

DIVORCING DEPORTATION:
THE OREGON TRAIL TO IMMIGRANT INCLUSION

by

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Immigration policy under the Trump Administration has relied on local officials and local information to fulfill federal policy goals of high-volume deportation. It has embroiled states and localities and inspired impassioned objection from many impacted localities. This intensification of federal deportation has compelled states, towns, and cities to define their relationships with their immigrant communities of color, federal deportation policy, and immigration law.

This is nowhere more true than in Oregon. Oregon's response has been to unravel the strands of federal deportation policy that had over time become enmeshed in state, local, and private institutions. This Article, drafted in the crucible of an intensive upper-level immigration course, takes a deep dive into Oregon's efforts to shake off the tendrils of federal deportation policy. Why might it be worthwhile to follow the trail of immigrant inclusion in Oregon? Understanding the genesis of inclusive immigrant policies in this jurisdiction reveals that inclusionary policies have a deep-rooted history that long precedes the current administration's pronouncements. As a case study, Oregon's decades-long effort to disentangle itself from the divisiveness of federal immigration policy sheds valuable light on the process by which local jurisdictions build local policies to foster the kind of inclusion of immigrant communities of color seen as critical to local prosperity.

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INTRODUCTION

Immigration has always shaped the contours of membership and community in states and localities across the United States.¹ States and cities have traditionally been excluded from formal governance of foreign migration in favor of federal sovereignty over border control. President Donald Trump's immigration policy, however, sparked a dramatic proliferation of the apparatus of deportation that embroiled states and localities, inspiring impassioned objection from many impacted localities.² The Trump Administration resurrected previously discarded programs, such as the Secure Communities program, that rely on local officials and local information to fulfill federal policy goals of high-volume deportation.³ This intensification of federal deportation compelled states, towns, and cities to articulate how they will relate to their immigrant communities of color, federal deportation policy, and immigration law.⁴

This is nowhere more true than in Oregon. Oregon's response to current and past federal efforts to entangle it in deportation policy has been to unravel the strands of federal deportation policy that had over time become interwoven into state, local, and private institutions.⁵ As examples, on April 6, 2017, the Chief Justice of the Oregon Supreme Court sent an unprecedented letter to Department of Homeland Security (DHS) John F. Kelly and Attorney General Jeff Sessions urging them to direct deportation officials to cease making arrests in and around Oregon's courthouses.⁶ In July 2017, residents of Wasco County, Oregon sued the Northern Oregon Regional Corrections Facility (NORCOR), alleging that NORCOR's contract with Immigration and Customs Enforcement (ICE) to take administrative custody of noncitizens by holding

¹ See generally Gerald L. Neuman, *The Lost Century of Immigration Law* (1776–1875), 93 COLUM. L. REV. 1833 (1993); HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2007); HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* (2006).

² See, e.g., Brief for *Amicus Curiae* 56 Cities and Counties in Support of Plaintiffs-Appellees at 2–3, *City and Cty of S.F. v. Donald J. Trump*, No. 17-17480 (9th Cir. Feb. 12, 2018) (asserting that “President Trump’s threat to use the Executive Order to defund sanctuary jurisdictions is a weapon not only against [the plaintiffs] but against all local governments, including Amici.”).

³ Christopher N. Lasch et al., *Understanding “Sanctuary Cities”*, 59 B.C. L. REV. 1703, 1730 (2018).

⁴ *Id.* at 1704–06.

⁵ TESS HELLGREN ET AL., INNOVATION LAW LAB, *BELONG: STRENGTHENING OREGON’S DISENTANGLEMENT STATUTE TO ENHANCE PUBLIC SAFETY, PROTECT FUNDAMENTAL RIGHTS, AND PROMOTE COLLECTIVE PROSPERITY* 8–13 (2018), https://innovationlawlab.org/wp-content/uploads/2018/07/Belong_Report_Inclusion_2018.pdf.

⁶ Letter from Thomas A. Balmer, Chief Justice., Or. Supreme Court, to Jeff Sessions, Attorney Gen., & John F. Kelly, Sec’y, Dep’t of Homeland Sec. 1–2 (Apr. 6, 2017) (“I respectfully request that you exercise your broad discretion in enforcing federal immigration and criminal laws, and *not* detain or arrest individuals in or in the immediate vicinity of the Oregon courthouses.”).

them in its jail violated Oregon's decades-old law exempting Oregon resources from immigration enforcement.⁷ In August, 2017, Governor Kate Brown signed into law a statute clarifying that "immigration status" constituted confidential information long-protected under state common law and legislation and restricting its public bodies from sharing that information for the purpose of enforcing federal immigration laws.⁸ And in spring 2018, the City of Portland and Multnomah County collectively pledged almost one million dollars for publicly supported removal defense for members of its immigrant communities.⁹

Scholarship on state and local entanglement with federal immigration policy has tended to take a national approach, collecting and categorizing local laws and policies or drawing broad lessons about federalism.¹⁰ This Article, drafted in the crucible of an intensive upper-level immigration course, takes a deep dive into the policies of a particular jurisdiction: the state of Oregon. Why is it worth following the trail of immigrant inclusion in Oregon? Understanding the genesis of inclusive immigrant policies in this jurisdiction reveals that inclusionary policies have a deep-rooted history that long precedes the current administration's pronouncements. As a case study, Oregon's decades-long effort to disentangle itself from the divisiveness of federal immigration policy sheds valuable light on the process by which local jurisdictions build local policies to foster the kind of inclusion of immigrant communities of color seen as critical to local prosperity.

This Article is the outcome of a unique pedagogical experience. Four pairs of students enrolled in the Transformative Immigration Law course in the fall of 2017 at Lewis & Clark Law School investigated and researched four of the foremost barriers to integration of Oregon immi-

⁷ Neita Cecil, *Oregon Law Center Sues NORCOR Over Holding of ICE Detainees*, HOOD RIVER NEWS (Jul. 25, 2017), <http://www.hoodrivernews.com/news/2017/jul/26/oregon-law-center-sues-norcor-over-holding-ice-det/>.

⁸ OR. REV. STAT. § 191.502(2) (a), H.B. 3464, 79th Leg., Reg. Sess. (Or. 2017).

⁹ See CITY OF PORTLAND, MAYOR'S PROPOSED BUDGET DECISIONS AS OF 4/30/2018, at 4, <https://www.portlandoregon.gov/cbo/article/682140> (reflecting \$500,000 allocation for "Universal Representation by Equity Corps of OR"); Bd of Cty Comm'rs for Multnomah Cty, Resolution No. 2018-048 (May 31, 2018) (adopting budget amendment setting a \$500,000 allocation for legal aid services for immigrants and refugees), <https://multco.us/file/73358/download>; see also *Universal Representation Passes!*, CAUSA (June 5, 2018), <http://causaoregon.blogspot.com/2018/06/universal-representation-passes.html>.

¹⁰ See, e.g., Lasch et al., *supra* note 3; Barbara E. Armacost, "Sanctuary" Laws: *The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197 (2017); Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Networks*, __ MINN. L. REV. __ (forthcoming 2018) (manuscript at 8–13); Huyen Pham, *A Framework for Understanding Subfederal Enforcement of Immigration Laws*, 13 U. ST. THOMAS L.J. 508, 509 (2017) (describing six distinct immigration enforcement models that local law enforcement agencies have implemented). See generally Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245 (2016) (collecting and analyzing immigrant protective police and prosecutorial policies, and classifying them by type and justification).

grants. These four issues are significant not only to Oregon, but to state and local jurisdictions across the nation.¹¹

Each of the four policy memoranda made direct contributions to ongoing policy debates, litigation approaches, or media coverage of their topics. Two of the chosen topics, establishing universal representation for immigrant community members, and defining the scope of confidential information, address legislative and policy frameworks that have both immediate and lasting implications for local and national policy. As such, they are appropriate for a scholarly medium and the two memoranda appear here.¹² While they have been significantly trimmed and revised for the format of a law review, they are primarily the students' work and reflect their committed research and drafting.

The Article proceeds in two main parts. Part I looks behind the universal representation program that Oregon adopted, unearthing its impetus and the trail to its adoption. It examines the effect on Oregon of the detention and deportation emphasis of federal immigration policy and the impact that low legal representation rates has on Oregon's communities. It traces the legal framework around government-appointed representation for noncitizens, and provides empirical support for adopting a program of universal representation for individuals in removal proceedings in Oregon.

Part II addresses a small but significant modification of Oregon's open records law clarifying that in Oregon, confidential personal information includes immigration status, and receives the same protections from disclosure as other personal information when public bodies collect and maintain it. The Article concludes with closing thoughts about the implications of these policies.

I. ACCESS TO JUSTICE: LEGAL REPRESENTATION FOR OREGONIANS FACING DEPORTATION¹³

The commitment that Portland and Multnomah County made in 2018 to provide publicly-funded legal representation for immigrant residents in deportation proceedings addressed a need to ensure fairness in the legal system, preserve the unity of their communities, and foster inclusive policies.¹⁴ The rationale offered for this initiative was multifold.

¹¹ See Lasch, et al., *supra* note 3, at 1706–08.

¹² The remaining memos, covering immigration arrests in and around courthouses (authored by Cecilia Anguiano and Demi Jacques) and the NORCOR litigation (authored by Lizeth Marin and Favio Perez), are not included in this Article because the issues they address have undergone significant development since completion of the memos.

¹³ This Part was primarily authored by Lindsay Jonasson and Teresa Smith.

¹⁴ The authors use “deportation proceedings” to refer to the administrative proceedings that the U.S. government uses to forcibly expel a person from the United States under INA § 240, 8 U.S.C. § 1229 (2012). Although the U.S. government has several prosecutorial options respecting the type of expulsion processes it might use,

Immigrants and their families are deeply integrated into Oregon's fabric and vital to its shared prosperity. Despite their contributions, unprecedented numbers of Oregon residents found themselves targeted by the federal government's robust detention and deportation apparatus. These Oregonians include parents of U.S. citizen children who had lived in Oregon for decades, young people who had called Oregon their home since they were children, long-time community members with green cards in danger of losing their legal status, and people who arrived more recently in search of refuge from persecution in their home countries.¹⁵ Those unsuccessful in their legal cases faced expulsion from the United States, potentially permanent separation from their families, and return to possibly life-threatening conditions.¹⁶

Although these consequences are severe, individuals in deportation proceedings are generally have not been provided with a government-appointed attorney, as they are in criminal cases.¹⁷ Thus, many Oregon residents faced prosecution by a skilled government attorney in a complex legal system without the assistance of a lawyer and were deported without a fair chance to defend themselves. Oregon families were divided and communities and workplaces disrupted, leaving taxpayers, employers, and the state to bear a significant financial burden.¹⁸

This Part explains why Oregon's local governments have joined the growing national movement to promote due process and protect communities by guaranteeing the right to counsel for community residents in removal proceedings. First, we describe the legal representation crisis for Oregonians facing deportation created by lack of access to counsel and the dramatic growth of the federal government's detention and deportation apparatus. We demonstrate through local data that thousands of Oregon residents have been unrepresented in deportation proceedings and that Oregonians with attorneys are far more likely to prevail in their immigration cases. Our findings suggest that lack of counsel prevented Oregon residents with legal avenues for relief from claiming their right to remain in their homes.

Second, we set out a proposal for when representation should be compelled for individuals against whom the government brings a legal action. We demonstrate that state and federal law has long recognized access to counsel as fundamental to due process when the complexity of

see e.g., INA §§ 235(b) and 241(a)(5), we limit our analysis to § 240 proceedings because of the availability of data.

¹⁵ See STEPHEN W. MANNING ET AL., INNOVATION L. LAB, DEFEND EVERYONE: CREATING THE EQUITY CORPS OF OREGON TO PROVIDE UNIVERSAL REPRESENTATION 12–13 (2018), https://innovationlawlab.org/reports/Defend_Everyone_Report.pdf.

¹⁶ *Id.*

¹⁷ *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1135–36 (9th Cir. 2018) (holding that neither the Due Process Clause nor the INA created a categorical right to court-appointed counsel at government expense for noncitizen minors).

¹⁸ See MANNING ET AL., *supra* note 15, at 6.

the adversarial system or the capacity of the individual, as well as the severe and punitive potential results, limit fairness in the judicial system. We demonstrate how the current provision of representation reflects these criteria. We also explain how Oregon ideals such as family unity, inclusiveness, and anti-discrimination are furthered by government-sponsored legal representation in deportation proceedings.

Finally, we explore Oregon's model for government-sponsored legal representation. Our discussion is divided into two interrelated categories: the scope and the structure of legal service delivery. We analyze the benefit of a universal representation approach that does not limit coverage by the "merit" of the individual or their claim. With regard to structure, we describe the massive collaborative representation strategy intended to build a collective structure to meet Oregon's challenges of scale and geography.

A. Oregon is Experiencing a Legal Representation Crisis for Immigrant Residents Facing Deportation

Dramatic growth of the federal government's detention and deportation apparatus, combined with low rates of representation for immigrants facing deportation, created an immigrant representation crisis in Oregon and nationwide. As a result, many immigrant community members were locked up and deported without the help of counsel to ensure fair outcomes in immigration court. In this Section, we document the representation crisis for Oregon residents in removal proceedings. To begin, we highlight the integral role that immigrants have played in the state to show that representation is necessary to preserve Oregon's families, communities, and economy. We turn next to a data-driven analysis of representation rates and case outcomes for Oregonians facing deportation. After briefly describing our methodology, we demonstrate that large numbers of Oregon residents have been unrepresented in deportation proceedings, particularly among those who are detained. We then illustrate the impact of legal representation by demonstrating that Oregon residents with attorneys are far more likely to prevail against deportation. To conclude, we emphasize the significance of representation in the face of the Trump Administration's use of the federal government's robust detention and deportation apparatus to target deeply-rooted community members at an unprecedented scale.

1. Representation and the Preservation of Oregon's Families, Communities, and Economy

Access to counsel for Oregon residents facing deportation is necessary to preserve the integrity of Oregon's families, communities, and workplaces. As of the time of this writing, there is abundant evidence that immigrant Oregonians are deeply woven into the fabric of the state and contribute extensively to its collective prosperity as workers, business owners, tax-

payers, and neighbors.¹⁹ One in ten Oregon residents is an immigrant, totaling almost 400,000 foreign-born Oregonians. 42 percent of Oregon's immigrant residents have naturalized as citizens.²⁰ Conversely, roughly 230,000 Oregon residents are noncitizens and could therefore be subject to deportation. 130,000 Oregonians are undocumented, comprising one third of Oregon's immigrant population.²¹ 10,170 of Oregon's immigrant youth were DACA recipients as of January 2018, and thousands more met all criteria to apply for DACA in 2017.²² The majority of undocumented Oregonians are long-time residents—87 percent have been in the U.S. for more than five years, including 66 percent who have been in the U.S. for over ten years.²³

Immigrants are an essential part of Oregon families. One in eight Oregon residents is a native-born U.S. citizen with at least one immigrant parent.²⁴ Many Oregon families have mixed citizenship statuses—one in twelve Oregon children is a U.S. citizen living with at least one undocumented parent, totaling more than 71,000 children. Altogether, nearly 90,000 U.S. citizens in Oregon live with at least one family member who is undocumented.²⁵

Immigrant Oregonians also help drive Oregon's economic engine. Immigrants comprise nearly 13 percent of the state's workforce, and Oregon's immigrant-led households paid nearly \$737 million in state and local taxes in 2014. Undocumented immigrants comprise 4.8 percent of the workforce and contributed roughly \$81 million in state and local taxes in 2014. Oregon's DACA recipients alone paid an estimated \$20 million in state and local taxes in 2016. As consumers, Oregon residents in immigrant-led households had \$7.4 billion in spending power in 2014.²⁶

2. *Deportation without Legal Representation of Oregon Residents*

A growing body of research from across the country has found that large percentages of immigrants in removal proceedings do not have legal representation, and those without legal representation are much

¹⁹ AM. IMMIGRATION COUNCIL, IMMIGRANTS IN OREGON (Sept. 15, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_oregon.pdf. See also OR. EXEC. ORDER NO. 17-04, Renewing Oregon's Commitment to Protecting Its Immigrant, Refugee, and Religious-Minority Residents (Feb. 2, 2017), https://www.oregon.gov/gov/Documents/executive_orders/eo_17-04.pdf.

²⁰ AM. IMMIGRATION COUNCIL, *supra* note 19.

²¹ *Id.*

²² *Deferred Action for Childhood Arrivals (DACA) Data Tools, DACA Recipients & Program Participation Rate, by State*, MIGRATION POLICY INST., (Jan. 30, 2018), <https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles>.

²³ *Profile of the Unauthorized Population: Oregon*, MIGRATION POLICY INST., <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/OR> (last visited Aug. 19, 2018).

²⁴ AM. IMMIGRATION COUNCIL, *supra* note 19.

²⁵ *Id.*

²⁶ *Id.*

more likely to be deported from their homes and separated from their families. To prove that Oregon is no exception, we offer below the first detailed data-driven examination of representation rates and case outcomes for Oregon residents in deportation proceedings. Throughout the analysis, we highlight the particular inequalities for immigrants in detention and those who reside in more rural parts of Oregon.

a. Methodology

Before proceeding, it is best to begin with some basic information about our methodology to better explain the utility and limitations of our findings. We primarily examined publicly available findings from the Transactional Records Access Clearinghouse (TRAC), a nonpartisan, nonprofit data research center at Syracuse University. TRAC's findings are based upon a detailed analysis of records obtained from the Executive Office for Immigration Review (EOIR) through requests under the Freedom of Information Act.²⁷

To get the most complete picture possible of removal proceedings for Oregon residents, we examined TRAC data from the two immigration courts in which Oregonians will usually appear: Portland and Tacoma. Generally, Oregon residents who are arrested by ICE officers are either released or transferred to the Northwest Detention Facility in Tacoma, Washington.²⁸ Tacoma Immigration Court has jurisdiction over the cases of those detained at the Tacoma facility.²⁹ Those detained at the facility include residents of Washington and Oregon, as well as individuals transferred from the Mexico border and other states.³⁰

To reach our major conclusions on representation rates and outcomes, we used TRAC data³¹ to examine deportation cases in the Portland and Tacoma immigration courts that were *initiated* by the Department of Homeland Security (DHS) between 2012 and 2016.³² Importantly, the location of the case was based on the last proceeding, as of August 2017, rather than the initial filing. The data set yielded 6,363

²⁷ See TRAC IMMIGRATION PROJECT, <http://trac.syr.edu/immigration/>.

²⁸ See generally U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, EREGISTRATION VALIDATION PROCESS: PORTLAND IMMIGRATION COURT (Apr. 9, 2018), <https://www.justice.gov/sites/default/files/eoir/legacy/2013/10/30/Portland.pdf> (explaining that court locations in Alaska, Idaho, and Montana are not staffed but are used by judges to conduct individual calendar hearings).

²⁹ U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, TACOMA IMMIGRATION COURT (Jan. 22, 2008), <https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/22/tacomaadvisory.pdf>.

³⁰ Megan Farmer et al., *A Rare Look Inside Tacoma's Immigration Jail*, KUOW (July 11, 2017), <http://kuow.org/post/photos-rare-look-inside-tacoma-s-immigration-jail>. Further research is needed to determine how many Oregon residents are detained in Tacoma.

³¹ TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, DETAILS ON DEPORTATION PROCEEDINGS, <http://trac.syr.edu/phptools/immigration/nta/>.

³² EOIR data uses the federal government's fiscal year, which begins on October 1, and ends September 30.

removal cases in Portland Immigration Court and 8,671 in Tacoma Immigration Court. To determine representation rates, we analyzed the entire set of cases. In studying outcomes, however, we could only examine those cases in which the case was completed (through a final decision or administrative closure) as of August 2017 (3,315 in Portland and 8,599 in Tacoma).

The definitions of the terms “representation” and “success” are particularly important. An individual is considered to be represented if an attorney filed an appearance in the case on or before the date of the last proceeding, regardless of whether the attorney actually appeared at the hearings or represented the client for the entire case.³³ For purposes of our data analysis, we defined a “successful outcome” as any decision other than a removal order or voluntary departure, including termination of proceedings, a grant of relief, prosecutorial discretion, and other administrative closure, all of which allow the individual to remain in the country.

To analyze representation and outcomes by custody status, we characterize respondents in Portland Immigration Court as not detained and those in Tacoma Immigration Court as detained. Of the total respondents in Portland Immigration Court, 97 percent were never detained or had been released from detention. Of those in Tacoma Immigration Court, 99.5 percent were detained.

b. Thousands of Oregon Residents Lack Access to Legal Counsel

A large portion of Oregonians in deportation proceedings are forced to defend themselves without a lawyer against trained government attorneys, and representation rates are particularly low for detained and rural immigrants. We found through our examination of cases initiated during a five-year period that 34 percent of (non-detained) immigrants in Portland Immigration Court are unrepresented, as are 75 percent of (detained) immigrants in Tacoma Immigration Court. Analysis of a different, smaller EOIR data set of cases decided recently in Portland Immigration Court yields similar results: 33 percent of individuals were unrepresented.³⁴ In Tacoma Immigration Court, however, other studies suggest that as many as 92 percent of individuals may be unrepresented.³⁵

³³ See *infra* Part I.A.2 for a discussion of the limitations of this measurement of representation.

³⁴ This data set was obtained by Immigrant Defense Oregon from EOIR in November 2017. Within the data set, we examined all deportation cases decided on their merits by an immigration judge in Portland Immigration Court from October 1, 2015 through June 30, 2017 (n=1,326). Cases “decided on their merits” includes only those which resulted in an initial decision for removal (including voluntary departure), termination, or relief, and does not include administrative closures. Representation is tracked at the time of case completion. The data is subject to change as EOIR staff frequently enter and update information in the database.

³⁵ See CITY OF TACOMA RESOLUTION NO. 39849, Creation of a Deportation Defense Subfund 1 (Oct. 24, 2017), <http://cms.cityoftacoma.org/cro/Council%20Action%20Memo%20Deportation%20Defense%20Fund.pdf> (citing the City of Seattle’s de-

Consistent with the Oregon results, the largest national study found that 34 percent of non-detained immigrants and 86 percent of detained immigrants are unrepresented.³⁶

These low representation rates translate into thousands of Oregonians facing deportation without legal counsel. Of those in Portland Immigration Court against whom DHS initiated deportation proceedings in 2017, 552 were unrepresented.³⁷ Among their counterparts in Tacoma, 1,565 were unrepresented.³⁸ Another measure provides a more comprehensive look at the entire backlog of cases in which Oregonians lack attorneys. As of May 2017, more than 3,600 Oregon residents had deportation cases pending in immigration court; 1,383 did not have legal representation.³⁹ Furthermore, these numbers are likely to understate the number of unrepresented Oregonians facing deportation because those detained in Tacoma may be counted as Washington residents.

Our study indicated that, although Oregon residents from urban and rural counties statewide lack access to counsel in deportation proceedings, rural Oregonians were the least likely to have an attorney. As of May 2017, Washington County had the largest total number of residents in pending removal proceedings (843), 36 percent of whom were unrepresented. Multnomah County was close behind with 724 residents in pending removal proceedings, with 34 percent unrepresented. Marion County was third with 518 residents in pending removal proceedings, 34 percent unrepresented. The counties of Jackson and Umatilla each had 212 residents in pending removal proceedings and particularly low rates of representation—76 percent in Jackson County and 44 percent in Umatilla County were unrepresented. The counties of Lane and Clackamas had the next largest populations of immigrant residents in removal proceedings, respectively. There are also hundreds of immigrants in removal proceedings who reside in other rural counties across the state. The counties of Curry, Crook, Jackson, Lake, Klamath, Morrow, Tillamook, and Polk had the lowest rates of represented residents, ranging from 0 to 51 percent, respectively.⁴⁰

In 2017, immigrant advocates in Oregon identified nonprofit removal defense services as one of the critical holes in Oregon's immigra-

fense fund statistics).

³⁶ Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 31 (2015) (using "non-detained" to refer to both released and never-detained immigrants).

³⁷ TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, *supra* note 31. Representation status determined as of September 30, 2017.

³⁸ *Id.*

³⁹ TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, INDIVIDUALS IN IMMIGRATION COURT BY THEIR ADDRESS, http://trac.syr.edu/phptools/immigration/addressrep/about_data.html (explaining that data is based on home address postal codes found in court records, which may be the address of the detention facility for detained individuals).

⁴⁰ *Id.*

tion legal services infrastructure.⁴¹ Although several organizations expanded their removal defense capacity to better address this gap, there still appeared to be a shortage of free or low-cost counsel for immigrants in removal proceedings. Furthermore, the services that did exist were primarily located in or near Portland.

Even those Oregonians who were able to access an attorney may not have received full-service representation at every hearing for bond and/or the merits. As discussed above, the TRAC data examined for this study categorizes an individual as represented if the individual had an attorney at any point on or before the date of the last proceeding, regardless of whether the lawyer actually represented the individual for the entire case. In fact, the leading national study shows that only 45 percent of represented immigrants had their attorney appear at all court hearings. On average, attorneys in represented removal cases were present in court for only 70 percent of their client's hearings. Almost all missed hearings took place early in the court process, rather than at the trial stage (if the case reached trial).⁴²

c. The Difference that Representation Makes

The striking gap in access to counsel described above is significant because legal representation matters: Oregonians with attorneys to represent them in removal proceedings were far more likely to win successful outcomes in their immigration cases, particularly if they were detained. As discussed below, we found that represented (and primarily non-detained) immigrants in Portland Immigration Court were over two—and up to three-and-a-half—times more likely to prevail in their cases than their unrepresented counterparts. Meanwhile, represented and detained immigrants in Tacoma Immigration Court were five-and-a-half times more likely to succeed than those without an attorney. In total, only 6 percent of unrepresented and detained immigrants in Tacoma prevailed.

A more detailed look at outcomes in deportation cases in Portland Immigration Court provides a fuller picture of the strong positive impact of representation on case outcomes. Among individuals in Portland Immigration Court whose cases were initiated during a selected five-year period, 76 percent of represented immigrants prevailed, while only 37 percent of those without an attorney were successful. In other words, represented and primarily non-detained immigrants succeeded more than twice as often as their unrepresented counterparts. A different, smaller set of cases decided recently in Portland Immigration Court suggests that representation may have an even stronger effect on outcomes

⁴¹ Leland Baxter-Neal, Multnomah Pub. Def. Immigrant Def. Or., Draft Proposal for Comprehensive Removal Defense Collaborative Framework (Oct. 23, 2017) (on file with author) (citing the May 2017 Immigrant Inclusion Plan summarizing discussions from the March 2017 stakeholder convening at Lewis & Clark College); MANNING ET AL., *supra* note 15, at 12–13.

⁴² Eagly & Shafer, *supra* note 36, at 20–21.

for non-detained Oregon residents.⁴³ Of those cases, 69 percent of represented immigrants prevailed on the merits, as compared with 20 percent of those without representation.⁴⁴ By this measure, represented and non-detained immigrants are nearly three-and-a-half times more likely to succeed than their unrepresented counterparts.

The discrepancy is even more dramatic for detained immigrants. In Tacoma Immigration Court, among individuals whose cases were initiated during the same five-year period, 33 percent of represented immigrants were successful, as compared to 6 percent of those without legal representation. In other words, immigrants detained in Tacoma who had representation were five-and-a-half times more likely to succeed than detained immigrants without a lawyer.

The data suggests that Oregon residents with a legal right to remain in the United States have been deported because they lacked an attorney to help them win their case.⁴⁵ These findings are consistent with studies from across the country showing that immigrants without representation in removal proceedings are much more vulnerable to deportation. Nationally, when compared to their unrepresented counterparts, never-detained immigrants with legal representation were three-and-a-half times more likely to succeed, released immigrants were five-and-a-half times more likely to succeed, and detained immigrants were ten-and-a-half times more likely to succeed.⁴⁶ Studies from California, San Francisco, and New York City have also found a strong correlation between legal representation and successful case outcomes.⁴⁷

Stronger evidence that legal representation directly leads to improved success rates for immigrants facing deportation comes from an evaluation of the nation's first publicly-funded universal representation

⁴³ EOIR data set obtained by Immigrant Defense Oregon, *supra* note 34.

⁴⁴ *Id.* Note that this data set includes only cases decided on the merits. For these purposes, "prevailing on the merits" includes a grant of relief or termination of proceedings.

⁴⁵ However, due to selection bias, EOIR data can only show that representation is associated with better case outcomes, not that it causes them. Other factors may also contribute to higher rates of success for represented immigrants. For example, those with stronger claims may be more likely to secure counsel. *See Eagly & Shafer, supra* note 36, at 48.

⁴⁶ *Id.* at 49 (examining cases decided on their merits and defining success as a grant of relief or termination of case).

⁴⁷ *See* CAL. COAL. FOR UNIVERSAL REPRESENTATION, CALIFORNIA'S DUE PROCESS CRISIS: ACCESS TO LEGAL COUNSEL FOR DETAINED IMMIGRANTS (June 2016), <https://www.nilc.org/wp-content/uploads/2016/06/access-to-counsel-Calif-coalition-report-2016-06.pdf>; N. CAL. COLLABORATIVE FOR IMMIGRANT JUSTICE, ACCESS TO JUSTICE FOR IMMIGRANT FAMILIES AND COMMUNITIES: STUDY OF LEGAL REPRESENTATION OF DETAINED IMMIGRANTS IN NORTHERN CALIFORNIA (Oct. 2014), <https://www.lccr.com/wp-content/uploads/NCCIJ-Access-to-Justice-Report-Oct.-2014.pdf>. *See generally* Steering Comm. of the N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, *New York Immigrant Representation Study Report: Part 1*, 33 CARDOZO L. REV. 357 (2011).

program. Launched in 2013, the New York Immigrant Family Unity Project (NYIFUP) has provided representation to nearly all low-income detained immigrants in New York City deportation proceedings since 2014.⁴⁸ Estimates show that 48 percent of cases will end successfully for NYIFUP clients, allowing them to remain legally in the United States. This is a 1,100 percent increase over the 4 percent success rate for unrepresented and detained immigrants before NYIFUP.⁴⁹ Because NYIFUP attorneys represent all income-eligible individuals, regardless of the strength of the claim, this study was able to draw a direct, causal relationship between representation through NYIFUP and successful legal outcomes.⁵⁰

In addition to improving case outcomes, legal representation also improves the chances that immigrants can get out of detention and reunite with their families. NYIFUP clients obtain bond and are released from detention almost twice as often as unrepresented individuals at similar courts (49 percent compared with 25 percent). NYIFUP representation is also associated with lower bond amounts.⁵¹ The success of universal legal representation for detained immigrants in New York City is a strong indicator that providing counsel for Oregon residents in deportation proceedings will help to ensure that those with a legal avenue for relief can vindicate that right and remain in their homes.

3. *Representation and the Ramp-up in Federal Immigration Enforcement*

The Trump Administration's aggressive detention and deportation policies have spotlighted the impact of legal representation. A brief review of the recent history of immigration enforcement reveals how Oregon's legal representation crisis developed and, under the Trump Administration, reached a new urgency.

Over the past several decades, the federal government constructed a complex immigration enforcement infrastructure that now stretches from outside U.S. borders into the nation's interior.⁵² This infrastructure enabled a dramatic increase in removals, which skyrocketed nationwide from 30,039 in 1990 to 188,467 in 2000, and to a peak of 434,015 in 2013.⁵³ That record high was precipitated in part by the 2008 implemen-

⁴⁸ See JENNIFER STAVE ET AL., VERA INST. OF J., EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY 7 (Nov. 2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/new-york-immigrant-family-unity-project-evaluation/legacy_downloads/new-york-immigrant-family-unity-project-evaluation.pdf.

⁴⁹ *Id.* at 25–28.

⁵⁰ *Id.* at 28–31.

⁵¹ *Id.* at 49–52.

⁵² DORIS MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY, (Jan. 2013), <https://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery>.

⁵³ DEPT. OF HOMELAND SECURITY, *Aliens Removed or Returned: Fiscal Years 1892 to*

tation of the Secure Communities Program, an information-sharing and detention system that gave the Department of Homeland Security (DHS) access to biometric data collected by local police and sheriffs and often led to the ICE apprehension of non-citizens without a criminal history.⁵⁴

Although the Obama administration significantly increased removals, its enforcement priorities gradually evolved to focus on the deportation of recent unauthorized border crossers and non-citizens with criminal records.⁵⁵ In November 2014, the Obama administration abandoned Secure Communities⁵⁶ and announced further executive action on immigration to narrow the focus of DHS enforcement priorities. By 2016, total removals had dipped to 344,354, including a sharp decrease in interior removals. Eighty-five percent of all deportations (removals and returns) were of non-citizens who had recently crossed the U.S. border.⁵⁷

Beginning in January 2017, the Trump Administration sharply reversed efforts to prevent the separation of families and set the stage for mass detention and deportation of deeply-rooted community members. Among Trump's first acts in office, Executive Order 13768 directed agencies to enforce immigration laws against all removable aliens and broadened the categories of non-citizens who were priorities for removal to include any undocumented immigrant who crossed the border without authorization.⁵⁸ Up to eight million undocumented immigrants fell into that category, compared to 1.4 million under the Obama Administration's final priorities.⁵⁹ To that end, Trump also reinstated the controversial Secure Communities Program.⁶⁰

The Trump Administration's tactics had significant impacts. Immigration arrests increased more than 42 percent during the first year of the Trump Administration.⁶¹ Non-criminal arrests during the same peri-

2015, *2015 Yearbook of Immigration Statistics, Table 39* <https://www.dhs.gov/immigration-statistics/yearbook/2015/table39>.

⁵⁴ Lasch et al., *supra* note 3, at 1722–23.

⁵⁵ Muzaffar Chishti et al., *The Obama Record on Deportations: Deportee in Chief or Not?*, MIGRATION POLICY INST. (Jan. 26, 2017), <https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not>.

⁵⁶ Lasch et al., *supra* note 3, at 1724.

⁵⁷ Muzaffar Chishti et al., *supra* note 55.

⁵⁸ EXEC. ORDER NO. 13768, *Enhancing Public Safety in the Interior of the United States*, 82 Fed. Reg. 8799 (Jan. 25, 2017); *see also* Memorandum from John Kelly, Sec'y, Dep't of Homeland Security, to Kevin McAleenan, Acting Comm'r, U.S. Customs and Border Protection, et al., *re Implementing the President's Immigration Enforcement Policies 2* (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf (mirroring the broad enforcement priorities in Exec. Order No. 13768).

⁵⁹ Brian Bennett, *Not Just 'Bad Hombres': Trump is Targeting Up to 8 Million People for Deportation*, LOS ANGELES TIMES (Feb. 4, 2017), <http://www.latimes.com/politics/la-na-pol-trump-deportations-20170204-story.html>.

⁶⁰ EXEC. ORDER NO. 13768, *supra* note 58.

⁶¹ Kristin Bialik, *ICE Arrests Went Up in 2017, With Biggest Increases in Florida, North-*

od rose nearly 160 percent, from approximately 4,200 in 2016 to more than 10,800 in 2017.⁶² Likewise, removals during the first six months of the Trump Administration increased by 31 percent over the same period in 2016.⁶³ In September, the Trump Administration struck at the heart of immigrant communities with the phase-out of the DACA program, putting 690,000 immigrant youth in danger of losing work authorization and protection from deportation,⁶⁴ including the more than 10,000 DACA recipients in Oregon.⁶⁵ The crisis in legal representation in removal proceedings deepened as the threat of detention and deportation of individuals integral to Oregon families, communities, and the economy reached a new scale.

B. *Core Considerations for Government-Appointed Legal Representation*

This section distills the statutory and constitutional considerations for court-appointed counsel, grounded on the principle that representation reaches constitutional urgency when an individual faces an overly complex system or lacks the capacity to navigate such a system and when the end result takes on a punitive character.

Representation is an integral component of the United States legal system. Courts have outlined the need for government-provided representation under two broad circumstances: (1) when individuals face an extremely complex and difficult to navigate legal system and lack the capacity to navigate such a system, and (2) when potential outcomes may rise to a punitive or severe level.

1. *Practical Implications of Appointed Counsel*

Setting aside, for the moment, the question of whether appointed counsel is legally mandated, there are practical and efficiency-based reasons for increasing representation rates. Representation by an attorney, unsurprisingly, has numerous benefits to the individual. An attorney may argue for release from detention on bond or parole, make sure that the government meets its burden of proof to establish grounds for deporta-

ern Texas, Oklahoma, PEW RESEARCH CTR (Feb. 8, 2018), <http://www.pewresearch.org/fact-tank/2018/02/08/ice-arrests-went-up-in-2017-with-biggest-increases-in-florida-northern-texas-oklahoma/>.

⁶² *Id.*; ICE ERO *Immigration Arrests Climb Nearly 40%*, IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/features/100-days>.

⁶³ U.S. DEP'T OF JUSTICE, *Return to Rule of Law in Trump Administration Marked by Increase in Key Immigration Statistics* (Aug. 8, 2017), <https://www.justice.gov/opa/pr/return-rule-law-trump-administration-marked-increase-key-immigration-statistics>.

⁶⁴ Gustavo Lopez, et al., *Key Facts About Unauthorized Immigrants Enrolled in DACA*, PEW RESEARCH CTR. (Sept. 25, 2017), <http://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/> (analyzing data released by USCIS on September 4, 2017).

⁶⁵ U.S. Citizenship and Immigr. Services, *Approximate Active Daca Recipients 6* (Sept. 4, 2017), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_population_data.pdf.

tion, and provide and argue for evidence and witnesses that may prove an individual's case for relief such as asylum, adjustment of status, or cancellation of removal.⁶⁶ Representation also has a dramatic effect on outcomes and represented individuals bring fewer unmeritorious claims than those without representation.⁶⁷ Individuals are also more likely to be released from custody and then more likely to appear at future deportation hearings.⁶⁸

Not only does representation level out the playing field between an individual and the state, but it creates a more efficient system, which ultimately leads to additional benefits such as lower detention costs.⁶⁹ Immigration judges have noted that cases can be adjudicated "more efficiently and quickly" when an individual has a "competent lawyer."⁷⁰ When individuals are provided representation, the average number of days that a respondent is detained is reduced. Cases move much more quickly, detained individuals accept removal orders if they know they do not have an adequate case for relief, and representation leads to more respondents being released on bond.⁷¹ A 2012 study found that when detained immigrants were assisted in court proceedings, the reduction in time for the proceedings resulted in an average detention cost savings of over \$600 per individual, or more than \$19.9 million annually.⁷² Advocates for the New York Family Unity Project have noted that their system of universal representation "has changed the culture of the courtroom, creating a more professional atmosphere in which the government is held to its required level of proof . . . [L]aw clerks say that they get better briefs from the parties and that the level of practice has gone up."⁷³

⁶⁶ National Immigration Law Center, *Blazing a Trail: The Fight for Right to Counsel in Detention and Beyond* 9 (Mar. 2016), <https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf>.

⁶⁷ Center for Popular Democracy et al., *The New York Immigrant Family Unity Project: Good for Families, Good for Employers, and Good for All New Yorkers* 9 (2013), https://populardemocracy.org/sites/default/files/immigrant_family_unity_project_print_layout.pdf.

⁶⁸ See National Immigration Law Center, *supra* note 66, at 9 (finding unrepresented detained immigrants had a three percent rate of success whereas 74 percent of those who were represented and not detained were successful); Eagly & Shafer, *supra* note 36, at 2.

⁶⁹ Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel*, 39 ABA HUMAN RIGHTS MAGAZINE (2013), https://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/vol_30_no_4_gideon/extending_the_promise_of_gideon.html.

⁷⁰ Eagly & Shafer, *supra* note 36, at 59.

⁷¹ National Immigration Law Center, *supra* note 66, at 14.

⁷² *Id.* at 15 (noting that ICE estimates that detention costs \$119 per "daily bed" and the 2016 fiscal year budget for detention was two billion dollars).

⁷³ *Id.* at 11.

2. *The Status of Statutory and Constitutional Prescriptions for Appointed Counsel*

Congress protected a noncitizen's right to counsel in an immigration proceeding, but did not go as far as to provide for appointed counsel. Any person charged with being "removable" is entitled by statute to be represented by counsel, but "at no expense to the Government."⁷⁴ Lawyers for the Department of Homeland Security Immigration and Customs Enforcement (ICE) represent the state and public interest, but the interest of the noncitizen may be unrepresented if noncitizens are unable to pay for an attorney.

Whether there is a constitutional right to appointed counsel in immigration proceedings is a complex question. Three cases triangulate this issue. In 1975, the Sixth Circuit concluded that due process did not compel a categorical right to appointed counsel in deportation proceedings, holding instead that a case-by-case determination of whether fundamental fairness required appointed counsel was proper.⁷⁵ More recently, a California district court held that immigrants with mental disabilities were entitled as a reasonable accommodation to appointed counsel during removal proceedings.⁷⁶ Most recently, the Ninth Circuit held, consistent with the Sixth Circuit, that minors in removal proceedings do not have a categorical right to appointed counsel in removal proceedings.⁷⁷

While these decisions do not support a categorical right to appointed counsel in all removal circumstances, they are compass points to the circumstances that may lead to requiring appointed counsel either as a constitutional matter, or as a matter of policy. The next two subsections lay out these considerations.

3. *Complex Adversarial Systems and a Lack of Capacity to Represent Oneself Necessitate Representation*

Legal proceedings that are complex and adversarial are an important factor in determining the need for court-appointed representation. The right to counsel in criminal court has its basis in the Sixth Amendment, which makes it clear that accused parties "shall enjoy the right . . . to have the Assistance of Counsel for [their] defense."⁷⁸ Courts have interpreted this to mean that counsel must be provided for defendants in federal and state criminal proceedings who are unable to pay for their own representation unless the defendant waives this right.⁷⁹ After all, "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."⁸⁰ Courts have rea-

⁷⁴ INA § 292; 8 U.S.C. § 1362 (2012).

⁷⁵ *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (6th Cir. 1975).

⁷⁶ *Franco-Gonzalez v. Holder*, 767 F.Supp.2d 1034, 1058 (C.D. Cal. 2010).

⁷⁷ *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1135–36 (9th Cir. 2018).

⁷⁸ *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963).

⁷⁹ *Id.* at 340.

⁸⁰ *Id.* at 344 (1963) (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

soned that the legal system is not easily navigable without the aid of representation and in order to ensure fairness and due process, access to representation needs to be assured.

Removal proceedings, like criminal proceedings, are often complex and thus difficult to navigate.⁸¹ Case precedent has demonstrated a particular need for representation when an individual does not have the capacity to navigate the complex legal system on their own. The Ninth Circuit's decision in *Franco-Gonzales*, addressing whether lawful permanent residents who have a mental impairment have a statutory entitlement to counsel in deportation hearings, makes this clear.⁸² The court noted that 8 U.S.C. § 1229a(b)(3) requires the Attorney General to make sure that there are safeguards in place to protect the rights of non-citizens who are mentally incompetent.⁸³ The district court ruled that the government was barred from subjecting the plaintiffs in this particular case to future removal proceedings unless they were represented by a "qualified representative."⁸⁴ The case ultimately turned into a class action lawsuit and in 2013, a federal district court ordered the federal government to provide legal counsel for immigrant detainees who are not able to represent themselves in immigration court because of serious mental disabilities.⁸⁵ This lawsuit also influenced the federal government to suggest that it would change its policies around providing procedural safeguards to immigrants who are detained and have severe mental disabilities.⁸⁶

The need for representation has also been, and continues to be addressed, in the case of children who must appear in immigration court. In 2008, the Trafficking Victims Protections Reauthorization Act was passed to provide grants to "ensure, to the greatest extent practicable . . . that all unaccompanied alien children who are or have been in the custody [of the federal government] . . . have counsel to represent them in legal proceedings or matters . . ."⁸⁷ The Ninth Circuit, addressing appointed counsel for children in *Lin v. Ashcroft* and *C.J.L.G. v. Sessions*, emphasized that minors are entitled to heightened protections in remov-

⁸¹ Guttentag & Arulanantham, *supra* note 68.

⁸² *Franco-Gonzalez v. Holder*, 767 F.Supp.2d 1034, 1052 (C.D. Cal. 2010).

⁸³ *Id.* at 1052–53 (holding that an Immigration Judge shall not accept an admission of removability from someone with a mental impairment who does not have counsel; the court must serve the NTA to the representative of that person, and a representative or guardian can appear on behalf of the individual in the proceeding).

⁸⁴ *Id.* at 1061.

⁸⁵ *Franco-Gonzalez v. Holder*, No. CV 10-02211, 2013 WL 3674492, at *1 (C.D. Cal. Apr. 23, 2013).

⁸⁶ *Id.* at *3–4, 19. The basis for providing representation in the *Franco-Gonzales* decision was section 504 of the Rehabilitation Act, but it still exemplifies accommodations that are necessary for noncitizens when they are not competent to represent themselves. *Id.*

⁸⁷ See Guttentag & Arulanantham, *supra* note 68.

al proceedings.⁸⁸ *Lin* declared that “[a]bsent a minor’s knowing, intelligent, and voluntary waiver of the right to counsel, the IJ may have to take an affirmative role in securing representation by competent counsel.”⁸⁹

In criminal courts, it is agreed that lawyers are not simply luxuries, but rather are necessities for procedural justice.⁹⁰ This is also true in immigration courts because of how complex the system is and the hurdles that many must overcome simply to adequately present their case. Because of this comparable complexity in the immigration court and the inequity between individuals and the prosecution, representation is necessary to level the playing field and allow fair proceedings.

4. *A Severe or Punitive Result Necessitates Representation*

The second circumstance that favors appointed counsel is when an individual may be subjected to a judgment that is so severe that it is punitive or may result in the loss of life or liberty. For example, the right to appointed counsel is integral to fundamental fairness in cases that result in incarceration as punishment.⁹¹ The right of a defendant in a criminal trial to counsel is not limited by the type of the offense or whether or not a jury trial is required.⁹² The length or extent of imprisonment is irrelevant because constitutional questions that are involved in the case may not be any less complex in a case that would result in a short imprisonment as compared to one that would put an individual in jail for an extended period of time.⁹³ The compelling factor is not the extensiveness of incarceration, but whether or not there will be any denial of life or liberty.⁹⁴

Removal also imposes a penalty that can be at least as severe as a criminal sentence.⁹⁵ Deportation “may deprive an immigrant of ‘all that makes life worth living,’” and “meticulous care” is required to ensure that the deprivation of liberty “meet[s] the essential standards of fairness.”⁹⁶ In *Padilla v. Kentucky*, the court noted that changing immigration laws have increased the stakes of a noncitizen’s criminal conviction, and therefore “[t]he importance of accurate legal advice for noncitizens ac-

⁸⁸ See *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1134 (9th Cir. 2018) (observing that “[c]hildren are, as a general rule, less capable of advocating for themselves than are adults”).

⁸⁹ *Lin v. Ashcroft*, 377 F.3d 1014, 1034 (9th Cir. 2004).

⁹⁰ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

⁹¹ *Argersinger v. Hamlin*, 407 U.S. 25, 39–40 (1972) (“Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel.”).

⁹² *Id.* at 25.

⁹³ *Id.* at 37.

⁹⁴ See *id.*

⁹⁵ Michael Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. Irvine L. Rev. 415, 427–28 (2012).

⁹⁶ *Bridges v. Wixon*, 326 U.S. 135, 147, 153 (1945).

cused of crimes has never been more important.”⁹⁷ Even though removal proceedings are administrative, they are “intimately related to the criminal process,” enough that attorneys must advise criminal noncitizen defendants of their risk of deportation.⁹⁸

The case law analyzing statutory and constitutional entitlements to appointed counsel provides invaluable lessons for states and localities grappling with how to protect their communities from erroneous and excessive detention and deportation. Oregon has recognized that a “deported alien may be required to sever family ties, become impoverished and return to a society in which he no longer can function and may, indeed, face life-threatening conditions.”⁹⁹ Providing representation is a major step toward fairness when a penalty as severe as deportation is at stake.¹⁰⁰

C. Toward an Oregon Model for All-Inclusive Legal Representation for Immigrants Facing Deportation

In 2018, Portland and Multnomah County adopted the Equity Corps of Oregon as its universal representation program for residents in removal proceedings. A growing number of state and local governments had already responded to aggressive immigration enforcement by establishing legal defense funds for immigrant residents facing deportation.¹⁰¹ Although each right-to-counsel project must be tailored to local circumstances,¹⁰² approaches taken in other places informed the creation of the new Oregon infrastructure for legal representation.¹⁰³

1. A National Move Toward Locally-Based Representation

In adopting this model, Oregon was not writing on a blank page. Before turning to the analysis of Oregon’s pathway to appointed removal counsel, a brief mapping of the rising nationwide movement for universal representation provides useful context. New York City led the way in 2013 with the launch of the New York Immigrant Family Unity Project

⁹⁷ Padilla v. Kentucky, 559 U.S. 356, 364 (2010).

⁹⁸ *Id.* at 357.

⁹⁹ Lyons v. Pearce, 694 P.2d 969, 977 (Or. 1985).

¹⁰⁰ *Id.*; see also Aguilera-Enriquez v. INS, 516 F.2d 565, 568 (6th Cir. 1975) (requiring a case-by-case test to determine when access to counsel is necessary in immigration proceedings to provide fundamental fairness).

¹⁰¹ In Oregon, the City of Portland and the County of Multnomah have recently approved funding for universal representation. See Press Release, Mayor Ted Wheeler, City of Portland FY 2018–2019 Mayor’s Proposed Budget Decisions at 74 (2018) <https://www.portlandoregon.gov/transportation/article/684671> (granting \$500,000 for universal representation); FY19 Chair’s Budget Briefing, Multnomah County Budget Advisory Committee Recommendations, 3, 5 (April 18, 2018), <https://multco.us/file/71554/download>.

¹⁰² National Immigration Law Center, *supra* note 66, at 24.

¹⁰³ See, e.g., MANNING ET AL., *supra* note 15 at 15–20 (describing Oregon Equity Corps model).

(NYIFUP), the nation's first public defender system for detained immigrants facing deportation, publicly-funded at \$10 million annually as of 2017.¹⁰⁴ The project was so successful that in 2017 the New York State Assembly approved \$4 million in 2017 to expand representation statewide.¹⁰⁵

California had made significant strides as well. In 2014, Alameda County¹⁰⁶ and San Francisco¹⁰⁷ each directed public funding toward immigrant representation. In June 2017, the County and City of Los Angeles jointly contributed \$5 million to the newly-established L.A. Justice Fund.¹⁰⁸ Likewise, in Washington, Seattle and King County allocated \$1.5 million to legal defense for immigrants in April 2017,¹⁰⁹ and Tacoma established a deportation defense fund for residents in October 2017.¹¹⁰ Other jurisdictions followed.¹¹¹ In November 2017, an additional 11 cities launched the SAFE Cities Network to provide publicly-funded representation for immigrants facing deportation.¹¹²

¹⁰⁴ STAVE ET AL., *supra* note 48, at 7, 10.

¹⁰⁵ Vera Institute of Justice, *New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation* (April 7, 2017), <https://www.vera.org/newsroom/press-releases/new-york-state-becomes-first-in-the-nation-to-provide-lawyers-for-all-immigrants-detained-and-facing-deportation>.

¹⁰⁶ Alameda County Public Defender, *California's First County Public Defender Immigration Representation Project*, <http://www.acgov.org/defender/documents/PRESSRELEASEJorjanihiringChorneyedits.pdf> (last visited Nov. 20, 2017).

¹⁰⁷ Tamara Aparton, *SF Public Defender Immigration Unit Launches Today*, SAN FRANCISCO PUBLIC DEFENDER (May 23, 2017), <http://sfpublicdefender.org/news/2017/05/sf-public-defender-immigration-unit-launches-today>.

¹⁰⁸ Letter from Sachi A. Hamai, Chief Executive Officer, to Los Angeles County Board of Supervisors re Los Angeles Justice Fund 1 (June 20, 2017), <http://file.lacounty.gov/SDSInter/bos/supdocs/114727.pdf> (directing \$3 million to the L.A. Justice Fund); Eric Garcetti, City of Los Angeles, *Statement: Mayor Garcetti on the City of Los Angeles' \$2 Million Share of the L.A. Justice Fund* (June 23, 2017), <https://www.lamayor.org/statement-mayor-garcetti-city-los-angeles-2-million-share-la-justice-fund>.

¹⁰⁹ Office of Immigrant and Refugee Affairs, City of Seattle, *Seattle-King County Immigrant Legal Defense Network*, <https://www.seattle.gov/iandraffairs/programs/legal-defense-fund-and-network> (last visited Nov. 20, 2017).

¹¹⁰ CITY OF TACOMA RESOLUTION NO. 39849, *supra* note 35.

¹¹¹ Chicago directed \$1.3 million to a new fund in December 2016. Fran Spielman, *Emanuel's \$1.3 Million Legal Defense Fund Sails Through – With a Caveat*, CHICAGO SUN-TIMES (Dec. 13, 2016), <https://chicago.suntimes.com/chicago-politics/emanuels-1-3m-legal-defense-funds-sails-through-with-a-caveat/>. Washington, D.C. has allocated \$1 million since January 2017. Washington, D.C. Mayor Muriel Bowser's Office of Community Affairs, *Ensuring the Safety and Security of DC's Immigrant Community*, <https://mayor.dc.gov/sites/default/files/dc/sites/mayoromb/publication/attachments/ImmigrantActions.pdf> (last visited Nov. 20, 2017). And Denver established a fund in August 2017. CITY OF DENVER EXEC. ORDER NO. 142, *Standing with Immigrants and Refugees: A Safe and Welcoming City for All of Denver's People* (Aug. 31, 2017), <https://www.denvergov.org/content/dam/denvergov/Portals/executiveorders/142-Standing-With-Immigrants-And-Refugees.pdf>.

¹¹² Vera Institute of Justice, *SAFE Cities Network Launches: 11 Communities United to Provide Public Defense to Immigrants Facing Deportation* (Nov. 9, 2017), <https://www.vera.org>.

As states and localities crafted programs in light of the needs of their communities, distinct models of public representation emerged from the variety of state and local programs. The two primary approaches were reliance on institutional providers and the creation of a public defender system. Some jurisdictions combined these two approaches.

The *institutional-provider model*, first developed in New York City, distributed cases among a small number of immigration legal service providers prepared to handle a high volume of the full range of removal cases. The contract was limited to a small group of providers to increase scale by reducing costs and maximizing efficiencies.¹¹³ The providers are generally non-profit organizations selected through a competitive grant process and overseen by a coordinating body.¹¹⁴ NYIFUP attorneys, for example, work at three contracted agencies. They meet with detained immigrants on the morning of their first court appearance to conduct screening interviews and begin representation for eligible individuals. The assigned provider is then responsible for representing the client for the duration of the case, including any appeals.¹¹⁵

The NYIFUP institutional-provider model is a team-based approach that also includes holistic legal support services from social workers, expert witnesses, interpreters, investigators, and mental health evaluators. Importantly, NYIFUP attorneys assist clients in collateral proceedings in family, criminal, and federal court when necessary for their immigration case, as well.¹¹⁶ The project has greatly benefited from the organizations' expertise across subject matter areas, particularly in the immigration consequences of criminal convictions.¹¹⁷ The institutional-provider model has been quite successful in New York City and replicated in other jurisdictions, including Los Angeles.

In addition to funding direct legal services, local governments utilizing the institutional-provider model have also earmarked smaller amounts of grant money for other services. Those include: community navigation services (such as outreach, immigration consultations, and referrals)¹¹⁸ and capacity building for removal defense (such as the coordination of pro bono services to expand access to attorneys and technical

org/newsroom/press-releases/safe-cities-network-launches-11-communities-united-to-provide-public-defense-to-immigrants-facing-deportation.

¹¹³ See STAVE, ET AL., *supra* note 48, at 11.

¹¹⁴ See, e.g., *Id.* (regarding NYIFUP); Letter from Sachi A. Hamai, *supra* note 107 (regarding L.A. Justice Fund); Office of Immigrant and Refugee Affairs, *supra* note 108 (regarding Seattle-King County Immigrant Legal Defense Network).

¹¹⁵ See STAVE, ET AL., *supra* note 48, at 11.

¹¹⁶ *Id.* at 11–12.

¹¹⁷ *Id.* at 44–45.

¹¹⁸ See, e.g., *Seattle-King County Immigrant Legal Defense Network*, *supra* note 52; Sophia Tareen & Amy Taxin, *Cities, Counties Plan Immigrant Legal Aid After Trump's Win*, ASS. PRESS (Dec. 19, 2016), <https://apnews.com/d128dc51f06941ef8d327647843b322c/cities-counties-mull-immigrant-legal-fund-after-trumps-win> (describing Chicago's legal defense fund goal to employ 200 community navigators).

assistance to less-experienced organizations that are developing removal defense programs).¹¹⁹

The second model for government-sponsored legal representation is to create a new immigration unit within existing public defender offices to provide legal representation by immigration attorneys for noncitizens in removal proceedings. To date, this has been done by San Francisco and Alameda County Public Defender Offices.¹²⁰ NYIFUP attorneys also come from public defender organizations, but those agencies are contracted for the project within the institutional-provider model, discussed above.¹²¹

2. *Oregon's Massive Collaborative Representation Model*

Building on the experience of the institutional-provider and public defender jurisdictions, Oregon developed a third model, employing “massive collaborative representation.”¹²² This approach to large-scale representation has emerged in recent years, arising from pro bono efforts to provide universal representation for mothers and children seeking asylum at isolated “family” detention centers first established by the Obama Administration in 2014.¹²³ To reach the scale necessary to represent everyone, the project transformed the traditional legal service delivery model of one-to-one representation into a team-based approach to representation as a series of distinct tasks.¹²⁴ The resulting model opposes the mass detention and deportation system with large-scale infrastructure that connects nonprofit organizations and private lawyers through a shared technological backbone, legal strategy, and capacity-expanding systems.¹²⁵

The massive collaborative representation model had been substantially field-tested. Portland-based Innovation Law Lab had used the massive collaborative representation model to create two infrastructures to counter unwarranted detention and deportation: BorderX, to secure release from detention, and Centers of Excellence, to represent individuals released from detention for the remainder of their case. BorderX used technology to connect legal advocates interfacing in-person with clients

¹¹⁹ See, e.g., *Informational Webinar: L.A. Justice Fund* (Jul. 15, 2007), <https://www.calfund.org/wp-content/uploads/LAJF-Info-Webinar-7-11-17v4.pdf>.

¹²⁰ See Alameda County Public Defender, *supra* note 106; Aparton, *supra* note 106.

¹²¹ National Immigration Law Center, *supra* note 66, at 15.

¹²² *Big Immigration Law Project*, INNOVATION L. LAB, <https://innovationlawlab.org/big-immigration-law-project/> (last visited Nov. 20, 2017).

¹²³ See Stephen Manning, *Ending Artesia*, INNOVATION L. LAB (Jan. 2015), <https://innovationlawlab.org/the-artesia-report>; see also CARA Pro Bono Family Detention Project, <http://caraprobono.org/partners/> (discussing similar pro bono projects to assist mothers and children detained in Texas facilities even after the Artesia detention center was closed in December 2014).

¹²⁴ *Id.*

¹²⁵ *Big Immigration Law Project*, *supra* note 122.

at detention centers with remote legal teams that produce court-ready packets for requests for release (e.g. bond motions, motions to reopen, or requests for reinterview). Through this collaboration, a single lawyer at a geographically isolated detention center could increase representation by a scale of ten. The Centers of Excellence were organized in specific jurisdictions, including Portland, to coordinate, train, and support a network of local non-profit and pro bono attorneys representing individuals who have been released from detention. Cases were managed through a central database, and attorneys joined in regular collaborative conferences to discuss case placement and strategy.¹²⁶

The massive collaborative representation model offered creative solutions for institutional immigration legal service providers (including public defender organizations) to use shared technology and strategy to increase scale and overcome geographic challenges. The shared technological platform served as a centralized case management system. For Oregon, this technological backbone had the potential to overcome geographic challenges to representation of rural Oregonians distant from Portland Immigration Court and most non-profit legal service providers.¹²⁷

The Equity Corps of Oregon is a “scalable, data-driven, innovative model for holistically delivering immigrant defense services in a manner that creates [a] permanent pathway to immigrant inclusion.”¹²⁸ It is composed of five integrated parts, and connects to a larger immigrant advocacy infrastructure called the Oregon Rights Architecture.¹²⁹

First, at the core of the program are the Equity Corps attorneys, housed at established immigration legal non-profits represent immigrants at risk for deportation, and dedicated to the program. Second, Community Navigation Services is composed of navigators and trained volunteers embedded in impacted communities. The navigators “identify beneficiaries, guide them through the network’s services, and provide culturally-specific support.”¹³⁰

Third, a centralized clearinghouse locates screening services, research, and technical assistance in a single clearinghouse. Central and collaborative, it allows legal defenders to focus only on winning cases and preventing family separation. Finally, a case cost fund overcomes economic barriers to justice by covering psychological evaluations, translation services, and other needed costs.¹³¹

The Equity Corps builds on the existing Oregon Rights Architecture, which connects five areas of immigrant-inclusion work and the organiza-

¹²⁶ *Id.*

¹²⁷ *See, e.g.,* STEPHEN W. MANNING ET AL., *supra* note 15, at 3–6 (discussing the benefits of a collaborative infrastructure).

¹²⁸ *See id.* at 2.

¹²⁹ *See id.* at 12–14.

¹³⁰ *Id.* at 4.

¹³¹ *Id.*

tions working in those areas: (1) education about constitutional, legal and human rights, family safety planning, and moving individuals to a more stable immigration status; (2) rapid response to unconstitutional activity through raid reporters, legal observers, safety planners, and responding attorneys; (3) critical response, in which organizations deploy legal and community organizing at the moment when rapid deportation and detention are most likely to occur; (4) deportation defense in the immigration courts or rapid removal forums such as expedited removal by immigration officials; and (5) redress and accountability, which uses data aggregation to create reporting and analysis, and supports litigation to redress unconstitutional conduct.

In Oregon, the Rights Architecture is managed via Oregon Ready, a coalition of immigrant advocates collaborating across disciplines, including legal service providers, social service organizations, grassroots organizations, labor unions, faith groups, rapid response teams, and experts in policy and litigation.¹³²

The Equity Corps completes the fourth core component of the Oregon Infrastructure: removal defense. It also ties removal defense to education and rapid response through the community navigators. The navigators are embedded in organizations that work directly with impacted populations, and “provide front-line screening and referrals into the organizations engaged with deportation defense,” thereby creating capacity system-wide.¹³³

3. *Looking Ahead: Implications and Predictions*

As of the time this Article was written, the Equity Corps is a collaboration between the City of Portland and Multnomah County, not a statewide program. The Oregon context, however, argues for a statewide solution because of the geographic distribution of need for legal representation. Many of the areas with the highest concentrations of unrepresented immigrant residents, such as Washington, Marion, Jackson, and Umatilla counties, may be less likely than progressive urban areas to create a legal defense fund. The same is true for other rural counties that are home to many immigrants who need lawyers to help fight deportation. Most government-sponsored legal defense funds nationwide have been established at the city and county level, as evidenced in the list above. Where statewide funding has recently been secured, as in New York and California, action by the state government was preceded by local action.

Thus, the city/county collaboration that supports the Equity Corps may serve as a pilot program to develop an effective representation model that could be scaled up and expanded to other parts of the state. And, as with other advocacy efforts, the creation of a legal defense fund in one municipality could create momentum for local campaigns in other areas

¹³² *Id.* at 13.

¹³³ *Id.* at 14.

around the state as well as for a statewide solution.¹³⁴

Oregon's Equity Corps may also establish local standards for due process and fairness for immigrants in deportation proceedings that will push the law toward a recognition of the constitutional right to counsel.¹³⁵ This is evidenced by the Supreme Court decision in *Padilla*, in which the Court cited "prevailing professional norms" in holding that competent advice about the immigration consequences of criminal pleas is required by the constitution.¹³⁶ Lastly, the increased presence of attorneys provides an opportunity to expand legal protections for immigrants more broadly through impact litigation. For example, NYIFUP attorneys have won several important cases in the Second Circuit. Among them is *Lora v. Shanahan*, in which the court found it unconstitutional to detain immigrants beyond six months without a bond hearing. While Supreme Court precedent has now limited the impact of this case,¹³⁷ it has allowed many in Connecticut, New York, and Vermont to secure their release from detention.¹³⁸

Finally, the establishment of a legal defense fund counters the characterization of immigrants as undeserving criminals by focusing on the right to due process for all. For decades, the immigrant-as-criminal narrative has enabled deportations by supporting the increasing entanglement between immigration enforcement and the criminal justice system.¹³⁹ Since his campaign, Trump has used language and stories that criminalize immigrant communities to justify his plans for mass deportation.¹⁴⁰ The Trump Administration has consistently attacked sanctuary cities as

¹³⁴ For example, arguments in support of Forest Grove Resolution No. 2017-21 to declare Forest Grove an inclusive "Sanctuary City" specifically referenced adoption by the City of McMinnville of a similar resolution. See Memorandum from Ashley Driscoll, City Attorney, & Jesse VanderZanden, City Manager, to Mayor and City Council re Forest Grove's Inclusive Community Resolution (Feb. 13, 2017), http://www.forestgrove-or.gov/sites/default/files/fileattachments/city_council/meeting/7861/cc02-13-17a.resoenglish.pdf (attaching the text of the City of McMinnville Resolution).

¹³⁵ National Immigration Law Center, *supra* note 66, at 13.

¹³⁶ *Id.*

¹³⁷ See *Jennings v. Rodriguez*, 138 S. Ct. 830, 844, 846 (2018) (rejecting a six-month limitation on specified categories of immigrant detention).

¹³⁸ STAVE ET AL., *supra* note 48, at 40.

¹³⁹ Lasch et al., *supra* note 3, at 1714–15.

¹⁴⁰ See, e.g., U.S. Immigr. and Customs Enforcement, *Victims of Immigr. Crime Engagement (VOICE) Office*, <https://www.ice.gov/voice#> (last reviewed/updated Aug. 9, 2018) (an office created by the Trump Administration in early 2017 to highlight crimes committed by "criminal aliens"); *Transcript: Donald Trump Speech at Rally in Phoenix, Arizona*, Time Magazine (Aug. 22, 2017), <http://time.com/4912055/donald-trump-phoenix-arizona-transcript/> (quoting President Trump's statement that "the wonderful Americans whose children were killed for the simple reason that our government failed to enforce our immigration laws," and going on to say that "one by one we are finding the gang members, the drug dealers, and the criminals who prey on our people.").

havens for criminal aliens.¹⁴¹ Trump's rhetoric has also made explicit the white supremacist beliefs that underpin the construction of immigrants of color as criminals.¹⁴² This narrative has played out locally as the City of Portland and Multnomah County have come under fire for several high-profile assaults allegedly committed by an undocumented immigrant who had a number of police encounters in prior months and had recently been released from police custody.¹⁴³

Looking ahead, as Oregon's immigration legal representation crisis continues to intensify, Oregon will look to the Equity Corps to promote fairness in the legal system and keep families and communities united. Immigrants are integral to Oregon communities and, with representation, these individuals can overcome the disadvantages and inequities that arise when subjected to legal action by the state. Universal representation comports with current legal and political precedent and values of Oregon.

II. WHOSE INFORMATION? OREGON PUBLIC RECORDS AND DISCLOSURE OF INFORMATION FOR THE PURPOSE OF DEPORTATION¹⁴⁴

In contrast to the creation of a universal representation program, the passage of H.B. 3464 required no expenditure of funds or construction of a corps. It merely clarified how the state would understand what information was personal and therefore exempt from Oregon's open records laws. Both policy changes, however, play a central role in unraveling the strands of federal deportation policy that had, over time, become interwoven into Oregon's institutions. Part II maps the second part of the disentanglement trail.

¹⁴¹ See, e.g., Ericka Cruz Guevarra & Conrad Wilson, *US Attorney General Jeff Sessions Attacks Sanctuary Cities in Portland*, OR. PUB. BROADCASTING (Sept. 19, 2017), <http://www.opb.org/news/article/jeff-sessions-portland-visit-protest/> (describing speech in which Jeff Sessions argues that sanctuary cities lead to more violent crime).

¹⁴² See, e.g., Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <http://time.com/4473972/donald-trump-mexico-meeting-insult/> (noting, among others, a tweet by Donald Trump from June 5, 2013, "Sadly, the overwhelming amount of violent crime in our major cities is committed by blacks and [H]ispanics . . ." and remarks in a June 16, 2015 speech, "[Mexicans coming to the U.S. are] bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people.").

¹⁴³ See, e.g., Maxine Bernstein, *Man Accused of Attacking 2 Women in NE Portland Now Faces 27-Count Indictment*, THE OREGONIAN (Aug. 2, 2017), http://www.oregonlive.com/portland/index.ssf/2017/08/post_607.html; *Sergio Martinez's Arrests in Oregon, 2016-2017*, THE OREGONIAN (Sept. 2, 2017), http://www.oregonlive.com/portland/index.ssf/2017/09/sergio_martinez_arrests_in_ore.html.

¹⁴⁴ This Part was primarily authored by Alex Boon and Ben España.

A. A History of Disentanglement from Deportation Policy

The Willamette River runs northward in its eponymous valley and, nearly at its midpoint, it makes a sweeping curve east, carving a flat, wide river bank on its west flank. There, Polk County meets the river on the west and the town of Independence sits with its historical Main Street driving due west from the river's curve toward the Oregon coast. In an agricultural state at the center of its largest agricultural valley, Independence was a world producer in hops—once naming itself the “Hop Capital of the World.” Although overwhelming a majority white city, its prosperity as a crossroads for shipping and agricultural products was tied to its Native American and Latino populations.¹⁴⁵

Independence, like Oregon as a whole, has a complex history of explicit racialized exclusion.¹⁴⁶ On January 9, 1977 four Polk County deputies entered the Hi Ho Restaurant in Independence, Oregon and arrested Delmiro Trevino, a U.S. citizen of Mexican descent.¹⁴⁷ Without identifying themselves or producing a warrant, the deputies interrogated Trevino and his colleagues about their citizenship status, apparently based solely on the color of their skin.¹⁴⁸ One of the deputies grabbed Trevino and forced him to stand in the middle of the restaurant. Mr. Trevino was released only when others identified him as a long time resident of the area.¹⁴⁹

In line with Oregon's historical racial exclusion laws, local Oregon officials had established a pattern of using immigration status checks in a pretextual manner against racial minorities.¹⁵⁰ Others have written about

¹⁴⁵ See Jerry Garcia, *Latinos in Oregon*, OREGON ENCYCLOPEDIA (Mar. 17, 2018), https://oregonencyclopedia.org/articles/hispanics_in_oregon/#.Wu8QrchIAWo; Kenneth R. Coleman, *White Man's Territory: The Exclusionary Intent Behind the 1850 Donation Land Act*, OREGON HUMANITIES (Apr. 27, 2018) <https://oregonhumanities.org/rll/magazine/owe-spring-2018/white-mans-territory-kenneth-r-coleman/>.

¹⁴⁶ See Thomas C. McClintock, *James Saules, Peter Burnett, and the Oregon Black Exclusion Law of June 1844*, 86 PACIFIC NORTHWEST Q. 121 (1995) (describing the history of Oregon's black exclusion laws); Kristofer Allerfeldt, *Race and Restriction: Anti-Asian Immigration Pressures in the Pacific Northwest of America during the Progressive Era, 1885–1924*, 88 J. OF THE HISTORICAL ASS. 53, 53–73 (Feb. 20, 2003) (discussing the history of racial exclusion in Oregon, focusing on Asian immigrants and persons of Asian ancestry).

¹⁴⁷ TESS HELLGREN ET AL., *supra* note 5, at 5–6 (citing complaint filed in *Trevino v. Dahlin*, No. 77-209 (D. Or. Mar. 15, 1977)).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ According to the legislative history of ORS 181A.850, the Oregon legislature gathered ample testimony respecting the use of immigration law by Oregon law enforcement as a pretextual basis for targeting communities of color. See *Cruz v. Multnomah County*, 279 Or. App. 1, 22–23 (2016) (describing legislative findings that “law enforcement personnel in certain communities’ nevertheless sometimes ‘stop and interrogate people using immigration law as the basis for the stop.’”). Robert Mendoza, the Commissioner of the Oregon Commission on Hispanic Affairs explained that the “ramifications of” Oregon enforcing federal immigration law “is such that Hispanics and other ethnic minorities, including United States citizens, are de-

the propensity for these types of pretextual immigration checks to challenge the right of racial minorities to belong in a community.¹⁵¹ The Hi Ho incident, then, was not unique but it became the crucible for Oregon's steady, sometimes meandering march toward disentanglement from federal immigration enforcement as a means to prevent racialized policing and protect the state's prosperity.¹⁵²

Shortly after Mr. Trevino's public humiliation by the Polk County Sheriff's office, he sued.¹⁵³ Trevino brought a class action against the county sheriff and the Immigration and Naturalization Service (INS), the precursor to the Immigration and Customs Enforcement (ICE), alleging that the sheriff and other law enforcement officers had engaged in a longstanding pattern of racial profiling, unwarranted stops, and unlawful interrogation and humiliation of Oregon residents.¹⁵⁴ The complaint as-

tained, interrogated, and harassed by local law enforcement agencies on the mere [basis] of color, language, and dress, a clear violation of one's constitutional rights." See Exhibit S, Senate Judiciary Committee, HB 2314, May 20, 1987 (Statement of Robert Mendoza, Oregon Commissioner of Hispanic Affairs); *see also*, Exhibit F, Senate Judiciary Committee, HB 2314, May 20, 1987 (Statement of Danny Santos, Hispanic Political Action Committee) (explaining that "attempts by Oregon officials to enforce these federal laws has had an adverse affect on community relations with the Hispanic citizenry."); TESS HELLGREN ET AL., *supra* note 7, at 5 (explaining that "[b]y the 1970s, arrests and deportations of immigrants had risen sharply both nationally and in Oregon. Local Oregon police were routinely engaging in racial profiling and discriminatory arrests of Latinos in the name of supporting federal immigration efforts.").

¹⁵¹ *See, e.g.*, Aarti Kohli, Peter L. Markowitz & Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, CHIEF JUSTICE EARL WARREN INST. ON L. & SOCIAL POLICY, at 4-5 (Oct. 2011), https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf (finding racial profiling based on immigration status resulted in higher pre-textual arrests of Latinos, regardless of actual immigration status); Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1002-04 (2016) (arguing that immigrants of color—because of their color—are subject to immigration removals because of race-disparate local policing and local policies); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1104 (2004) ("[P]ermanent involvement of state and local police in routine immigration enforcement raises the further risk of racial profiling and selective immigration enforcement beyond moments of real or perceived national threat"); Carrie L. Arnold, *Note, Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 119 (2007) (describing "evidence of racial profiling when state and local officers have teamed up with federal officers to investigate immigration violations.").

¹⁵² *Cf.* TESS HELLGREN ET AL., *supra* note 5, at 5-8 (citing several public policy enactments to conclude that "[o]ver the past several years, Oregon has moved haltingly toward a more inclusive vision."). The authors also note, "[a]t the same time, despite the continued importance of ORS 181A.820, the statute has been consistently underenforced by state and local authorities . . ." *Id.* at 9.

¹⁵³ *Trevino v. Dahlin*, No. 77-209 (D. Or. Mar. 15, 1977); TESS HELLGREN ET AL., *supra* note 5, at 6-7 (describing lawsuit).

¹⁵⁴ *Trevino v. Dahlin*, No. 77-209 (D. Or. Mar. 15, 1977); Conrad Wilson, *30 Years Later, Oregon's 'Sanctuary State' Law Serves as a Model for Others*, OR. PUB. BROADCASTING

serted that police had “engaged in a pattern and practice of stopping, detaining, interrogating, searching and harassing” people based on the color of their skin and because they were of Mexican descent.¹⁵⁵ It claimed that the federal agency had instructed or permitted law enforcement officers around the state to take those actions.¹⁵⁶ The lawsuit settled, with a stipulation from INS that it would not authorize arrests over the phone.¹⁵⁷

Mr. Trevino’s lawsuit sparked legislative change in Oregon to make disentanglement the official policy of Oregon.¹⁵⁸ Rocky Barilla, the lawyer who filed the lawsuit, was ultimately elected to the state legislature and in 1987 spearheaded what is now referred to as the original Oregon sanctuary law, now Oregon Revised Statute § 181A.820.¹⁵⁹ The text of section 181A.820 prohibits immigration arrests by barring the use of agency “moneys, equipment or personnel” when they are used “for the purpose of detecting or apprehending” someone whose only violation of law arises from presence in the United States “in violation of federal immigration laws.”¹⁶⁰

The legislative history shows that the legislature’s intent to disentangle Oregon from federal immigration enforcement was in pursuit of two policy goals. The original bill was passed to (1) decrease litigation and insurance costs associated with enforcing federal immigration law, and (2) to put a stop to civil rights violations arising from racial profiling.¹⁶¹ The legislature was aware of a need to ensure that immigrants in Oregon would not fear that deportation or removal would result from cooperating with local officers.¹⁶² Moreover, the Deputy Attorney General emphasized that the statute furthered a “policy of great significance” to law enforcement by “making it easier for them to collect information from persons who might otherwise fear that they would be deported by cooperating with law enforcement.”¹⁶³

The process of disentanglement that began in 1987 with the passage

(May 1, 2017), <https://www.opb.org/news/article/oregon-sanctuary-city-state-donald-trump-immigration>.

¹⁵⁵ *Trevino v. Dahlin*, No. 77-209 (D. Or. Mar. 15, 1977).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*; Order of Dismissal & Stipulation, *Trevino v. Dahlin*, No. 77-209 (D. Or. Jul. 17, 1978); TESS HELLGREN ET AL., *supra* note 5, at 6.

¹⁵⁸ TESS HELLGREN ET AL., *supra* note 5, at 6 (“The Trevino lawsuit also paved the way for the creation of Oregon’s disentanglement statute.”).

¹⁵⁹ *Id.* at 6–8.

¹⁶⁰ OR. REV. STAT. § 181A.820(1).

¹⁶¹ *Cruz v. Multnomah County*, 279 Or. App. 1, 22–23 (2016).

¹⁶² Statement of Peter Shepard, Deputy Attorney General, to the Senate Judiciary Committee (June 26, 2003). A later amendment to OR. REV. STAT. § 181A.820 was also intended to (1) respond to and deter threats to public safety after 9/11, and (2) clarify that local officers could make immigration arrests pursuant to judicially-issued warrants. As the Deputy Attorney General understood the bill, it would clarify that “warrants that have been issued by a federal judge . . . as opposed to immigration holds” allow officers to make arrests for immigration crimes. OR. REV. STAT. § 181A.820(3).

¹⁶³ *Id.* (Statement of Peter Shepard, Deputy Attorney General).

of § 181A.820 remained incomplete. For example, the interaction and sharing of information between Oregon law enforcement and community agencies with the federal deportation agency under the Secure Communities program, discussed above in Part I, continued in different forms over the years.¹⁶⁴ More recently, the Trump Administration has sought to require that states and localities permit their employees, officers, and agencies to disclose information regarding citizenship and immigration status to federal authorities to streamline the deportation process of community members.¹⁶⁵

The extent of Oregon's entanglement with the deportation process continued to cause concerns—particularly the use of Oregon-collected information—and its impact on racial minorities.¹⁶⁶ The mayor of Woodburn, Oregon, a majority Latino town near the capital, sent a letter to her state Representative, Teresa Alonso Leon, and Attorney General Ellen Rosenblum.¹⁶⁷ The mayor asked for “help explaining what rights exist” for Oregonians “when interacting with federal immigration agents.”¹⁶⁸ Neither Alonso Leon nor the Attorney General could offer “clarity and guidance” to the “teachers . . . principals . . . city employees and local elected officials” as to how they could protect their communities.¹⁶⁹

State leaders recognized the costs that this confusion imposed on Oregon families and communities. They testified that Oregon “school districts, courthouses—even mayors” were struggling to deal with the uncertainty arising from the “ambiguity of federal law,” and that the uncertainty harmed Oregon in several ways.¹⁷⁰ First, it harmed business, with one town experiencing fear arising from that legal uncertainty that was strong enough to “grind their economy to a halt.”¹⁷¹ Second, it harmed state and local budgets, as each decision that involved federal law raised complex questions that public bodies must “wrestle with on their own” absent clarification from the state legislature.¹⁷² As for public safety, they cited a 2013 University of Illinois study finding that 44 percent of Latinos considered themselves less likely to contact police if they were victims of crime, because of “fear that police officers will ask them about their immigration status.”¹⁷³ Finally, they noted that Oregon’s “state and local law enforcement are already overextended,” without having to spend “state

¹⁶⁴ See *supra* note 54 and accompanying text; TESS HELLGREN ET AL., *supra* note 5, at 10 (describing the Secure Communities program and its operation in Oregon).

¹⁶⁵ See *infra* at note 60 and accompanying text.

¹⁶⁶ Hearing on H.B. 3464 before the Oregon H. Rules Comm. (June 8, 2017) (Statement of Representative Teresa Alonso Leon).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* (Statement of Attorney General Rosenblum).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

resources doing the Federal Government's bidding."¹⁷⁴

State leaders were also deeply concerned about both the loss of immigrant community members through deportation and civil rights violations arising from discriminatory federal policy.¹⁷⁵ One legislator observed that in Portland, Oregon's Reynolds School district, "countless families" had lost relatives to federal immigration authorities.¹⁷⁶ The Governor saw a need to make "absolutely clear [that Oregon] will not participate" in federal enforcement of immigration laws because of "recent anti-immigration measures (including the Muslim registry) taken by the federal government."¹⁷⁷

What emerged from these wide-ranging concerns, among other things, was Oregon House Bill 3464 (HB 3464). The statute "aim[ed] to end [the] uncertainty"¹⁷⁸ by clarifying that immigration information is not specially exempted from the legal protections for personal and confidential information.¹⁷⁹ It was passed as part of a trio of bills that expanded the scope of confidentiality law by making it apply to all public bodies, streamlined the law by organizing Oregon's scattered exemptions, and created a uniform procedure whereby anyone who seeks to compel disclosure may do so in accordance with the public body's requirements and general provisions of Oregon public records laws.¹⁸⁰

At the request of Oregon's Governor and Attorney General, H.B. 3464 was introduced in the House, where it was sponsored by Representatives Alonso Leon and Hernandez.¹⁸¹ The Governor spoke out against "treat[ing] Oregonians as criminals on the basis of their immigration status."¹⁸² Rather, Oregon's longstanding goal had been to "make Oregon a more welcoming and inclusive state for everyone" and recognize the "contributions to the collective prosperity of all Oregonians" made by immigrants.¹⁸³

The U.S. Department of Justice responded to Oregon's disentanglement laws by threatening to withhold federal funds unless Oregon "certifies compliance" with 8 U.S.C. § 1373.¹⁸⁴ Section 1373 prohibits

¹⁷⁴ *Id.* (Statement of Governor Brown).

¹⁷⁵ *Id.* (discussing federal "Muslim registry" proposal).

¹⁷⁶ *Id.* (Statement of Representative Hernandez).

¹⁷⁷ *Id.* (Statement of Governor Brown).

¹⁷⁸ *Id.* (Statement of Attorney General Rosenblum).

¹⁷⁹ *See* Or. H.B. 3464 § 1(1).

¹⁸⁰ *See* SB 106 (2017); HB 2101 (2017); HB 3361 (2017).

¹⁸¹ Or. H.B. 3464 (enrolled house bill).

¹⁸² House Rules Committee (June 8, 2017) (Statement of Governor Brown).

¹⁸³ *Id.*

¹⁸⁴ Letter from Acting Assistant Attorney General Alan Hanson, U.S. Department of Justice, to Michael Schmidt, Executive Director, Oregon Criminal Justice Commission (November 15, 2017) ("Schmidt Letter"); *see also* Letter from Acting Assistant Attorney General Alan Hanson, U.S. Department of Justice, to Multnomah County Chair Deborah Kafoury (November 15, 2017), <https://www.justice.gov/opa/press-release/file/1011571/download> ("Kafoury Letter").

states from prohibiting or restricting their employees or agencies from sending information “to,” or receiving “from” federal immigration authorities information about an individual’s “citizenship or immigration status.”¹⁸⁵ The Justice Department singled out a collection of Oregon’s policies and provisions that served to disentangle state and local entities from federal immigration policy and suggested, without concluding, that Oregon may be unlawfully restricting “the sending of information regarding immigration status.”¹⁸⁶ The laws and policies that the Justice Department identified included Oregon’s original disentanglement law, ORS 181A.820, and its new confidentiality law, H.B. 3464.¹⁸⁷

These developments in Oregon’s governance of its law enforcement resources, public bodies, and protection of personal information of its community members are ripe for analysis, especially in light of the Justice Department’s singling out of Oregon for threats to federal funding. This Article is the first in-depth analysis of the state’s pioneering approach to disentangling itself and its resources from federal deportation policy. The next section will assess the scope of Oregon’s confidentiality provisions and the interplay with federal deportation efforts.

B. Protecting Confidential Information from Disclosure

This Part evaluates current protection under Oregon law of confidential information sought for purposes of pursuing federal deportation consequences. It concludes, first, that Oregon law prohibits state and local enforcement of federal immigration law by prohibiting disclosure of confidential “citizenship or immigration status,” and other non-status information where the purpose is to enforce federal immigration law. Second, it explains that Oregon law does not violate federal disclosure requirements because Oregon confidentiality law does not restrict disclosure as prohibited by federal law governing the passing of information to federal authorities under 8 U.S.C. § 1373.

1. Oregon Law Prohibits Public Bodies from Disclosing Confidential Information to Enforce Immigration Law Unless Required by Law

Oregon law prohibits public bodies from disclosing to anyone certain confidential information when disclosure is sought to enforce immigration law, except in specified circumstances.¹⁸⁸ Understanding the breadth of Oregon’s information-protective legal framework requires evaluating which entities it governs, what kind of information it protects, and when disclosure is permitted or required. Under H.B. 3464, personal information, including immigration status and virtually all other information, cannot be disclosed for the purpose of enforcement of federal

¹⁸⁵ 8 U.S.C. § 1373 (2012).

¹⁸⁶ Hanson Letter, *supra* note 184.

¹⁸⁷ *Id.*

¹⁸⁸ OR. REV. STAT. § 192.355(2)(a) (personal exemption); OR. REV. STAT. § 192.345(3) (conditional criminal law exemption); Or. H.B. 3464.

immigration law unless it is disclosed pursuant to a warrant or court order.

a. Oregon Confidentiality Law Applies to All “Public Records” Possessed by “Public Bodies”

Oregon’s public records laws permits public access to government records while carefully protecting personal and confidential information.¹⁸⁹ Oregon confidentiality law applies to all “public bodies,” including law enforcement agencies.¹⁹⁰ The term public body includes “every state officer, agency,” city or county, “any board, department” or other “agency thereof,” and “any other” state agency,¹⁹¹ as well as certain private entities that contract with public bodies.¹⁹²

Virtually all information in public records that is “related to” public business is a public record.¹⁹³ “Public record” includes information recorded by “every means,”¹⁹⁴ “regardless of physical form or characteristics.”¹⁹⁵ Thus, almost all recorded information is a public record, so long as it relates to public business.

b. Immigration Status Information and Other “Personal” Information is Exempt from Disclosure for the Purpose of Enforcement of Federal Immigration Law Unless Required by a Court, Judicial Warrant, or State or Federal Law

Oregon law is now clear that information about immigration status is personal information that receives protection from disclosure. While Oregon’s public records law applies to all “public records” possessed by all “public bodies,”¹⁹⁶ public records may be exempt from disclosure when they are of a personal nature.¹⁹⁷ Records of a “personal nature” have long been exempt from disclosure.¹⁹⁸ The “personal nature” exemption ap-

¹⁸⁹ *E.g.*, OR. REV. STAT. § 192.311.

¹⁹⁰ OR. REV. STAT. § 192.311(4); Or. H.B. 3464 § 1(1).

¹⁹¹ OR. REV. STAT. § 192.311(4) (as amended, 2017). *See also* Or. H.B. 3464 § 1(6)(c).

¹⁹² *Bull Mountain Meadows, LLC v. Frontier Communications Northwest, Inc.*, 282 Or. App. 43, 46–47 (2016) (applying agency test to determine whether a private company that contracted with a public utility was a public body due to that relationship).

¹⁹³ OR. REV. STAT. § 192.311(5)(a).

¹⁹⁴ *Id.* at (7).

¹⁹⁵ *Id.* at (5)(a).

¹⁹⁶ *Id.* at (2)–(7).

¹⁹⁷ *E.g.*, OR. REV. STAT. § 192.355(2)(a).

¹⁹⁸ OR. REV. STAT. § 192.502(2)(a). Status information may also be exempt because it was provided “in confidence,” OR. REV. STAT. § 192.355(2)(a); or, as required by law that applies only to the public body that holds the record, or another generally applicable confidentiality law; *i.e.*, Oregon Public Records Law. *See* Attorney General’s Public Records Law Reform Task Force at 15 (Dec. 15, 2016) (Draft Report). There are over 550 exemptions, and only 85 of them are found in Oregon Public Records law. *See* OR. REV. STAT. § 192.311–192.505. The remaining scattered provisions are incorporated in the “catchall” exemption. *See* OR. REV. STAT. § 192.355(9)(a).

plies if 1) the information is personal and 2) disclosure unreasonably invades privacy.¹⁹⁹ The personal requirement is not strict, because the purpose of the exemption is to protect privacy, not personal information.²⁰⁰ Therefore, it is sufficient, but in no way required, that personal information be of a type “not normally shared with strangers.”²⁰¹ For example, in *Jordan v. Motor Vehicles Dep’t*, the Oregon Motor Vehicle Department (“MVD”) refused to disclose a citizen’s address.²⁰² Even though it was a public record, and one of over two million, the court held that the MVD could determine it was “personal” in light of the exemption’s purpose.²⁰³ Further, the court dismissed the court of appeals’ view (but affirmed its decision) that “personal” means, at a minimum, normally not shared with strangers.²⁰⁴

Immigration status and other information is personal, although it may be generic, because it belongs to the individual and the individual has a privacy interest that is sufficient to require protection. Generic information, of a type shared by millions, may be “personal” even though it is a public record.²⁰⁵ Immigration status information, like the information in *Jordan*, may be in public records and may be of a type shared by many people, but it nevertheless belongs to each individual person. Given that the exemption applies in light of the privacy interest at stake, status information is personal. Further, immigration status information, especially where an immigrant may fear deportation, is not normally shared with strangers. It shares that critical characteristic with other protected information, including one’s home address, and one’s age, weight, and residential telephone number, which “are always personal.”²⁰⁶ H.B. 3464 clarifies that that type of information is personal regardless of who seeks it.

HB 3464 protects that personal information by prohibiting disclosure and ensuring that certain personal information can be disclosed only in specified circumstances. When the purpose of disclosure is to enforce federal immigration law, the following exemptions apply.²⁰⁷ First, public records regarding “citizenship or immigration status” cannot be disclosed unless it is (1) required by a judicial warrant, court order, or otherwise required by law; or (2) the seeker is the person described in the record or the information is aggregate and anonymous.²⁰⁸ Second, virtually all other “personal” information is categorically exempt from

¹⁹⁹ *Jordan v. Oregon Motor Vehicle Dep’t*, 308 Or. 433, 440 (1989).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 441.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 441.

²⁰⁶ *Id.*

²⁰⁷ Or. H.B. 3464; OR. REV. STAT. § 181A.820.

²⁰⁸ OR. REV. STAT. § 192.311(2)(a); Or. H.B. 3464 § 1(3).

disclosure.²⁰⁹

HB 3464 is consistent with longstanding protections against unreasonable invasion of privacy.²¹⁰ Under H.B. 3464, disclosure of information held by a public body for a discrete, local purpose unreasonably invades privacy where the purpose of disclosure is to enforce federal immigration law.²¹¹ The Oregon Supreme Court has held that public disclosure of personal information unreasonably invades privacy when the information is 1) collected for a public purpose, 2) the requestor seeks to use it for an unrelated purpose, 3) and in light of those purposes, disclosure would unreasonably invade privacy.²¹² Typically, a public body must show upon each request that a particular disclosure constitutes an “unreasonable invasion of privacy,” because in most contexts the statutory scheme does not define the term “unreasonable invasion.”²¹³

Oregon collects information that could be used to enforce federal immigration for a variety of discrete purposes, and the enforcement of immigration law without judicial oversight is an unrelated purpose; in light of those differing purposes disclosure would unreasonably invade the state’s and the immigrant community’s privacy. Oregon collects information to educate, provide access to health care, courts, shelter,²¹⁴ and to enforce state and federal criminal law.²¹⁵ The enforcement of federal immigration law is unrelated to any of those purposes, unless disclosure is sought pursuant to a “court order” or judicial “warrant.”²¹⁶ In that case the coincidence of purposes is the enforcement of criminal law.²¹⁷

As for immigration information, Oregon public bodies generally only collect it to “determine eligibility for a benefit a person is seeking” but not to enforce immigration law, so disclosure to enforce federal immigration law is typically an inconsistent purpose.²¹⁸ Further, that disclosure would harm Oregon and its people in several ways. First, public disclosure would harm the “peace, health and safety” of the immigrant community that has reasonably relied on Oregon’s word.²¹⁹ As for Oregon, it would struggle to maintain its relationship with its immigrant communi-

²⁰⁹ Or. H.B. 3464 § 1(1).

²¹⁰ *Jensen v. Schiffman*, 24 Or. App. 11, 16 (1976) (interpreting ORS 192.501(3), the conditional criminal records exemption). *See* Or. H.B. 3464 §1(1)(a)–(g) (listing protected information).

²¹¹ Or. H.B. 3464 §§ 1(1), (3).

²¹² *Jordan*, 308 Or. at 442–43 (holding that the Motor Vehicle Department’s refusal to disclose a person’s address was lawful when the address was sought by a community member to monitor and pursue her).

²¹³ *Id.*

²¹⁴ Or. H.B. 3464 § 2(1).

²¹⁵ OR. REV. STAT. § 181A.820(3) (authorizing immigration arrests pursuant to federal criminal warrants).

²¹⁶ *Id.*; Or. H.B. 3464 § 1(3)(a).

²¹⁷ *Id.*

²¹⁸ Or. H.B. 3464 § 1(2).

²¹⁹ Or. H.B. 3464 § 3 (2017). *See also* OR. REV. STAT. § 181A.820.

ties,²²⁰ because of the resulting damage to the trust it has cultivated with immigrants over many years.²²¹ Moreover, that invasion of privacy would harm Oregon's ability to exercise control over its funds, employees, and officers in furtherance of its interests.²²²

c. Disclosure is in the Public Interest When an Exception Applies; i.e., When Required by a Warrant, Court Order, or State or Federal Law

Public disclosure of the personal information identified in H.B. 3464 is narrowly circumscribed. A public body must disclose information for the purpose of the enforcement of federal immigration law only if required by 1) state or federal law, 2) a court order, 3) or a criminal "warrant authorized by a court."²²³ While criminal records are generally exempt when proceedings are pending, they are generally public unless the government shows a clear need that requires confidentiality.²²⁴ H.B. 3464 and ORS 181A.820 clarify that there is a "clear need" to maintain confidentiality where criminal records are sought to enforce federal immigration law, unless they are sought pursuant to a criminal warrant; *i.e.*, when a judge or magistrate determines that information must be disclosed.

2. Oregon Law Does Not Violate § 1373, and § 1373 Does Not Preempt Oregon Law

Oregon law does not violate § 1373 because it does not prohibit disclosure. In expressing its concern that Oregon may be out of compliance with section 1373, the U.S. Justice Department pointed to provisions in both the original sanctuary law and the new public records provision, noting that: (1) H.B. 3464 § 1(1) prohibits disclosure of address and contact information when the purpose is to enforce federal immigration law,²²⁵ (2) H.B. 3464 §1(3) states that a public body "may decline to disclose. . . information concerning a person's citizenship or immigration status,"²²⁶ and (3) ORS 181A.820 prohibits the use of state resources for the purpose of detecting or apprehending persons "whose only violation of law" arises from unlawful presence.²²⁷

HB 3464 does not, by its terms, prohibit disclosure. Rather, it clari-

²²⁰ *Id.* at § 2 (encouraging model confidentiality policies at non-public sensitive locations).

²²¹ *E.g.*, OR. REV. STAT. § 181A.820.

²²² *Id.* at (1) (prohibiting use of state resources for the purpose of enforcement of federal immigration law).

²²³ Or. H.B. 3464 § 1(3) (a)–(C); *see also* OR. REV. STAT. § 181A.820 (3), (5).

²²⁴ *Jensen v. Schiffman*, 24 Or. App. 11, 16 (1976) (interpreting OR. REV. STAT. § 192.345(3), the conditional criminal records exemption).

²²⁵ Or. H.B. 3464 § 1(1). The Kafoury Letter also expressed concern about the Multnomah County Sheriff's policy of responding to ICE requests for information "with no greater information than is available to the public." Kafoury Letter, *supra* note 184, at 1. That policy is not assessed here.

²²⁶ Or. H.B. 3464 § 1(3).

²²⁷ *See* Schmidt Letter, *supra* note 184.

fies that as with other types of information, public bodies may decline to disclose immigration status information, and it specifies the avenues through which disclosure may occur. The language of the law is permissive: public bodies “may decline to disclose” confidential information. And Oregon merely requires judicial process—such as a warrant or court order—before disclosing confidential information for the purpose of enforcing federal immigration law.²²⁸ Such processes do not amount to prohibition or unwarranted restriction of information disclosure. Because there is no prohibition on information disclosure, § 1373 does not preempt Oregon law.

Section 1373 does not tell the states what to do; it tells the states what *not* to do—it “prohibits prohibitions.”²²⁹ Construed literally, the federal statute does not actually compel the states to disclose immigration-related information. Instead, it tells the states not to prevent or restrict *themselves* (or government entities or officials) from sending information regarding an individual’s immigration status to the INS (or receiving such information from the INS).²³⁰ Additionally, persons and agencies may not prevent or restrict any government entity from maintaining or exchanging such information amongst themselves.²³¹ Finally, the statute only imposes one duty: DHS is obligated to respond to any inquiries regarding citizenship or immigration status.²³² This duty to respond applies to inquiries from federal, State, or local government agencies.²³³ Thus, § 1373 imposes an affirmative duty on immigration authorities; in contrast, it merely forbids the states from prohibiting disclosure, which is not what Oregon law does.

CONCLUSION

The creation of universal representation for Oregon’s immigrants and the protection of their personal information, including immigration information, are prominent symptoms of a persistent issue. They are central to the efforts of state and localities seeking to concentrate their resources on local matters and preserve the prosperity to which immigrants contribute.

²²⁸ Or. H.B. 3464.

²²⁹ *City of Chi. v. Sessions*, No. 17 C 5720, 2017 U.S. Dist. LEXIS 149847, at *34 (N.D. Ill. Sep. 15, 2017).

²³⁰ 8 U.S.C. § 1373(a-b).

²³¹ 8 U.S.C. § 1373(b)(2-3).

²³² 8 U.S.C. § 1373(c).

²³³ *Id.*