffed them both.<sup>18</sup> The ICE agents ultimately realized that the  
 17 defendant’s uncle was not removable, but by that time, they had lost the keys to the handcuffs  
 18 and had to obtain a handsaw in order to remove the cuffs.<sup>19</sup> In one incident at the Roxbury  
 19 District Court, a criminal defendant appeared for a pretrial hearing with his girlfriend and young  
 20 child when they were approached by ICE and asked for identification.<sup>20</sup> During the hearing, six  
 21 ICE agents sat directly behind the defendant in the gallery whispering to him that they were  
 22 going to get him as soon as the hearing ended. The defendant was under such stress that he  
 23

24 <sup>15</sup> Chief Justice Lloyd A. Karmeier, *ICE Arrests Threaten to Chill Access to Justice*, Illinois Courts Connect (Aug.  
 28, 2017), [http://www.illinoiscourts.gov/Media/enews/2017/082517\\_chief\\_justice.asp](http://www.illinoiscourts.gov/Media/enews/2017/082517_chief_justice.asp).

25 <sup>16</sup> *Ryan v. U.S. Immigration & Customs Enf’t*, 382 F. Supp. 3d 142, 151 (D. Mass. 2019).

26 <sup>17</sup> Compl. ¶ 54, *Ryan v. U.S. Immigration & Customs Enf’t*, No. 1:19-cv-11003-IT (D. Mass. April 29, 2019), ECF.  
 No. 1.

27 <sup>18</sup> Compl. ¶ 59, *Ryan v. U.S. Immigration & Customs Enf’t*, No. 1:19-cv-11003-IT (D. Mass. April 29, 2019), ECF.  
 No. 1,

28 <sup>19</sup> *Id.*

<sup>20</sup> Compl. ¶ 57, *Ryan v. U.S. Immigration & Customs Enf’t*, No. 1:19-cv-11003-IT (D. Mass. April 29, 2019), ECF.  
 No. 1,

1 fainted during the hearing. When asked for an administrative warrant or detainer, the ICE agents  
 2 could not produce any documents. The defendant was released, but did not appear at his next  
 3 hearing, even though the case was almost certainly going to be dismissed.<sup>21</sup>

4 In New Mexico, a Ph.D. student lawfully in the United States on a student visa was  
 5 detained by ICE agents in February 2019 at Bernalillo County's Metropolitan Court in the state's  
 6 largest city when he faced a charge for driving under the influence.<sup>22</sup> Despite directing the  
 7 arresting agents to his sponsor at the University of New Mexico, he was taken to a holding cell  
 8 and told he would be deported before ultimately being released. That same month, ICE agents  
 9 arrested a woman who had gone to the same court to provide proof that she had completed  
 10 classes following a speeding ticket.<sup>23</sup>

11 In New Jersey, at an Essex County courthouse, a defendant was arrested immediately  
 12 following trial and deported prior to sentencing, despite a request from the judge to complete the  
 13 proceeding. In another case, a parent at a hearing regarding return of custody of his or her  
 14 children from foster care was arrested while in the courtroom.<sup>24</sup>

15 In Oregon, civil immigration arrests at or near courthouse have raised serious risks to  
 16 public safety. In June 2018, ICE arrested a man immediately following a hearing in his case just  
 17 outside a Washington County courtroom. The arrest was so violent and chaotic that the judge  
 18 was compelled to send a letter documenting the event to the Chief Justice of the Oregon Supreme  
 19 Court, among others. The judge described the arrest as creating "general melee," and explained,

20 Many people were screaming, bodies were slamming against the walls, it was  
 21 clear that some manner of fighting was going on, and it appeared that someone  
 22 (a female) was in anguish or pain. But we had no idea what was happening or  
 23 who was involved. . . .

24 <sup>21</sup> *Id.*

25 <sup>22</sup> Katy Barnitz, *ACLU seeks video of ICE arrest at courthouse*, Albuquerque Journal (Aug. 14, 2019 12:05 a.m.),  
<https://www.abqjournal.com/1353537/aclu-seeks-video-of-ice-arrest-at-courthouse-lawsuit-argues-courts-refusal-to-release-footage-is-improper.html>.

26 <sup>23</sup> Elise Kaplan, *Migrant advocates say ICE arrests continue at court*, Albuquerque Journal (May 21, 2019 9:21  
 27 p.m.), <https://www.abqjournal.com/1318815/advocates-protest-continued-ice-arrests-at-metro-court.html>.

28 <sup>24</sup> *ICE in the New Jersey Courts: The Impact of Immigration Enforcement on Access to Justice in the Garden States*,  
 Make the Road New Jersey, 3 (Dec. 2017),  
[https://d3n8a8pro7vhmx.cloudfront.net/maketheroadnj/pages/70/attachments/original/1513001085/ICE\\_in\\_the\\_Courts\\_Data\\_-\\_final\\_Dec\\_10\\_2017.pdf](https://d3n8a8pro7vhmx.cloudfront.net/maketheroadnj/pages/70/attachments/original/1513001085/ICE_in_the_Courts_Data_-_final_Dec_10_2017.pdf).

1 ICE agents . . . placed the security of this court, and those before it, in an  
 2 untenable and unacceptable position. Their actions to lie in wait on the third  
 3 floor of the courthouse and ambush a non-violent defendant during one of our  
 4 busiest dockets directly jeopardized the safety of everyone involved. And, the  
 5 disruption was significant.<sup>25</sup>

6 Despite the judge’s objection to the “melee,” the Defendants were not deterred. A couple  
 7 months later, plainclothes ICE officers arrested a man *inside* the same judge’s courtroom  
 8 following a hearing.

9 Other cases in Oregon involved similar disruptions. For example, ICE arrested a father of  
 10 three at the Washington County Courthouse who was attempting to pay a ticket for driving  
 11 without a license. ICE also arrested a man at the same courthouse who reported to pay his final  
 12 fine on a DUII conviction. He was jailed and ultimately deported. In April 2017, plainclothes  
 13 ICE agents followed a noncitizen from the Clackamas County Courthouse to his truck following  
 14 a hearing, blocked his truck from leaving and violently arrested him.

15 In Pennsylvania, immigration arrests at courthouses have led to serious miscarriages of  
 16 justice. In one 2018 incident, a man walked outside of a Montgomery County courthouse during  
 17 a break only to be arrested by ICE. Family members who had posted his \$9,000 cash bail did not  
 18 know if they would see the money again.<sup>26</sup> In another incident, ICE arrested a noncitizen even  
 19 though the noncitizen did not match the police photo they possessed.<sup>27</sup>

20 Lawyers and community advocates in Pennsylvania also report that the Defendants often  
 21 make arrests before a person can attend to his or her court business. For example, in Bucks  
 22 County, one man was detained by ICE on his way into the Ottsville Magisterial District Court to  
 23 pay for a ticket for driving without a license.<sup>28</sup> In these types of situations, judges will issue

24 <sup>25</sup> Letter from Chief Criminal Judge Andrew R. Erwin to WSH-Judges, Bob Herman, Kevin Barton, Pat Garrett  
 25 (June 1, 2018) (a copy of the letter is on file with counsel).

26 <sup>26</sup> Brian Hickey, *ICE Arrests at Montgomery County Courts Spark Fears of Chilling Effect on Crime Victims,*  
 27 *Witnesses*, Philly Voice (Mar. 15, 2018), <https://www.phillyvoice.com/ice-arrests-montco-courthouses-said-have-chilling-effect-crime-victims-witnesses>.

28 <sup>27</sup> *Obstructing Justice: The Chilling Effect of ICE’s Arrests of Immigrants at Pennsylvania Courthouses*, Stephen  
 and Sandra Sheller Center for Social Justice, Temple University Beasley School of Law, 6 (Jan. 30, 2019),  
<https://www2.law.temple.edu/cs/publication/obstructing-justice-the-chilling-effect-of-ices-arrests-of-immigrants-at-pennsylvanias-courthouses>.

<sup>28</sup> *Id.*

1 “bench warrants” for failure to appear, which will then be held against the noncitizen during his  
2 or her hearing before an immigration judge.<sup>29</sup>

3 Similarly, in Vermont, ICE arrested a man outside a Burlington courthouse in 2017 as he  
4 was on his way to attend a preliminary hearing for a DUI charge. The prosecution dismissed the  
5 charge at the hearing.<sup>30</sup> The same year, another man was arrested as he entered a Windsor  
6 County courthouse to respond to a DUI charge.<sup>31</sup> And on New Year’s Eve 2018, a local activist  
7 was arrested inside a Middlebury courthouse immediately after he pleaded not guilty to a DUI  
8 charge.<sup>32</sup>

9 **2. The Defendants’ policy has impeded prosecutions and deterred our residents’**  
10 **access to state courts.**

11 Civil immigration arrests in or around state courthouses have also seriously interfered with  
12 the investigation and prosecution of crime in Amici States and deterred our residents’ ability or  
13 willingness to access state courts.

14 In New York, ICE has often failed to produce defendants for scheduled court appearances,  
15 even when requested to do so—preventing criminal trials from proceeding and justice from  
16 being served. In 2018, ICE produced only 23 of 53 detainees to the Nassau District Attorney’s  
17 office.<sup>33</sup> In one May 2019 case, ICE arrested and deported a criminal defendant facing felony  
18 sexual and domestic violence charges to Uruguay minutes before he was due to plead guilty at  
19 the Kings County Criminal Court.<sup>34</sup> Although the defendant would have had to spend more than  
20  
21  
22

23 <sup>29</sup> *Id.*

24 <sup>30</sup> Kathleen Masterson, *ICE arrests dairy worker en route to Burlington courthouse*, Vt. Public Radio (Mar. 16,  
2017), available at <https://www.vpr.org/post/ice-agents-arrest-dairy-worker-en-route-burlington-courthouse#stream/0>.

25 <sup>31</sup> Kymelya Sari, *Migrant LGBTQ leader faces deportation after ICE arrest at courthouse*, Seven Days (Jan. 24,  
2019), available at <https://www.sevendaysvt.com/OffMessage/archives/2019/01/24/migrant-lgbtq-leader-faces-deportation-after-ice-arrest-at-courthouse>.

26 <sup>32</sup> *Id.*

27 <sup>33</sup> *Safeguarding the Integrity of Our Courts: The Impact of ICE Courthouse Operations on New York State*,  
Immigrant Defense Project, 19 (2019), <https://www.immigrantdefenseproject.org/wp-content/uploads/Safeguarding-the-Integrity-of-Our-Courts-Final-Report.pdf>.

28 <sup>34</sup> Compl. ¶ 92, *State of New York*, 2019 WL 6906274.

1 three years in prison, his removal has permitted him to continue to harass the victim on social  
2 media, where he boasts about getting away with his past crimes.<sup>35</sup>

3 Crime reporting in New York has also decreased, as call rates to the Immigrant Affairs  
4 Unit (“IAU”) of state prosecutors’ offices show. In 2018, calls to the Kings County IAU were  
5 down 67% compared to 2016.<sup>36</sup> Nassau County’s IAU had 82 calls from March to December  
6 2015, 51 calls in 2016, only three calls in 2017, and only eight calls in 2018.<sup>37</sup> In addition,  
7 victims and witnesses have been less willing to testify in court. For example, in two  
8 prosecutions, two men robbed at gunpoint and knifepoint refused to appear to testify against their  
9 assailants. In the latter case, the prosecutor had to reduce the charges to a misdemeanor as a  
10 result.<sup>38</sup>

11 In Illinois, the Administrative Office of Illinois Courts has seen a 25% decrease in  
12 interpreter usage since 2015. Administrative officials are concerned that the decrease reflects  
13 how litigants with limited English proficiency are coming to court with less frequency due to  
14 ICE’s increased presence at Illinois courthouses.

15 In Massachusetts, a federal court has recognized that “noncitizens are reluctant to attend  
16 court in any capacity” as a result of the Defendants’ growing practice of conducting civil  
17 immigration arrests at or near state courthouses.<sup>39</sup> Some noncitizens have “reported fear seeking  
18 the court’s assistance for help with domestic violence concerns.”<sup>40</sup> “Victims of employer abuse  
19 and wage theft have also refused to seek court intervention because of their fears of ICE presence  
20 in the courthouses.”<sup>41</sup>

21 In New Jersey, fear of immigration arrests has had significant impacts on crime reporting  
22 and participation in the justice system. In one case in Gloucester County, robbery victims who  
23 were eyewitnesses in a 2019 homicide case were undocumented. Although prosecutors sought to  
24

25 \_\_\_\_\_  
35 *Id.*

26 36 *Safeguarding the Integrity of Our Courts*, *supra* note 21, at 13–14 & fig. 2.

27 37 *Id.* at 14–15 & fig. 3.

28 38 Compl. ¶ 90, *State of New York*, 2019 WL 6906274.

39 *Ryan*, 382 F. Supp. 3d at 151.

40 *Id.*

41 *Id.*

1 have them testify at trial, they relocated to Tennessee and refused to return for trial due to ICE  
2 detainers.

3 This incident accords with others recounted by legal and social service providers in New  
4 Jersey, who report a decrease in noncitizens seeking assistance for domestic violence or family  
5 issues.<sup>42</sup> Noncitizens are also reluctant to attend court or seek judicial relief. Of 59 surveyed  
6 providers in 14 New Jersey counties, 78% have had noncitizen clients who were scared to attend  
7 criminal court, 62% have had noncitizen clients withdraw or fail to pursue orders of protection,  
8 56% have had noncitizen clients refuse to attend municipal court, 55% have had noncitizen  
9 clients fail to appear in municipal or criminal court, and 55% have had noncitizen clients fail to  
10 file petitions or complaints—all due to fear of ICE presence at courthouses.<sup>43</sup>

11 ICE’s activities have also had profound consequences on the pursuit of justice in Oregon.  
12 Attorneys from Oregon report that key witnesses have refused to testify for fear of being arrested  
13 by the Defendants, that clients have declined to report sexual assault to the authorities for fear of  
14 being deported, and that other clients have declined to fully pursue their rights so they could  
15 avoid stepping foot in a courthouse. Community advocates have reported that individuals they  
16 work with have chosen to endure domestic violence rather than report it or seek a restraining  
17 order for fear of arrest and deportation.

18 **3. The Defendants have disregarded Amici states’ good-faith efforts to work**  
19 **cooperatively to avoid undue federal interference.**

20 Several Amici States have made good-faith efforts to work cooperatively with the  
21 Defendants to see if civil immigration arrests at or near state courthouses can be conducted  
22 without interfering with judicial proceedings or unduly prejudicing our residents. These efforts  
23 began in March 2017, after the Chief Justice of California sent a letter to the Departments of  
24 Justice and Homeland Security explaining that state courthouses are “a vital forum for ensuring  
25 access to justice and protecting public safety,” and that these important sovereign functions  
26 would be undermined “if the public feels that our state institutions are being used to facilitate  
27

28 <sup>42</sup> *ICE in the New Jersey Courts*, *supra* note 24, at 2–3.

<sup>43</sup> *Id.*



1 other goals and objectives, no matter how expedient they may be.”<sup>44</sup> The Chief Justice requested  
 2 that the Defendants refrain from “stalking courthouses” in order to ensure the state “judiciary’s  
 3 ability to provide equal access to justice.”<sup>45</sup> The Chief Justice’s letter was soon followed by  
 4 similar letters from the Chief Justices or Attorneys General of Connecticut, Maryland,  
 5 Massachusetts, New Jersey, Washington, and Oregon.<sup>46</sup>

6 When these pleas fell on deaf ears, many Amici States took legal and administrative steps  
 7 to preserve and protect their judicial systems. For example, in New York, the Office of Court  
 8 Administration (“OCA”) initially issued a policy in 2017 requiring all law enforcement agents,  
 9 including ICE, to identify themselves and notify a judge if they intended to arrest a party or  
 10 participant in that judge’s case.<sup>47</sup> The policy also prohibited courtroom arrests absent an  
 11 emergency and required court security personnel to file “Unusual Occurrence Reports” for each  
 12 arrest.

13 Next, in April 2018, the Governor of New York issued Executive Order No. 170.1 to  
 14 further guide immigration arrests in state facilities.<sup>48</sup> The order required that federal immigrant  
 15 agents obtain a judicial warrant or order to make an arrest on state facilities, “unless the civil  
 16 arrest is related to a proceeding within such facility.”<sup>49</sup> In April 2019, OCA updated its policy to  
 17 include the same judicial-warrant requirement for arrests conducted in state courthouses.<sup>50</sup>

18 Other Amici States have taken similar steps. In Illinois, the Cook County of Board  
 19 Commissioners issued a proclamation in February 2018 directing ICE to refrain from  
 20 enforcement activities within Cook County courthouses.<sup>51</sup> In New Mexico, the state’s busiest  
 21

22 <sup>44</sup> Letter from Chief Justice of Cal. Tani G. Cantil-Sakauye to Att’y General Jeff Sessions and Sec’y of Homeland  
 23 Sec. John F. Kelly (Mar. 16, 2017),

[https://newsroom.courts.ca.gov/\\_gallery/get\\_file/?file\\_id=58caba3aa1383525625a54c2&ir=1&file\\_ext=.pdf](https://newsroom.courts.ca.gov/_gallery/get_file/?file_id=58caba3aa1383525625a54c2&ir=1&file_ext=.pdf).

<sup>45</sup> *Id.*

24 <sup>46</sup> *Safeguarding the Integrity of Our Courts*, *supra* note 21, at 69 & nn.304–05 (collecting letters).

25 <sup>47</sup> Office of the Chief Admin. Judge, N.Y. State Unified Court Sys., *Policy and Protocol Governing Activities in  
 Courthouses by Law Enforcement Agencies* (Apr. 26, 2017).

26 <sup>48</sup> State of N.Y. Exec. Order No. 170.1, *Amendment to Executive Order 170—State Policy Concerning Immigrant  
 Access to State Services and Buildings* (Apr. 25, 2018).

<sup>49</sup> *Id.*

27 <sup>50</sup> Office of the Chief Admin. Judge, N.Y. State Unified Court Sys., *Protocol Governing Activities in Courthouses  
 by Law Enforcement Agencies* (Apr. 17, 2019).

28 <sup>51</sup> *A Proclamation by the President of the Board of Commissioners Cook County, Illinois*, (Feb. 7, 2018),

[https://www.cookcountyil.gov/sites/default/files/2.7.18\\_proclamation\\_ice\\_county\\_courts.pdf](https://www.cookcountyil.gov/sites/default/files/2.7.18_proclamation_ice_county_courts.pdf).

1 court adopted a “Courthouse Access Policy” mandating that law enforcement officers “should  
 2 not hinder or impede individuals in the courthouse conducting court business” without a lawful  
 3 arrest warrant.<sup>52</sup> Reasoning that arrests, interrogations, or other restrictions on freedom “create[]  
 4 an environment of fear, confusion and mistrust among courthouse participants,” the policy  
 5 requires all law enforcement officers to present and display appropriate credentials upon entering  
 6 the courthouse and prohibits interrogations unless necessary for public safety or to execute an  
 7 arrest warrant.<sup>53</sup>

8 In New Jersey, the Chief Justice also issued a directive imposing new requirements on ICE  
 9 agents attempting arrests at any state courthouses in May 2019.<sup>54</sup> That directive requires ICE  
 10 agents seeking to make a courthouse arrest to identify themselves, state the purpose of their visit,  
 11 and notify court security personnel, among other requirements. Oregon issued a similar directive  
 12 in 2019 “to maintain the integrity of our courts and provide access to justice,”<sup>55</sup> as did  
 13 Philadelphia.<sup>56</sup>

14 Despite these efforts, federal immigration officers and agents have often failed to follow  
 15 court rules and directives and refused to produce a judicial warrant or even to identify  
 16 themselves. In New York, for example, ICE agents told the wife of a defendant outside the  
 17 Queens County Criminal Courthouse in June 2019 that they would produce a warrant for the  
 18 defendant’s arrest, but never did.<sup>57</sup> Instead, they pushed the defendant into a fence and arrested  
 19 him.<sup>58</sup> In June and August 2019, ICE agents at the New York County Criminal Courthouse,  
 20 Manhattan Criminal Court, and Kings County Criminal Court also failed to produce judicial  
 21

22 <sup>52</sup> *Courthouse Access Policy*, New Mexico Judicial Branch, Second Judicial District Court 3 (Nov. 9, 2017),  
 23 <https://seconddistrictcourt.nmcourts.gov/uploads/files/News/SJDCCourthouseAccessPolicy20171120.pdf>.

<sup>53</sup> *Id.*

24 <sup>54</sup> *Immigration-Related Policies: Revisions to Judiciary Forms; Updated Attorney General Guidance; Court  
 Involvement with ICE Activities*, Supreme Court of New Jersey, (May 23, 2019)  
 25 <https://www.njcourts.gov/notices/2019/n190523a.pdf>.

26 <sup>55</sup> *Oregon Chief Justice Issues Rule Limiting Courthouse Arrests*, (Nov. 14, 2019),  
 27 [https://www.courts.oregon.gov/news/Lists/ArticleNews/Attachments/1213/acd3fb79befadf4982b20ceba127ffd0-  
 Media-Release-New-UTCR-Limiting-Civil-Arrests-in-Court-Facilities-effective-2019-11-14.pdf](https://www.courts.oregon.gov/news/Lists/ArticleNews/Attachments/1213/acd3fb79befadf4982b20ceba127ffd0-Media-Release-New-UTCR-Limiting-Civil-Arrests-in-Court-Facilities-effective-2019-11-14.pdf).

28 <sup>56</sup> Jeff Gammage, *ICE to cease arrests in Philly courthouses, agree to new rules of conduct, says Sheriff’s  
 Department*, Phil. Enquirer (Apr. 5, 2019), [https://www.inquirer.com/news/ice-immigration-immigrants-courts-  
 arrests-sheriffs-department-20190405.html](https://www.inquirer.com/news/ice-immigration-immigrants-courts-arrests-sheriffs-department-20190405.html).

<sup>57</sup> Compl. ¶ 71, State of New York, 2019 WL 6906274.

<sup>58</sup> *Id.*

1 warrants.<sup>59</sup> Similarly, in New Mexico, advocates documented at least five people who were  
 2 improperly arrested at the Bernalillo County’s Metropolitan Court despite its Courthouse Access  
 3 Policy.<sup>60</sup>

4 **B. The Defendants’ policy runs counter to a long-established nationwide consensus**  
 5 **against disrupting courthouses with civil arrests.**

6 Early American courts adopted a privilege against civil arrests at or near courthouses in  
 7 order to protect the integrity and authority of the courts. This common law privilege had  
 8 originated in fifteenth century England, when civil litigation was initiated by arrest.<sup>61</sup> As civil  
 9 litigants began to stake out courthouses to catch their opponents on unrelated court business, *see*,  
 10 *e.g.*, *Walpole v. Alexander* (1782) 99 Eng. Rep. 530, the privilege developed to protect parties  
 11 and witnesses while they were coming to, remaining in, or returning from court, *see* 3 William  
 12 Blackstone, *Commentaries on the Laws of England* 289 (1768) (prohibiting the arrest of  
 13 “[s]uitors, witnesses, and other persons” while attending court, “which include[d] their necessary  
 14 coming and returning”). By the time Congress enacted the INA in 1952, that privilege had long  
 15 been a well-settled part of state common law not only in Washington, but across the United  
 16 States. And the INA evidences no intent, much less an “unmistakably clear” intent, *Gregory v.*  
 17 *Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Will v. Michigan Dep’t of State Police*, 491 U.S. 58,  
 18 65 (1989)), to displace the “long-established and familiar” privilege against civil arrests at  
 19 courthouses, *United States v. Texas*, 507 U.S. 529, 534 (1993).

20 As explained in more detail below, American courts’ treatment of the privilege included  
 21 several key features. First, the privilege against civil arrest at or near courthouses became nearly  
 22 universally adopted. As one district court observed, “[t]his ancient privilege” was “incorporated  
 23 into American law in the early years of our republic by virtually all state and federal courts.”  
 24 *State of New York*, 2019 WL 6906274, at \*1. Indeed, by the early twentieth century, the Supreme  
 25 Court had “recognized this privilege as a matter of federal common law as well, and did so in  
 26

27 <sup>59</sup> *Id.* ¶¶ 70, 73, 74.

<sup>60</sup> Kaplan, *supra* note 22.

28 <sup>61</sup> *See* Christopher N. Lasch, *A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis*, 127 Yale L.J. Forum 410 (2017).

1 part because of its ubiquity among the common laws of the states.” *Id.* at 25 n.9 (discussing  
2 *Stewart v. Ramsey*, 242 U.S. 128 (1916)). Second, the privilege not only protected parties and  
3 witnesses, but also served the distinct and important function of “enabl[ing] courts to function  
4 properly”—thus protecting the States’ core sovereign interest in the administration of their  
5 judiciaries. *Id.* at \*8. Third, although state courts later expanded the privilege to protect certain  
6 parties and witnesses against service of process at or near courthouses as well, the privilege’s  
7 original function of protecting individuals from civil arrest was not abrogated. *Id.* at \*23–25.  
8 Each of these principles is evident in the common law of the Amici States.

9 In New York, the state’s highest court held in 1876 that “[i]t is the policy of the law to  
10 protect suitors and witnesses from arrests upon civil process while coming to and attending the  
11 court and while returning home.” *Person v. Grier*, 66 N.Y. 124, 125 (1876). That recognized  
12 privilege continued to apply against civil arrests even after service of process began to replace  
13 arrest as the dominant means of initiating a civil action. *Parker v. Marco*, 136 N.Y. 585, 589  
14 (1893). Underlying the continued acceptance of the New York privilege, as in Washington, was  
15 the recognition that it was “necessary for the maintenance of its authority and dignity and in  
16 order to promote the due and efficient administration of justice.” *Id.* By necessity, then, the  
17 privilege was not just of parties and witnesses, but “also the privilege of the court.” *Id.*

18 Similar principles have been deeply embedded in the laws of other Amici States for  
19 centuries. In 1822, Zephaniah Swift, the Chief Judge of Connecticut's Superior Court, explained  
20 the Founding-era protection against arrest for litigants and witnesses: “Parties and witnesses in  
21 cases pending before a court of justice, are privileged from arrests, *adeundo, morando, et*  
22 *redeundo*.” Zephaniah Swift, 1 *A Digest of the Laws of the State of Connecticut* 497 (1822). As  
23 in Washington and New York, this privilege “is considered the privilege of the court, and not of  
24 the party attending the court; and it is discretionary with the court to allow it or not.” *Id.* The  
25 leading Connecticut Supreme Court case on this issue reflected both the reasoning and rule  
26 announced in Swift’s treatise, saying that “there can be no doubt that in all such cases of parties  
27 or witnesses, they can not be arrested or detained, and will be discharged at once on motion to  
28 the court . . . .” *Bishop v. Vose*, 27 Conn. 1, 12 (1858). Over time, Connecticut expanded the

1 reach of the privilege to service of process, but never disturbed the original protection against  
2 civil arrests.

3 Like Connecticut, New Jersey made significant early contributions to the widespread  
4 acceptance of the privilege. “A leading authority in the state courts,” *Stewart*, 242 U.S. at 129,  
5 the New Jersey Supreme Court’s 1817 decision in *Halsey v. Stewart* reasoned that “[c]ourts of  
6 justice ought, everywhere, to be open, accessible, free from interruption, and to cast a perfect  
7 protection around every man who necessarily approaches them,” 4 N.J.L. 366, 367 (1817). The  
8 court recognized that, as such, the privilege belonged not only to “parties and witnesses,” but  
9 “alike” to “the court and the citizen” to “protect[] the court from interruption and delay.” *Id.* at  
10 368–69. By 1920, it was a “thoroughly settled” part of New Jersey common law “that a party to a  
11 suit while necessarily going to, staying at, or returning from the court, is equally privileged from  
12 the service of a summons or of a *capias* [writ of arrest] in a civil action.” *Michaelson v.*  
13 *Goldfarb*, 94 N.J.L. 352, 352 (1920). Despite civil arrest falling out of favor as a form of service  
14 in the century since *Halsey*, the New Jersey Supreme Court found that the privilege against civil  
15 arrest had “never been relaxed or modified in this state.” *Id.* at 353. Indeed, no New Jersey case  
16 limited the privilege to service of process or non-residents.

17 Most other jurisdictions reached the same reasoning and holding of *Halsey*. By the late  
18 1800s, courts in Illinois, Maryland, Massachusetts, Oregon, Pennsylvania, Vermont, and  
19 Virginia agreed “that parties and witnesses attending in good faith any legal tribunal, with or  
20 without a writ of protection, are privileged from arrest on civil process during their attendance,  
21 and for a reasonable time in going and returning.” *Larned v. Griffin*, 12 F. 590, 590 (C.C.D.  
22 Mass 1882); *see also Greer v. Young*, 120 Ill. 184, 187–88 (1887) (recognizing the “almost  
23 unbroken current of authority” asserting “the privilege or immunity which the common law has,  
24 from a very early period, extended to parties and witnesses in a lawsuit while attending court,  
25 including going and coming” in “cases of *arrest* on civil process”); *Bolgiano v. Gilbert Lock Co.*,  
26 73 Md. 132 (1890) (“A witness is protected from arrest on any civil process while going to the  
27 place of trial, while attending there for the purpose of the cause, and while returning home;  
28 eundo, morando, et redeundo; and it matters not whether he attends voluntarily or by

1 compulsion.”); *Wemme v. Hurlburt*, 133 Or. 460 (1930) (“Parties and witnesses are exempt from  
 2 arrest while going to, in attendance on, and returning from, court. This exemption is not  
 3 prescribed by statute, but is a part of the common law and is a power inherent in courts for the  
 4 purpose of preventing delay, hindrance, or interference with the orderly administration of justice  
 5 in the courts.”); *Hayes v. Shields*, 1797 WL 726, at \*2 (Pa. 1797) (recognizing “the privilege of  
 6 the court” to protect court attendees from process and arrest); *In re Healey*, 53 Vt. 694, 695  
 7 (1881) (“It has long been a well-settled rule of law that all persons who have any relation to a  
 8 cause which calls for their attendance in court, and who attend in the course of that cause, though  
 9 not compelled by process, are for the sake of public justice protected from arrest in coming to,  
 10 attending upon and returning from the court.”); *Lester v. Bennett*, 1 Va. App. 47, 50 (Ct. App.  
 11 1985) (“Several early Virginia cases state that exemption from arrest and service of process on a  
 12 person attending court is a common law privilege.”). Some of the courts in the Amici States  
 13 would later extend the privilege, to varying degrees, to protect against service of process, but  
 14 without disturbing the privilege’s original function. *See, e.g., Diamond v. Earle*, 217 Mass. 499,  
 15 500 (1914).

16 Given this legal history, it is hardly surprising that courts that have recently considered the  
 17 privilege have found that its protection against civil arrests at or near courthouses has not only  
 18 “remained largely intact over the centuries,” *State of New York*, 2019 WL 6906274, at \*1, but  
 19 was certainly “present at common law when Congress enacted” the INA, *Ryan v. U.S.*  
 20 *Immigration & Customs Enf’t*, 382 F. Supp. 3d 142, 157 (D. Mass. 2019). The Defendants’  
 21 policy flies in the face of this near-universal privilege.

## 22 CONCLUSION

23 For the foregoing reasons, the Amici States join in asking this Court to grant Washington’s  
 24 motion for a preliminary injunction to bar the Defendants from conducting civil immigration  
 25 arrests at or near Washington courthouses.

26  
 27  
 28

1 Dated: January 16, 2020

Respectfully submitted,

2 **STATE OF NEW YORK**

3 /s/ Steven C. Wu  
4 Steven C. Wu (*pro hac vice pending*)  
5 *Deputy Solicitor General*

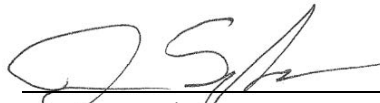
6 Matthew Colangelo (*pro hac vice pending*)  
7 *Chief Counsel for Federal Initiatives*

8 Daniela Nogueira (*pro hac vice pending*)  
9 *Assistant Attorney General*

10 Office of the Attorney General  
11 28 Liberty Street  
12 New York, NY 10005

13 Attorneys General listing  
14 continues on next page

15 **NEWMAN DU WORS LLP**

16 

17 Jason B. Sykes, WSBA No. 44369  
18 *jason@newmanlaw.com*  
19 Rachel Horvitz, WSBA No. 52987  
20 *rachel@newmanlaw.com*  
21 2101 Fourth Avenue, Suite 1500  
22 Seattle, WA 98121  
23 (206) 274-2800

24 Local Counsel  
25 Pursuant to Local Rule 83.1(d)

1 WILLIAM TONG  
2 *Attorney General of Connecticut*  
3 165 Capitol Avenue  
4 Hartford, CT 06106

GURBIR S. GREWAL  
*Attorney General of New Jersey*  
25 Market Street  
Trenton, NJ 08625

5 KARL A. RACINE  
6 *Attorney General for the*  
7 *District of Columbia*  
8 One Judiciary Square  
9 441 4th Street, N.W.  
10 Washington, DC 20001

HECTOR BALDERAS  
*Attorney General of New Mexico*  
408 Galisteo St.  
Santa Fe, NM 87501

11 KWAME RAOUL  
12 *Attorney General of Illinois*  
13 100 West Randolph Street  
14 Chicago, IL 60601

ELLEN F. ROSENBLUM  
*Attorney General of Oregon*  
1162 Court Street, NE  
Salem, OR 97301

15 BRIAN E. FROSH  
16 *Attorney General of Maryland*  
17 200 Saint Paul Place  
18 Baltimore, MD 21202

JOSH SHAPIRO  
*Attorney General of the*  
*Commonwealth of Pennsylvania*  
1699 Arch Street  
Philadelphia, PA 19103

19 MAURA HEALEY  
20 *Attorney General Commonwealth of*  
21 *Massachusetts*  
22 One Ashburton Place  
23 Boston, MA 02108

PETER F. NERONHA  
*Attorney General of Rhode Island*  
150 South Main Street  
Providence, Rhode Island 02903

24 KEITH ELLISON  
25 *Attorney General of Minnesota*  
26 102 State Capitol  
27 75 Rev. Dr. Martin Luther King Jr. Blvd.  
28 St. Paul, MN 55155

THOMAS J. DONOVAN, JR.  
*Attorney General of Vermont*  
109 State Street  
Montpelier, VT 05609

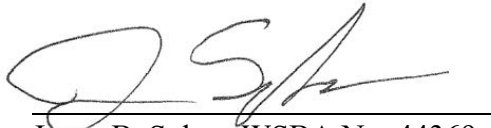
MARK R. HERRING  
*Attorney General of the*  
*Commonwealth of Virginia*  
202 North 9th Street  
Richmond, VA 23219



**CERTIFICATE OF SERVICE**

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The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on January 16, 2020.



Jason B. Sykes, WSBA No. 44369  
*jason@newmanlaw.com*  
2101 Fourth Ave., Ste. 1500  
Seattle, WA 98121  
(206) 274-2800

The Honorable Thomas S. Zilly

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

STATE OF WASHINGTON,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND  
SECURITY, et al.,

Defendants.

Case No. 2:19-cv-02043-TSZ

**[PROPOSED] ORDER GRANTING  
MOTION OF THE STATE OF NEW  
YORK FOR LEAVE TO FILE *AMICUS  
CURIAE* BRIEF IN SUPPORT OF  
PLAINTIFF’S MOTION FOR  
PRELIMINARY INJUNCTION**

NOTE ON MOTION CALENDAR:  
January 31, 2020

This matter came before the Court on the Motion of the State of New York for Leave to File *Amicus Curiae* Brief in support of Plaintiff State of Washington’s Motion for Preliminary Injunction (“Motion for Leave”). Having been fully informed, the Court GRANTS the Motion for Leave. The *amicus* brief attached as Exhibit A to the Motion for Leave is hereby deemed filed.

IT IS SO ORDERED this \_\_\_\_ day of January, 2020.

\_\_\_\_\_  
The Honorable Thomas S. Zilly  
United States District Court Judge

1 Presented by:

2  
3 **NEWMAN DU WORS LLP**

4 /s/ Jason B. Sykes

5 Jason B. Sykes, WSBA No. 44369

6 *jason@newmanlaw.com*

7 Rachel Horvitz, WSBA No. 52987

8 *rachel@newmanlaw.com*

9 2101 Fourth Ave., Ste. 1500

10 Seattle, WA 98121

11 (206) 274-2800

12 **STATE OF NEW YORK**

13 Steven C. Wu (*pro hac vice pending*)

14 *Deputy Solicitor General*

15 Matthew Colangelo (*pro hac vice pending*)

16 *Chief Counsel for Federal Initiatives*

17 Daniela Nogueira (*pro hac vice pending*)

18 *Assistant Attorney General*

19 Office of the Attorney General

20 28 Liberty Street

21 New York, NY 10005

22 *Counsel for the State of New York*