Advocating for Remote Hearings for Tenants Chilled from Appearing Personally in Court Due to Fear of ICE Encounters

One consequence of the current federal administration's marked increase in anti-immigration efforts has been to chill immigrants from utilizing basic public services such as schools, police, hospitals, and courts.[1] As numerous members of the Housing Justice Network have reported, this chilling effect impacts immigrant tenants, who in many cases have proven reluctant or unwilling to appear in court to contest evictions, seek orders to remedy substandard conditions, seek redress for unlawful discrimination, or otherwise vindicate their housing rights judicially.

Though by no means a comprehensive solution, one fundamental means of mitigating the specter of ICE encounters as a deterrent to participating in housing litigation is to secure remote hearings for immigrant clients. Appearing remotely enables immigrant clients to avoid the risk of encountering ICE at the courthouse as well as in transit. Unfortunately, many advocates have reported varying degrees of difficulty in reliably securing remote hearings for immigrant clients. The denial of such remote hearings in many cases leads immigrant tenants to default in pending proceedings or refrain from pursing meritorious actions—and surely exerts pressure on immigrant tenants to accept settlement terms less favorable than they could otherwise secure.

This memo aims to provide guidance for advocates confronting judges and courts indifferent, or hostile, to immigrant tenants' need for remote judicial hearings. The first section explains how a credible fear of an ICE arrest (or potentially other disagreeable interaction) establishes good cause for a court to grant a motion to appear remotely, and how the denial of such a motion likely constitutes reversible judicial error in the large majority of cases. The second section discusses practical considerations and possible advocacy strategies for maximizing immigrant tenants' access to remote hearings both legally and in practice.

I. Credible fear of ICE arrest establishes good cause for a remote hearing.

Particularly since the Covid-19 pandemic spurred the adoption of remote hearing technology, state courts have increasingly utilized remote hearings in at least some kinds of cases.[2] This includes a

[1] See, e.g., Emelynn Arroyave and Oprah Cunningham, "The Human Costs of Trump's Immigration Crackdown," The Leadership Council on Civil and Human Rights (Feb. 14, 2025), https://civilrights.org/blog/the-human-costs-of-trumps-immigration-crackdown/

[2] See, e.g., Michael Hartman, "State Courts' Embrace of Technology: What We Know So Far," National Center for State Legislatures, https://www.ncsl.org/events/details/state-courts-embrace-of-technology-what-we-know-so-far, last visited July 15, 2025.

wide variety of housing cases, including eviction actions and foreclosures.[3] Though principally intended to enable the resumption (or avoid the cessation) of court dockets in a manner consistent with the social distancing imperatives of the pandemic era, remote hearings have also proven to offer a number of ancillary benefits for housing litigants—such as decreased travel burdens and lower default rates.[4]

A. Remote hearings ordinarily fulfill procedural due process requirements.

Remote court hearings have generally survived broad challenges based on procedural due process. Multiple courts have held that mere differences between virtual and in-person communication are not enough to make remote judicial proceedings categorically unfair.[5] In *United States v. Lattimore*, for example, a federal court ruled that holding a suppression hearing remotely would not diminish effectiveness of counsel, implicating the defendant's Sixth Amendment rights: like "every other court in the country," the court stated, it had "conducted a great number of video hearings and found that by and large, counsel is able to see, hear, assess, and examine witnesses in an effective manner."[6] Other courts have similarly held that due process violations did not occur during remote proceedings when the party was able to be heard, seen, and communicate with counsel.[7] The Seventh Circuit noted in 2008 that immigration removal hearings, which have long been statutorily authorized to be conducted remotely, have never been held categorically contrary to due process.[8] And of course remote hearing technology has significantly improved since then.

A party can still establish a procedural due process violation in a particular case, such as where the remote format impairs the factfinder's ability to gauge a witness's demeanor and make a credibility determination.[9] Whether a remote hearing violates due process will be determined on a case-by-case basis, "depending on the degree of interference with the full and fair presentation of petitioner's case caused by the video conference, and on the degree of prejudice."[10] But this is a difficult standard; even a remote hearing "plagued with communication problems" was upheld against a due process challenge

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[3] See Janna Adelstein, "Courts Continue to Adapt to Covid-19," Brennan Center for Justice (Sept. 10, 2020), https://www.brennancenter.org/our-work/analysis-opinion/courts-continue-adapt-covid-19.

[4] See, e.g., David A Hoffman and Anton Strezhnev, "Longer trips to court cause evictions," Proc Natl Acad Sci U S A. (Jan. 3, 2023), https://pmc.ncbi.nlm.nih.gov/articles/PMC9926236/.

[5] *U.S. v. Lattimore*, 525 F.Supp. 3d 142, 150 (D.D.C. 2021) (citing *U.S. v. Rosenschein*, 474 F.Supp. 3d 1203, 1209 (D.N.M. 2020)).

[6] *Lattimore*, 525 F.Supp.3d at 150.

[7] *See e.g. TJH. Dep't of Family Servs.*, 2021 WY 256, 485 P.3d 408 (Wyo. 2021) (mother's due process rights were not violated when default evidentiary hearing in parental rights termination was held by video because her attorney was able to cross-examine the witness and she was able to privately chat with her attorney on Microsoft Teams); *Chaparro v. State*, 497 P.3d 1187 (Nev. 2021) (defendant's Zoom sentencing hearing was fair and just "despite its unorthodoxy because the defendant was able to confidentially communicate with counsel and speak on the record); *People v. Whitmore*, 295 Cal.Rptr.3d 461 (Ct. App. 2022) (requiring the defendant to appear remotely for posttrial and sentencing hearings during COVID-19 did not thwart the fairness of the proceeding, given "recent improvements in the quality of videoconferencing technology.").

[8] *Eke v. Mukasey*, 513 F.3d 372, 382 (7th. Cir. 2008).

[9] C.f. *Rusu v. INS*, 296 F.3d 316, 322 (4th Cir. 2002) (even if asylum seeker was unfairly prejudiced by the "potential negative impact of video conferencing on a fact-finder's credibility assessments," this was harmless error because no evidentiary basis for asylum claim was presented), citing *Edwards v. Logan*, 38 F.Supp.2d 463, 467 (W.D.Va. 1999).

[10] *Vilchez v. Holder*, 682 F.3d 1195, 1199-200 (9th Cir. 2012).

where the plaintiff did not show that better procedures would have made a difference in the outcome.[11] Moreover the possibility that holding a hearing remotely might unfairly prejudice the opposing party in a particular set of circumstances does not vitiate the general rule that remote hearings tend to afford a constitutionally sufficient opportunity to be heard in most cases.

B. State courts generally make remote hearings available for good cause shown.

Covid-19 has since receded, but most state courts continue to utilize remote judicial hearings in a variety of circumstances. Almost every state has promulgated rules, judicial orders, or administrative orders concerning that allow for the use of remote hearings.[12] And some of these states make remote hearings widely available, such as California's rule instructing courts to permit parties to appear remotely in civil proceedings "to the extent feasible," for the reason that remote hearings cam improve access to the courts and reduce litigation costs.[13] North Carolina allows proceedings of all types to be conducted remotely, subject to a party's objection.[14] Georgia similarly allows for all civil proceedings to occur remotely with consent of the parties and agreement of the court—with the exception of trials.[15]

Other states prescribe certain proceedings to be held remotely.[16] Arizona, for example, recommends that remote hearings be used in eviction proceedings "for initial appearances, bench trials, writs of restitution, and post-judgment actions, while in-person hearings are recommended for jury selections and jury trials."[17] Then, still other states simply give courts discretion to determine if a remote proceeding should be granted at a party's request, without further defining that discretion.[18] Indiana, for example, allows for a court to conduct testimonial proceedings remotely for "good cause shown."[19] But whether a remote hearing is requested under an open-ended state rule like Indiana's or in response to a landlord's objection, permission to participate remotely should usually come down to that same question: whether there is good cause.

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[11] *Vilchez*, 682 F.3d 1195 at 1200.

[12] See Perkins Coie, "Remote Proceeding Tracker" (Updated Feb. 21, 2025), https://perkinscoie.com/insights/publication/remote-proceeding-tracker.

[13] Cal. R. Ct. 3.672(a).

[14] N.C. GEN. STAT. § 7A-49.6(a) (2025); N.C. GEN. STAT. § 7A-49.6(d) (2025).

[15] Ga. Unif. R. Sup. Cts. 9.1(b); Ga. Unif. R. Sup. Cts. 9.1(d).

[16] *See e.g.* Administrative Order A. 8-23 (Maine 2023) (stating that hearings, conferences, and all other proceedings in criminal matters, as well as testimonial hearings and trials in any case, matters shall be held in person); Judicial Council oneCourtMN Hearings Initiative Policy (Minn. effective 2023) (providing a chart of hearing types presumed to be held remotely, which includes evictions, and hearing types presumed to be held in-person).

[17] Administrative Order No. 2022-88 (Ariz. 2022). In eviction proceedings, remote hearings are recommended These recommendations are presumptive, although orders adopting the standards must include a provision that authorizes a judge to make a hearing-specific deviation from the presumptive manner.

[18] *See e.g.* Tex. R. Civ. P. 21d(b)(2) (prohibiting a court from requiring a party to appear electronically in a testimonial proceeding absent good cause or the agreement of the parties); Utah R. Civ. P. 87 (giving the court discretion to determine which format to use for a hearing).

[19] Ind. Admin. R. 14(c).

Typical good reasons for allowing remote hearings include easing logistical challenges (such as lack of transportation or burdensome distances),[20] mitigating employment and economic-related impacts (such as the inability to take time off),[21] or addressing safety concerns (such as illnesses or disabilities that make appearing in-person more burdensome or dangerous).[22] Additional common factors include whether undue surprise or prejudice would result,[23] and whether an in-person hearing would afford benefits to judicial efficiency, accuracy, and access to justice that might outweigh logistical or external hardships.[24] Additionally, some states include as a good cause factor the seriousness and importance of the interest at stake.[25]

To make the best case for a remote hearing under such a discretionary, factor-based analysis, a party should present particularized factual reasons explaining why there is good cause for hearing a case remotely in the specific circumstances. That is, a party should avoid relying on a "one-size-fits-all boilerplate pronouncement."[26]

C. A credible threat of ICE arrest should establish good cause for a remote hearing.

As numerous reports have documented, ICE poses a threat not only to persons who are actually wanted for immigration violations but also imperils in-status immigrants and U.S. citizens.[27] The danger ICE poses is especially acute for tenants and witnesses who fit certain profiles, such as being non-white or speaking a language other than English.[28] And ICE encounters regularly involve excessive use of force,

[20] Tex. R. Civ. P. 21d(e)(7).

[21] See, e.g. Virtual Proceedings Policy (Colo. 2023); WIS. STAT. § 885.56 (2025); Virtual Proceedings Policy (Colo. 2023).

[22] 'Committee Comments on Rule 241,' Ill. Sup. Ct. (rev'd 2023).

[23] See, e.g. WIS. STAT. § 885.56(1)(a) (2025); Virtual Proceedings Policy (Colo. 2023); OKLA. STAT. tit. 12, § 34(c)(1)(2025); Mich. Civ. P. 2.407(c)(2); ADM20-8001 (Minn. 2022).

[24] Utah R. Civ. P. 87(b)(4) (comparing burden on the participant of appearing in person compared to appearing remotely); see also *Bd. of Educ. v. Griffin*, 2007 U.S. Dist. LEXIS 107010* (D. Md. 2007) (witness living several states away demonstrated good cause to testify via telephone, as cost of in-person presence "far outweighed" any benefit).

[25] "Whether a physical liberty or other fundamental interest is at stake in the proceeding," OKLA. STAT. tit. 12, § 34(c)(6) (2025); WIS. STAT. § 885.56(1)(f) (2025) (same); Mich. Civ. P. 2.407(c)(6) (same).

[26] *Civil Commitment of B.N. v. Health & Hosp. Corp.*, 199 N.E.3d 360, 364-65 (Ind. 2022) (motion referring solely to "Covid-19" was not specific enough to establish good cause for a remote hearing).

[27] See, e.g., Pramila Jayapal, "Hearing cases remotely reduces those risks and thereby improves access to justice" (July 16, 2025), https://jayapal.house.gov/2025/07/16/jayapal-introduces-legislation-to-end-ice-targeting-of-us-citizens/.

[28] See, e.g., ACLU of California, "Court Prohibits Federal Government from Racial Profiling, Denying Access to Counsel in Immigration Raids" (July 11, 2025) (discussing TRO that prohibits federal immigration agents from immigration agents from stopping individuals without reasonable suspicion and profiling individuals based on "apparent race or ethnicity; speaking Spanish or English with an accent; presence in a particular location like a bus stop, car wash, or agricultural site; or the work the person does"), https://www.aclusocal.org/en/press-releases/breaking-court-prohibits-federal-government-racial-profiling-denying-access-counsel); Adrian Florido, "'Antagonized for being Hispanic': Growing claims of racial profiling in LA raids," NPR (July 4, 2025), https://www.npr.org/2025/07/04/nx-s1-5438396/antagonized-for-being-hispanic-growing-claims-of-racial-profiling-in-la-raids.

warrantless stops without reasonable suspicion, destruction of personal property , and other rampant abuses[29]—in addition to well-documented mistreatment of persons in ICE custody.[30]

An immigrant or non-white tenant's concern about ICE activity thus instantly presents many of the factors states consistently identify as most important in determining whether good cause to appear remotely exists. ICE agents pose a burden and a safety risk to certain tenants traveling to, appearing in, and returning home from a court appearance. Hearing those tenants' cases remotely reduces those risks and thereby improves access to justice. Therefore, a fear of ICE interdiction should establish good cause for securing a remote hearing.

D. Proving the credible fear: key considerations

Establishing that a litigant or witness genuinely fears coming in-person to court because of the threat of ICE interdiction should require only a declaration stating as much. Yet presenting such a declaration raises a number of potential concerns for an immigrant tenant. Even though immigrants with documented lawful status and even U.S. citizens may have ample concern about encountering ICE, the possibility cannot be dismissed that articulating such a concern might be construed as evidence that the declarant is undocumented or associated with others (such as household members) who are undocumented. Hence a landlord or other opposing party might potentially share such a declaration (or other information) with ICE in hopes that immigration enforcement action would be taken against the tenant. Or the opposing party might threaten to do so in hopes of gaining settlement leverage over the tenant. There could also be some risk that ICE itself might find the declaration in a public court records system, or that some other third-party might find it and forward it to ICE. The probability and severity of these risks may differ from location to location and tenant to tenant; advocates and clients will need evaluate these risks based on their specific situations but advocates should strongly consider a number of steps to mitigate these risks.

For one, any declaration should point out the risks ICE poses to lawful immigrants and U.S. citizens and generally be written in such a way that no reasonable reader could construe the declaration as an admission that the declarant is undocumented or remaining unlawfully in the U.S. Additional factors that tend to mark a person as a more likely target of ICE profiling—but which do not include a person's lack of lawful status or details from which that could be discerned—would also appear beneficial. This may include such information as the tenant's belonging to a particular race, ethnicity, or religion, being of limited English proficiency or speaking with an accent, having a particular manner of dress, being from certain neighborhoods, etc., as well as reports or statistics of ICE enforcement actions at the relevant courthouse or transportation corridors the litigant would need to access. But such declarations need not and should not include specific details about the person's immigration status or other such sensitive information.

[29] See, e.g., Mekahlo Medina, "Residents alleged excessive force, unwarranted entries during ICE operations in LA County," NBC Los Angeles (Feb. 28, 2025), https://www.nbclosangeles.com/news/local/ice-operations-spark-controversy-with-allegations-of-excessive-force-and-unwarranted-entries/3643731/.

[30] Nazish Dholakia, "The Truth About Immigration Detention in the United States," Vera Institute (June 11, 2025), https://www.vera.org/news/the-truth-about-immigration-detention-in-the-united-states.

Second, advocates should consider utilizing any available procedures to present such information under seal, in camera, or in other ways that minimize access to the information by the public and potentially even opposing parties.

Third, some tenants may have other grounds by which to establish good cause for remote hearings—such as burdens on work or school, travel limitations, mobility impairments, and so on. In some instances, clients may be better off relying solely on such alternative grounds to seek remote hearings, even if their true motivation is a need to avoid ICE.

E. Regarding potential objections to remote hearings for litigants chilled by ICE

Regrettably, advocates have reported great difficulty in securing remote hearings for tenants deterred from appearing in court because of potential ICE encounters. The following considerations may be useful to advocates in overcoming some objections that opposing parties may raise, or concerns that courts may have, in granting remote hearings for this purpose.

1. Contentions that the risk of an ICE encounter is too remote

One objection litigants may face is that the probability of encountering ICE on the way to or from an in-person hearing is too low to justify holding the hearing remotely. As alluded to above, this contention might be based on characteristics of the specific person seeking the remote hearing (e.g., that a person is supposedly not at risk of ICE harassment because they are a U.S. citizen), the level of ICE activity in the community (e.g., that litigants need not worry because ICE is not highly active in the community, or because ICE has been enjoined from conducting courthouse arrests in the relevant location), or simply the perceived statistical probability of encountering ICE on any particular trip to the courthouse.

Courts should fundamentally reject objections based on remoteness because if a litigant's fear of ICE interdiction is genuine and deters that person from traveling to court and appearing in-person, then there is a chilling effect and it undermines access to justice.[31] But to the extent courts insist a litigant's fear of encountering ICE be well-founded, any reports, statistics, media stories, or other evidence showing that appearing in court would make an ICE encounter "at least remotely possible" ought to suffice:[32] The reality is that ICE's demonstrated tactics, and flagrant disregard for laws and the rights of the people they pursue, have made such fear eminently reasonable as a matter of course:

> ICE raids often occur without warrants. Agents frequently detain individuals not charged with any crime. Homes, schools, hospitals, workplaces, and courthouses have all become targets. Agents in plain clothes swarm unsuspecting individuals, arrest them without explanation, and separate families under the pretense of national security. In many cases, masked agents refuse

[31] See Judicial Council OneCourtMN Hearings Initiative Policy (Minn. 2023) (court should hold hearing virtually "if holding the hearing in person would cause a participant to reasonably fear for their safety."); see also Virtual Proceedings Policy (Colo. 2023).

[32] See *Doe* at 682 ("A credible threat will not be found "where plaintiffs do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible," citing *Cayuga Nation v. Tanner,* 824 F.3d 321, 331 (2d Cir. 2016).

to identify themselves at all—creating a climate of terror where the public cannot distinguish lawful enforcement from lawless abduction.[33]

In one especially relevant aspect of the agency's lawlessness, ICE has made dozens of arrests inside courthouses across the country[34] —even despite written ICE policy to generally avoid enforcement actions in or near courthouses, or in areas within courthouses that are dedicated to non-criminal proceedings.[35]

At least one court has evaluated the gravity of a civil litigant's risk of ICE interdiction by appearing physically in a state courthouse—and found the associated chilling effect amounted to a sufficiently actual and imminent injury to establish standing in a suit to enjoin ICE from engaging in courthouse immigration enforcement.[36] Specifically, the "dramatic increase in enforcement activity" during the first Trump administration indicated that ICE enforcement against the plaintiff would be "*at least* remotely possible, if not likely," should he appear in family court.[37] This showing satisfied the U.S. Supreme Court's established standard for establishing standing through the threat of prosecution, which requires only "a credible fear of prosecution—or enforcement."[38]

2. Contentions that avoiding ICE is not a proper basis for allowing a remote hearing

Another potential objection litigants could face is that enabling ICE avoidance is not a legitimate basis on which to grant a remote hearing, or could potentially even violate the federal prohibition on harboring undocumented immigrants or interfering with immigration enforcement actions. Notably, the federal Department of Justice arrested Wisconsin judge Hannah C. Dugan in April for helping a man evade ICE agents at the Milwaukee courthouse by arranging for him to exit through a non-public door,[39] with the DOJ having brought a similar prosecution against a Boston judge during the first Trump administration.[40]

In light of these high-profile cases, some judges could be particularly skittish about granting remote hearings for the specific purpose of enabling litigants to avoid ICE encounters.[41] But enabling

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[33] John Whitehead and Nisha Whitehead, "America's most lawless agency: ICE is the prototype for tyranny," https://www.ocregister.com/2025/06/28/americas-most-lawless-agency-ice-is-the-prototype-for-tyranny/

[34] Angelica Franganillo Diaz and Priscilla Alvarez, *ICE targets migrants for arrest at courthouses as Trump administration intensifies deportation push*, CNN (June 2, 2025).

[35] U.S. IMMIGR. & CUSTOMS ENF'T, POL'Y NO. 11072.4, CIVIL IMMIGRATION ENFORCEMENT ACTIONS IN OR NEAR COURTHOUSES (2025).

[36] *Doe v. U.S. Immigr. & Customs Enforcement,* 490 F.Supp.3d 672, 683 (S.D.N.Y. 2020).

[37] *Doe*, 490 F.Supp.3d at 683 (italics in original).

[38] *Doe*, 490 F.Supp.3d at 682.

[39] James Hill, "DOJ says Milwaukee judge accused of helping undocumented immigrant evade arrest not immune from criminal prosecution," ABC News (June 9, 2025), https://abcnews.go.com/US/doj-milwaukee-judge-accused-helping-undocumented-immigrant-evade/story?id=122671975.

[40] See Tovia Smith, "Wisconsin judge's case is rare but not unprecedented. There's another near Boston," NPR (May 17, 2025), https://www.npr.org/2025/05/17/g-s1-67288/wisconsin-judge-hannah-dugan-immigrant-ice-case-boston-shelley-joseph.

[41] Note that judicial immunity has not protected Judge Dugan from prosecution under the anti-harboring statute. See United States v. Dugan, No. 25-CR-89, 2025 WL 1870854, at *13 (E.D. Wis. July 7, 2025) ("In the civil context, it is well-established and undisputed that judges have absolute immunity from civil lawsuits for monetary damages when engaging in judicial acts [but]

parties and witnesses to appear and participate in judicial proceedings without outside interference of whatever kind is critical to the administration of justice, and granting remote hearings for that purpose does not obstruct immigration enforcement.

a. Granting remote hearings does not constitute unlawful harboring

The federal anti-harboring statute makes it a crime to "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation[.]"[42] Hence this statute cannot even come into play unless the judge actually knows (or could not, other than through recklessness, fail to know) that the litigant seeking the remote hearing is unlawfully in the U.S. As discussed above, a housing litigant's lack of immigration status (when there is such a lack of status) need not be included in a litigant's declaration and generally has no relevance in a housing matter. And since the fear of ICE encounters is by no means limited to undocumented immigrants, granting a remote hearing on this basis would not signal judicial awareness that a litigant is out-of-status or undocumented.

Multiple U.S. Circuit Court of Appeals have interpreted the anti-harboring statute as requiring "conduct 'tending to substantially facilitate an alien's remaining in the United States illegally' and to prevent government authorities from detecting the alien's unlawful presence."[43] Scheduling a remote hearing for a litigant concerned about the *possibility* of encountering ICE during a courthouse visit does not substantially facilitate a person's avoidance of removal as, to use Judge Dugan's case as an example, physically concealing immigrant the judge knows to be undocumented from ICE agents then present to arrest the person. Furthermore, as the Fourth Circuit explained in *de Reyes v. Waples Mobile Home Park,* violating the harboring statute requires the use of "deceit" to assist with the evasion of immigration authorities,[44] and there would be nothing deceitful about simply allowing a litigant to appear remotely.

Accordingly, granting a remote court appearance would not plausibly amount to "conceal[ing], harbor[ing], or shield[ing] from detection" under the harboring statute, even if the judge knew the litigant was not lawfully in the U.S. and entered the order specifically to enable that litigant to appear without risking an ICE encounter at or *en route* to the courthouse. There is no deception, there is no interference with an active effort to apprehend the person, and the degree to which the remote hearing enables the litigant to evade detection or arrest is not substantial.

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not immune from criminal prosecution for acts wholly outside their official roles as judges [or] for the criminal deprivation of constitutional rights under 18 U.S.C. § 242 [or] for acts, though related to official duties, are in violation of criminal law.").

[42] 8 U.S.C.A. § 1324(a)(1)(A)(iii).

[43] *DelRio-Mocci v. Connolly Props. Inc.,* 672 F.3d 241, 246 (3d Cir. 2012), quoting *United States v. Rubio–Gonzalez*, 674 F.2d 1067, 1073 (5th Cir.1982).

[44] See *Reyes v. Waples Mobile Home Park Ltd. P'ship,* 91 F.4th 270, 277 (4th Cir.), cert. denied, 145 S. Ct. 172 (2024) ("[T]he statute only applies to those who intend in some way to aid an undocumented immigrant in hiding from the authorities. It involves an element of deceit that is not present in run-of-the mill leases made in the ordinary course of business.").

b. The common law doctrine of immunity from courthouse arrest supports the use of remote hearings to facilitate the proper operation of the courts.

Furthermore, the common law recognizes a longstanding tradition of immunity from civil courthouse arrest.[45] This privilege dates back to the fifteenth century, and serves not only to "preserve the sanctity of the court" and "the decorum which ought to prevail,"[46] but to "ensure[] that courts everywhere are "open, accessible, free from interruption, and able to protect the rights of all who come before the court."[47] Holding a remote hearing where the court's ability to assure the fullest participation of the parties and hear from the broadest range of witnesses is threatened by the specter of ICE activity is fully consistent with the tradition and purpose of this common law doctrine.[48]

Allowing ICE activity to intimidate litigants and witnesses from coming to court quite obviously interferes with the administration of justice.[49] Hence, some courts have invoked the privilege to enjoin ICE from making certain civil immigration arrests in federal courthouses.[50] Immigration arrests in state courthouses may further encroach upon states' "core sovereign judicial and police functions" in violation of the Tenth Amendment.[51] If a court may enjoin ICE from conducting courthouse arrests, then it stands to reason that same court could also grant the lesser relief of a remote hearing to prevent a courthouse immigration arrest from taking place.

At least one court has declined to enjoin ICE arrests at courthouses, finding a lack of clarity around whether Congress intended the common law immunity to remain in effect when authorizing immigration arrests in the Immigration & Nationality Act.[52] But whether or not ICE may lawfully carry out immigration arrests in courthouses, state courts certainly have no duty to actively *assist* ICE in making immigration arrests[53] and should not assist in ways that frustrate courts' basic mission of hearing and adjudicating cases fairly and correctly. That is, facilitating immigration enforcement is not a relevant

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[45] See Christopher N. Lasch, *A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis*, 127 YALE L.J.F. 410, 422 (2017).

[46] See, e.g., *Orchard's Case*, 38 Eng. Rep. 987 (1828).

[47] *Velazquez-Hernandez v. U.S. Immigr. & Customs Enf't*, 500 F.Supp.3d 1132, 1137, 1145 (S.D. Cal. 2020); (prohibiting the civil immigration arrest of any individual appearing in federal courthouse while that individual is inside, or traveling to and from, the courthouse).

[48] See, e.g., *Parker v. Marco*, 136 N.Y. 585, 589 (N.Y. 1893) (common law privilege against courthouse arrests necessary to promote the efficient administration of justice).

[49] *Velazquez-Hernandez* at 1145 (administration of justice is "obstructed" if parties are liable to be civilly arrested while attending court) (citing *Halsey v. Stewart,* 4 N.J.L. 426, 427 (N.J. 1817)).

[50] See N.Y. v. U.S. Immigr. & Customs Enf't, 431 F.Supp.3d 377 (S.D.N.Y. 2019) (also finding ICE courthouse arrest policy was arbitrary or capricious in violation of the Administrative Procedures Act); see *Velazquez-Hernandez,* 500 F.Supp.3d at 1148; see also *Doe v. U.S. Immigr. & Customs Enf't*, 490 F.Supp.3d 693-4 (S.D.N.Y. 2020) (common law privilege against courthouse arrest extends to arrests of allegedly undocumented immigrants in courthouses).

[51] *Washington v. U.S. Dep't of Homeland Sec.*, 614 F.Supp.3d 863, 882 (W.D. Wash. 2020).

[52] *Ryan v. U.S. Immigr. & Customs Enf't*, 974 F.3d 9, 26 (1st Cir. 2020) (uncertain whether Congress considered civil immigration arrests authorized by within scope of common law privilege against civil courthouse arrest).

[53] See Bertina Kudrin, Megan Thomas, Niharika Vattikonda, "Can the U.S. Government Compel States to Enforce Immigration Law?" Lawfare (April 30, 2025), https://www.lawfaremedia.org/article/can-the-u.s.-government-compel-states-to-enforce-immigration-law.

criterion for a state court judge to consider in a housing case—so to deny a remote hearing for the purpose facilitating immigration enforcement would be arbitrary and a clear abuse of discretion.[54]

E. Procedures for challenging denial of a remote hearing.

The sole remedy for an individual litigant prejudiced by a state court's denial of a remote hearing will generally be to appeal. An appellate court reviews the denial a remote hearing for abuse of discretion,[55] and most such appeals will likely turn on whether the moving party established good cause for a remote hearing and, if so, whether the court's reason(s) for denying the remote hearing was relevant and capable of outweighing the need to be heard remotely. In a demonstrative case from the pandemic era, the Louisiana Court of Appeals summarily overturned an eviction judgment entered by default against a pair of medically vulnerable tenants who did not appear for an in-person hearing due to fears of Covid-19 infection, and ordered the trial court to "conduct the proceedings herein by use of video conferencing, subject to the right of any party or counsel who chooses to attend in person."[56]

Another concern, however, is the possibility that a state court, rather than adjudicate remote hearing requests on an individualized basis according to case-specific factors, might establish a policy that categorically denies remote hearings to housing court users who fear ICE encounters. Any such policy—whether established by statute, court rule, administrative order, or otherwise[57]--would infringe upon the related constitutional rights of access to court[58] and procedural due process, which obligates states to remove unjustifiable barriers to full participation in judicial proceedings.[59] Assuming the existence of that policy could be proven, litigants deterred by that policy from using the court should have grounds to challenge the policy affirmatively.

1. Remote hearings must be available for litigants who show a need for them as a matter of access to court and procedural due process.

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[54] See generally *BASR P'ship v. United States*, 915 F.3d 771, 783 (Fed. Cir. 2019) ("To constitute an abuse of discretion, the trial court's decision must be clearly unreasonable, arbitrary or fanciful, or based on clearly erroneous findings of fact or erroneous conclusions of law.").

[55] *See, e.g., United States v. Faunce,* 66 F.4th 1244, 1257 (10th Cir. 2023); *United States v. Kivanc,* 714 F.3d 782, 791 (4th Cir. 2013); see also *Matter of W. B.,* 333 Or. App. 63, 64, 552 P.3d 128, 129 (2024) ("We review a trial court's decision to allow remote location testimony for abuse of discretion."); *McNamara v. ICO Polymers N. Am., Inc.,* 2023 IL App (1st) 220634-U, ¶ 33 ("Whether our review is of the exclusion of evidence, of a decision to exclude a witness, or of a ruling concerning the use of remote hearings under our Supreme Court Rules, we agree that the standard of review is the abuse of discretion standard."), appeal denied, 238 N.E.3d 309 (Ill. 2024), and appeal denied, 238 N.E.3d 309 (Ill. 2024).

[56] *Nguyen v. Hall,* 2020-0531 (La. App. 1 Cir. 6/25/20).

[57] Whether an unconstitutional policy of denying remote hearings to litigants fearing ICE encounters could be established through evidence of a customary practice appears plausible, but is beyond the scope of this memo. See, e.g., *Mettler v. Whitledge,* 165 F.3d 1197, 1204 (8th Cir. 1999) (requirements to establish an unconstitutional custom include "a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees [and] deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct").

[58] *Monsky v. Moraghan*, 127 F.3d 243, 246 (2nd Cir. 1997) (right of access to court derived from the First Amendment right to petition for redress, the Privileges and Immunities Clause of Article IV, section 2, and the Due Process Clauses of the Fifth and Fourteenth Amendments).

[59] See *Tennessee v. Lane*, 541 U.S. 509, 523 (2004), citing *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

Under *Mathews v. Eldridge,* the basic analysis for determining whether procedural due process requires a given procedure includes weighing the private interest that will be affected, the risk of an erroneous deprivation of that interest through the procedures used, the probable value of additional or substitute procedural safeguards, and "finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[60] A policy of categorically denying remote hearings to housing court litigants who fear ICE encounters does not survive a good faith application of the *Mathews* test.

Just using eviction cases as an example, the private interest at stake is the right to remain in one's home, which is a "significant interest in property."[61] Requiring a tenant to appear in-person for a court hearing presents a very high risk of erroneous deprivation if it means the tenant, due to the fear of ICE interdiction, will not appear and thus either lose by default or at the very least be unable to present proofs and arguments.[62] The same is true if the tenant actually is arrested by ICE, either on the way or at the courthouse before the matter is called. The threat of ICE interdiction may also chill witnesses or other relevant persons from appearing at in-person proceedings, which further deprives the court of available evidence and increases the risk of erroneous deprivation.[63] The denial of remote hearings also infringes on access to court, creating pressure on tenants who fear ICE encounters to resolve their cases more quickly and against their best interests.[64]

Allowing parties and witnesses who fear ICE encounters to appear remotely thus increases the likelihood that housing cases will be adjudicated on the merits and with the maximum amount of evidence available. That means making remote hearings available to litigants concerned about ICE interdiction has great value in reducing the risk of erroneous deprivation. And denying remote hearings serves no relevant governmental interest. Particularly as remote hearings have become more common in the wake of Covid-19, substantially all courts are equipped with the necessary technology for remote hearings and experienced with its use. Hence there is no material cost or administrative burden.[65]

A policy of denying remote hearings to litigants fearful of ICE encounters therefore does not survive a *Mathews* analysis, and for substantially the same reasons likely also infringes impermissibly on

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[60] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)

[61] *Greene v. Lindsey*, 456 U.S. 444, 450-451 (1982).

[62] See generally Bing Le, *Constitutional Challenges to Courthouse Civil Arrests of Noncitizens*, 43 N.Y.U. REV. L. & SOC. CHANGE 295, 353 (2019).

[63] See, e.g., *Doe v. U.S. Immigr. & Customs Enforcement*, 490 F.Supp.3d 672 (S.D.N.Y. 2020).

[64] *Safeguarding the Integrity of Our Courts: The Impact of ICE Courthouse Operations in New York State*, THE IMMIGR. DEF. PROJECT (Apr. 10, 2019) at 58.

[65] Note that ICE, in attempting to justify its practices against actions seeking to enjoin courthouse arrests, has argued the practice can "reduce safety risks to the public, targeted aliens, and ICE officers and agents." See Memorandum of Todd Lyons, Acting Director, U.S. Immigration & Customs Enforcement, Re: Civil Immigration Enforcement Actions In or Near Courthouses (May 27, 2025), https://www.ice.gov/doclib/foia/policy/11072.4.pdf. Specious though this argument may be from ICE itself, the argument is fully unavailable as a justification for denying remote hearings (since any supposed danger that "targeted aliens" did pose to the public would be better mitigated by allowing such persons to remain at home and participate remotely).

the right of access to court.[66] A higher state court, or potentially a federal court, could therefore declare unlawful and potentially enjoin such a practice.[67]

2. Procedural considerations for challenging court policies that systematically deny remote hearings to litigants concerned about ICE encounters.

Where advocates identify a state court policy that undermines access to justice for of an entire category of tenants, such as those with credible fears of ICE interdiction, affirmative litigation may be appropriate to challenge the policy. This may be a preferable or even necessary approach where tenants face considerable obstacles to appeal (such as insurmountable bond requirements, mootness problems, or other such issues). Most states have extraordinary writ or mandamus-type procedures by which to challenge improper judicial policies; federal jurisdiction may lie where due process or another federal constitutional right is involved.[68]

Note that affirmative cases need not necessarily be brought directly by impacted immigrant clients; for example, legal services providers who alleged that courthouse arrests impeded their ability to serve their clients were held to have standing to challenge ICE's courthouse arrest policy in *Doe v. ICE*.[69] Housing advocates should similarly be able to establish standing to challenge a state court's policy of denying remote hearings for clients threatened with ICE interdiction, as such policy prevents advocates from being able to effectively serve those clients.

Multiple cases from the housing context suggest a federal court may declare unlawful, and even enjoin, state judicial eviction proceedings that violate tenants' constitutional rights. For example, the U.S. Supreme Court declared a provision of Oregon's summary eviction statute unconstitutional in *Lindsey v. Normet,* pursuant to a class action filed under 42 U.S.C. § 1983.[70] In *Caulder v. Durham Housing Authority,* the Fourth Circuit affirmed an order enjoining the execution of a state eviction court judgment where required procedural safeguards had not been provided to a public housing tenant.[71] Critical to that ruling was the appellate court's observation that the state summary eviction proceeding would not have afforded the tenant a meaningful opportunity to defend against the eviction.[72] Similarly, in the much more recent case of *Sinisgallo v. Islip Housing Authority,* a federal courts enjoined an

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[66] See, e.g., *Wilmer Cutler Pickering Hale & Dorr LLP v. Exec. Off. of President,* No. CV 25-917 (RJL), 2025 WL 1502329, at *118-19 (D.D.C. May 27, 2025) (judicial litigation is a form of petitioning, restrictions on which are subject to "exacting scrutiny").

[67] See 42 U.S.C. § 1983 ("in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.")

[68] *Pulliam v. Allen,* 466 U.S. 522, 541 (1984) ("We remain steadfast in our conclusion, nevertheless, that Congress intended § 1983 to be an independent protection for federal rights and find nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review.").

[69] *Doe v. U.S. Immigr. & Customs Enforcement,* 490 F.Supp.3d. at 684.

[70] See, e.g., *Lindsey v. Normet,* 405 U.S. 56, 59 (1972) (considering challenge to Oregon summary eviction statute under 42 U.S.C. § 1983 based on due process and equal protection grounds).

[71] *Caulder v. Durham Housing Authority*, 433 F.2d 998, 1004 (4th Cir. 1970).

[72] See *Caulder*, 433 F.2d at 1002 ("It is significant that the final notice of termination on which the Housing Authority proceeded before the magistrate constituted an exercise of the unlimited power of termination contained in the lease. It did not condition termination on the fact that any covenant of the lease had been breached, or that the rent had not been paid.").

unlawful detainer action because the state court would not have been allowed to hear or adjudicate the tenant's defense (which was based on the right to reasonable accommodations for a disability).[73]

Even so, federal litigation to enjoin state court practices that violate federal constitutional rights has become markedly more difficult in recent years. In the case of *Whole Woman's Health v. Jackson,* a majority of the U.S. Supreme Court ruled that state judges and court clerks were not proper defendants in an action challenging the Texas Heartbeat Act (THA)—a statute which authorized private citizens to bring lawsuits for injunctions and statutory damages against doctors who perform abortions.[74] Given this means of enforcement by private suits, the plaintiffs sought to enjoin clerks from docketing cases to enforce the THA and to prevent judges from hearing such cases.[75] However, the Supreme Court ruled that such relief would be inappropriate because those state judges were not averse to the future defendants in THA enforcement suits—but would rather be called upon to adjudicate those actions (and to dismiss them if the THA was, in fact, unconstitutional).[76]

In addition to *Whole Woman's Health*, advocates contemplating a federal court challenge to state court practices should consider the opinion of Judge Howard Sachs in the Covid-era case of *KC Tenants v. Byrn*.[77] In that case, the presiding judge and court administrator of the 16th Judicial Court in Kansas City, Missouri, had issued orders allowing the filing and processing of eviction suits subject to a federal eviction moratorium then in effect—though not the execution of judgments.[78] *KC Tenants* sued in U.S. District Court to enjoin the order, arguing that accepting eviction cases for filing, and hearing and deciding those cases, violated the federal moratorium's prohibition on "any action by a landlord ... to remove, or cause the removal of a covered person."[79]

Judge Sachs disagreed with *KC Tenants'* core argument, ruling that "the prohibition of any 'action' to 'cause the removal' of a tenant simply mean[t] that an evicting officer shall not be sought out, or a moving van obtained, or some similar conduct undertaken to achieve an actual eviction" and that the filing and processing of eviction lawsuits was "preliminary to even beginning a physical eviction."[80] However, Judge Sachs then went on to say that he might have denied injunctive relief to *KC Tenants* even had he agreed with their interpretation of the moratorium's coverage, for the reason "that the

[73] *Sinisgallo v. Town of Islip Hous. Auth*., 865 F.Supp.2d 307 (E.D.N.Y. 2012).

[74] See *Whole Woman's Health v. Jackson,* 595 U.S. 30, 39 (2021).

[75] *Whole Woman's Health* at 39.

[76] *Whole Woman's Health* at 39-40 ("Clerks serve to file cases as they arrive, not to participate as adversaries in those disputes. Judges exist to resolve controversies about a law's meaning or its conformance to the Federal and State Constitutions, not to wage battle as contestants in the parties' litigation.").

[77] *KC Tenants v. Byrn,* 504 F. Supp. 3d 1026, 1031–32 (W.D. Mo. 2020), vacated, No. 4:20-CV-00784-HFS, 2022 WL 3656453 (W.D. Mo. Aug. 24, 2022)

[78] See *KC Tenants* at 1028.

[79] *KC Tenants* at 1028.

[80] *KC Tenants* at 1028.

relief sought here, federal court intervention stripping down a state court docket, is extraordinary, possibly unprecedented."[81]

A federal equitable order against a state court or judge is only appropriate if there is no adequate state law remedy.[82] To the *Whole Woman's Health* court, this meant a trial and potential appeal through the normal state court process.[83] But Judge Sachs took a very expansive view of what might constitute an adequate state remedy—including not only appeals but also mandamus or writ of prohibition (which, dubiously in this connection, are generally appropriate only where the state court determines there is no adequate remedy).[84]

Judge Sachs' reluctance to interfere with unconstitutional state court actions also relied on the need for "comity" in dealing with the state courts, and a statement by the late Justice Harry Blackmun, ironically in a case upholding the ability of federal courts to enjoin unconstitutional acts by state judges, that "[m]uch has changed since the Civil Rights Acts were passed. It no longer is proper to assume that a state court will not act to prevent a federal constitutional deprivation or that a state judge will be implicated in that deprivation."[85] Though Judge Sachs later vacated the order, the opinion nevertheless demonstrates the reluctance with which many federal judges may be likely to approach the subject of potentially enjoining state judicial officials.

Accordingly, advocates looking to challenge court policies of denying remote hearings to people concerned about ICE encounters should probably prioritize appeals and even state law writs wherever possible. Advocates looking to bring such challenges in U.S. District Courts should be prepared to counter the deep reservations Judge Sachs expressed in *KC Tenants*—especially the lack of an adequate state law remedy.[86]

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[81] *KC Tenants* at 1034.

[82] *Pulliam v. Allen,* 466 U.S. 522, 542 (1984) ("Petitioner did not appeal the award of injunctive relief against her. The Court of Appeals therefore had no opportunity to consider whether respondents had an adequate remedy at law, rendering equitable relief inappropriate[.]").

[83] See *Pulliam* at 40.

[84] See *KC Tenants* at 1033 ("Plaintiff would likely assert that state court prohibition practice would not offer adequate relief here. Perhaps not today, but if plaintiff represents indigent tenants, including those supposedly sued earlier, would an early October effort have been considered a legally adequate remedy? My current supposition is that it would…"); c.f. *Scott Cnty. Reorganized R-6 Sch. Dist. v. Missouri Comm'n on Hum. Rts.,* 872 S.W.2d 892, 893 (Mo. Ct. App. 1994) ("The two requirements for issuance of a writ are lack of jurisdiction and lack of an otherwise adequate remedy").

[85] See *KC Tenants* at 1032, discussing *Pulliam, 466 U.S. at*, 541-43 (1984) ("We conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity. In so concluding, we express no opinion as to the propriety of the injunctive relief awarded in this case.").

[86] See *Pulliam* at 542.