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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ELIZEO VELAZQUEZ-HERNANDEZ,
et al.,

Plaintiffs-Petitioners,

v.

U.S. IMMIGRATION AND CUSTOMS
ENFORCEMENT, et al.,

Defendants-Respondents.

Case No.: 3:20-cv-2060-DMS-KSC

**ORDER GRANTING MOTION FOR
TEMPORARY RESTRAINING
ORDER**

Plaintiffs in this case challenge the United States Border Patrol’s practice of using the federal courthouse as a preferred location to arrest noncitizens appearing for court hearings in order to place them in civil deportation proceedings. For the past several years, the Department of Homeland Security (“DHS”), through its sub-agency United States Border Patrol, has taken into civil immigration custody many individuals who, like Plaintiffs, appear on bond for their court trials to contest a misdemeanor illegal entry charge. Regardless of outcome, these individuals are taken into immigration custody by Border Patrol at the conclusion of their trials. Plaintiffs seek a temporary restraining order (“TRO”) to enjoin DHS from conducting such courthouse arrests.

Plaintiffs allege DHS’s courthouse arrest policy violates the Administrative Procedure Act (“APA”) because it is arbitrary and capricious and exceeds DHS’s statutory

1 authority by violating the common-law rule against civil courthouse arrest. Plaintiffs
2 further allege this policy violates Plaintiffs’ rights of access to the court under the First,
3 Fifth, and Sixth Amendments to the United States Constitution, violates Plaintiffs’ Sixth
4 Amendment right to present a defense, and that DHS’s practice of making courthouse
5 arrests without a warrant violates 8 U.S.C. § 1357(a)(2) of the Immigration and Nationality
6 Act (“INA”) and the Fourth Amendment to the United States Constitution. Defendants
7 argue the Court should deny the motion as the Court lacks jurisdiction to hear the matter,
8 the resumption of immigration custody is not an arrest, the policy is not arbitrary and
9 capricious, and there is no common-law privilege immunizing Plaintiffs from civil arrests
10 at the courthouse.

11 It is undisputed the courthouse arrests at issue are for civil immigration enforcement
12 only (deportation) and not for arrest due to commission of a new crime, or to apprehend an
13 individual who poses a danger to national security or a risk to public safety. The matter
14 has been fully briefed and argued. The Court concludes Plaintiffs have met their burden
15 and are entitled to a TRO prohibiting DHS officers’ practice of conducting civil
16 immigration arrests at the federal courthouse. This practice deters parties and witnesses
17 from coming to court, instills fear, is inconsistent with the decorum of the court, and
18 degrades the administration of justice. The common-law rule against civil courthouse
19 arrest is incorporated in the INA and ensures that courts everywhere are open, accessible,
20 free from interruption, and able to protect the rights of all who come before the court.
21 DHS’s courthouse arrest policy violates these long-standing principles.

22 **I.**

23 **BACKGROUND**

24 Plaintiffs allege that since 2018, DHS officers have attended many federal court
25 proceedings in the Southern District of California for noncitizens charged with
26 misdemeanor illegal entry who have been released on bond, and arrested them in the
27 courtroom or surrounding courthouse complex after conclusion of their criminal cases.
28 (First Am. Compl. (“FAC”) ¶ 29; Mot. for TRO 5–6.) Specifically, these officers are

1 United States Border Patrol agents. (*See* Decl. of Jasper Frontiero (“Frontiero Decl.”) ¶ 3.)
2 Border Patrol acknowledges its agents patrol the courthouse in order to “resume custody”
3 of illegal-entry defendants at the conclusion of their criminal cases. (*Id.* ¶ 3; Decl. of
4 Bradley Blazer (“Blazer Decl.”) ¶¶ 3–4.) Border Patrol is housed within United States
5 Customs and Border Protection (“CBP”), and as noted is a sub-agency of DHS.

6 Prior to 2017, it was the federal government’s policy to only undertake immigration
7 enforcement actions at or near courthouses against “Priority 1” noncitizens. (*See* Ex. H to
8 Mot. for TRO.) “Priority 1” was the category of individuals whom the government deemed
9 the highest priority for deportation and consisted of “aliens who pose a danger to national
10 security or a risk to public safety.” (Ex. D to Mot. for TRO.)

11 Beginning in 2017 under the Trump Administration, the government shifted its
12 priorities and increased immigration enforcement. On January 25, 2017, the President
13 issued Executive Order 13,768, titled “Enhancing Public Safety in the Interior of the United
14 States,” which directed agencies to “employ all lawful means to ensure the faithful
15 execution of the immigration laws of the United States against all removable aliens.” (Ex.
16 K to Mot. for TRO.) Subsequently, on February 20, 2017, then-Secretary of Homeland
17 Security John Kelly rescinded “all existing conflicting directives, memoranda, [and] field
18 guidance” regarding immigration enforcement priorities, pursuant to the Executive Order.
19 (Ex. L to Mot. for TRO.)

20 On January 10, 2018, Immigration and Customs Enforcement (“ICE”), a sub-agency
21 of DHS, formalized ICE Directive No. 11072.1, “Civil Immigration Actions Inside
22 Courthouses.” This Directive provides that ICE may civilly arrest on courthouse premises
23 “aliens with criminal convictions, gang members, national security or public safety threats,
24 aliens who have been ordered removed from the United States but have failed to depart,
25 and aliens who have re-entered the country illegally after being removed.” (Ex. M to Mot.
26 for TRO.) Furthermore, it provides that ICE may arrest others, such as undocumented
27 witnesses or family members, in “special circumstances.” (*Id.*) “Special circumstances”
28 are not clearly defined; the Directive states enforcement determinations will be made “on

1 a case-by-case basis in accordance with federal law and consistent with [DHS] policy.”
2 (*Id.*) Following the issuance of the Directive, courthouse immigration arrests increased
3 dramatically. As one court put it, “plaintiffs infer from the more than 1700 percent increase
4 in such arrests that the Directive actually embodies a conscious decision to conduct
5 widespread immigration arrests in or around state courthouses, a reversal of ICE’s pre-
6 2017 policy to largely abstain from such arrests.” *New York v. U.S. Immigration &*
7 *Customs Enf’t*, 431 F. Supp. 3d 377, 381 (S.D.N.Y. 2019); *see Washington v. U.S. Dep’t*
8 *of Homeland Sec.*, No. C19-2043 TSZ, 2020 WL 1819837, at *4 (W.D. Wash. Apr. 10,
9 2020) (noting estimated 600% upsurge in courthouse arrests and finding the record
10 “supports a conclusion that the effect of Directive No. 11072.1 was essentially to eliminate
11 prior constraints on ‘courthouse arrests’” by ICE and CBP). This increase in immigration
12 enforcement produced a chilling effect on noncitizens’ appearances in courts. (*See Br. of*
13 *American Immigration Lawyers Association as Amicus Curiae in Supp. of Pls.’ Mot. for*
14 *TRO 9–11* (citing evidence of noncitizens’ unwillingness to appear as a result of ICE
15 arrests).)

16 It does not appear that CBP has issued any directive regarding courthouse arrests.
17 As of October 2020, CBP’s website states that “enforcement actions at courthouses will
18 only be executed against individuals falling within the public safety priorities” of a
19 November 2014 memorandum. (Ex. P to Mot. for TRO). However, this memorandum
20 was explicitly rescinded by Secretary Kelly in February 2017. (Ex. L to Mot. for TRO.)
21 The website indicates that non-targeted individuals may be arrested at courthouses in
22 “exigent circumstances.” (Ex. P to Mot. for TRO.)

23 In accordance with the change in priorities set forth in the Executive Order, in April
24 2018, then-Attorney General Jeff Sessions directed each United States Attorney’s Office
25 along the southern border to adopt a “zero-tolerance” policy called “Operation Streamline”
26 for illegal entry offenses, under which the federal government began prosecuting virtually
27 all instances of misdemeanor illegal entry under 8 U.S.C. § 1325(a). (*See Office of the*
28 *Att’y Gen., Memorandum for Federal Prosecutors Along the Southwest Border* (April 6,

1 2018).) In response to the increased number of illegal entry prosecutions, this District
2 instituted a separate court calendar and procedures to handle the massive influx of cases.
3 *See United States v. Chavez-Diaz*, No. 18MJ20098 AJB, 2018 WL 9543024, at *1 (S.D.
4 Cal. Oct. 30, 2018), *rev'd and remanded*, 949 F.3d 1202 (9th Cir. 2020) (describing
5 Operation Streamline and citing court statistics showing 1,152 misdemeanor § 1325(a)
6 prosecutions in August 2018, compared to *one* in January 2018). Typically, Border Patrol
7 apprehends and arrests individuals such as Plaintiffs for illegal entry, then transfers them
8 to the custody of the United States Marshals Service (“USMS”) for the purposes of criminal
9 prosecution. (Blazer Decl. ¶¶ 3–4; Frontiero Decl. ¶ 3.) As Defendants acknowledge,
10 many of these individuals are subsequently released on bond, resulting in Border Patrol’s
11 practice of attending court proceedings to arrest them at the conclusion of the criminal case
12 in order to place them in deportation or removal proceedings. (*See* Blazer Decl. ¶ 4;
13 Frontiero Decl. ¶ 3.)

14 Plaintiffs are individuals charged in the Southern District of California with
15 misdemeanor illegal entry in violation of 8 U.S.C. § 1325, as part of the government’s
16 Operation Streamline. (FAC ¶¶ 1, 17.) Plaintiffs are all released on bond after a federal
17 magistrate judge determined they were not flight risks or sufficiently dangerous, and
18 remain out of custody pending upcoming court appearances in their criminal cases. (*Id.*
19 ¶ 1.) Plaintiffs allege federal officers “attend nearly every court hearing of individuals
20 released on bond facing charges of violating 8 U.S.C. § 1325 in order to effectuate a civil
21 courthouse arrest following the conclusion of the case.” (Mot. for TRO 5–6.) Plaintiffs
22 submit declarations from defense counsel who represented clients charged through
23 Operation Streamline with violations of 8 U.S.C. § 1325. (*See* Decl. of Leila W. Morgan;
24 Decl. of Chandra L. Peterson; Decl. of Chloe S. Dillon; Decl. of Ryan W. Stitt; Decl. of
25 Sean McGuire.) Counsel do not recall any case of this type concluding without a civil
26 arrest occurring at the courthouse or in close proximity to the courthouse complex. (*See*
27 *id.*) Border Patrol agents, if permitted, intend to resume custody of Plaintiffs at the
28 courthouse when their criminal proceedings end. (Blazer Decl. ¶ 7.)

1 Accordingly, Plaintiffs face arrest in and around the courthouse after their criminal
2 cases conclude. (FAC ¶ 7.) On October 20, 2020, Plaintiffs commenced the present action
3 and filed the subject motion. On November 10, 2020, Plaintiffs filed a First Amended
4 Complaint, removing as plaintiffs individuals whose criminal cases had concluded.
5 Defendants have stipulated to refrain from their immigration enforcement practices
6 pending the Court’s ruling on the TRO.

7 **II.**
8 **DISCUSSION**

9 Plaintiffs seek a TRO restraining DHS officers’ practice of conducting civil
10 immigration arrests of “parties, witnesses and others attending, being present at, or
11 departing from” the federal courthouses in the Southern District of California. (FAC,
12 Request for Relief, ¶ e.)¹ Before turning to the merits and other injunctive relief factors,
13 the Court addresses Defendants’ jurisdictional arguments that review is barred by 8 U.S.C.
14 §§ 1252(b)(9), 1252(g), 1226(e), and the APA.

15 Section 1252 does not foreclose the Court’s review in this case. The Supreme Court
16 has stated “§ 1252(b)(9) does not present a jurisdictional bar where those bringing suit are
17 not asking for review of an order of removal, the decision to seek removal, or the process
18 by which removability will be determined.” *Dep’t of Homeland Sec. v. Regents of the Univ.*
19 *of California*, 140 S. Ct. 1891, 1907 (2020) (internal quotation marks, alteration, and
20 citation omitted); *see Jennings v. Rodriguez*, 138 S. Ct. 830, 840–41 (2018) (cautioning
21 against an overly broad interpretation of the “arising from” language used in § 1252). As
22 the Ninth Circuit explains, “§ 1252(b)(9) is a ‘targeted’ and ‘narrow’ provision that ‘is
23 certainly not a bar where, as here, the parties are not challenging any removal
24 proceedings.’” *Gonzalez v. U.S. Immigration & Customs Enf’t*, 975 F.3d 788, 810 (9th
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26 _____
27 ¹ The Southern District of California includes San Diego and Imperial counties and two
28 courthouses, one in each county. The enforcement actions at issue involve the San Diego
courthouse but could expand to the federal court in Imperial county. Accordingly, the relief
requested applies to both courthouses.

1 Cir. 2020) (quoting *Dep't of Homeland Sec.*, 140 S. Ct. at 1907). Similarly, although 8
2 U.S.C. § 1252(g) provides that no court shall have jurisdiction to hear any claim “arising
3 from” the decision to “commence proceedings, adjudicate cases, or execute removal
4 orders” against an undocumented person, this language does not “sweep in any claim that
5 can technically be said to ‘arise from’ the three listed actions of the Attorney General,” but
6 “refer[s] to just those three specific actions.” *Jennings*, 138 S. Ct. at 841 (citing *Reno v.*
7 *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482–83 (1999)). Here, Plaintiffs do
8 not challenge their immigration proceedings, removal orders, or DHS’s authority to remove
9 them. Rather, their challenge is to DHS’s practice of courthouse arrests and failure to
10 obtain warrants for their arrest, which are collateral to their removal. Therefore, review is
11 not foreclosed under either § 1252(b)(9) or § 1252(g).

12 Defendants’ argument under § 1226(e) also fails. Section 1226(e) prohibits a court
13 from setting aside any discretionary “action or decision” by the Attorney General
14 “regarding the detention or release of any alien or the grant, revocation, or denial of bond
15 or parole.” However, § 1226(e) does not bar a “constitutional challenge” to the “statutory
16 framework” permitting detention without bail. *Demore v. Kim*, 538 U.S. 510, 510 (2003).
17 Such a challenge is not a matter of “discretionary judgment,” “action,” or “decision,” and
18 thus falls outside the scope of § 1226(e). *Jennings*, 138 S. Ct. at 841. Here, again,
19 Plaintiffs’ challenge is not to any individual discretionary decision regarding their
20 detention or release. Rather, Plaintiffs challenge DHS’s courthouse arrest policy as
21 arbitrary and capricious, exceeding statutory authority, and unconstitutional. Section
22 1226(e) does not preclude review of these claims.

23 Defendants next contend their decisions regarding arrests are “committed to agency
24 discretion by law” under the APA and therefore unreviewable. 5 U.S.C. § 701(a)(2).
25 Defendants argue that law enforcement officials’ decisions on when and how to arrest
26 suspects are discretionary functions. But Plaintiffs’ challenge is not to the discretionary
27 decisions of when and how each Plaintiff will be arrested, nor to DHS’s decision to arrest
28 particular individuals as opposed to others. “[Plaintiffs] challenge instead what they allege

1 to be a categorical policy to conduct immigration arrests in particular places where the
2 statute (implicitly) and the common law (explicitly) do not permit such arrests. Such a
3 policy would not be committed to unreviewable agency discretion.” *New York*, 431 F.
4 Supp. 3d at 385–86; *see also Washington*, 2020 WL 1819837, at *6 (rejecting DHS’s
5 argument that determination of where civil immigration enforcement actions will occur is
6 committed to agency discretion).

7 With these findings, the Court turns to the TRO. The purpose of a TRO is to preserve
8 the status quo before a preliminary injunction hearing may be held; its provisional remedial
9 nature is designed merely to prevent irreparable loss of rights prior to judgment. *Granny*
10 *Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439
11 (1974). The standard for issuing a temporary restraining order is identical to the standard
12 for issuing a preliminary injunction. *Lockheed Missile & Space Co., Inc. v. Hughes*
13 *Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). Injunctive relief is an
14 “extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is
15 entitled to such relief.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).
16 To meet that showing, Plaintiffs must demonstrate “[they are] likely to succeed on the
17 merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief,
18 that the balance of equities tips in [their] favor, and that an injunction is in the public
19 interest.” *Am. Trucking Ass’ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)
20 (quoting *Winter*, 555 U.S. at 20).² Each factor is met.

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23 ² The Ninth Circuit applies separate standards for injunctions depending on whether they
24 are prohibitory, *i.e.* they prevent future conduct, or mandatory, *i.e.* “they go beyond
25 ‘maintaining the status quo[.]’” *Hernandez v. Sessions*, 872 F.3d 976, 997 (9th Cir. 2017).
26 To the extent Plaintiffs are requesting mandatory relief, that request is “subject to a higher
27 standard than prohibitory injunctions,” namely that relief will issue only “when ‘extreme
28 or very serious damage will result’ that is not capable of compensation in damages,” and
the merits of the case are not ‘doubtful.’” *Id.* at 999 (quoting *Marlyn Nutraceuticals, Inc.*
v. Mucos Pharma GmbH & Co., 571 F.3d 873, 879 (9th Cir. 2009)). Under either standard,
Plaintiffs have met their burden for the reasons set out above.

1 Likelihood of Success. “The first factor under *Winter* is the most important—likely
2 success on the merits.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). While
3 Plaintiffs carry the burden of demonstrating likelihood of success, they are not required to
4 prove their case in full at this stage but only such portions that enable them to obtain the
5 injunctive relief they seek. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

6 Here, Plaintiffs argue they are likely to succeed on the merits because the INA
7 incorporates a centuries-old common-law privilege against civil arrest at the courthouse,
8 and thus Border Patrol’s immigration arrests violate the APA as agency action “in excess
9 of statutory jurisdiction, authority, or limitation.” 5 U.S.C. § 706(2)(C). Defendants argue
10 Border Patrol’s actions are not arrests, and even if they are, there is no applicable common-
11 law privilege. The Court finds Plaintiffs are likely to succeed on this claim.

12 First, Defendants’ contention that Border Patrol retains “constructive custody” over
13 Plaintiffs and will simply resume physical custody at the conclusion of Plaintiffs’ criminal
14 cases is without merit. Defendants imply Plaintiffs were “paroled,” but “[i]n the
15 immigration context, not all paroles are treated equally.” *Garcia v. Holder*, 659 F.3d 1261,
16 1268 (9th Cir. 2011). Defendants make general reference to 8 U.S.C. § 1182(d)(5)(A),
17 which authorizes “parole” for “urgent humanitarian reasons or significant public benefit.”
18 Plaintiffs contend that they are, at most, subject to “conditional parole” under 8 U.S.C.
19 § 1226(a). There is no evidence that Plaintiffs were “paroled” under 8 U.S.C.
20 § 1182(d)(5)(A). *See Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 115–16 (9th Cir.
21 2007) (distinguishing § 1182(d)(5)(A) parole from § 1226(a) conditional parole and finding
22 alien was not paroled under § 1182(d)(5)(A) in the absence of evidence such as I-94 card).
23 Rather, if Plaintiffs have been paroled, it appears to be pursuant to § 1226(a). *See id.*
24 (stating aliens who are apprehended for illegal entry will generally be conditionally paroled
25 under § 1226(a)). The government may choose to revoke such parole and “rearrest” the
26 noncitizen. *See* 8 U.S.C. § 1226(b). Border Patrol contends they are not “rearresting”
27 individuals such as Plaintiffs, but the statutory provision for “rearrest” does not support
28 Defendants’ theory of constructive custody. The Ninth Circuit has explained “[a]rrest is

1 commonly used as it is defined: ‘the taking or detainment (of a person) in custody by
2 authority of law; legal restraint of the person; custody; imprisonment.’” *Yith v. Nielsen*,
3 881 F.3d 1155, 1167 (9th Cir. 2018) (quoting *United States v. Leal-Felix*, 665 F.3d 1037,
4 1041 (9th Cir. 2011)).

5 After transferring Plaintiffs to USMS custody, DHS could have lodged immigration
6 detainers on Plaintiffs, which would cause them to be remanded directly back to ICE
7 custody upon their bond being posted. (*See Blazer Decl.* ¶ 3.) Here, instead, DHS
8 “exercised its discretion not to lodge detainers on the named Plaintiffs.” (*Blazer Decl.* ¶ 7.)
9 Each Plaintiff was subsequently ordered released from custody on bond by a federal
10 magistrate judge. (Pls.’ Reply in Supp. of Mot. for TRO 1.) Defendants’ cases are
11 inapposite as they involve criminal parolees, post-conviction supervision, or the transfer of
12 immigration detainees for housing purposes, and Defendants do not cite any case with facts
13 analogous to the present circumstances to support their theory of continuous constructive
14 custody. Border Patrol’s enforcement actions are properly characterized as arrests.

15 Next, Defendants argue that the INA does not incorporate a common-law privilege
16 against civil courthouse arrest, and in any event, the privilege does not apply to Plaintiffs.
17 Defendants’ arguments are unpersuasive.

18 Historically, English courts recognized a privilege against civil arrest for individuals
19 appearing in court. As Blackstone explained: “Suitors, witnesses, and other persons,
20 necessarily attending any courts of record upon business, are not to be arrested during their
21 actual attendance, which necessarily includes their coming and returning. And no arrest
22 can be made ... in any place where the king’s justices are actually sitting.” 3 William
23 Blackstone, *Commentaries on the Laws of England* 289 (1768). The privilege arose from
24 two distinct concerns produced by civil courthouse arrests. First, civil arrest deterred
25 parties from coming to court voluntarily. *See, e.g., Walpole v. Alexander*, 99 Eng. Rep.
26 530, 531, 3 Dougl. 45, 46 (1782) (explaining privilege “encourage[s] witnesses to come
27 forward voluntarily”). Second, it “would give occasion to perpetual tumults, and was
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1 altogether inconsistent with the decorum which ought to prevail in a high tribunal.”
2 *Orchard’s Case*, (1828) 38 Eng. Rep. 987, 987.

3 As service of process became the more common method for securing personal
4 jurisdiction over a civil defendant, courts ruled that the privilege against *capias*—civil
5 arrest—applied equally to protect individuals from service of process while attending
6 court. *See, e.g., Halsey v. Stewart*, 4 N.J.L. 366, 368 (N.J. 1817) (“It is often matter of
7 great importance to the citizen to prevent the institution and prosecution of a suit in any
8 court ... and the fear that a suit may be commenced there by summons will as effectually
9 prevent his approach as if a *capias* might be served upon him.”).

10 This traditional common-law privilege against civil arrest or service of process at
11 the courthouse continued into American common law, where it was recognized as well-
12 established into the twentieth century. In *Stewart v. Ramsay*, 242 U.S. 128 (1916), the
13 Supreme Court articulated the privilege as follows: “The true rule, well founded in reason
14 and sustained by the greater weight of authority, is that suitors, as well as witnesses, coming
15 from another state or jurisdiction, are exempt from the service of civil process while in
16 attendance upon court, and during a reasonable time in coming and going.” *Id.* at 129.
17 *Stewart* elucidates several key points. The privilege belongs not to the defendant, but to
18 the court. *Id.* at 130. This is because it is “founded in the necessities of the judicial
19 administration,” which would be “embarrassed” or “interrupted” if parties or witnesses
20 were subject to civil arrest or summons while attending court. *Id.* (quoting *Parker v.*
21 *Hotchkiss* (1849) 1 Wall. Jr. 269). The Court cited numerous state cases from the 1800s
22 and noted “the Federal circuit and district courts have consistently sustained the privilege.”
23 *Id.* at 131 (collecting cases).

24 Against this backdrop, the Court turns to the INA. Under the canon of
25 nonderogation, “[s]tatutes which invade the common law ... are to be read with a
26 presumption favoring the retention of long-established and familiar principles, except
27 when a statutory purpose to the contrary is evident.” *Pasquantino v. United States*, 544
28 U.S. 349, 359 (2005) (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993) (internal

1 quotation marks omitted). For this presumption to apply, the common-law rule should be
2 “well-established” at the time of the statute’s enactment. *Pasquantino*, 544 U.S. at 359–
3 60; *United States v. Craft*, 535 U.S. 274, 288 (2002). In determining whether a statute
4 “invades” or enters a field addressed by common law, courts look to whether the purpose
5 and rationale of the common law apply to the statutory context in which Congress was
6 legislating. *See Pasquantino*, 544 U.S. at 360, 368–72.

7 Here, the Court finds no question that the purpose and rationale of the common-law
8 rule against courthouse arrest apply to the statutory context in which Congress was
9 legislating. The privilege goes back to at least the fifteenth century and persisted for
10 hundreds of years thereafter in English and American common law. *See New York*, 431 F.
11 Supp. 3d at 388–89 (discussing privilege’s history). Congress enacted the INA in 1952,
12 only twenty years after the Supreme Court reiterated the privilege in *Lamb v. Schmitt*, 285
13 U.S. 222 (1932). *See id.* at 225 (“[T]he due administration of justice requires that a court
14 shall not permit interference with the progress of a cause pending before it, by the service
15 of process in other suits[.]”)

16 Although the INA confers broad authority to make warrantless immigration arrests,
17 *see* 8 U.S.C. §§ 1226(a), 1357(a), those sections are silent as to whether such arrests are
18 permitted in courthouses. Thus, the statutes on their face do not indicate that Congress
19 intended to abrogate the common-law privilege. *See Pasquantino*, 544 U.S. at 359
20 (requiring Congress to clearly state its intent to abrogate the common law). Moreover, in
21 8 U.S.C. § 1357(a), Congress not only authorized immigration officers to conduct arrests,
22 but provided for certain restrictions and permissions on where immigration enforcement
23 could take place. It permitted immigration officers to enter private lands within twenty-
24 five miles of the border to make such arrests, but prohibited access to dwellings, 8 U.S.C.
25 § 1357(a)(3), and within a reasonable distance of the border, permitted officers to board
26 any vessel, railway car, aircraft, conveyance or vehicle, *id.* These provisions reflect a
27 concern with the location of arrest, just as the common-law rule does. Congress protected
28 the sanctity of the home from such enforcement and disruption, just as the common-law

1 rule shields the court and litigants from such interruption. Accordingly, the common-law
2 rule’s purpose and rationale apply to the statutory context in which Congress was
3 legislating in 1952 when it enacted the INA, and thus the Court presumes Congress
4 intended to retain the common-law rule.

5 The government points to 8 U.S.C. § 1229(e), which mentions courthouse arrests, in
6 support of its argument that Congress knew DHS officers were making civil courthouse
7 arrests to place noncitizens in removal proceedings. Section 1229(e)(1) requires that “[i]n
8 cases where an [immigration] enforcement action leading to a removal proceeding was
9 taken against an alien at any of the locations specified in paragraph (2), the Notice to
10 Appear shall include a statement that the provisions of section 1367 of this title have been
11 complied with.” The locations specified in § 1229(e)(2) include “a courthouse.” 8 U.S.C.
12 § 1229(e)(2)(B). However, the thrust of § 1229(e) is not on the location where civil
13 immigration enforcement is permitted, but on limiting use of information against
14 noncitizen victims—obtained during “domestic violence, sexual assault, trafficking, or
15 stalking” proceedings—by an immigration judge or hearing officer to make an adverse
16 determination of deportability.

17 Moreover, Congress enacted § 1229(e) in 2006, over fifty years after the original
18 INA. *See* Violence Against Women and Department of Justice Reauthorization Act, PL
19 109–162, January 5, 2006, 119 Stat. 2960. “The views of a subsequent Congress ... form
20 a hazardous basis for inferring the intent of an earlier one.” *Bilski v. Kappos*, 561 U.S. 593,
21 645 (2010) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)) (internal quotation
22 marks omitted). “When a later statute is offered as an expression of how the Congress
23 interpreted a statute passed by another Congress a half century before, such interpretation
24 has very little, if any, significance.” *Id.* at 645 (citing *Rainwater v. United States*, 356 U.S.
25 590, 593 (1958)) (internal quotation marks and alterations omitted).

26 The district court in *Ryan v. U.S. Immigration & Customs Enforcement* found “[t]he
27 2006 enactment of the Violence Against Women and Department of Justice
28 Reauthorization Act has little bearing on the court’s interpretation of Congressional intent

1 regarding courthouse arrests in 1952, and certainly does not amount to a clearly stated
2 intent to abrogate the common law privilege.” 382 F. Supp. 3d 142, 158–59 (D. Mass.
3 2019). Although the district court’s holding was vacated on appeal, *see Ryan v. U.S.*
4 *Immigration & Customs Enf’t*, 974 F.3d 9 (1st Cir. 2020), the First Circuit did not reject
5 the finding that § 1229(e) was of little relevance. Indeed, it focused its nonderogation
6 analysis exclusively on Congress’s intent in 1952. *See id.* at 23–28.

7 The Court agrees that the reference to courthouse arrest in the 2006 enactment of
8 § 1229(e) is insufficient to find that Congress clearly intended to abrogate the common-
9 law privilege against courthouse arrest when it enacted the INA in 1952. To the contrary,
10 the Court presumes Congress retained the common-law rule because it was well-
11 established at the time of enactment and applies to the context in which Congress was
12 legislating. For these reasons, the Court follows *New York*, 431 F. Supp. 3d at 392, in
13 finding the INA incorporates the common-law privilege against civil courthouse arrest.
14 *See id.* at 389 (stating “continuing availability” and “breadth” of common law privilege is
15 shown by Supreme Court’s continuing application of privilege to service of process even
16 after historical civil arrest had become obsolete and before regulatory immigration arrests
17 had become common); *see also Washington*, 2020 WL 1819837, at *10 (finding plaintiffs
18 plausibly alleged, at motion to dismiss stage, that INA incorporated privilege against
19 courthouse arrest).

20 Defendants argue that even if the INA incorporates the privilege, it does not apply
21 to Plaintiffs. First, Defendants rely on *Ryan v. U.S. Immigration & Customs Enforcement*,
22 974 F.3d 9 (1st Cir. 2020), for the proposition that the privilege does not apply to a civil
23 arrest made “on behalf of the sovereign.” This reasoning is flawed. As Defendants
24 acknowledge, the privilege belongs not to the parties, but to the court itself. *See Stewart*,
25 242 U.S. at 130 (“The privilege which is asserted here is the privilege of the court, rather
26 than of the defendant.”) (citation omitted). Defendants, and *Ryan*, neglect to consider the
27 underlying policy which drives the privilege. The essence of the privilege is the sanctity
28 of the court. It is “founded in the necessities of the judicial administration, which would

1 be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process
2 while attending upon the court.” *Stewart*, 242 U.S. at 130 (citation omitted). The privilege,
3 consistent with the constitutional right of access to the court, “enables the citizen to
4 prosecute his rights without molestation, and procure the attendance of such as are
5 necessary for their defence and support.” *Halsey*, 4 N.J.L. at 369. This “great object in
6 the administration of justice” is “obstructed” if parties are liable to be civilly arrested or
7 served while attending court. *Id.* at 368. The holding in *Ryan* wholly ignores this purpose.
8 Civil arrest—whether by a private individual or by the government—runs afoul of this
9 privilege of the court. The Executive may have sovereign power over immigration
10 enforcement, but the Executive does not have sovereign power over the court.

11 At oral argument, counsel for Defendants argued that Border Patrol’s arrests do not
12 disrupt the dignity of the court because they are conducted at the conclusion of criminal
13 proceedings, unlike ICE arrests in state courts which delayed and disrupted ongoing
14 proceedings. Defendants’ argument once again overlooks the purpose of the privilege.

15 The court, as the third, independent branch of government, is a sanctuary—a place
16 where parties and witnesses must be free from interference and intimidation to present their
17 claims and defenses. To fulfill its constitutional duties, the court must be open and
18 accessible in reality, and in perception. The specter of immigration sweeps at the
19 courthouse cuts decidedly against both of these duties. The reality is that parties and
20 witnesses are deterred from and fear coming to court, and the perception is that the
21 Executive is using the court as an enforcement tool to effectuate its immigration goals.
22 *Ryan*’s reasoning allows the executive branch to implement its goals without regard to the
23 court’s purposes. Here, immigration enforcement through courthouse arrests intrudes on
24 the court’s constitutional obligations, “interrupt[s]” its ability to be open and accessible
25 through intimidation of the parties, and “embarrasse[s]” the administration of the courts.
26 *Stewart*, 242 U.S. at 130 (stating the common-law rule is “founded in the necessities of the
27 judicial administration”) (citation omitted). The court is not an “arrest pad” nor will it ever
28 be. The disruption caused by a blunt enforcement practice of this nature invades the

1 decorum and dignity of the court and its constitutional charge to protect the rights of all
2 who come before it.

3 Next, Defendants argue the privilege does not protect criminal defendants, such as
4 Plaintiffs, from civil service of process. The reasoning behind this claimed exception
5 appears to be that the privilege does not apply to those whose attendance in court is not
6 voluntary, and thus Plaintiffs are not entitled to the privilege because they are required to
7 come to court for their criminal cases. Defendants rely on *Netograph Mfg. Co. v.*
8 *Scrugham*, 90 N.E. 962 (N.Y. 1910), which reasoned that since the privilege is meant to
9 encourage voluntary attendance, its purpose fails “when a suitor or witness is brought into
10 the jurisdiction of a court while under arrest or other compulsion of law.” *Id.* at 963. But
11 *Netograph* predates *Stewart*, which found that state courts had applied the privilege “to
12 witnesses attending voluntarily as well as those under subpoena.” 242 U.S. at 130
13 (collecting cases). Defendants point out that the Supreme Court in *Lamb v. Schmitt*,
14 decided after *Stewart*, cites *Netograph*. The *Lamb* Court did reference *Netograph* in
15 passing, but its focus was on a distinctly narrower issue—whether the privilege applied to
16 an attorney who was served with process in one case “commanding his continued presence”
17 in a closely related case seeking “restoration of the subject-matter of the suit wrongfully
18 removed from the custody of the court.” 285 U.S. at 226. The Court noted that “immunity
19 [from service of process], if allowed, might paralyze the arm of the court and defeat the
20 ends of justice[,]” *id.*, and concluded under those circumstances that “[j]udicial necessities
21 require that such immunity should be withheld,” *id.* at 228. *Lamb* did not question
22 *Stewart*’s statement that the privilege applies to witnesses compelled to attend court.

23 Moreover, in *Dwelle v. Allen*, 193 F. 546 (S.D.N.Y. 1912), Judge Learned Hand
24 distinguished *Netograph*, and set forth the basis for the common-law rule: “[T]he proper
25 test is not ... whether the appearance be voluntary or not, but whether the privilege will
26 promote the purposes of justice.” 193 F. at 548–49. The New York federal court
27 reaffirmed this test as recently as 2005, noting the “federal judiciary as a whole follows a
28 similarly broad rule.” *Estate of Ungar v. Palestinian Auth.*, 396 F. Supp. 2d 376, 380–81

1 (S.D.N.Y. 2005) (citing *Stewart*, 242 U.S. at 130). It stated that “treating a party who is
2 present under compulsion of bail ... differently from one under compulsion of a subpoena
3 ... makes no sense.” *Id.* at 382. This rationale is sound. Even if parties or witnesses are
4 required to attend, the threat of civil arrest may well deter them from appearing or
5 presenting a full defense, and in such circumstances, the court’s application of the privilege
6 properly furthers the “necessities of ... judicial administration.” *Stewart*, 242 U.S. at 130
7 (citation omitted).

8 At oral argument, Defendants urged the Court to focus on the specific facts of
9 Plaintiffs’ cases to determine whether the privilege applies. That inquiry, however, leads
10 inexorably to application of the privilege here. Ultimately, this is a case about an agency
11 policy, not the lone arrest of a single defendant or litigant required to be in court. As Border
12 Patrol acknowledges, they attend court proceedings for essentially every defendant
13 similarly situated to Plaintiffs. (*See* Blazer Decl. ¶ 4; Frontiero Decl. ¶ 3.) There are five
14 plaintiffs now, but there could easily be dozens tomorrow. Thus, unlike cases such as
15 *Lamb*, which dealt with a case-by-case determination of whether the common-law privilege
16 applied to an individual’s circumstances, this case involves a government policy of
17 conducting arrests of parties appearing before the court. This practice runs headlong into
18 the underlying principles of the privilege against civil courthouse arrest: the right of access
19 and the administration of justice, as recognized by the Supreme Court in *Stewart* and *Lamb*.

20 “[T]he policy objectives cited for hundreds of years by English and American courts
21 to justify the common law privilege against civil courthouse arrests apply equally to
22 modern-day immigration arrests.” *New York*, 431 F. Supp. at 391. The privilege
23 encourages witnesses to come forth voluntarily, but its “even more fundamental purpose
24 ... is to enable courts to function properly,” *id.*, and “to promote the purposes of justice,”
25 *Dwelle*, 193 F. at 548–49. In *Stewart*, the Supreme Court recognized and reaffirmed that
26 the long-standing privilege against civil courthouse arrest ultimately lies in the sanctity of
27 the court. As it explained: “Courts of justice ought, everywhere, to be open, accessible,
28 free from interruption, and to cast a perfect protection around every [person] who

1 necessarily approaches them.” *Stewart*, 242 U.S. at 129 (quoting *Halsey*, 4 N.J.L. at 367)
2 (internal quotation marks omitted). Defendants’ practice of civil courthouse arrest
3 impermissibly encroaches on the court’s duty to be open, accessible and protective of the
4 rights of all who approach. Although the executive branch has broad authority to enforce
5 the immigration laws, it may not use the judicial branch in this manner to serve its purposes.

6 Accordingly, the Court finds there is a likelihood of success on Plaintiffs’ APA claim
7 that Defendants’ practice of courthouse arrests exceeds statutory authority by violating the
8 common-law rule against such arrests. In light of Plaintiffs’ likely success on this claim,
9 the Court declines to address the balance of Plaintiffs’ statutory and constitutional claims.

10 Irreparable Injury and Balance of Equities. Turning to the next two factors, Plaintiffs
11 must show they are “likely to suffer irreparable harm in the absence of preliminary
12 relief[,]” and demonstrate that “the balance of equities tips in [their] favor.” *Hernandez*
13 *v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017) (quoting *Winter*, 555 U.S. at 20). Plaintiffs
14 have met their burden.

15 Defendants argue Plaintiffs cannot show harm because they will still be subject to
16 arrest even if a TRO issues. But as discussed above, the harm of these courthouse arrests
17 is unique because it impacts the right of access to the court and the administration of justice.
18 Given this, the Court finds Plaintiffs have shown likelihood of irreparable harm.

19 The same reasoning suggests the balance of equities tips in Plaintiffs’ favor.
20 Defendants contend a TRO will simply allow Plaintiffs to evade removal from the United
21 States. But this is a problem of Defendants’ own making and has nothing at all to do with
22 the Court. The Court does not work for, or against, the Executive; rather, it must fulfill a
23 clarion constitutional charge: to guarantee equal and unfettered access to all litigants so
24 they may be heard and adjudged in accordance with the rule of law. Defendants
25 acknowledge they could have lodged immigration detainers on Plaintiffs when releasing
26 them to USMS custody, which would have eliminated the need to re-arrest Plaintiffs at the
27 end of their criminal proceedings. Instead, they declined to do so, which permitted
28 Plaintiffs to be released on bond and gave rise to the policy at issue here. On the other

1 hand, Plaintiffs face the threat of courthouse arrest in violation of a long-standing privilege.
2 The balance of hardships weighs in favor of Plaintiffs.

3 Public Interest. The final factor for consideration is the public interest. *See*
4 *Hernandez*, 872 F.3d at 996. To obtain the requested relief, “[p]laintiffs must demonstrate
5 that the public interest favors granting the injunction ‘in light of [its] likely consequences,’
6 *i.e.*, ‘consequences [that are not] too remote, insubstantial, or speculative and [are]
7 supported by evidence.’” *Id.* (quoting *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th
8 Cir. 2009)).

9 Here, the public interest is served by allowing Plaintiffs to attend their court
10 proceedings free of the threat of civil immigration arrest. Defendants’ courthouse arrest
11 policy appears impermissibly to infringe on the common-law privilege against such arrest
12 as incorporated in the INA, and it would not be “‘in the public’s interest to allow the
13 [government] . . . to violate the requirements of federal law.’” *Ariz. Dream Act Coal. v.*
14 *Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (quoting *Melendres v. Arpaio*, 695 F.3d 990,
15 1002 (9th Cir. 2012)). The public has a strong interest in voluntary participation in the
16 court system, maintaining the dignity of the court, and the fair administration of justice.
17 Given these purposes of the common-law privilege against civil courthouse arrests, the
18 public interest weighs in favor of granting Plaintiffs’ motion.

19 III.

20 CONCLUSION

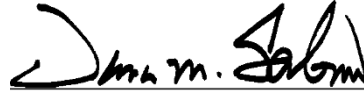
21 For these reasons, Plaintiffs’ motion for temporary restraining order is **GRANTED**.
22 The Court **ENJOINS** the Department of Homeland Security and its sub-agencies from
23 making a civil immigration arrest of any individual appearing in federal court in the
24 Southern District of California while that individual is present in, or traveling to and from,
25 court.

26 This Order will expire in fourteen (14) days, on November 30, 2020, unless extended
27 for good cause or by Defendants’ consent. The parties are ordered to meet and confer by
28 no later than **November 23, 2020**, to attempt resolution of these matters. Absent

1 resolution, the matter will be heard on Plaintiffs' motion for preliminary injunction. The
2 parties shall determine a mutually agreeable hearing date and briefing schedule and submit
3 proposed dates to the Court prior to the expiration of this Order.

4 **IT IS SO ORDERED.**

5 Dated: November 16, 2020

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8 Hon. Dana M. Sabraw
9 United States District Judge
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