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ARTICLE

THE IMMIGRATION SUBPOENA POWER

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For over a century, the federal government has wielded the immigration subpoena power in darkness, forcing private individuals, subfederal governments, and others to help it detain and deport. This vast administrative power has remained opaque even to those who receive these subpoenas and invisible to those it affects most. Indeed, the very people targeted by these subpoenas often don't know they exist, much less how they facilitate arrest and deportation. For these reasons—and more—this power has escaped the legal battles raging over other immigration enforcement tactics and the scrutiny of journalists, scholars, and courts. Thus, as state- and locality-held information has become central to immigration enforcement, this power raises urgent questions about when, how, and with what constraints the federal government uses it more broadly.

This Article provides the first comprehensive account of the immigration subpoena power. Drawing upon previously undisclosed agency records and an original dataset reflecting thousands of subpoenas issued nationwide, this Article shows how Immigration and Customs Enforcement (ICE) deploys a power created to facilitate racial exclusion at the border to reach deep into our communities and people's lives. It demonstrates how ICE uses subpoenas to pierce state and local sanctuary laws and force subfederal governments—and others—to become unwilling partners in arrests, detention, and removal. And it exposes a range of other unlawful practices.

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These findings shed vital light on the immigration subpoena regime. They help resolve important constitutional questions, illuminate new constraints, and offer lessons that transcend the immigration realm.

INTRODUCTION 3
I. THE IMMIGRATION SUBPOENA POWER 11
A. The Development of Immigration Subpoena Authority 12
B. The Modern Immigration Subpoena Power 21
C. Immigration Subpoena Constraints 25
II. THE IMMIGRATION SUBPOENA REGIME 32
A. Immigration Subpoena Data 32
B. Who and What ICE Subpoenas 36
1. State and Local Government, Generally 37
2. State and Local Criminal Legal Systems 42
3. Schools and Other Essential Services 45
4. Employers, Tech Companies, and Other Providers of Indispensable Services 48
C. How ICE Subpoenas 52
1. Demands for Objects and Action 53
2. Gag Orders 55
D. Why ICE Subpoenas 59
E. How Often ICE Subpoenas 63
III. BOUNDING IMMIGRATION SUBPOENAS 67
A. Federalism and Commandeering Avoidance 67
B. Privacy, Vindicable Rights, and Notice 73
C. Free Speech and Restraints on Restraints 77
IV. BEYOND IMMIGRATION SUBPOENAS 80
A. Presumption of Regularity 80
B. Internal Administrative Law 85
C. Limits Beyond Law 88
CONCLUSION 90
APPENDIX 91
A. Obtaining the Data 91
B. Compiling the Data 92
C. Coding Subpoena Recipients 96
D. Dating Subpoenas 97
E. Immigration Subpoenas to State and Local Law Enforcement 97

INTRODUCTION

After a series of public losses in its war on "sanctuary" cities, the first Trump Administration deployed the immigration subpoena, a new and formidable weapon in this fight.[1] It used these agency-issued subpoenas to retaliate against its political foes—cities and states that refused to participate in federal immigration enforcement—and demand they do what the federal government could not otherwise compel: provide confidential information that would allow ICE to arrest, prosecute, and deport their constituents.[2]

Unlike President Donald Trump's prior efforts, this tactic proved effective. Of course, some cities initially resisted,[3] but once the spotlight faded, that defiance was short-lived. Challenging these subpoenas, the cities seemed to conclude, was futile. And they stood down, quietly turning over the very information they had promised to protect.[4]

Though brief, this battle had enormous implications. For the immigrants caught in the crossfire, it meant exposure to some of the harshest penalties in our legal system: arrest, detention, and exile from their families and homes.[5] For cities and states, it exposed a major chink

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1. Colleen Long, Immigration Agency Subpoenas Sanctuary City Law Enforcement, AP News (Jan. 15, 2020), https://apnews.com/article/immigration-ap-top-news-subpoenas-arrests-politics-ba19871e3754e9c4c9838bd3b600154e [https://perma.cc/TV3V-3P6P] [hereinafter Long, Immigration Subpoenas] (quoting ICE leadership describing this use of immigration subpoenas as a major change and indicating that they had "never been sent to law enforcement agencies before").

2. Stef W. Kight, Trump Has Declared War on Sanctuary Cities, Axios (Feb. 19, 2020), https://www.axios.com/2020/02/19/trump-immigration-lawsuit-subpoena-sanctuary-cities [https://perma.cc/3ZGV-JJW8] (describing the Trump Administration's efforts to force state and local cooperation with federal immigration enforcement); see also Jim Mustian, ICE Ups Ante in Standoff With NYC: 'This Is Not a Request', NBC News (Jan. 18, 2020), https://www.nbcnewyork.com/news/local/ice-ups-ante-in-standoff-with-nyc-this-is-not-a-request/2261924/ [https://perma.cc/MVQ6-TE4G] (reporting that ICE issued subpoenas to New York City in an attempt to circumvent the city's sanctuary policies).

3. See, e.g., Colleen Long, Denver Officials Won't Hand Over Information Sought by Immigration and Customs Enforcement, Colo. Sun (Jan. 17, 2020), https://coloradosun.com/2020/01/17/denver-ice-immigrants-subpoena/ [https://perma.cc/MR2X-R7HV] (reporting that Denver officials refused to comply); Jim Mustian, Feds Ask Judges to Enforce Immigration Subpoenas Sent to NYC, AP News (Feb. 3, 2020), https://apnews.com/article/cdaba9b7b87e4542b43fbf003a560f8a [https://perma.cc/75DK-3TLZ] (last updated Feb. 3, 2020) (reporting that New York City initially did not provide information in response to the subpoenas, arguing that they "lack[ed] a legitimate purpose").

4. See, e.g., Memorandum in Support of Motion to Dismiss at 2, United States v. City of New York, No. 1:20-mc-256 (E.D.N.Y. filed Feb. 18, 2020), 2020 U.S. Dist. Ct. Motions LEXIS 415314 (reporting that New York City complied with the subpoena); Conor McCormick-Cavanagh, Denver Won't Appeal Judge's Ruling in Fight Against ICE, Westword (May 7, 2020), https://www.westword.com/news/ice-wins-round-in-legal-fight-with-denver-11705038 [https://perma.cc/NC94-76DB] (similar for Denver).

5. See, e.g., McCormick-Cavanagh, supra note 4 (reporting that ICE planned to use the information subpoenaed to deport the noncitizen targets); Conrad Wilson, Oregon

in the armor of local sovereignty, one that could undermine subfederal policy on policing, privacy, and control of local resources.[6] And, for the effort to disentangle local government from immigration enforcement, it landed a trenchant blow. It showed how these subpoenas could jeopardize one of the most powerful immigrant-protective movements of the twenty-first century[7]: the sanctuary policies that prevent state and local actors from providing confidential information and other resources to facilitate federal immigration enforcement.[8] In other words, the immigration subpoena offensive worked as intended—and ICE suggested that this was only the beginning and that it might start using this tactic "much more broadly."[9]

But has it? And how else does ICE use these administrative subpoenas—issued without judicial sign-off, active litigation, or even probable cause—to demand that recipients provide confidential records, testify against others, or present themselves for interrogation? The problem—perhaps the biggest takeaway from this episode—is that no one

State Police, Hillsboro, Clackamas County Sheriff to Defy ICE Subpoenas, The Bulletin (Mar. 8, 2020), https://www.bendbulletin.com/localstate/oregon-state-police-hillsboro-clackamas-county-sheriff-to-defy-ice-subpoenas/article_ce3e6e54-616f-11ea-98a7-13a93a34fe6d.html [https://perma.cc/Y9FD-9J83] (last updated Apr. 13, 2021) (reporting that ICE sought the subpoenaed information to commence removal proceedings against the noncitizen targets).

6. See Bridget A. Fahey, Data Federalism, 135 Harv. L. Rev. 1007, 1010–12, 1028 (2022) (observing this type of connection between federal subpoenas and threats to local sovereignty); Robert A. Mikos, Can the States Keep Secrets From the Federal Government?, 161 U. Pa. L. Rev. 103, 154 (2012) (same).

7. Anti-immigrant groups saw this potential, touting immigration subpoenas as the "key to unlock[ing] sanctuary jurisdictions" and forc[ing] hundreds of localities nationwide to help ICE arrest and detain. David Jaroslav, Opinion, ICE Should Use Subpoenas as a Key to Unlock Sanctuary Jurisdictions, The Hill (July 10, 2020), https://thehill.com/opinion/immigration/506684-ice-should-use-subpoenas-as-a-key-to-unlock-sanctuary-jurisdictions/ [https://perma.cc/SRH3-3K54].

8. The term "sanctuary" is generally used to refer to laws and policies that "prohibit[] the use of subfederal resources to enforce immigration laws," often by barring state and local officers from arresting and detaining for ICE. Huyen Pham & Pham Hoang Van, Subfederal Immigration Regulation and the Trump Effect, 94 N.Y.U. L. Rev. 125, 130–34, 154, 162 (2019). Although not the focus of this Article, no discussion of the contemporary sanctuary movement's power would be complete without recognition of the role that community-based organizations and impacted people have played in the adoption of these laws and policies. See, e.g., John Washington, Another Way to Keep Families Together: Join the New Sanctuary Movement, The Nation (June 28, 2018), https://www.thenation.com/article/archive/another-way-keep-families-together-join-new-sanctuary-movement/ [https://perma.cc/L62Q-HRBG] (discussing the role of community-based organizations in advocating for this legislation).

9. Adam Shaw, ICE Subpoenas NY for Info on Illegal Immigrant Accused of Murder, as Sanctuary City Fight Escalates, Fox News (Jan. 18, 2020), https://www.foxnews.com/politics/ice-subpoenas-new-york-sanctuary-city-fight [https://perma.cc/6TZN-3ZFW] (internal quotation marks omitted) (quoting former Acting Director of ICE Matthew Albence); see also Long, Immigration Subpoenas, supra note 1 (referring to comments by the deputy executive associate director of ICE's Enforcement and Removal Operations).

knows. In short, this episode revealed major, unanswered questions about when, how, and with what constraints the massive immigration enforcement agency uses its subpoena power more broadly.

These questions are particularly pronounced because the immigration subpoena regime has long operated in darkness.[10] Although the immigration subpoena power is over a century old,[11] information about when and how the government uses it is virtually nonexistent in the public domain.[12] Unlike the typical subpoena issued by a federal court,[13] these

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10. This Article focuses on "immigration subpoenas," by which it means subpoenas issued by the Enforcement and Removal Operations (ERO) subcomponent of ICE, which is responsible for civil immigration enforcement in the nation's interior. See Memorandum from John Morton, Assistant Sec'y, ICE, to All ICE Emps. 1 (June 9, 2010), https://www.washingtonpost.com/wp-srv/hp/ssi/wpc/MortonMessage.pdf [https://perma.cc/4KUM-5AVN] [hereinafter Morton, ERO Memorandum] (announcing the creation of the Enforcement and Removal Operations directorate and outlining its functions); see also Stipulation and [Proposed] Order at 2, Nash v. Immigr. & Customs Enf't, Nos. 21-cv-04299 & 23-cv-06994 (S.D.N.Y. filed Nov. 18, 2024), ECF No. 60 [hereinafter Stipulation and Proposed Order] (confirming that the majority of subpoenas that the Enforcement and Removal Operations subcomponent issues are for civil immigration purposes). It does not cover subpoenas issued by other ICE subcomponents primarily focused on different types of enforcement, immigration judges (IJs) adjudicating removal proceedings, or DHS officers adjudicating naturalization applications.

11. See infra section I.A.

12. Just Futures Law and Boston University's immigration clinic have done critical work to expose the issuance of administrative subpoenas to technology companies, primarily by ICE's Homeland Security Investigations component (HSI). See Just Futures L. & Bos. Univ. Sch. of L., ICE Issued Hundreds of Requests to Major Tech Companies for Personal Data 1 (n.d.), https://pigeon-orb-9y46.squarespace.com/s/Final_JFL-ICE-admin-subpoenas-factsheet.pdf [https://perma.cc/D4NZ-J299] (reflecting subpoenas issued by HSI); Just Futures L., First Production from ICE_Redacted, Document Cloud (July 28, 2023), https://www.documentcloud.org/documents/23889930-first-production-from-ice_redacted (on file with the *Columbia Law Review*); Just Futures L., First Production from ICE_Spreadsheet of Administrative Subpoenas Issued to Certain Tech Companies, Document Cloud (July 28, 2023), https://www.documentcloud.org/documents/23893291-first-production-from-ice_spreadsheet-of-administrative-subpoenas-issued-to-certain-tech-companies-1 (on file with the *Columbia Law Review*); Just Futures L., Second Production From ICE_Redacted, Document Cloud (July 28, 2023), https://www.documentcloud.org/documents/23921560-boston-u-v-ice_second-production_redacted (on file with the *Columbia Law Review*). This information is extremely valuable but distinct because HSI focuses on criminal and national security–related enforcement, not civil immigration enforcement. See Morton, ERO Memorandum, supra note 10, at 1. Innovation Law Lab also did important work related to immigration subpoenas in the wake of the 2020 initiative. See Toolkit for Resisting ICE Administrative Subpoenas, Innovation L. Lab, https://innovationlawlab.org/toolkit/toolkit-resisting-ice-administrative-subpoenas/ [https://perma.cc/7Z94-VSQJ] (last visited Jan. 17, 2025).

13. See, e.g., Fed. R. Civ. P. 45(a)(4) (requiring the notification of all parties prior to service of pretrial subpoenas seeking, inter alia, records, inspections, and tangible objects). Though a full study is beyond the scope of this Article, this is also true for at least some administrative adjudication. See 8 C.F.R. § 1003.35 (2024) (permitting IJs to issue administrative subpoenas of removal adjudications); Exec. Off. for Immigr. Rev., Immigration Court Practice Manual § 3.2, https://www.justice.gov/media/1239281/dl?inline [https://perma.cc/YP48-76ZF] (last updated Aug. 12, 2024) (requiring

"investigative" subpoenas issued by ICE are not part of public, ongoing legal proceedings, nor are they formally connected to any filed charge or complaint. And, since ICE may issue these subpoenas to obtain information about almost any matter related to the immigration domain without a reason to even suspect that a legal violation has occurred,[14] these subpoenas may never make it into any public record or onto any litigant's radar.

Perhaps for these reasons, immigration subpoenas have largely escaped both the legal battles raging over other ICE tactics and the scrutiny of scholars, reporters, and courts. To be sure, scholars such as Professors Medha D. Makhlouf and Bridget Fahey have published important work identifying some of the concerns that ICE's subpoenas and other information-gathering tools could raise.[15] But no scholar has examined the immigration subpoena regime as a whole or how the agency wields this power on the ground. Indeed, the government itself lacks the fundamental information necessary to study this regime because ICE has no functional system for even tracking—much less analyzing—subpoenas' use in the immigration realm.[16] Thus, despite in-depth examinations of other aspects of immigration enforcement[17] and administrative subpoenas

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parties seeking such a subpoena in removal adjudications to file a motion and serve it upon opposing counsel).

14. See infra Part I.

15. See Fahey, supra note 6, at 1028, 1052–53 (describing ICE's efforts to obtain information from local governments); Medha D. Makhlouf, Health Care Sanctuaries, 20 Yale J. Health Pol'y, L. & Ethics 1, 30–32 (2021) (examining immigration surveillance in the context of health care and arguing, inter alia, that prior ICE policy did not sufficiently limit its use of administrative subpoenas and other information requests in that space). Others have noted some of the legal questions these tools might create. See, e.g., Aleksandar Dukic, Stephanie Gold & Gregory Lisa, Key Legal Considerations Relating to "Sanctuary Campus" Policies and Practices, 44 J. Coll. & Univ. L. 23, 34 (2018) (questioning the legality of mandates requiring that educational institutions turn over students' information); Lisa A. DiPoala, Note, Immigration Reform and Control Act of 1986: A License for Warrantless Searches, 40 Syracuse L. Rev. 817, 829–33 (1989) (arguing that the employer-investigation provisions of Immigration Reform and Control Act, including different administrative subpoena provisions, violate the Fourth Amendment); Kathryn Perrotta, Case Comment, Immigration Law—Third-Party Subpoenas—Can the INS Find John Doe?, Peters v. United States, 853 F.2d 692 (9th Cir. 1988), 13 Suffolk Transnat'l L.J. 866, 867–76 (1990) (analyzing a case related to group subpoenas).

16. See infra section II.A.

17. To note some of the many shining examples: Scholars have examined aspects of immigration enforcement's relationship with state and local law enforcement. E.g., Adam B. Cox & Thomas J. Miles, Policing Immigration, 80 U. Chi. L. Rev. 87 (2013); Eisha Jain, Jailhouse Immigration Screening, 70 Duke L.J. 1703 (2021); Michael Kagan, Immigration Law's Looming Fourth Amendment Problem, 104 Geo. L.J. 125 (2015); Pham & Van, supra note 8. Others have looked at this issue through the lens of enforcement at the border. E.g., S. Deborah Kang, The INS on the Line: Making Immigration Law on the U.S.-Mexico Border, 1917–1954 (2017); Eunice Lee, Regulating the Border, 79 Md. L. Rev. 374 (2020). Others have considered its internal structures and governance. E.g., Fatma Marouf, Regional Immigration Enforcement, 99 Wash. U. L. Rev. 1593 (2022); Shalini Bhargava Ray, Abdication Through Enforcement, 96 Ind. L.J. 1325 (2021). Others have argued for

in other contexts,[18] the immigration subpoena regime remains unstudied, largely unchallenged, and, for many, entirely unknown.

The need to understand this regime has never been greater. While local governments have long played an important role in federal immigration enforcement in the nation's interior,[19] the increased resistance to state and municipal collaboration has changed the enforcement landscape.[20] Specifically, because so many local law enforcement agencies now refuse to arrest and detain for immigration purposes, ICE relies even more heavily on information gathered, generated, and retained by local governments.[21] As the federal fury over sanctuary cities' refusal to provide this information shows, the interior immigration enforcement regime depends on this information at every stage, from identifying potential targets to executing arrests to effecting deportations.[22]

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rethinking it entirely. E.g., Peter L. Markowitz, Rethinking Immigration Enforcement, 73 Fla. L. Rev. 1033 (2021); Emily Ryo, Less Enforcement, More Compliance: Rethinking Unauthorized Migration, 62 UCLA L. Rev. 622 (2015). And still others have examined its uncomfortably close relationship with administrative adjudication in the immigration context. E.g., Ingrid Eagly & Steven Shafer, Detained Immigration Courts, 110 Va. L. Rev. 691 (2024); Mary Holper, The Fourth Amendment Implications of "U.S. Imitation Judges", 104 Minn. L. Rev. 1275 (2020).

18. Given the ubiquity of administrative subpoenas in contemporary practice, they come up in many excellent articles. For some important recent examples, see Aram A. Gavoor & Steven A. Platt, Administrative Investigations, 97 Ind. L.J. 421 (2022) [hereinafter Gavoor & Platt, Administrative Investigations] (providing a first-of-its-kind survey of the law of administrative investigations); Jennifer D. Oliva, Prescription-Drug Policing: The Right to Health-Information Privacy Pre- and Post-*Carpenter*, 69 Duke L.J. 775, 795 (2020) (arguing that, in light of recent Supreme Court precedent, administrative subpoenas for certain health information violate patients' Fourth Amendment privacy rights). For articles exploring the federalism implications of administrative subpoenas among other federal information-gathering tools, see, e.g., Fahey, supra note 6, at 1028; Mikos, supra note 6, at 116–18.

19. See Cox & Miles, supra note 17, at 87, 92–99 (discussing the history of these partnerships and their dramatic expansion starting in 2008).

20. See Lindsay Nash, Deportation Arrest Warrants, 73 Stan. L. Rev. 433, 460–61 (2021) [hereinafter Nash, Warrants] (discussing local declinations to participate in immigration enforcement).

21. See Fahey, supra note 6, at 1028, 1052–53 (describing a range of ways that ICE attempts to obtain and use data held by state and local government entities). In this sense, interior immigration enforcement is different than enforcement at the border, which often functions through border surveillance, observation, and arrests. See, e.g., Dan Whitcomb & Ted Hesson, Nine Migrants Die Trying to Cross Rio Grande River Into United States, Reuters (Sept. 3, 2022), https://www.reuters.com/world/us/eight-migrants-die-trying-cross-rio-grande-river-into-united-states-2022-09-03/ [https://perma.cc/QAQ4-VCAY].

22. See supra notes 2–3 and accompanying text; see also Pham & Van, supra note 8, at 128, 148 (describing how the Trump Administration, in particular, "relentlessly extracted participation from . . . so-called 'sanctuary cities,' or jurisdictions that refuse to fully cooperate with federal immigration enforcement").

While ICE has publicly focused on obtaining this information from police, jailors, and probation departments,[23] its reach into local interactions does not end there. Because immigration arrests and prosecutions can implicate virtually every aspect of people's lives—including spouses' employment, children's schooling, and medical care—so too can ICE's investigative powers.[24] In this way, these investigations can extend beyond the individuals under investigation to anyone—including U.S. citizens—with whom they associate.[25] Thus, knowing how ICE uses its subpoena power to obtain this information is critical to understanding the extent to which local entities remain complicit in immigration enforcement, the practical and legal implications of the immigration subpoena regime, and the efficacy of constraints on this power in the civil immigration realm.

This Article begins to answer these questions, providing the first comprehensive account of the immigration subpoena power. Drawing on previously undisclosed agency records reflecting thousands of subpoenas used in investigations nationwide,[26] it shows how the agency wields a power initially created to facilitate racial exclusion at the border to reach deep into some of the most intimate areas of people's lives, including schools, social services agencies, and other historically protected domains.[27] Indeed, it shows that the agency has long used these subpoenas to obtain children's records from schools, compel sensitive records from local agencies, surveil people's movements, and more.[28]

This Article also reveals the significant federalism implications of ICE's subpoena practice. It demonstrates that, contrary to the agency's own representations,[29] ICE regularly used these subpoenas to compel state and local law enforcement to participate in federal immigration enforcement well before Trump and has continued doing so to the present day.[30] But it also shows that ICE's practice of subpoenaing states and

23. See supra notes 2–3 and accompanying text.

24. See infra section I.B.

25. See infra section I.B.

26. The author obtained these data and other records through Freedom of Information Act (FOIA) requests—and ultimately two lawsuits. See infra section II.A. This Article refers to the author's dataset as "Combined FOIA Data." This dataset and the underlying records are on file with the *Columbia Law Review* and available on request.

27. See infra sections II.A–.B.1. Although ICE and its predecessors are agency subcomponents, this Article refers to them as "agencies" for readability and because the immigration enforcement subcomponent's name has changed throughout history.

28. See infra section I.B.

29. See, e.g., Kight, supra note 2 ("Former ICE director Thomas Homan told Axios that during his 34 years working in immigration enforcement, DHS never had to subpoena another law enforcement agency."); Press Release, ICE, ICE Issues Subpoenas to Obtain Information Refused Under Connecticut's Sanctuary Policies (Feb. 13, 2020), https://www.ice.gov/news/releases/ice-issues-subpoenas-obtain-information-refused-under-connecticuts-sanctuary-policies [https://perma.cc/A5CE-V22T] (claiming that ICE has not "historically needed to use its lawful authority to issue . . . subpoenas" against law enforcement agencies).

30. See infra section II.B.2.

localities that refuse to participate in federal immigration enforcement has recently transformed and become embedded in ICE policy, creating a formal structure for waging an intersovereign subpoena battle that rages on, largely in secret, today.[31]

This Article not only shows where the agency uses this power but also provides troubling new insight into how. It reveals that the agency has sought to broaden its subpoena power to make prospective demands for information and real-time surveillance, attempted to foist investigatory functions upon subfederal government entities, and tried to obscure its subpoena practices by imposing all-encompassing, indefinite—and unlawful—gag orders upon subpoena recipients.[32] Ultimately, this study paints a troubling picture of how ICE uses this power to force subfederal governments and others to contribute to immigration arrests and detention.

In addition to this descriptive contribution, this Article makes two important analytical claims. First, it argues that this examination exposes patterns of unauthorized and unconstitutional conduct that permeate the immigration subpoena regime.[33] It shows how ICE's use of immigration subpoenas implicates a host of constitutional questions—related to federalism, privacy, and free speech—that have gone unanswered and, in some respects, entirely unexplored. And it contends that this study helps raise and even resolve some of these questions by demonstrating the ways that ICE's practices impinge on core constitutional rights and constraints. These findings are important not only to identify these issues but also because they open three paths to agency restraint: They give rise to viable legal challenges in an area where judicial review is notoriously weak;[34] raise troubling policy questions that, in other contexts, have prompted

31. See infra sections II.B.2, II.D.

32. See infra sections II.B.2–.B.4.

33. See infra Part III.

34. See, e.g., United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) ("[I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."); Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 208 (1946) (concluding that the Fourth Amendment guards "at most" against "too much indefiniteness or breadth" in subpoenas for the production of records); Gavoor & Platt, Administrative Investigations, supra note 18, at 423 (describing the "highly deferential standard [of review] that rarely results in the quashing of agency investigative action or the exercise of agency self-restraint"); Diego A. Zambrano, Discovery as Regulation, 119 Mich. L. Rev. 71, 106 (2020) ("Regulated entities almost never succeed in challenging an administrative subpoena on scope, burden, or other reasons.").

subregulatory self-constraint;[35] and arm the public with information necessary to exert pressure through other means.[36]

Second, this Article argues that understanding how the immigration subpoena power is implemented has doctrinal and normative implications that transcend the immigration field.[37] As the first scholarship to date that examines a large set of primary administrative subpoena records—agency-level subpoenas and data[38]—it offers new insights that apply to administrative subpoena use and investigations more broadly. Specifically, it argues that this ground-level view of agency practice suggests the need to rethink the presumption of administrative regularity and the application of internal administrative law principles in at least some similar contexts. These insights are especially important in considering enforcement regimes that, like ICE's, impose extraordinarily harsh penalties and bear most heavily on historically marginalized populations who often lack resources and political power. Ultimately, this Article makes the case for greater external constraints and more probing judicial review in the immigration subpoena regime and beyond.

The Article proceeds in four parts. Part I explores why the immigration subpoena power was created and what that power looks like today. It traces the history of the immigration subpoena from its origins as a mechanism for racial exclusion to the broad, uncanalized power of compulsory information-sharing and surveillance it has become. And it shows why, despite the general acceptance of administrative subpoenas in other regimes, the immigration subpoena power raises distinct and urgent questions—ones that demand a closer look at how it functions in practice.

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35. See, e.g., FBI, Termination Procedures for National Security Letter Nondisclosure Requirement 1 (2015), https://www.fbi.gov/file-repository/nsl-ndp-procedures.pdf [https://perma.cc/59HH-QWL9] (limiting use of agency-issued gag orders in national security–related compulsory process); see also Memorandum from Merrick Garland, Att'y Gen., DOJ, to the Deputy Att'y Gen., the Assoc. Att'y Gen., Heads of Dep't Components, U.S. Att'ys & Fed. Prosecutors 1 (July 19, 2021), https://www.justice.gov/ag/page/file/1413001/download [https://perma.cc/5SJ2-J5FG] (limiting subpoenas sent to media).

36. See, e.g., Alan Z. Rozenshtein, Surveillance Intermediaries, 70 Stan. L. Rev. 99, 149–54, 162 (2018) (discussing the role of public pressure in constraining other surveillance regimes).

37. See infra Part IV.

38. It seems that the only other scholarship that closely examines agency-level subpoena practices is the fascinating work of scholars who have examined subpoenas issued to news media but done so through interviews with and surveys of media recipients. See, e.g., Vince Blasi, The Newsman's Privilege: An Empirical Study, 70 Mich. L. Rev. 229, 235–39 (1971); RonNell Andersen Jones, Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media, 93 Minn. L. Rev. 585, 620–24 (2008); RonNell Andersen Jones, Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism, 84 Wash. L. Rev. 317, 350–53 (2009). Many scholars have done valuable work on administrative subpoenas based on case law resulting from challenges to these subpoenas. See, e.g., supra notes 6, 18. The vast majority of administrative subpoenas, however, do not wind up in litigation, meaning that judicial decisions reflect an important but small part of the larger administrative subpoena picture.

Part II illuminates the current immigration subpoena regime. It uses new agency data and records obtained under the Freedom of Information Act to show how ICE uses this authority in the nation's interior. Ultimately, it provides a first-of-its-kind view of how this tool is used in practice and of the unlawful conduct that permeates the immigration subpoena regime. Part III explores the constitutional and doctrinal implications. It argues that the findings in this Article raise a number of serious constitutional questions, help resolve some of those questions, and justify important doctrinal and procedural changes. Part IV argues that these findings offer valuable lessons about administrative subpoena doctrine and practice that transcend the immigration regime.

I. THE IMMIGRATION SUBPOENA POWER

The standard administrative subpoena origin story centers on the expansion of agencies' power to investigate and regulate industry, associating administrative subpoenas' growth with the rise of administrative governance and explaining their place in the related transformation of legal norms.[39] To the extent that immigration subpoenas are mentioned at all, they're essentially footnotes in that narrative.[40] But the immigration subpoena story was—and remains—distinct in critical ways. This Part tells that tale.

It begins by tracing the immigration subpoena power from its beginnings as a mechanism to facilitate racial exclusion to its current place as a powerful—and largely unconstrained—tool of compulsory process, detention, and deportation in the nation's interior. It then considers the current immigration subpoena framework and its place in the broader administrative subpoena expanse. As a whole, this Part shows that the immigration subpoena power raises distinct and urgent questions and explains why it's so vital to understand how it functions on the ground.

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39. See, e.g., Mariano-Florentino Cuéllar, Foreword: Administrative War, 82 Geo. Wash. L. Rev. 1343, 1402, 1422 (2014) (describing the growth of the administrative state's investigative powers); Kenneth Culp Davis, The Administrative Power of Investigation, 56 Yale L.J. 1111, 1111–14 (1947) (same); Milton Handler, The Constitutionality of Investigations by the Federal Trade Commission (pt. 2), 28 Colum. L. Rev. 905, 924–29 (1928) (same); David E. Lilienthal, The Power of Governmental Agencies to Compel Testimony, 39 Harv. L. Rev. 694, 696–99 (1926) (same); Christopher Slobogin, Subpoenas and Privacy, 54 DePaul L. Rev. 805, 814 (2005) [hereinafter Slobogin, Privacy] (same); see also William J. Novak, The Progressive Idea of Democratic Administration, 167 U. Pa. L. Rev. 1823, 1845 (2019) ("In the late nineteenth and early twentieth centuries, reformers turned to administration, independent agencies, and regulatory commissions as a new kind of democratic check on private economic corruption and public legislative capture.").

40. See, e.g., Handler, supra note 39, at 925–26 (mentioning the existence of the immigration subpoena power, but not elaborating); Lilienthal, supra note 39, at 697–98 (same).

A. *The Development of Immigration Subpoena Authority*

The immigration subpoena story begins in the 1890s, amid the clash between nativist labor interests and those supportive of immigration. At that point, Herman Stump, the superintendent of the newly created Bureau of Immigration and an unabashed racist,[41] was attempting to respond to demands from labor advocates and Congress that the agency more effectively prevent migrant workers—especially those racialized as undesirable—from reaching U.S. shores.[42] In 1894, Stump argued to the Treasury Secretary—then charged with immigration enforcement and adjudication—that, to do so, the Bureau needed stronger tools.[43] He explained that the Bureau had run into challenges when enforcing the "contract-labor laws," which prohibited helping certain migrant workers come to the United States[44]: It was difficult to prosecute the bosses, agents, and employers who were ultimately responsible for violations of this law because the noncitizens they helped migrate were often unwilling to testify against them.[45] Accordingly, Stump recommended legislation authorizing a small set of high-level Bureau officers to "examine books and papers" and "summon" witnesses to testify before the administrative tribunals that adjudicated the admissibility of noncitizens seeking to enter the United States.[46] The Secretary evidently agreed, elevating Stump's request to the House Committee on Immigration and Naturalization shortly thereafter.[47] But the agency's subpoena authority request was soon displaced by further-reaching asks and fell off the agency's legislative agenda entirely.[48]

Although Stump's idea was novel, he did not invent it from whole cloth. Just a few years before, Congress had created federal administrative

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41. For example, then-Representative Stump made a racism-laced plea that his colleagues enact the infamously harsh 1892 amendment to the Chinese exclusion laws. See H.R. Rep. No. 52-255 (1892).

42. See H.R. Doc. No. 53-247, at 2–4 (1894) (letter from Stump to the Treasury Secretary explaining the need for increased investigative powers); see also Brian Gratton, Race or Politics? Henry Cabot Lodge and the Origins of the Immigration Restriction Movement in the United States, 30 J. Pol'y Hist. 128, 133–35 (2018) (describing the "ethnic rift" underlying this effort); Matthew J. Lindsay, Immigration, Sovereignty, and the Constitution of Foreignness, 45 Conn. L. Rev. 743, 802–04 (2013) (describing the xenophobic and racist considerations that motivated Congress).

43. 1894 Ann. Rep. of the Superintendent of Immigr. to the Sec'y of the Treasury 16 [hereinafter Superintendent of Immigration Report] (asking Congress to provide the Bureau with increased investigative authority).

44. See H.R. Doc. No. 53-247, at 4 (explaining the challenges of enforcement under the "contract-labor laws" and the Department's desire to have the laws revised by Congress); Superintendent of Immigration Report, supra note 43, at 16, 21 (same); see also Foran Act, ch. 164, 23 Stat. 332 (1885) (repealed 1952) (prohibiting "the importation and migration of foreigners and aliens under contract . . . to perform labor").

45. Superintendent of Immigration Report, supra note 43, at 16.

46. Id.

47. See H.R. Doc. No. 53-247, at 1–2.

48. See, e.g., Treasury Dep't, Report of the Immigration Investigating Commission 40–46 (1895) (recommending legislation on a host of other immigration-related issues).

subpoena authority through an 1887 law that established the Interstate Commerce Commission (ICC) to regulate railroads and other common carriers.[49] Borrowing from the model used in standard judicial adjudication, Congress vested the ICC—which functioned as a quasi-judicial tribunal—with the power to subpoena the testimony of witnesses and production of records to allow it to investigate, conduct hearings, and ultimately adjudicate complaints.[50] And, if subpoena recipients refused to comply with administrative subpoenas' demands, the ICC could turn to federal courts for orders of enforcement and, if necessary, contempt.[51] But at its inception and even through the first decades of the twentieth century, the ICC's power to subpoena was highly contested.[52] Courts bristled at the idea of vesting executive agencies with the historically judicial power to compel testimony and demand "exposure of[] one's private affairs and papers" for use in administrative investigations and even for quasi-judicial administrative adjudication.[53] And so the very notion of agency-issued subpoenas—and whether they could be used outside of administrative adjudication or against people in their private capacity—remained in considerable doubt when Stump suggested bringing it into the immigration realm.

This legal uncertainty did not prevent the Bureau from reviving its call for subpoena authority roughly a decade later, this time to increase more overtly race-based exclusion. At this point, the Bureau made the case for immigration subpoena power in terms that were sure to resonate with Congress: as a way to increase Chinese exclusion.[54] After all, many within the agency and Congress believed that Chinese immigrants posed a particular racialized threat to the conception of the United States as a white, homogenous nation and that Chinese immigrants were uniquely "cunning" in their attempts to circumvent the morass of laws specifically

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49. Interstate Commerce Act, ch. 104 §§ 11–12, 24 Stat. 379, 383–84 (1887).

50. Id. §§ 12–13, 24 Stat. at 383–84.

51. Id. § 12, 24 Stat. at 383.

52. See, e.g., Gavoor & Platt, Administrative Investigations, supra note 18, at 426 (discussing the initial judicial skepticism toward the ICC's subpoena power); Davis, supra note 39, at 1120–21 (same).

53. Davis, supra note 39, at 1120 (internal quotation marks omitted) (quoting In re Pac. Ry. Comm'n, 32 F. 241, 251 (C.C.D. Cal. 1887)); see also Lilienthal, supra note 39, at 695–96 (arguing that "[t]o the lawyer or judge of one hundred years ago, it was inconceivable that the government should require" disclosure of private documents without judicial process).

54. In that era, race, ethnicity, and national origin were often conflated and functionally merged, particularly in the context of citizens of China. See Erika Lee, At America's Gates: Chinese Immigration During the Exclusion Era, 1882–1943, at 81 (2003) [hereinafter Lee, America's Gates] (describing the use of characteristics such as descent, language, nationality, and association in attempts to categorize people by race); Mae M. Ngai, The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924, 86 J. Am. Hist. 67, 69–70 (1999) (discussing the racialization of certain immigrant groups).

designed to keep them out.[55] This framing was also suited to the times: In the first decade of the 1900s, Congress and the agency were already actively devising ways to strengthen and expand the machinery of Chinese exclusion.[56]

Against this backdrop, Hart Hyatt North, the commissioner of the Bureau of Immigration's San Francisco office, suggested the creation of immigration subpoena authority to facilitate Chinese exclusion.[57] North was focused on excluding what he described in racist terms as the "'wily Chinee'" and was "somewhat obsessed" with Chinese criminality.[58] He was also the top official of the most important port for the Bureau's enforcement of the Chinese exclusion laws.[59] Given this—and particularly coupled with his assertions of high rates of fraud among citizens of China entering the country—his suggestion that officers be empowered to summon witnesses to testify about matters relevant to the admissibility of Chinese applicants carried significant weight.[60]

In 1909, the Bureau began elevating North's suggestion to Congress and incorporated it into the Bureau's proposed legislation.[61] Although North made this suggestion to facilitate the exclusion and removal of Chinese citizens, the Bureau proposed adding subpoena power to its general immigration law enforcement powers.[62] This was presumably because the Bureau, by this point, prosecuted most Chinese citizens under the general immigration laws (rather than the narrower and more

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55. 1909 Comm'r Gen. Immigr. Ann. Rep. 128 [hereinafter 1909 CGAR]; see also Lee, America's Gates, supra note 54, at 190 (discussing the government's "institutional and racialized suspicion of Chinese" people during that period); Lucy E. Salyer, Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law 33–34 (1995) (discussing the then-widespread feeling that Chinese immigrants "should continue to be excluded"). The original Chinese exclusion law was extended and modified through at least fifty-eight laws. See 1930 Comm'r Gen. Immigr. Ann. Rep. 6.

56. See, e.g., V.H. Metcalf, Sec'y of Com. & Lab., Compilation From the Records of the Bureau of Immigration of Facts Concerning Enforcement of Chinese Exclusion Laws, H.R. Doc. No. 59-847, at 9 (1906).

57. 1909 CGAR, supra note 55, at 129–30. For more on Commissioner North, see Lee, America's Gates, supra note 54, at 190.

58. Erika Lee & Judy Yung, Angel Island: Immigrant Gateway to America 12 (2010) (quoting Hart Hyatt North); Lee, America's Gates, supra note 54, at 190. While not wishing to perpetuate this language, it seemed important to recognize and convey the particular type of racism at issue here.

59. See H.R. Doc. No. 59-847, at 9 (1906).

60. See 1909 CGAR, supra note 55, at 129–30; Memorandum from the Special Immigrant Inspector to the Comm'r-Gen. 2–3 (Mar. 16, 1910) (on file with the *Columbia Law Review*) (describing this provision as a means of ensuring attendance and compulsion of "truthful evidence" in "Chinese cases" that would require witnesses, including applicants for admission, to testify under oath on pain of perjury and contempt).

61. See 1911 Comm'r Gen. Immigr. Ann. Rep. 177; 1910 Comm'r Gen. Immigr. Ann. Rep. 157, 181 [hereinafter 1910 CGAR]; 1909 CGAR, supra note 55, at 129–30, 156–57, 177.

62. See 1909 CGAR, supra note 55, at 156–57.

cumbersome Chinese exclusion laws).[63] Specifically, the Bureau suggested an expansive provision that would vest immigration inspectors—who handled both enforcement and adjudication—with broad authority to compel testimony and the production of records in connection with virtually every type of entry, exclusion, or deportation decision the agency made.[64] But despite the broad request, the racial-exclusion purpose behind its subpoena proposal remained clear. The Bureau explained that this provision would "remedy those vexatious conditions which have always characterized the attempts of our officers to secure a proper enforcement of the Chinese-exclusion laws" and noted that, if Congress was unwilling to adopt a broader provision that applied beyond the context of Chinese exclusion, it should at least grant immigration inspectors the power to compel evidence from one particular racialized group: Chinese citizens.[65]

In the end, this targeted fallback proved unnecessary. By 1913, the Bureau's broad subpoena proposal had been incorporated in ultimately successful legislation that sought, among other things, to dramatically expand Asian exclusion.[66] Perhaps reflecting the novelty of this subpoena power at the time, the legislation did not go quite as far as the Bureau had hoped. First, it sought to vest subpoena authority only in commissioners and inspectors-in-charge—a set of high-level administrative officers—rather than low-level immigration inspectors as the agency had proposed.[67] Second, the legislation appeared to deny the portion of the agency's request seeking subpoena authority to prosecute noncitizens facing removal in the nation's interior, instead granting subpoena authority only to facilitate the exclusion of migrants at the border.[68]

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63. See Salyer, supra note 55, at 115; see also Nat'l Comm'n on L. Observance & Enf't, Report on the Enforcement of the Deportation Laws of the United States 33 (1931); Memorandum from the Special Immigrant Inspector to the Comm'r-Gen., supra note 60, at 2–3.

64. See 1909 CGAR, supra note 55, at 177.

65. 1910 CGAR, supra note 61, at 147.

66. See H.R. Rep. No. 62-1340, at 13 (1913) (Conf. Rep.).

67. Id. At that time, there was no presumption that subpoena power could be subdelegated to lower-level officers. See, e.g., Lowell Sun Co. v. Fleming, 120 F.2d 213, 216 (1st Cir. 1941) (refusing to find that subpoena-issuing power could be subdelegated absent clear statutory language).

68. See S. Rep. No. 64-352, at 12 (1916) (suggesting that the Bureau initially understood the provision to permit subpoenas only in the context of admission); 1915 Comm'r Gen. Immigr. Ann. Rep. 39–41 [hereinafter 1915 CGAR] (same). Subsequently, a number of courts interpreted the enacted version of this provision (containing the same language) as authorizing subpoenas in the context of deportation from the interior of the country rather than only in connection with exclusion determinations. See, e.g., Loufakis v. United States, 81 F.2d 966, 967 (3d Cir. 1936); United States v. Parson, 22 F. Supp. 149, 154 (S.D. Cal. 1938); In re C—, 4 I. & N. Dec. 415, 416 (B.I.A. 1951). But other courts—including the Supreme Court in dicta—interpreted the statute as only "deal[ing] with the examination of entering aliens by the Immigration Service." United States v. Minker, 350 U.S. 179, 184 (1956) (discussing the 1917 law containing the same language); Sherman v. Hamilton, 295 F.2d 516, 520 (1st Cir. 1961) (interpreting the 1917 provision similarly).

Congress adopted this provision almost verbatim in an omnibus immigration law enacted in 1917.[69] This legislation both widened the scope of Asian exclusion[70] and vested the agency with the procedural tools—including subpoena power—to more completely effect this bar.[71] Specifically, it enacted a provision vesting commissioners and inspectors-in-charge (who played both enforcement and adjudication roles) with the power to "require by subpoena the attendance and testimony of witnesses" before immigration inspectors determining whether noncitizens were subject to exclusion and to compel "the production of books, papers, and documents touching the right of any alien to enter, reenter, reside in, or pass through the United States."[72] In terms of enforcement authority, the 1917 Act hewed to the ICC model: Rather than empowering the agency to enforce its subpoenas directly by vesting it with the power of contempt, it authorized agency officers to obtain orders of enforcement—and if necessary contempt—from district courts when subpoena recipients failed to comply.[73] And while the 1917 Act's legislative history was dominated by debate about more controversial issues,[74] it makes clear that Congress relied on the Bureau's prior recommendations and rationale for needing this and other administrative enforcement tools.[75]

When the Bureau began using its new power, it proceeded with caution—understandably so given the still-questionable legal status of administrative subpoenas.[76] The Bureau almost immediately adopted a rule emphasizing that this authority should be used sparingly—only when "absolutely necessary"—and directed the high-level subpoena-issuers to send reports to the Bureau's central office each time they used this power.[77]

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69. See Act of Feb. 5. 1917, ch. 29, § 16, 39 Stat. 874, 886 (repealed 1952).

70. See Hardeep Dhillon, The Making of Modern U.S. Citizenship and Alienage: The History of Asian Immigration, Racial Capital, and U.S. Law, 41 Law & Hist. Rev. 1, 18 (2023) (explaining that the 1917 Act's "exclusion zone" spread "roughly from Afghanistan to the Pacific").

71. See § 16, 39 Stat. at 886.

72. Id.

73. Id.

74. See, e.g., Henry Fairchild, The Literacy Test and Its Making, 31 Q.J. Econ. 447, 449 (1917) (discussing additional proposed changes, including the introduction of a literacy test).

75. See S. Rep. No. 64-352, at 12 (1916) (referencing the agency's recommendations in its annual reports and reiterating the House Committee's comments on virtually identical legislation from a prior session); S. Rep. No. 63-355, at 1–2 (1914) (noting that the Secretary's and Commissioner General's recommendations for improving the "machinery" for the "effective enforcement" of the law have been "adopted wherever possible"); see also 1916 Comm'r Gen. Immigr. Ann. Rep. at XXVII; 1915 CGAR, supra note 68, at 40–41; 1914 Comm'r Gen. Immigr. Ann. Rep. 24; 1913 Comm'r Gen. Immigr. Ann. Rep. 255.

76. See supra notes 52–53 and accompanying text.

77. Immigr. & Naturalization Serv., DOL, Immigration Laws: Immigration Rules and Regulations of January 1, 1930, Rule 24, at 185–86 (1937); Bureau of Immigr., DOL, Immigration Laws: Rules of May 1, 1917, Rule 24, at 69 (1917).

Despite this mandate, it is difficult to know precisely how the immigration enforcement agency used this power in these years. It may be that the Bureau in fact exercised restraint. A government-commissioned study of the immigration agency (then part of the Immigration and Naturalization Service (INS) within the DOJ) concluded as much in 1940; it noted that immigration subpoenas were "rarely resorted to" during this period, and decisions involving immigration subpoenas were sparse, particularly when compared to the case law involving other types of administrative subpoenas issued during that time.[78] Or it could be that, as now, agency recordkeeping was lacking, subpoena-issuers failed to report subpoena use, and few subpoenas resulted in litigation.[79] Whatever the reason, immigration subpoenas remained largely under the radar as legal challenges to other administrative subpoenas proliferated and did not even warrant a mention in the Attorney General's "complete statement" of administrative subpoena practices in 1941.[80]

But the immigration subpoena power emerged from relative quiescence in 1952, when Congress overhauled and restructured the nation's immigration laws. At the time, both the INS and the McCarthy-era Congress were particularly focused on the risk of foreign "subversives," especially among those who were or would become naturalized U.S. citizens.[81] Accordingly, after an in-depth congressional investigation of the immigration and nationality systems,[82] Congress enacted the 1952 Immigration and Nationality Act (INA).[83] This act combined the once-separate immigration and naturalization laws and amended them to require more probing review of naturalization applications, eliminate obstacles to denaturalization, facilitate the identification and exclusion of

78. Immigr. & Naturalization Serv., DOL, Report of the Committee on Administrative Procedure 70 (1940).

79. See infra section II.A.

80. Off. of the Att'y Gen., Final Report of the Attorney General's Committee on Administrative Procedure 125, 414–35 (1941). This omission is particularly notable because immigration subpoena power (then vested in the Bureau's successor, the Immigration and Naturalization Service) had been moved into the DOJ and under the Attorney General's purview. See Reorganization Plan No. V of 1940, 5 Fed. Reg. 2223 (June 4, 1940); Act of June 4, 1940, ch. 231, 54 Stat. 230–31 (codified as amended at 8 U.S.C. §§ 1551–1552 (2018)) (enacting the Reorganization Plan).

81. In re Barnes, 219 F.2d 137, 145 (2d Cir. 1955) (discussing Congress's "particular sensitivity" to these fears in drafting the 1952 Act), rev'd sub nom. United States v. Minker, 350 U.S. 179 (1956); S. Rep. No. 81-1515, at 781, 787 (1950) ("[T]he conclusion is inescapable that the Communist party and the Communist movement in the United States is an alien movement . . . .").

82. See S. Rep. No. 81-1515, at 1 (report to the Senate Committee on the Judiciary on the results of the investigation).

83. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.C. ch. 12 (2018)).

expatriated U.S. citizens, and "strengthen[] . . . the investigatory powers" of the agency to accomplish those goals.[84]

To those ends, the 1952 Act broadened the INS's immigration subpoena power in three major ways.[85] First, it expanded the INS's authority to vest subpoena power in lower-level employees, permitting the Attorney General (then responsible for immigration enforcement) to grant "any immigration officer" the power to issue subpoenas.[86] Second, it changed the term "alien" to "person," empowering the INS to issue subpoenas in investigations of U.S. citizens.[87] Third, it added language that widened the subpoena power's scope, meaning that it could be used to obtain evidence not only related to exclusion at the border, but about any person's right to "enter, reenter, reside in, or pass through the United States" and any other "matter which is material and relevant to the enforcement of this Act and the administration of the Service."[88] In other words, Congress extended the subpoena power to almost any matter under the INS's purview.[89]

By this point, judicial resistance to the idea of administrative subpoenas had largely dissipated. Amid the exigencies of World War II, courts' "careful policing" of administrative subpoenas began to ebb and, in the decade that followed, was largely eliminated.[90] This shift was hastened by a series of Supreme Court decisions beginning in 1943 that collectively sanctioned the notion of agency-issued subpoenas in the context of industry regulation, rationalizing this power as necessary for effective enforcement in a quickly expanding administrative state.[91] In these cases—a succession of challenges to administrative subpoenas

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84. *In re Barnes*, 219 F.2d at 145; see also INA §§ 246(b), 335(b), 340, 349(a)(2), 349(a)(4); S. Rep. No. 81-1515, at 722, 766–69.

85. Although beyond the parameters of this Article, it is worth noting that the 1952 Act also provided for administrative subpoenas in the context of naturalization proceedings and for use (by the precursor to immigration judges) in adjudicating removability. See INA § 335(b).

86. INA § 235(a), 66 Stat. at 198–99; see also *Minker*, 350 U.S. at 187 (interpreting this provision).

87. § 235(a).

88. Id.

89. See, e.g., *Minker*, 350 U.S. at 187 (describing the breadth of the provision); United States v. Van, 931 F.2d 384, 387 (6th Cir. 1991) (same); Sherman v. Hamilton, 295 F.2d 516, 520 (1st Cir. 1961) (same).

90. Cuéllar, supra note 39, at 1347, 1401–07.

91. Davis, supra note 39, at 1113–14 (discussing the Court's rulings in this era); see also United States v. Morton Salt Co., 338 U.S. 632, 652–53 (1950) ("Even if one were to regard the request for information . . . as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves . . . ."); Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 217–18 (1946) ("There is no harassment when the subpoena is issued and enforced according to law."); Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 508–10 (1943) ("The subpoena power delegated . . . is so clearly within the limits of Congressional authority that it is not necessary to discuss the constitutional questions . . . .").

seeking records from corporate entities—the Court dispensed with longstanding constitutional questions related to privacy and self-incrimination.[92] And it found these subpoenas unproblematic from a civil liberties perspective, explaining that the opportunity for judicial review before an administrative subpoena could effectively "safeguard" subpoena targets from agency abuse.[93] But this review, the Court made clear, was not the judicial policing of the past[94]: These cases inaugurated the enduring rule that "[a]s long as the subpoena was not excessively broad and called for materials relevant to a legitimate administrative purpose," it should be enforced.[95]

Armed with the 1952 Act's broader subpoena authority and the prospect of more deferential review, the INS began using immigration subpoenas in its nationwide denaturalization campaign.[96] The INS sought to use these subpoenas to compel naturalized citizens to provide potentially incriminating testimony in investigations to determine whether to institute denaturalization proceedings in federal court (and, presumably thereafter, in deportation cases before the agency).[97] These subpoenas were quickly challenged on both statutory and constitutional grounds, culminating in a set of consolidated cases that soon reached the Supreme Court.[98]

This challenge—the 1956 case *United States v. Minker*—was the first and only time that the Supreme Court has squarely considered the immigration subpoena power.[99] And, although its recent decisions had consistently "legitimiz[ed] the routine use of administrative subpoenas" and rejected the individual liberties concerns they raised,[100] the 1952 subpoena provision gave the Court significant pause. Given the subpoena statute's broad language and Congress's distinct scheme for

92. See Davis, supra note 39, at 1127–29; Slobogin, Privacy, supra note 39, at 814–16 (discussing this doctrinal shift in major subpoena-related decisions from that era); see also *Okla. Press*, 327 U.S. at 198–217; *Endicott Johnson Corp.*, 317 U.S. at 510.

93. *Okla. Press*, 327 U.S. at 217.

94. Id.; Gavoor & Platt, Administrative Investigations, supra note 18, at 426 (discussing this evolution in case law).

95. Cuéllar, supra note 39, at 1408.

96. See, e.g., Lansky v. Savoretti, 220 F.2d 906, 907 (5th Cir. 1955), rev'd, 350 U.S. 952 (1956); In re Oddo, 117 F. Supp. 323, 324 (S.D.N.Y. 1953), rev'd sub nom. In re Barnes, 219 F.2d 137, 140 (2d Cir. 1955), rev'd sub nom. United States v. Minker, 350 U.S. 179 (1956); In re Minker, 118 F. Supp. 264, 265 (E.D. Pa. 1953); see also Patrick Weil, The Sovereign Citizen: Denaturalization and the Origins of the American Republic 136–37 (2013) (describing denaturalization campaigns).

97. See, e.g., *In re Barnes*, 116 F. Supp. 464, 468–69 (N.D.N.Y. 1953).

98. See, e.g., Brief for Respondent at 2–4, *Minker*, 350 U.S. 179 (Nos. 35, 47), 1955 WL 72401 (raising those challenges).

99. *Minker*, 350 U.S. at 187. The only other Supreme Court case in which an immigration subpoena played a central role is United States v. Balsys, 524 U.S. 666 (1998), which focused on the scope of the Fifth Amendment's protection against self-incrimination.

100. Cuéllar, supra note 39, at 1404; see also supra note 92 and accompanying text.

denaturalization proceedings, the Court pronounced the statute ambiguous as to whether it allowed the INS to subpoena subjects of potential denaturalization actions.[101] It ignored its recent precedents directing deference, instead focusing on the "extensive" authority conferred by the statute and the fact that "[t]he subpoena power 'is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer.'"[102] The Court then explained that, while the statute provided an opportunity for judicial review pre-enforcement, that was not enough in this case; it elaborated that even an "improvidently issued" subpoena "has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation."[103] Given these features and the stakes, the Court construed the expansive statute narrowly, holding that it did not authorize the INS to subpoena testimony from subjects of denaturalization investigations.[104]

Despite the Court's evident discomfort with the broad power the 1952 Act seemed to bestow, *Minker* was quickly confined to its denaturalization-based facts.[105] Indeed, the case law since then—though surprisingly thin—has been consistent in that respect.[106] Courts have distinguished or ignored *Minker*, even assuming that immigration subpoenas issued to force individuals to provide evidence for deportation and other immigration investigations should be treated like those issued in corporate investigations and applying the Supreme Court's precedents directing heightened deference.[107] And this has remained true even though, as the next Part describes, the INA (and therefore the immigration subpoena power itself) has expanded dramatically in the decades that followed[108]

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101. *Minker*, 350 U.S. at 186–90.

102. Id. at 187 (quoting Cudahy Packing Co. v. Holland, 315 U.S. 357, 363 (1942)).

103. Id. (internal quotation marks omitted) (quoting *Cudahy Packing Co.*, 315 U.S. at 363–64).

104. See id. at 190.

105. See, e.g., Sherman v. Hamilton, 295 F.2d 516, 519 (1st Cir. 1961) (finding that *Minker* placed no limits on the INS's subpoena power in the context of deportation proceedings); United States v. Zuskar, 237 F.2d 528, 532 (7th Cir. 1956) (distinguishing *Minker*).

106. See, e.g., *Sherman*, 295 F.2d at 519; *Zuskar*, 237 F.2d at 532; United States v. Ragauskas, No. 94-C-2325, 1994 WL 445465, at *2 (N.D. Ill. Aug. 12, 1994) (distinguishing *Minker*).

107. See, e.g., Immigr. & Customs Enf't v. Gomez, 445 F. Supp. 3d 1213, 1217 (D. Colo. 2020) (applying such precedents in resolving a challenge to an immigration subpoena); see also Laqui v. Immigr. & Naturalization Serv., 422 F.2d 807, 809 (7th Cir. 1970) (distinguishing *Minker*); *Sherman*, 295 F.2d at 519 (same).

108. See infra note 112 and accompanying text.

and the Court has increasingly recognized the fundamental rights at stake in immigration matters outside the denaturalization context.[109]

B. *The Modern Immigration Subpoena Power*

Although the INA has changed in major ways since 1952, the language of its immigration subpoena provision has not.[110] The current INA still vests the agency head with the authority to empower "any immigration officer" to subpoena testimony and records for use in any civil or criminal investigation under its purview except, as *Minker* found, denaturalization.[111] But while the statutory language is essentially unchanged, its reach is now even broader due to the dramatic expansion of the INA and the agency's "administration" in the decades since.[112]

The agency, for its part, has delegated the full expanse of its subpoena power to a range of law enforcement officers across the nation. Using both published regulations and nonpublic, internal memoranda, the agency has empowered ICE employees—even those focused on civil immigration enforcement—to demand records and testimony from *any* person or

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109. See, e.g., Padilla v. Kentucky, 559 U.S. 356, 373–74 (2010) (recognizing that deportation is a sufficiently severe penalty to trigger obligations under the Sixth Amendment when it would result from a criminal conviction); Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (finding that noncitizens' liberty interests warrant construing the statute authorizing post–removal order detention to contain an implicit temporal limit).

110. Compare Immigration and Nationality Act of 1952, ch. 477, § 235(a), 66 Stat. 163, 198–99 ("[A]ny immigration officer . . . shall have power to require by subp[o]ena the attendance and testimony of witnesses . . . and the production of books, papers, and documents . . . ."), with 8 U.S.C. § 1225(d)(4) (2018) (containing the same language).

111. 8 U.S.C. §§ 1103(a)(4), 1225 (d)(4)(A); 8 C.F.R. § 287.4(a)–(b) (2024); DHS, Privacy Impact Assessment for the ICE Subpoena System 2 (2011), https://www.dhs.gov/sites/default/files/publications/privacy_pia_27_ice_iss.pdf [https://perma.cc/BC2L-69LC] (describing the range of contexts in which ICE (including HSI) issues subpoenas); see also Peters v. United States, 853 F.2d 692, 695–96 (9th Cir. 1988) (observing that the immigration subpoena statute provides the agency with authority to issue subpoenas in civil and criminal investigations). Although the statute still says "Attorney General," this function was transferred to the DHS Secretary. See 6 U.S.C. § 557 (2018). DHS's subpoena authority ends once removal proceedings before an IJ begin; thereafter, any subpoenas must be issued by DOJ-based IJs. 8 C.F.R. §§ 287.4(a), 1003.35(b), 1287.4(a) (2024).

112. See, e.g., Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 302, 321, 341, 346, 110 Stat. 3009, 3009–576, –579 to 84, –635 to 36, –700 (codified as amended in scattered sections of 8 & 18 U.S.C.) (creating summary removal processes and adding new grounds of removability); Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537, 3537–44 (codified in scattered sections of 8 U.S.C.) (adding provisions to identify and penalize marriages entered into for immigration benefits). As the agency explained nearly four decades later, Congress has "not need[ed] to grant subpoena authority to the Service" since then—even when dramatically expanding the scope of immigration-related regulation—because "it had already granted that authority" in 1952, and the continual extension of its subpoena power has been presumed. Powers and Duties of Service Officers; Availability of Service Records, Control of Employment of Aliens, 56 Fed. Reg. 41,767, 41,777 (Aug. 23, 1991) (codified at 8 C.F.R. pts. 103, 247a).

entity in order to obtain information for *any* civil *or* criminal investigation within the agency's broad domain.[113] And, at present, there is generally no requirement that officers have probable cause, identify the suspected violation, or exercise restraint.[114] Accordingly, through a combination of statutory expansion and broad administrative subdelegation, the immigration subpoena power today is far more expansive than even the one *Minker* worried was an "extensive delegat[ion] . . . 'capable of oppressive use.'"[115]

In one sense, the fact that the agency has broad investigative subpoena power is not unique to the immigration scheme. In fact, many administrative subpoena statutes sound just as expansive, similarly vesting agencies with the power to issue subpoenas to investigate essentially any offense under their purview.[116] But the immigration subpoena power stands somewhat alone in allowing investigating enforcement officers to reach so deeply and consequentially into people's lives and with so few checks or constraints.

One reason the immigration subpoena power reaches so deeply is the substance of the INA, especially its admission and removal provisions. These provisions—which cover everything from mental and physical health to housing arrangements to intimate family relationships—can put suspected noncitizens' and their families' whole lives on the table.[117] Even people's intentions when entering the United States or in undertaking

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113. See 8 C.F.R. § 287.4(a); 2023-ICLI-00031, at 0032 (on file with the *Columbia Law Review*) (subdelegating authority in 2010); id. at 0033 (same in 2009); 2021-ICLI-00047, at 5516–18 (on file with the *Columbia Law Review*) [hereinafter 2007 Torres Memo] (same in 2007). In some instances, even officers who have not been delegated such authority (e.g., supervisory deportation officers) have issued subpoenas. See, e.g., 2021-ICLI-00047, at 372–79. All sources cited in this Article that begin with "2021-ICLI" were produced in the first FOIA lawsuit, described in section II.A, and are on file with the *Columbia Law Review*. All sources cited in this Article that begin with "2023-ICLI" were produced in the second FOIA lawsuit, described in section II.A, and are on file with the *Columbia Law Review*.

114. See, e.g., United States v. Zuskar, 237 F.2d 528, 534 (7th Cir. 1956) ("There is nothing in § 235(a) requiring the Director to state a cause of action in his subpoenas."); see also infra section I.C.

115. See United States v. Minker, 350 U.S. 179, 187 (1956) (quoting Cudahy Packing Co. v. Holland, 315 U.S. 357, 363–64 (1942)); Jennifer Nou, Subdelegating Powers, 117 Colum. L. Rev. 473, 475 (2017) (defining "subdelegation" as the phenomenon that occurs when agency heads "take authority granted from Congress or the President and further redelegate it to their subordinates").

116. See, e.g., 26 U.S.C. § 7602(a)–(b) (2018) (permitting the IRS to issue administrative "summons" to inquire into "any offense connected with the administration or enforcement of the internal revenue laws"); 42 U.S.C. § 405(d) (2018) (authorizing subpoenas for investigations "under this subchapter, or relative to any other matter within the [SSA] Commissioner's jurisdiction").

117. See, e.g., 8 U.S.C. § 1182(a)(1)(A)(i)–(iii) (2018) (denying admission to those with certain physical-and mental-health conditions); id. § 1186a(d)(1)(B)(i) (making a spouse's "actual residence" a consideration for good-faith marriage determinations); id. § 1227(a)(1)(G) (providing for removal based on marriage fraud).

past acts can be the subject of investigation in the immigration context.[118] As a result, unlike many enforcement actions in which administrative subpoenas are used,[119] immigration prosecutions regularly involve inquiry into a person's entire life, and often their family and community as well. Some investigations may inquire into marital spats, contraceptive use, and sex.[120] Others may scrutinize people's relationships with their parents, their parents' relationship with each other, and all of their living arrangements for decades.[121] Or a person's medical conditions.[122] Or sexual orientation.[123] Or all of these at once. And while it's true that other enforcement regimes also permit inquiry into intimate issues, none—so far as research for this Article has revealed—permit the whole-life scrutiny authorized by the INA.[124]

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118. See, e.g., id. § 1182(a)(6)(C)(i) (providing for inadmissibility based on willful misrepresentation of material fact); id. § 1182(a)(10)(A) (providing for inadmissibility if a person enters for the purpose of practicing polygamy); id. § 1182(a)(10)(C)(ii) (providing for inadmissibility if a person intentionally aided someone else in failing to comply with a child custody order).

119. Often, these enforcement actions focus on specific (often corporate) transactions or incidents, including tax violations, financial misconduct, and healthcare fraud. See, e.g., 26 C.F.R. § 301.7602-1(c)(4) (2024) (providing examples of the scope of tax liability investigations).

120. See Nina Bernstein, Do You Take This Immigrant?, N.Y. Times (June 11, 2010), https://www.nytimes.com/2010/06/13/nyregion/13fraud.html (on file with the *Columbia Law Review*) (describing the questions in a marriage fraud inquiry); see also United States v. Chowdhury, 169 F.3d 402, 405 (6th Cir. 1999) (discussing conflicting stories about whether a marriage was consummated).

121. See, e.g., U.S. Gov't Accountability Off., GAO-21-487, Actions Needed to Better Track Cases Involving U.S. Citizenship Investigations 2 (2021), https://www.gao.gov/assets/gao-21-487.pdf [https://perma.cc/5HAD-ZWCR] (noting policy requiring ICE to investigate claims or indicia of citizenship prior to enforcement actions); Immigrant Legal Res. Ctr., Chart C: Derivative Citizenship (2022), https://www.ilrc.org/sites/default/files/resources/natz_chart-c-2022-3-17.pdf [https://perma.cc/7HX6-GBVL] (showing requirements for derivative citizenship).

122. See, e.g., In re LaRochelle, 11 I. & N. Dec. 436, 438 (B.I.A. 1965) (holding that those who were medically inadmissible at entry but nevertheless entered are deportable); In re A—, 8 I. & N. Dec. 12, 14 (B.I.A. 1958) (finding it "proper to determine in this deportation proceeding whether the respondent suffered an attack of insanity prior to her last entry").

123. See, e.g., Em Puhl, Immigrant Legal Res. Ctr., Family-Based Petitions for LGBTQ Couples 8 (2020), https://www.ilrc.org/sites/default/files/resources/bona_fide_marriage_lgbtq_couples_final.pdf [https://perma.cc/3R9G-R3CF] (explaining how this issue arises in the context of determining whether a marriage is in good faith); see also Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1079 (9th Cir. 2015) (finding that "sexual abuse due to a person's gender identity or sexual orientation" constitutes torture under the Convention Against Torture).

124. Compare supra notes 120–123 and accompanying text (discussing the wide range of potential immigration-related investigations), with DOJ, Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities 12, 14, 16, 133 (2022) [hereinafter DOJ Subpoena Report] (describing the scope of the investigative administrative subpoena authority in certain other civil, criminal, and hybrid (civil and criminal) enforcement schemes).

But it's not just a matter of intrusiveness. The other reason that ICE's subpoena power is so consequential is the way it combines with and amplifies ICE's even more extraordinary powers.[125] Immigration enforcement officers, unlike any other federal law enforcement agents, are also vested with the power to unilaterally deprive people of liberty for extended periods of time—or forever.[126] Specifically, ICE officers can detain people for weeks, months, or years—and even issue their own arrest warrants—without any judicial review of the arrest or detention whatsoever.[127] ICE officers are also empowered to deprive certain people of liberty by unilaterally ordering them removed; in those circumstances, ICE is both the prosecutor and the adjudicator, as it initiates removal prosecutions *and* "adjudicates" them by issuing the removal order itself.[128] Adding subpoena authority to these extraordinary powers magnifies the impact of both.[129] And although neither this type of lengthy executive detention nor these prosecutor-issued deportation orders existed when Congress enacted the immigration subpoena statute,[130] the vast growth of the former has transformed the latter. It has converted these subpoenas from a tool to gather information for admissibility and removability determinations to one that also facilitates raids, lengthy executive detention, and processless deportations.

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125. See James L. Houghteling, Sec'y of Lab., Statement Before the House Judiciary Committee, Wednesday, February 8, 1939, *in* DOL, Twenty-Seventh Annual Report of the Secretary of Labor 213, 213–14 (1939) ("[T]he Secretary . . . stands virtually alone among executive officers in his right to restrict personal liberty and freedom of individual action of human beings."); Lindsay Nash, Inventing Deportation Arrests, 121 Mich. L. Rev. 1301, 1303–04, 1309 (2023) [hereinafter Nash, Arrests] (describing the ways in which ICE's arrest power is extraordinary and diverges from other legal regimes).

126. Nash, Warrants, supra note 20, at 455–56 (describing how a range of enforcement officers can authorize arrests for their colleagues or even themselves).

127. See Jennings v. Rodriguez, 583 U.S. 281, 328 (2018) (Breyer, J., dissenting) (describing the length of time people may be detained); Ingrid V. Eagly, Prosecuting Immigration, 104 Nw. U. L. Rev. 1281, 1305 (2010) (describing the absence of probable cause determinations in removal proceedings); Kagan, supra note 17, at 127–28, 163 ("In immigration enforcement, . . . there is no automatic, neutral review of probable cause if the arrested person is held in custody . . . .").

128. 8 U.S.C. §§ 1225(b)(1)(A)(i)–(iii), 1228(b) (2018).

129. See infra Part II; see also Hearings Before the President's Comm. on Immigr. and Naturalization, 82d Cong. 1007 (1952) (statement of Nat'l Union of Marine Cooks and Stewards) (expressing alarm about the unique combination of subpoena and arrest powers that were vested in the immigration agency).

130. When Congress adopted the 1952 provision, noncitizens facing deportation could seek release on bond from at least quasi-independent adjudicators since mandatory detention—that is, detention without the opportunity to ask an IJ for release on bond—did not yet exist. See Stephen H. Legomsky, The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms, 64 Wash. & Lee L. Rev. 469, 490 (2007) ("Mandatory detention made its immigration debut with the enactment of the Anti-Drug Abuse Act of 1988."). Similarly, expedited removal—which permits law enforcement officers to order the removal of people arrested in the interior—did not exist. See Jennifer Lee Koh, Removal in the Shadows of Immigration Court, 90 S. Cal. L. Rev. 181, 195 (2017) (discussing the "creation of expedited removal in 1996").

C. *Immigration Subpoena Constraints*

Given the stakes, one might expect some substantial protections to accompany immigration subpoenas. After all, many other administrative subpoena schemes—even those involving more limited inquiries or lower stakes—have some significant rules and rights built in.[131] Some agencies, for example, require employees to go through substantial internal approval processes when seeking certain investigatory subpoenas, including the submission of justifications memoranda or independent consultations before this compulsory process will issue.[132] Some schemes condition subpoena authority on a formal threshold approval after a preliminary investigation,[133] reserve subpoena-issuing power to the agency head,[134] or require the vote of a multimember commission.[135] Some impose heightened standards of cause before a subpoena can be used,[136] some guarantee certain rights to recipients,[137] and some—especially when

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131. Due to constraints of space, time, and the literature, this Article does not cover the rules and practices associated with all three-hundred-plus statutes that authorize administrative subpoenas. See Gavoor & Platt, Administrative Investigations, supra note 18, at 436–37. Instead, it draws on a range of sources to consider a cross-section of administrative subpoena schemes.

132. See, e.g., 47 C.F.R. § 0.111(h) (2023) (FCC); FBI, Domestic Investigations and Operations Guide §§ 18.6.4.3.2.3, 18.6.4.3.3.2 (2021) [hereinafter FBI, Domestic Investigations]; Memorandum from William A. White, Enf't Couns. for Superfund, to Regional Couns., EPA 3 (Aug. 30, 1991), https://www.epa.gov/sites/default/files/documents/subpoena-cercla-mem.pdf [https://perma.cc/RA4L-DF74]; Memorandum from Thomas L. Adams, Jr., Assistant Adm'r, EPA, to Reg'l Adm'rs, Regions I–X, EPA, Reg'l Couns., Regions I–X, EPA, & Dirs., Waste Mgmt. Div., Regions I–X, EPA 6–7 (Aug. 25, 1988), https://www.epa.gov/sites/default/files/documents/cerc-infreq-mem.pdf [https://perma.cc/R9SD-5JM4] [hereinafter 1988 CERCLA Mem.]; Off. of Inspector Gen. & Off. of Investigations, Dep't of Energy, Policies and Procedures Manual 8-37–8-41 (2014), https://www.governmentattic.org/11docs/DOE-OIGinvestigations%20Manual_2012.pdf [https://perma.cc/3RNE-2ERU]; Off. of Enf't, DOL, Enforcement Manual: Subpoenas, https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/enforcement/oe-manual/subpoenas.pdf [https://perma.cc/4W6G-KTX8] (last updated Mar. 18, 2022).

133. See, e.g., 12 C.F.R. § 622.104 (2024) (requiring the Farm Credit Administration to open a formal investigation); 17 C.F.R. § 202.5(a) (2024) (SEC); DOJ Subpoena Report, supra note 124, at app. A (Federal Reserve System's Board of Governors); SEC, Enforcement Manual 17–18 (2017) [hereinafter SEC Manual].

134. See, e.g., 15 U.S.C. § 2076(b)(10) (2018) (permitting head of Consumer Safety Protection Commission to delegate any power except their subpoena power).

135. See, e.g., 52 U.S.C. § 30107(a)(3) (2018) (FEC); 11 C.F.R. § 111.12 (2024) (same); 16 C.F.R. § 2.7(a), (c) (2024) (FTC); 17 C.F.R. § 11.4 (2024) (Commodity Futures Trading Commission).

136. See, e.g., 5 U.S.C. § 406(a)(4) (2018) (authorizing inspectors general to issue subpoenas only when "necessary" and not against the federal government); 12 U.S.C. § 5562(c) (2018) (requiring, among other things, that the CFPB have a "reason to believe" there is a violation); DOJ Subpoena Report, supra note 124, at app. A (discussing DOT subcomponent).

137. See, e.g., 16 C.F.R. § 2.9(b) (2024) (discussing the right to counsel in any compelled FTC deposition); FCC, Enforcement Overview 9 (2020),

the power is vast and stakes are great—mandate subpoena-issuing restraint.[138] And while it may seem counterintuitive that agencies would adopt these constraints, they appear to find it in their interest to do so, for example, to avoid judicial decisions, public outcry, or amendments that could impose greater limits on their authority.[139] Of course, as the next Part shows, policies tell only part of the story in this space and may not necessarily be reflected in practice.

Consistent with this, agencies often have robust rules for administrative subpoena recordkeeping. These requirements include directives that investigating officers maintain detailed records of subpoenas issued, justifications memoranda, and any responses from subpoenaed parties.[140] This helps preserve evidence for prosecution, but serves oversight goals as well: Recordkeeping permits agencies to self-police, ensure compliance with protocols, and protect investigated parties from agency abuse.[141] Importantly, careful recordkeeping should also facilitate external checks and input, allowing those outside the agency—including Congress and the public—to understand and help shape an agency's subpoena practice.[142]

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https://www.fcc.gov/sites/default/files/public_enforcement_overview.pdf [https://perma.cc/8P4T-BEJT] (same for the FCC).

138. See, e.g., DOJ Subpoena Report, supra note 124, at 16–17, apps. A, B (discussing Secret Service, DOT, Department of Education, and certain DOL approaches); Drug Enf't Admin., DOJ, DEA Agents Manual § 6614.23 (1999) (discussing subpoenas under the Controlled Substances Act); see also infra note 139 (collecting sources).

139. See, e.g., Seth F. Kreimer, Watching the Watchers: Surveillance, Transparency, and Political Freedom in the War on Terror, 7 U. Pa. J. Const. L. 133, 181 (2004) (discussing an FBI memo directing careful use of discretion due to the risk of losing such authority); Jessica Schneider & Hannah Rabinowitz, DOJ Codifies Rule Barring Secret Subpoenas of Journalists' Records, CNN (Oct. 26, 2022), https://www.cnn.com/2022/10/26/media/doj-journalists-records-biden [https://perma.cc/M44E-NRT8] (discussing new DOJ regulations placing limits on subpoenas of journalists' records); see also 1988 CERCLA Mem., supra note 132, at 13 (imposing certain documentation requirements prior to the issuance of a subpoena, including that the agency provide a justification for the subpoena, "[s]ince the use of administrative subpoenas may be judicially challenged").

140. See, e.g., I.R.S. Deleg. Order 25-1 (Rev. 2), IRM 25.5.5.1.5 (Mar. 16, 2022) (requiring that IRS employees retain summons, approval memoranda, and counsel review records in administrative case files); SEC Manual, supra note 133, § 3.2.9 (outlining procedures for maintenance of investigative files); sources cited supra note 139.

141. As the IRS explained, doing so allows agency management to periodically review subpoena-issuing practices to "ensure taxpayer rights were protected" and evaluate agency policy and practice. I.R.S. Deleg. Order 25-1 (Rev. 2), IRM 25.5.5.1.4; see also FBI, Domestic Investigations, supra note 132, § 18.6.4.3.3.1 (describing the filing requirements and form to be completed prior to issuance of an administrative subpoena); Off. of the Inspector Gen., DOJ, A Review of the Federal Bureau of Investigation's Use of National Security Letters: Assessment of Progress in Implementing Recommendations and Examination of Use in 2007 Through 2009, at 20 (2014), https://oig.justice.gov/reports/2014/s1408.pdf [https://perma.cc/JA5M-A8LV] (describing the FBI's implementation of systems to reduce human error in subpoena recordkeeping).

142. See Off. of the Inspector Gen., supra note 141, at 20.

Finally, some schemes have mechanisms that facilitate judicial review. This matters because judicial scrutiny is often said to be the backstop in this context, a "disciplining force" and safeguard against agency overreach.[143] In theory, judicial review is available to any subpoena recipient, as agencies must seek court enforcement before subpoena recipients can be punished for noncompliance,[144] and, at that point, recipients can raise challenges of their own.[145] But recipients often don't know they have this right, aren't able to exercise it, and, even if they could, are reluctant to wait around to see if they will get sued.[146] So, to make the potential for judicial review more meaningful, some administrative schemes explicitly empower subpoena recipients to affirmatively challenge administrative subpoenas.[147]

Of course, empowering subpoena recipients to raise challenges may not help much when it comes to subpoenas issued to third-party record-holders.[148] In those cases, the people whose records are at issue—the ones with most incentive to challenge the subpoena—may not know about the subpoena and, even if they do, may not have a right to challenge it in

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143. See United States v. Powell, 379 U.S. 48, 58 (1964) (describing the court's role in preventing abuses of process when called to enforce administrative subpoenas); United States v. Morton Salt Co., 338 U.S. 632, 640 (1950) (same). The helpful characterization of judicial review as a "disciplining force" comes from Professor Wendy E. Wagner's discussion of this dynamic in a different type of agency decisionmaking. See Wendy E. Wagner, A Place for Agency Expertise: Reconciling Agency Expertise With Presidential Power, 115 Colum. L. Rev. 2019, 2028 (2015).

144. See In re Nat'l Sec. Letter, 33 F.4th 1058, 1063 (9th Cir. 2022) ("The 'power to punish is not generally available to federal administrative agencies,' and so [subpoena] enforcement must be sought 'by way of a separate judicial proceeding.'" (quoting Shasta Mins. & Chem. Co. v. Sec. & Exch. Comm'n, 328 F.2d 285, 286 (1964))); see also Interstate Com. Comm'n v. Brimson, 154 U.S. 447, 489 (1894) ("[T]here is no such thing as contempt of a subordinate administrative body.").

145. See, e.g., United States v. Ramirez (In re Ramirez), 905 F.2d 97, 98 (5th Cir. 1990) (explaining that courts often "dismiss anticipatory actions filed by parties challenging such subpoenas as not being ripe for review because of the availability of an adequate remedy at law if, and when, the agency files an enforcement action"); Atl. Richfield Co. v. Fed. Trade Comm'n, 546 F.2d 646, 649 (5th Cir. 1977) (same).

146. See United States v. Minker, 350 U.S. 179, 187 (1956) (describing subpoenas' "coercive tendency").

147. See, e.g., 18 U.S.C. § 1968(h) (2018) (involving subpoena-like "civil investigative demands" for civil or criminal racketeering investigations); 18 U.S.C. § 3486(a)(5) (involving subpoenas for criminal investigations of health care fraud, child sexual abuse, certain unregistered sex offenders, and imminent threats to people in Secret Service protection). In still other schemes, recipients may challenge subpoenas through what are functionally administrative appeals. See 11 C.F.R. § 111.15(a) (2024) (FEC); 12 C.F.R. § 1080.6(e) (2024) (CFPB); 16 C.F.R. § 2.10 (2024) (FTC).

148. See Slobogin, Privacy, supra note 39, at 823–25 (arguing that the Court's interpretation of the Fourth Amendment affords little protection to third parties, "regardless of how much information in those records is provided by the subject of the records or the contractual arrangements between the parties"); see infra notes 388–393 (discussing more recent precedent affording some protection).

court.[149] But again, Congress has, in at least some cases, adopted specific provisions that grant the person whose records are at issue the right to challenge these subpoenas as well.[150] And so, despite the enduring precedents that tightly circumscribe judicial review in the administrative subpoena space, impacted parties' ability to bring suit has played an important role in exposing abuses, changing agency practice, and constraining administrative subpoena schemes.[151]

But the immigration subpoena regime lacks many of these features—and practically any meaningful constraints. While detailed subpoena guidance is common across the administrative state, the immigration agency generally provides almost none to civil enforcement officers.[152] For subpoenas to most types of recipients, the agency gives these officers almost no instruction about when (within the vast expanse of matters under the agency's purview) these subpoenas should be used, when (considering the sensitive issues immigration enforcement implicates) they should not, or the degree of suspicion that justifies compulsory process. ICE doesn't generally require its civil immigration enforcement officers to explain why they think a subpoena is appropriate or mandate

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149. See, e.g., Mobil Expl. & Producing U.S., Inc. v. Dep't of Interior, 180 F.3d 1192, 1200–01 (10th Cir. 1999) (finding that courts only have jurisdiction to review subpoena challenges brought by the agency); *In re Ramirez*, 905 F.2d at 98 (same); Belle Fourche Pipeline Co. v. United States, 751 F.2d 332, 333–35 (10th Cir. 1984) (same); see also Sec. & Exch. Comm'n v. Jerry T. O'Brien, Inc., 467 U.S. 735, 742 (1984) (finding no constitutional, statutory, or doctrinal requirement that agencies notify the subjects of records that it has subpoenaed their records from a third party).

150. The tax scheme, for instance, directly grants those rights, imposing default requirements that the agency notify taxpayers under investigation when it subpoenas their records from third parties and granting taxpayers the right to challenge subpoenas in court (or intervene if third-party recipients sue). 26 U.S.C. § 7609(a)(1), (b) (2018). While the tax scheme may be an outlier in this respect, other agencies' practices are heavily mediated by similar provisions in broader privacy statutes that generally require agencies to provide advance notice to subjects of certain types of records and provide those subjects a right to seek judicial review. See, e.g., 12 U.S.C. § 3405 (2018) (relating to certain financial records); 45 C.F.R. § 164.512(e)(1)(ii)(A), (e)(1)(iii) (2023) (relating to certain medical information).

151. See, e.g., John Doe, Inc. v. Mukasey, 549 F.3d 861, 866–67 (2d Cir. 2008) (describing the litigation and subsequent limitation of certain national security–related compulsory process and construing the statute to require additional protections); In re McVane, 44 F.3d 1127, 1137 (2d Cir. 1995) (recognizing certain privacy rights implicated by agency subpoenas); Dow Chem. Co. v. Allen, 672 F.2d 1262, 1276 (7th Cir. 1982) (concluding that the impact on academic freedom should be considered in determining the reasonableness of a forced disclosure); Barnhart v. United Penn Bank, 515 F. Supp. 1198, 1203–04 (M.D. Pa. 1981) (describing legislative amendments that provide greater procedural safeguards in reaction to decisions in prior litigation).

152. This description is based on extensive research and the results of a second FOIA lawsuit seeking all agency guidance (in any form) governing subpoena issuance and recordkeeping. See Complaint at 5, Nash v. Immigr. & Customs Enf't (*Nash II*), No. 23-cv-6994 (S.D.N.Y. filed Aug. 8, 2023) (requesting records reflecting "requirements and standards" that ICE officers must follow in issuing and "recording the issuance of these subpoenas").

restraint.[153] And, though agency policy prohibits other types of enforcement actions in schools, hospitals, and other entities that provide essential services to noncitizens and their families, ICE permits its agents to subpoena people's sensitive information from these very same places.[154]

The only instances in which ICE has issued more detailed guidance involve subpoenas that are issued to entities in positions of particular power or that are likely to draw public scrutiny.[155] For almost two decades, the only headquarters guidance at all was a nonpublic memorandum tersely stating that "sensitive" subpoenas—for example, those issued to obtain information from journalists, about foreign governments, or from public officers—and those seeking information about large groups of people had to be "vetted" through headquarters.[156] But the Trump Administration's highly politicized subpoena use resulted in two targeted policy changes. First, as part of a campaign by the Trump Administration to increase the agency's use of immigration subpoenas targeting sanctuary jurisdiction law enforcement, ICE disseminated a new internal policy that lays out detailed review and tracking protocols only for subpoenas to law enforcement in "non-compliant" (sanctuary) jurisdictions.[157] As is discussed more below, this policy purports to require some justification and headquarters review for these subpoenas, but records reflecting this

153. Although it's not possible to know whether communication occurred outside of the records produced for this study, emails reflecting field office–level processes and subpoena requests indicate that officers will issue them based on barebones subpoena forms. See, e.g., 2023-ICLI-00031, at 273; 2021-ICLI-00047, at 2973–76, 5521–22, 5601.

154. Memorandum from Alejandro N. Mayorkas, Sec'y, DHS, to Tae D. Johnson, Acting Dir., ICE, Troy A. Miller, Acting Comm'r, Customs & Border Prot., Ur M. Jaddou, Dir., USCIS, Robert Silvers, Under Sec'y, Off. of Strategy, Pol'y & Plans, Katherine Culliton-González, Officer for Civ. Rts. & Liberties, Off. of Civ. Rts. & Liberties, and Lynn Parker Dupree, Chief Priv. Officer, Priv. Off. 2, 4 (Oct. 27, 2021), https://www.dhs.gov/sites/default/files/publications/21_1027_opa_guidelines-enforcement-actions-in-near-protected-areas.pdf [https://perma.cc/Z2PV-TXVL] [hereinafter 2021 Protected Areas Guidance] (limiting "service," but not issuance, of subpoenas at these locations); see also infra section II.B.3.

155. See infra notes 157–160 and accompanying text.

156. 2007 Torres Memo, supra note 113, at 5516–17. When obligated to produce all guidance in any form, only two field offices identified records resembling additional guidance. The Los Angeles field office issued guidance in 2017 encouraging the use of subpoenas and noting only that they could be a "beneficial and valuable" way to obtain records from a range of places, including schools and businesses. 2023-ICLI-00031, at 272–73. This office required retention of subpoena-related records in "alien files," but that directive was apparently not followed. See infra note 171 and accompanying text. The San Antonio field office issued guidance in 2007 (in connection with its use of search warrants, administrative subpoenas, and other compulsory process) mandating that the field office director receive and concur with a "detailed brief" before officers moved forward with any of those enforcement activities. 2023-ICLI-00031, at 390, 394 (directing officers to also consider all the intended and unintended consequences without elaboration). But that requirement may have fallen away, as San Antonio leadership did not mention it in a subsequent email that simply reiterated the minimal headquarters guidance. Id. at 383.

157. 2023-ICLI-00031, at 34–40, 146.

process in practice raise serious concerns about the nature and goals of even this review and process.[158]

Second, following the Trump Administration's efforts to use immigration subpoenas to force journalists to reveal sources and impermissibly "intimidate the press,"[159] Congress directed ICE to issue a formal policy that required the elevation of these subpoenas to high-level personnel and mandated a related training.[160] ICE did so under President Biden, and that policy significantly limited the agency's use of immigration subpoenas to obtain journalists' sources.[161] But these policies apply only to these specific scenarios; for subpoenas to all other entities, the agency has essentially given its employees—from career law enforcement to political appointees—free rein.

The agency's hands-off approach extends to subpoena record-keeping. ICE's civil immigration enforcement subcomponent has declined to use the agency's software that automatically tracks information about subpoenas issued and does not use any other standardized system that would allow agency oversight of its subpoena regime.[162] ICE did issue an internal memorandum directing the heads of its twenty-five field offices to keep logs of certain subpoena-related information and corresponding copies of these subpoenas.[163] But the agency issued that memorandum almost two decades ago, and ICE headquarters has apparently never collected or reviewed these logs since.[164] (If it had, it would have learned that few if any of these field offices fully complied and some have not kept logs at all.[165]) Accordingly, in contrast to other agencies that appear to

158. See infra notes 334–335.

159. Hamed Aleaziz, The Trump Administration Is Trying to Force BuzzFeed News to Divulge Its Sources With a Subpoena, BuzzFeed News (Dec. 4, 2020), https://www.buzzfeednews.com/article/hamedaleaziz/ice-subpoena-buzzfeed-immigration-sources [https://perma.cc/Q2NJ-5QMU].

160. Hamed Aleaziz, ICE Is Creating a New Policy for Subpoenaing Reporters After Trying to Force *BuzzFeed News* to Turn Over Information, Buzzfeed News (Mar. 21, 2022), https://www.buzzfeednews.com/article/hamedaleaziz/ice-policy-subpoenaing-reporters [https://perma.cc/V4CC-XJWF]; see also Division F—Department of Homeland Security Appropriations Act 33–34 (2022), https://docs.house.gov/billsthisweek/20220307/BILLS-117RCP35-JES-DIVISION-F.pdf [https://perma.cc/3QW4-6Q4V] (outlining the requirements included in the fiscal year 2022 Appropriations Act).

161. See 2023-ICLI-00031, at 34–39.

162. See infra section II.A. As described below, ICE headquarters has made an effort to track subpoenas issued to sanctuary jurisdiction law enforcement as part of its initiative launched under Trump, but even that is not complete.

163. See 2007 Torres Memo, supra note 113, at 5516–17.

164. See id.; see also infra note 167 and section II.A (explaining that ICE headquarters only identified a specific type of headquarters log in its custody and lacked basic information about field office subpoena use).

165. See Nash v. ICE, Project ICE (on file with the *Columbia Law Review*) (documenting the field offices from which ICE was able to identify and produce logs, which is not the full set of field offices that issued subpoenas); infra section II.A.

track and review information about subpoena use,[166] ICE headquarters—which includes agency leadership, management, legal, and policy teams—lacks critical insight into ICE's subpoena practices and has no meaningful opportunity to self-police.[167]

In some ways, ICE's approach to rules and recordkeeping makes sense: ICE has had little to fear in terms of scrutiny or review. Since the immigration subpoena statute doesn't provide even recipients of immigration subpoenas—much less the people whose personal records are being sought—a right to affirmatively challenge the subpoenas in court,[168] judicial review is far less likely and largely within the agency's control. Other types of legal challenges are functionally impossible because the people whose information is on the line may never know about these subpoenas and ICE is not generally obligated to notify them that it's demanding their personal information.[169] Moreover, unlike enforcement proceedings in which investigation targets learn through discovery that agencies have used administrative subpoenas and those targets may be able to challenge the admission of evidence unlawfully subpoenaed,[170] the fact that ICE has used immigration subpoenas may *never* come out. Noncitizens facing removal may never know about it, as they have no right to discovery in removal proceedings, and even those who manage to obtain their "alien files" (individual case files) under the Freedom of Information Act (FOIA) are unlikely to find the subpoena there either.[171] And even if litigants could find out that ICE issued a subpoena in their case, they have little incentive to challenge it at that point since it may not result in the exclusion of evidence or termination

166. See supra note 139 (collecting examples).

167. As an example of the fact that ICE leadership and headquarters staff generally don't know how field offices exercise this power, see 2021-ICLI-00047, at 2325–28 (asking field offices, in 2019, whether they issue immigration subpoenas to law enforcement).

168. See In re Ramirez, 905 F.2d 97, 100 (5th Cir. 1990) (upholding the dismissal of a motion to quash a subpoena filed by the subpoena recipient because the court only had jurisdiction to consider challenges in the context of enforcement actions or enforcement counterclaims filed by the agency).

169. ICE is subject to generally applicable privacy statutes imposing default notice requirements on, for example, certain health, education, and financial records. See supra note 150. But it appears that most subpoenas in the available data do not seek records covered by these laws and, in those that do, ICE sometimes imposes gag orders that override default notice requirements. See infra sections II.B–.C.

170. See, e.g., United States v. Gayden, 977 F.3d 1146, 1151 (11th Cir. 2020) (discussing a motion to suppress evidence obtained through an administrative subpoena).

171. See August Joint Status Update at 1–2, Nash v. Immigr. & Customs Enf't (*Nash I*), No. 21-cv-4288 (S.D.N.Y. filed Aug. 30, 2024), ECF No. 56 (explaining that when ICE searched the relevant "alien files" for subpoena forms issued by three different field officers, the subpoenas were not there); Geoffrey Heeren, Shattering the One-Way Mirror: Discovery in Immigration Court, 79 Brook. L. Rev. 1569, 1573 (2014) (explaining that a noncitizen facing removal "cannot even get basic documents from her own immigration file without pursuing a cumbersome FOIA process" and recommending the adoption of a discovery process).

of a removal case anyway.[172] Thus, structural obstacles in the immigration system and the agency's implementation of its subpoena authority have largely immunized immigration subpoenas from judicial review, explaining both the odd silence in the federal reports and why the agency can behave as the next Part describes.

* * *

In sum, a number of features of the immigration subpoena power—the distinct and troubling history, extraordinary stakes, and exceptional dearth of constraints—make it unique within the administrative investigative state. These features also raise urgent questions about how this power is deployed, whether it is adequately restrained, and why—even through the information age—it has operated in secret for so long. To answer these questions, the next Part looks inside the immigration subpoena regime.

II. THE IMMIGRATION SUBPOENA REGIME

This Part illuminates the modern immigration subpoena regime. Using previously undisclosed agency data and records, it provides a comprehensive picture of how ICE uses the immigration subpoena power. This Part first describes the scope of these data and how the underlying records were obtained, and then maps the immigration subpoena regime in practice. It uses newly obtained data to show who ICE subpoenas, what ICE subpoenas, and how and why ICE wields this power. In so doing, it not only shows how the federal immigration regime forces a range of nonfederal entities to assist with enforcement but also reveals patterns of unlawful conduct that permeate immigration subpoena practice. Ultimately, this examination demonstrates that, in the context of immigration subpoenas, the stakes are far greater than previously known and the standard mechanisms for constraint have failed. But it creates opportunity too: As described in the Parts that follow, understanding how this power functions on the ground offers new possibilities for meaningful restraint.

A. *Immigration Subpoena Data*

Although administrative investigations are often opaque, government oversight, public pushback, and litigation have played an important role in bringing information about other administrative subpoena schemes to light. But unlike other subpoena schemes and even other aspects of immigration enforcement, the immigration subpoena regime has operated in the shadows, with little trace outside agents' files. This is due,

172. See Immigr. & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (holding that the exclusionary rule does not generally apply to removal proceedings); Nash, Arrests, supra note 125, at 1305.

in part, to the difficulty of challenging these subpoenas in litigation[173] but also to ICE's efforts to ensure that its use of immigration subpoenas is not disclosed and to ICE's failure to track and retain important subpoena-related information itself.[174] And the result is that information about how ICE uses its subpoena power is limited even within the agency and almost nonexistent in the public domain.

To obtain information about ICE's immigration subpoena practice, this Article turns to FOIA requests—and ultimately litigation.[175] While the initial FOIA request focused on information about the way that ICE uses immigration subpoenas to obtain information from state and local governments for purposes of civil immigration enforcement,[176] the records that ICE produced in litigation provide a far broader view of the agency's subpoena practices.[177] The records—consisting of aggregate data (fifty-nine unique logs from nineteen of ICE's twenty-five field offices[178] and two headquarters-level logs[179]); other primary documents (including 705 individual immigration subpoena forms (I-138 forms) and related communications); and agency descriptions of its subpoena practices—reflect the details of more than 3,000 immigration subpoenas issued between 2007 and 2023 (n=3,159). Together with both previously undisclosed policy memoranda obtained under FOIA and also government descriptions of its subpoena-related practices shared during

173. See supra section I.C.

174. See supra note 171; infra notes 180–185 and accompanying text.

175. See Complaint at 1, *Nash II*, No. 23-cv-6994 (S.D.N.Y filed Aug. 8, 2023); Complaint at 1, *Nash I*, No. 21-cv-4288 (S.D.N.Y. filed May 12, 2021).

176. See Complaint exh.A at 1–2, *Nash I*, No. 21-cv-4288 (S.D.N.Y. filed May 12, 2021).

177. Because ICE was required to produce full subpoena logs rather than only portions responsive to the state- and local-government-focused FOIA request, the dataset drawn from logs is not limited to subpoenas to state and local government entities. Since seven of the fifty-nine field office logs only contained subpoenas to subfederal government entities, I questioned whether ICE had produced the full logs, but ICE reissued the full record for one of those logs and confirmed that the remaining six were in fact the full, unabridged logs. See Stipulation and Proposed Order, supra note 10, at 2 (confirming that all logs of ERO subpoenas ultimately produced by field offices and headquarters were the full, unabridged logs). All logs cited in this Article are on file with the *Columbia Law Review*. ICE does not appear to have limited its production of subpoena forms in terms of recipient type either; the forms produced include subpoenas issued to a wide range of other entities. See Combined FOIA Data. Moreover, the proportion of state and local government subpoenas in the form subset of data was lower than the proportion of those subpoenas in the log subset.

178. The field office logs were produced from field offices of ICE's ERO subcomponent, which is primarily responsible for civil immigration enforcement and primarily issues subpoenas for civil immigration enforcement. See Morton, ERO Memorandum, supra note 10, at 1–2; Stipulation and Proposed Order, supra note 10, at 2 (confirming that the majority of subpoenas ERO issues are for civil immigration purposes).

179. See Criminal Apprehension Program HQ (CAPHQ) Log [hereinafter CAPHQ Log]. The CAPHQ Log begins in 2020 and apparently aspires to track subpoenas to sanctuary jurisdiction law enforcement. ICE produced both an initial and updated version.

the FOIA litigation, these records provide a ground-level view of the immigration subpoena regime through multiple administrations.

Because ICE does not comprehensively track even the issuance—much less record the details—of immigration subpoenas, however, the data are incomplete.[180] While ICE's subcomponent focused on criminal enforcement uses a centralized electronic system to track and automatically log all subpoenas it issues,[181] the ICE subcomponent that is primarily responsible for civil immigration enforcement—Enforcement and Removal Operations (ERO)—does not.[182] Nor do ERO officers reliably use any other consistent system for recording information about subpoenas they issue or for retaining the physical subpoena forms.[183] Instead, ERO's twenty-five field offices (and some portion of its 188 suboffices) handle subpoena recordkeeping in a variety of different ways, and some do not maintain logs or perhaps any system at all.[184] A majority of field offices maintained a subpoena log of some form for a portion of the 2007–2023 span, but even when logs exist, they contain different amounts of detail and are often incomplete.[185] Even when field offices maintained a log, some did not record information about the target of the subpoena, which made it impossible for ICE to find the actual subpoena it issued or any information about the case associated with the logged

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180. See, e.g., Agency Update to Nash Logs Chart (Sept. 6, 2023) (on file with the *Columbia Law Review*) (detailing the subset of field offices and suboffices that, after multiple searches, could identify logs, though they are not the full set of those that issued subpoenas); see also 2021-ICLI-00047, at 5337–42 (Los Angeles Log, failing to include what was subpoenaed); id. at 5354–64 (Newark Logs, same); New York City Log (failing to include dates or entries for subpoenas that the log itself shows the field office issued).

181. See DHS, supra note 111, at 2 (outlining HSI's subpoena tracking system); Homeland Sec. Investigations, ICE, Who We Are, https://www.ice.gov/about-ice/homeland-security-investigations [https://perma.cc/5EGE-S8JT] (last updated Apr. 30, 2024) (describing the HSI's mission and powers).

182. Enf't and Removal Operations, ICE, https://www.ice.gov/about-ice/ero [https://perma.cc/P2LC-LP6U] (last updated June 27, 2023); supra notes 157, 163 and accompanying text.

183. See, e.g., supra note 180 (collecting examples); infra note 185 (same); see also *Nash I*, No. 21-cv-4288, ECF Nos. 54, 56 (reporting that ICE was unable to find nearly half of the subpoena forms that it was required, by court-ordered stipulation, to produce); July Joint Status Update at 1, *Nash I*, No. 21-cv-4288 (S.D.N.Y. filed July 11, 2024), ECF No. 54 (discussing ICE's failure to locate a number of requested subpoenas); August Joint Status Update, supra note 171, at 1–2 (noting ICE's continued failure despite repeated attempts).

184. See supra notes 180 and 183 (collecting examples).

185. See, e.g., supra notes 180, 183. For more examples, compare 2021-ICLI-00047, at 5855, 5863 (containing two subpoenas with two different tracking numbers issued by the Seattle field office to Raymond School District in 2021), with Seattle Log (listing only one of these subpoenas). Or compare New York City Log (listing only subpoenas to government agencies), with 2021-ICLI-00047, at 5994, 6197, 6238 (indicating the New York City field office also issued subpoenas to private entities), and CAPHQ Log, supra note 179 (indicating that the New York City field office issued subpoenas to government entities that were not in the New York City Log).

subpoena.[186] And the physical subpoena forms that ERO field offices produced are revealing, but, because ERO offices appear to lack reliable organizational or retention systems when it comes to these records, they are not comprehensive either; instead, they reflect the subpoena forms that ERO field officers were able to find. Accordingly, although ICE conducted multiple searches over nearly three years, the records it located are incomplete.

Given these limits, it is worth emphasizing that, for the most part, the data described in this section are best understood as a massive collection of examples rather than an exhaustive accounting or representative model. The limits of ICE recordkeeping meant that it was not possible to obtain either a complete set of data or a representative sample of subpoenas or logs. As a result, the figures in the data presentation that follows reflect the available data but may not necessarily reflect the frequencies of nationwide use.[187] This also means that, in some instances, it is possible to discern regular uses of immigration subpoenas or subpoena tactics but not possible to determine or even extrapolate their frequency, geographic reach, or temporal scope. And, of course, it is not possible to know what data exist beyond this dataset if, for example, ERO employees are more likely to record or preserve subpoenas of certain types or that are issued in certain cases.

Even so, this large, nationwide dataset offers a powerful view of the way that ICE uses the immigration subpoena power. The logs, hundreds of individual subpoenas, agency communications, and other records reflect important new agency policies and practices and the details of more than 3,000 subpoenas issued by ERO. Moreover, although drawing data directly from hundreds of physical subpoenas and follow-up communication was tedious, it yielded enormous unanticipated benefits: It allowed for a granular understanding of how ICE uses the immigration subpoena power in practice, providing far more insight into how this regime operates than even the most comprehensive ERO logs capture.[188] Accordingly, although the limits of available data made certain calculations impossible, the records nevertheless show highly consequential patterns and practices, ones that raise serious questions of law and policy and that, unchecked, will likely persist.

Using these forms and logs, I created a comprehensive original dataset that compiles all data produced about the immigration subpoenas that ERO has issued since 2007.[189] To do so, I created one dataset by

186. See August Joint Status Update, supra note 171, at 1–2 (discussing ICE's failure to locate a number of requested subpoenas).

187. In some instances, multiyear field office-level logs do appear to provide at least some indication of frequency and trends for specific jurisdictions and time periods.

188. For example, while field office logs merely indicate that ICE subpoenaed schools for "records," 2021-ICLI-00047, at 343, individual subpoenas provide detail showing that ICE used them to obtain information about students' families. See infra section II.B.3.

189. For more information, see infra Appendix.

recording eleven categories of information from each subpoena form and coding this information for a range of variables. I created a second dataset by combining the unique logs, adding field office information separately obtained from ICE through a partial settlement agreement, removing entries that were duplicates of subpoenas included in the subpoena forms, and coding this data as well. In so doing, I created what appears to be the first and only source of systemic data about how the immigration subpoena regime functions in practice.

B. *Who and What ICE Subpoenas*

When immigration subpoenas burst into public view in 2020, ICE described its subpoena use in limited terms. It explained that the immigration subpoena regime was primarily focused on compelling information from employers and landlords, and its use of immigration subpoenas against state and local law enforcement in 2020 was highly unusual—according to ICE's former director, unprecedented.[190] And it has tried to downplay its immigration subpoena practice since, claiming that it doesn't "routinely" subpoena technology companies for non–criminal enforcement but declining to say more.[191] This section investigates these assertions and examines, more broadly, who and what ICE's civil immigration enforcement component subpoenas.

To provide a sense of the breadth of this regime, Figure 1 shows the range of entities to which ICE's civil enforcement component issued subpoenas. It demonstrates that ERO (referred to hereinafter as ICE) uses immigration subpoenas to obtain information from a range of sources, including employers and landlords, but also many other actors central to people's daily lives. Indeed, the data reveal that ICE routinely demanded information from sources ranging from utility companies to social media companies to telecommunications providers to the military to schools—and a large swath of other state and municipal actors.

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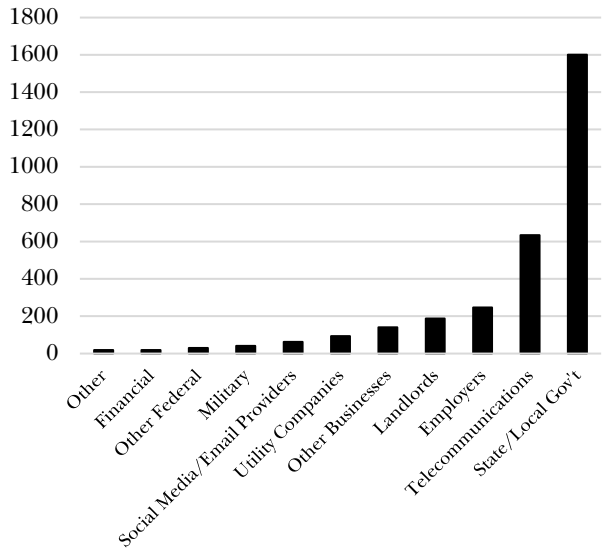
190. See supra note 29.

191. Johana Bhuiyan, This Is What Happens When ICE Asks Google for Your User Information, L.A. Times (Mar. 24, 2021), https://www.latimes.com/business/technology/story/2021-03-24/federal-agencies-subpoena-google-personal-information (on file with the *Columbia Law Review*).

FIGURE 1. IMMIGRATION SUBPOENA RECIPIENTS IN DATASET, 2007–2023[192]



In addition, although deficiencies in ICE's recordkeeping make it impossible to determine the frequency with which each type of subpoena was issued nationwide, these data at least suggest some relative proportions in which each type of subpoena was issued during this time frame.[193] They indicate that subpoenas to employers and landlords constitute, even taken together, a small proportion of this practice, particularly when compared to subpoenas to state and local government actors.[194] Ultimately, this first glimpse of the data shows that ICE frequently uses subpoenas to compel subfederal governments and a far broader range of actors than previously known to contribute to civil immigration enforcement. The remainder of this section explores these categories in more depth and considers their implications.

1. *State and Local Government, Generally.* — While each category of subpoena recipient raises different questions and concerns, subpoenas issued to state and local government are, in important ways, unique. For

192. This figure incorporates the data from logs and forms (n=3,077); it excludes eighty-two subpoenas that were impossible to categorize by function due to ICE recordkeeping and, in some instances, redactions. For more information on categorizing these subpoenas, see infra Appendix.

193. As noted below, the relative proportions appear to have shifted significantly over time. See infra Figure 2.

194. Combined, subpoenas to landlords and employers comprised only 14.1% (n=435) of subpoenas in the data, whereas subpoenas to state and local government actors comprised 52.0% (n=1,601). See supra Figure 1.

one thing, states and their political subdivisions—municipalities—have a distinct constitutional relationship with the federal government, one that permits them to decline to participate in federal enforcement programs in a way that private parties may not.[195] For another, states and localities have special relationships with their residents. Not only are states sovereign democracies in their own right,[196] but state and local governments are also the main providers of critical services and core rights—such as social services and education—in their residents' lives.[197] As a result, the survival and functioning of these subfederal governments and their residents often depend on frequent touchpoints and obligatory exchanges of residents' personal information. For all these reasons, federal subpoenas to state and local government actors raise a distinct set of questions and concerns.[198]

When it comes to ICE's use of immigration subpoenas against these actors, the data offer several important insights. First, and perhaps most importantly, they reveal that this practice is far larger than previously known. They show that, in fact, the Trump Administration's 2020 immigration subpoena offensive was neither unprecedented nor extraordinary: From at least the Obama Administration to the present day, ICE has been using immigration subpoenas to compel the disclosure of information from state and local government entities—including from state and local law enforcement and often from sanctuary jurisdiction actors.[199] As Figure 2 shows, these subpoenas to state and local governments were not one-off occurrences or the product of unprecedented circumstances requiring a unique, intersovereign exercise of compulsory power. Rather, the data make clear that these subpoenas were—and continue to be—regular tools that ICE uses to force state and local governments to search for, compile, and disclose information about their constituents.

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195. See Printz v. United States, 521 U.S. 898, 925, 935 (1997) (finding that the Tenth Amendment prohibits federal commandeering of state and local resources); see also infra section III.A.

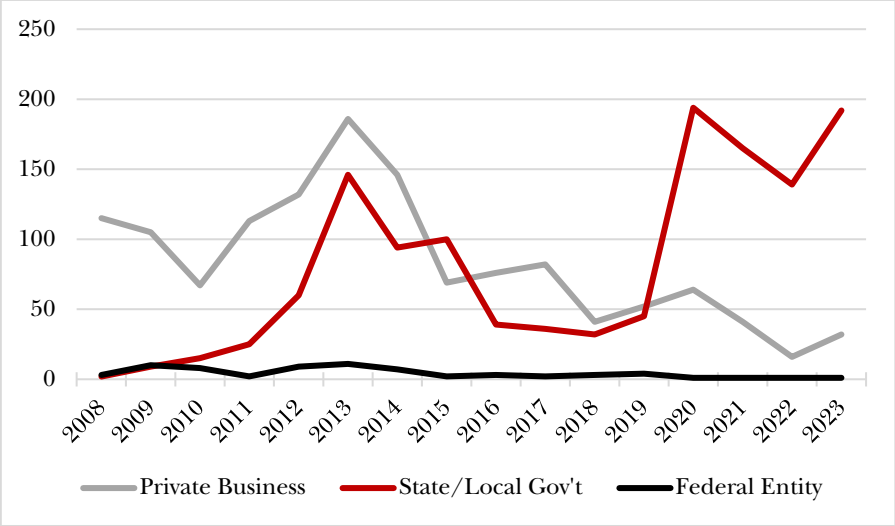
196. See Murphy v. NCAA, 138 S. Ct. 1461, 1475–77 (2018) (explaining that the residual sovereignty reserved to the states means that the federal government may not commandeer state legislative processes).

197. See Omer Kimhi, Reviving Cities: Legal Remedies to Municipal Financial Crises, 88 B.U. L. Rev. 633, 659 (2008) ("Local governments are the main providers of public services in the United States, and they supply services that are essential to residents' lives."); Hannah J. Wiseman, Rethinking Municipal Corporate Rights, 61 B.C. L. Rev. 591, 598 (2020) (discussing municipalities' provision of "essential public services—particularly to people who otherwise would struggle to obtain those services").

198. See, e.g., Fahey, supra note 6, at 1028, 1062–64 (describing some of the federalism concerns raised when the federal government uses administrative subpoenas and other means to "requisition state data"); Mikos, supra note 6, at 154–58 (arguing that compelling states to provide information via administrative subpoenas imposes "structural harms" and violates the Tenth Amendment's anticommandeering rule).

199. See infra section II.B.2.

FIGURE 2. IMMIGRATION SUBPOENAS USED TO OBTAIN RECORDS FROM STATE AND LOCAL ENTITIES IN DATASET, 2008–2023[200]



Second, it appears that this practice is on the rise. As Figure 2 illustrates, the data show an increase in ICE's use of immigration subpoenas against states and localities in recent years, suggesting a significant shift in agency practice. Of course, the limits of ICE recordkeeping make it impossible to reliably assess the frequency of subpoena use against particular actors nationwide, but other agency records corroborate this recent shift.[201] For example, as Trump-era ICE prepared to launch the January 2020 subpoena initiative, the vast majority of ICE's fields offices reported in 2019 that they did not use administrative subpoenas against state and local law enforcement at all.[202] Since then, as section II.D describes, ICE leadership launched an internal campaign to expand the use of immigration subpoenas against subfederal law enforcement.[203] As a result, the number of field offices that have issued these subpoenas to state and local law enforcement has more than

200. For more information, see infra Appendix. This figure begins in 2008 because there were so few data from 2007. For this figure, *n*=2,698; it does not reflect 356 subpoenas for which ERO did not record date information, seventy-nine that were not possible to categorize by sector, sixteen issued to nonprofits, two with obvious log date errors, or the ten from 2007.

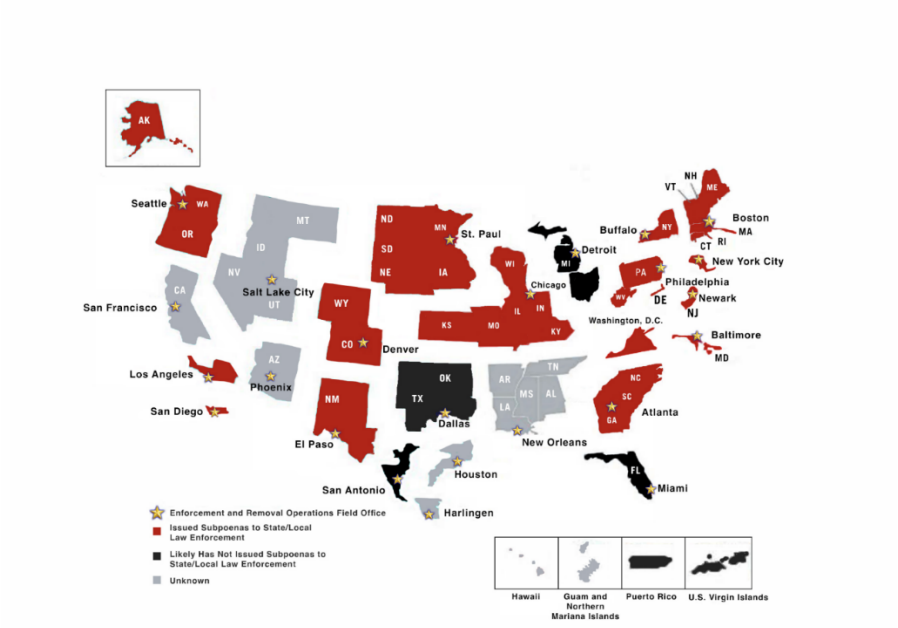
201. Field offices could have become more likely to preserve or log subpoenas to state and local government entities, but given the policy change described below, it seems unlikely that even such a new bias in recordkeeping would fully explain this shift. See infra Figure 3 and note 205.

202. See 2021-ICLI-00047, at 2325–28 (providing field offices' self-reports on the use of administrative subpoenas against subfederal law enforcement).

203. See infra notes 204–206 and accompanying text.

doubled since 2019,[204] meaning that a practice described as unprecedented in 2020—and that was then far more limited in scope—spread across much of the nation.

FIGURE 3. ICE FIELD OFFICES THAT ISSUED SUBPOENAS TO STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2019–2023[205]



The increase in subpoenas to states and localities also emerges sharply in logs from field offices that tracked their subpoena use regularly over time. For example, the log for ICE's Washington field office, which covers Washington D.C. and Virginia, indicates that it issued an average of 5.6% (average n=1.3) of its subpoenas annually to state and local entities from 2008 to 2020.[206] But in 2021, this rate rose dramatically to 89.0% (n=65),

204. See infra Appendix Table 1.

205. This map is a modified version of one published by ICE. See ICE, Ann. Rep. Fiscal Year 2022, at 3 (2022), https://www.ice.gov/doclib/eoy/iceAnnualReportFY2022.pdf [https://perma.cc/8AM7-S2SN] [hereinafter ICE, 2022 Report]. Credit to Bryan Jackson, Director of Digital Communications and Marketing at Cardozo Law, for invaluable assistance modifying it. It depicts the evidence of a field office-level policy shift between 2019 and 2023 to contrast with the agency's reported practices before that time. Importantly, field office use of these subpoenas appears likely to have varied significantly in terms of volume and may have changed within this time period, so this figure should not be taken to indicate volume or current practice. In addition, field office policy may not always be consistent with the practices of suboffices in their jurisdiction. For more information, see infra Appendix Table 1.

206. Washington Logs Fiscal Year 2008–2020.

and similarly high rates have continued through 2023.[207] The San Diego field office couldn't find any pre-2020 logs but reported not issuing subpoenas to state and local enforcement prior to then.[208] From 2020 on, however, it has issued these subpoenas regularly—and in large numbers.[209] In similar fashion (though on a smaller scale), the Los Angeles field office log shows that it almost never used subpoenas to seek information from state and local entities before 2020; however, by 2022—the most recent year reflected in the log—almost all of the logged subpoenas (seven out of eight) were issued to state and local actors.[210]

Yet this increase varies significantly by region.[211] Some field offices, like those in Buffalo, New York, and St. Paul, Minnesota, have long deployed subpoenas regularly against state and municipal actors.[212] And other field offices—namely those in Texas and Florida—appear to have little use for this type of subpoena since state "anti-sanctuary" laws essentially require localities to assist ICE even without an immigration subpoena.[213] Thus, the available data suggest a marked increase in subpoenas to state and local actors from ICE field offices across the nation but one that varies by region and, as the next section describes, is particularly pronounced in areas with sanctuary jurisdictions.

In sum, the records reveal both a longstanding practice and an expansion of the federal government's use of immigration subpoenas to compel information from states and localities in recent years. They show that, while ICE used this power against states and localities prior to Trump, the Trump Administration created an institutional shift; this project lasted for the remainder of his presidency and survived him, quietly continuing under Biden and across ICE field offices today.

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207. Washington Logs Fiscal Year 2021–2023. Data for 2023 spans January through April 2023.

208. See 2021-ICLI-00047, at 2325–26.

209. See infra section II.E. The Chicago field office similarly couldn't find logs prior to 2020 but issued them regularly in 2020 and 2021. See infra section II.E.

210. See 2021-ICLI-00047, at 5340 (Los Angeles Log).

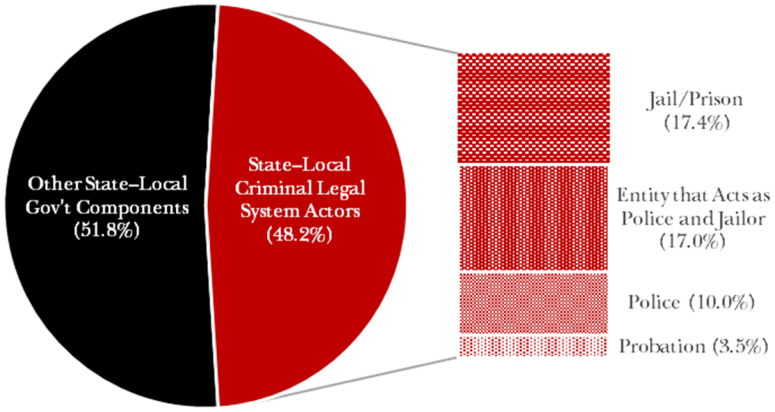
211. In this sense, it may be another example of the "drastic regional variations" in enforcement practices of ICE field offices that Professor Fatma Marouf has documented in the context of detainers, arrests, detention, and removals. See Marouf, supra note 17, at 1595.

212. 2021-ICLI-00047, at 343–51 (Buffalo Logs); St. Paul Logs.

213. See Fla. Stat. Ann. §§ 908.101–.105 (West 2024); Tex. Gov't Code Ann. § 752.053 (West 2023); 2021-ICLI-00047, at 5342–52 (Miami Logs). Even before Florida's 2019 "anti-sanctuary" law passed, local politics made it unnecessary, as Florida "[did]n't have any sanctuary cities." Brendan Farrington, Florida Governor Signs Bill Banning Sanctuary Policies, PBS News (June 14, 2019), https://www.pbs.org/newshour/politics/florida-governor-signs-bill-banning-sanctuary-policies [https://perma.cc/PE3Z-4RAU]; see also Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, Anti-Sanctuary and Immigration Localism, 119 Colum. L. Rev. 837, 844 (2019) (identifying and analyzing this "emerging federal and state anti-sanctuary trend[]" of laws that effectively prohibit localities from adopting sanctuary laws).

2. *State and Local Criminal Legal Systems.* — Given the longstanding thrust of immigration enforcement priorities,[214] it may not be surprising to learn that a large share of the immigration subpoenas sent to state and local government sought information from criminal legal system actors. As Figure 4 shows, the data reflect immigration subpoena practices that are heavily focused on compelling records and other assistance from criminal legal system actors—largely police departments, jails, and probation offices, but also juvenile detention facilities and even courts.

FIGURE 4. IMMIGRATION SUBPOENAS ISSUED TO STATE AND LOCAL CRIMINAL LEGAL SYSTEM ACTORS IN DATASET[215]



The data also show a particular focus within the sprawl of subfederal criminal enforcement: criminal legal system actors in sanctuary jurisdictions. For instance, the Washington field office's dramatic uptick

214. See David K. Hausman, The Unexamined Law of Deportation, 110 Geo. L.J. 973, 975 (2022) (discussing the focus of immigration enforcement on those with criminal charges and convictions).

215. This figure incorporates data from logs and forms (n=1,601). The patterned bar does not reflect the six subpoenas issued to other actors in the criminal legal system or subpoenas issued to courts (as it was not always possible to determine whether they related to the criminal legal system). The "Entity that Acts as Police *and* Jailor" category reflects the large subset of subpoenas that the logs report were issued to the San Diego County Sheriff's Department, which both operates a police force and oversees local detention facilities. Based on the instances in which ICE produced forms that corresponded to log entries, it seems extremely likely that all these subpoenas were issued to the San Diego County Sheriff's Department in its capacity as a jailor. Finally, it is worth noting that the San Diego field office issued more than half (57.8%) of all subpoenas to state and local law enforcement in the dataset, followed by 17.5% issued by the Washington field office; it is not clear whether they issue more of this type of subpoena than all other field offices, simply retain more records, or some combination of the two. For more information, see infra Appendix.

in subpoenas to state and local law enforcement was comprised entirely of subpoenas issued to a police department in Fairfax County, Virginia; this practice began just as the county adopted a sanctuary policy in 2021.[216] Similarly, records from the Atlanta field office demonstrate that, after successful community advocacy to persuade the Clarke County Sheriff's Office to cease detaining people for ICE in 2018,[217] ICE issued subpoenas to that office as well.[218] Or take the San Diego and Chicago field offices. Although ICE could not find pre-2020 logs related to those jurisdictions, the logs covering 2020 onwards show those field offices issuing many (for San Diego, hundreds) of subpoenas to subfederal law enforcement covered by state sanctuary laws.[219] And, though field offices covering other major sanctuary jurisdictions like New York City and Connecticut were unable to provide comprehensive subpoena logs, the records that ICE did find similarly indicate the use of subpoenas to target sanctuary jurisdiction law enforcement in those areas as well.[220] Thus, while ICE's attempt to use state and local criminal law enforcement as deportation "force multipliers" is hardly news, the data show the significant, previously unknown extent to which ICE has used immigration subpoenas to force state and local actors into that role. Moreover, as described in section II.D, the records show how ICE has formalized and systematized this practice.

The records also provide important insight into what exactly ICE is demanding of these state and local government actors. Because even the ICE officers who did log subpoenas often did not record what each subpoena sought in detail (if at all), the logs are lacking in this respect.[221] But the individual subpoena forms paint a vivid picture, showing both the sheer volume and the minute details of ICE's demands. They show—unsurprisingly given the extent to which criminal legal system involvement bears on immigration status—that many subpoenas seek records reflecting alleged noncitizens' criminal history.[222] But many sought personal

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216. See Fairfax Cnty., Va., Trust Policy 1 (2021), https://www.fairfaxcounty.gov/topics/sites/topics/files/assets/documents/pdf/fairfax-county-trust-policy.pdf [https://perma.cc/E5ND-L5WK].

217. See Sheriff of Clarke Cnty., Ga., General Order No. WD 9010.04 § IV(G)(7) (2018) (providing that people "for whom a detainer is issued" by ICE but whose detainer is not accompanied by a "federal warrant or court order signed by a federal magistrate or federal judge, shall not be held solely on the ICE detainer").

218. See 2021-ICLI-00047, at 2337, 2339.

219. See Combined FOIA Data. It appears that the Los Angeles field office similarly has begun using its subpoena power almost exclusively to obtain records from subfederal law enforcement covered by a state sanctuary law. Id. (showing that seven of eight subpoenas issued in 2022 were to subfederal law enforcement).

220. See Combined FOIA Data.

221. See, e.g., 2021-ICLI-00047, at 5337 (failing to record *what* was subpoenaed in the Los Angeles Log); 2021-ICLI-00047, at 5349–51 (same for Miami); 2021-ICLI-00047, at 5353–64 (same for Newark).

222. See, e.g., 2021-ICLI-00047, at 28, 2699, 2703 (showing subpoenas issued to the Athens-Clarke County Sheriff's Office and the New York City and Suffolk County probation departments).

information—and virtually all of the forms issued to criminal legal system actors since 2017 sought location information: home addresses, expected dates of release from state or local custody, or dates of future probation appointments.[223] In addition, these records show that ICE has regularly demanded that state and local law enforcement indefinitely provide updates if and when people's release dates and times change.[224] As described in section II.D, these records also show why the agency is demanding this information: "to improve [ICE's] ability to effectuate arrests," whether at people's homes or the minute they step out of subfederal law enforcement's doors.[225]

The records also reflect a dramatic expansion in the scope of these subpoena demands in the past few years. The individual forms in the dataset suggest that subpoenas issued to law enforcement before 2017 tended to be narrower and targeted, often seeking a single, defined document such as a presentence investigation report or permanent resident card.[226] Many subpoenas issued in recent years, by contrast, have ballooned, both in terms of their scope and the burden they impose on subfederal officers attempting to respond.[227] Lengthy, numbered lists of demands spill onto separate pages appended to many of the subpoena forms, and, rather than listing documents that the receiving officer must send, ICE often sets forth a laundry list of issues about which the officer must identify and produce "any and all" evidence "sufficient to establish" certain facts.[228] And, as noted, many recent subpoenas have obligated states and localities to go well beyond providing existing records, demanding calculations of the date, time, and place that subjects will be

223. See Combined FOIA Data. Note that this description includes both explicit requests for these pieces of information and requests for records that would necessarily contain this information.

224. See, e.g., 2021-ICLI-00047, at 331, 333, 2895, 2898, 2911, 2914 (subpoenas to Connecticut probation departments and the Illinois Department of Corrections); see also infra section II.C.1.

225. 2023-ICLI-00031, at 460; see also Declaration of David Thompson exh.A ¶¶ 47–48, Immigr. & Customs Enf't v. Gomez, No. 1:20-mc-00011 (D. Colo. Feb. 6, 2020) [hereinafter Thompson Aff.] (explaining that, when issuing a subpoena to local law enforcement, ICE sought the most up-to-date home and work addresses to efficiently execute arrests); Reply in Support of Petition at 10–11, *Gomez*, No. 1:20-mc-00011 [hereinafter Gomez Reply] (explaining that, in subpoenaing law enforcement, ICE seeks targets' and emergency contacts' location information to allow it to locate targets for arrest and removal); Petition to Enforce Administrative Subpoenas ¶¶ 24–25, *Gomez*, No. 1:20-mc-00011 ("[A]ddresses . . . assist ICE in locating the aliens and in assessing how best to safely take them into custody."); 2021-ICLI-00047, at 2923 (reporting that arrest authorization had been approved and seeking subpoena approval because the Illinois Department of Corrections "does not notify ICE prior to releasing any convicted aliens").

226. See, e.g., 2021-ICLI-00047, at 2651, 2986, 5381.

227. Compare 2021-ICLI-00047, at 281, 347, 2701, 2985 (demanding discrete documents prior to 2016), with 2021-ICLI-00047, at 329, 341, 2933 (issuing sweeping requests in 2020–2021).

228. 2021-ICLI-00047, at 289, 337–340; see also id. at 327–29, 2854–55, 2893–95, 2939–40 (additional sweeping requests).

released—and notification of subsequent changes—in perpetuity.[229] Thus, the records show a major shift in the scope of and burden imposed by subpoenas to sanctuary jurisdictions that has continued into the Biden era.

The practical and doctrinal implications of these revelations are profound. This study has shown that the federal government has long used these subpoenas to force unwilling states and localities to assist with immigration enforcement and that the scope of this effort has been—and continues to be—far greater than previously known. Perhaps most obviously, this information has important practical ramifications for noncitizens and others who rely on local commitments to refrain from information-sharing: It alerts them that these governmental promises come with significant limits and that, absent some change, personal information shared with state and local law enforcement could still wind up in ICE's hands. Understanding how the federal government compels this information—and the extent to which states and localities are complicit—also empowers the public to engage in debate and use levers of political power to push back.[230] And this information is critical to understanding the federalism issues that immigration subpoenas can present and that are central to state and local resistance. As Part III shows, this new understanding of how ICE wields its power to compel the assistance of state and local government has serious implications for percolating questions about the balance of state and federal powers—and it shows precisely the type of infringement that contemporary Tenth Amendment doctrine forbids.

3. *Schools and Other Essential Services.* — Despite the focus on subpoenas to criminal law actors, ICE's reach into subfederal governments' interactions with their residents does not end there. ICE also uses immigration subpoenas to delve into a wide range of other sensitive areas, including ones that are essential to people's survival and daily lives. Specifically, the data show that ICE has subpoenaed information from schools of every level,[231] social services agencies,[232] agencies that

229. See, e.g., 2021-ICLI-00047, at 331, 333, 2842, 2895, 2898, 2911, 2914; Chicago Log.

230. See Lindsay Nash, Violating Sanctuary 5 (2024) (on file with the *Columbia Law Review*) [hereinafter Nash, Violating Sanctuary] (unpublished manuscript) (discussing the importance of public information and of the public's ability to help ensure compliance with sanctuary laws).

231. See, e.g., sources cited infra note 242 and accompanying text.

232. See, e.g., 2021-ICLI-00047, at 477, 2612 (seeking "any and all records regarding the aforementioned subject relating to his nationality and citizenship" from a social services department); id. at 461 (seeking a child's case records from a social services nonprofit focused on foster care, adoption, and domestic violence services).

administer physical and mental health programs,[233] and even foster care providers.[234]

Subpoenas to schools, in particular, warrant a closer look. After all, education has long been seen as "perhaps the most important function" that state and local governments provide their residents,[235] regardless of students' citizenship or immigration status.[236] Indeed, the Supreme Court has made clear that schooling is critical for children to become self-sufficient members of society and for the preservation of our democratic government.[237] The states appear to view it similarly, overwhelmingly providing that primary education is both constitutionally guaranteed and legally required.[238] Even ICE appears to have recognized that schools are somewhat sacred, long classifying them as "protected" spaces generally off limits for most immigration enforcement.[239]

Yet schools are surprisingly common sites of immigration subpoena use. Even this incomplete dataset shows that ICE has regularly subpoenaed records from schools—from primary schools to colleges—and from state education departments. While subpoenas to schools appear far less frequently in the data than subpoenas to some other actors, records from some field offices show that they have issued several per year and indicate that subpoenas to schools are encouraged—and ongoing.[240] The data also indicate that the majority of these school subpoenas targeted information provided by children—most of these subpoenas were not sent to

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233. See, e.g., 2021-ICLI-00047, at 487 (seeking information related to Medicaid applications); id. at 499 (same); id. at 503 (seeking information from a health insurance company about a person's Medicaid use and prescription pick-up location).

234. See, e.g., 2021-ICLI-00047, at 2590, 2636 (custodial and foster care records); see also 2021-ICLI-00047, at 461 (same); 2021-ICLI-00047, at 5302 (adoption records).

235. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

236. See Plyler v. Doe, 457 U.S. 202, 222, 227–30 (1982) (invalidating a state law denying children access to elementary and secondary public education on the basis of immigration status).

237. See id. at 221; Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (noting that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system").

238. See State Education Practices, Nat'l Ctr. for Educ. Stat., https://nces.ed.gov/programs/statereform/tab1_2-2020.asp [https://perma.cc/96TT-RHR6] (last visited Sept. 15, 2024) (tracking compulsory school attendance laws by state); see also LaToya Baldwin Clark, Stealing Education, 68 UCLA L. Rev. 566, 587–89 (2021) (discussing state constitutional rights related to public education).

239. 2021 Protected Areas Guidance, supra note 154, at 2; see also Memorandum from John Morton, Dir., ICE, to Field Off. Dirs., Special Agents in Charge & Chief Couns. (Oct. 24, 2011) (on file with the *Columbia Law Review*) (limiting certain enforcement actions at schools and other "sensitive" locations).

240. See, e.g., 2021-ICLI-00047, at 343 (Buffalo Log); id. at 2061, 5315, 5753 (Seattle Logs); St. Paul Logs; see also 2023-ICLI-00031, at 272–73 (describing subpoenas as a "beneficial and valuable" way to get records from schools and other entities).

universities but to primary schools, school districts, and subfederal education departments.[241]

Even more surprising, these subpoenas demanded information about students and their families. In some instances—largely the subpoenas directed to universities—ICE demanded information such as transcripts and student schedules, records that *may* be relevant to determining if noncitizens on student visas violated the terms of their status.[242] But in many of the school subpoena forms produced, ICE sought to compel far more, demanding that schools turn over records that students are typically required to provide for enrollment: identity documents, birth certificates, addresses, and contact information for parents and caregivers.[243] In some subpoenas, ICE went even further, demanding the addresses of siblings and other family members, and indicating—even outright stating—that it intended to use this information to target members of students' families.[244] And some of these subpoenas show that ICE specifically demanded standard enrollment records like student birth certificates and identification showing alienage—likely to prosecute the students themselves.[245]

Taken together, these data provide valuable insight into how ICE uses immigration subpoenas in spaces otherwise "protected" from immigration enforcement: They demonstrate that ICE has used subpoenas to obtain personal information that children and others are obligated to provide to access essential services.[246] They also suggest that ICE does so to locate and presumably arrest these people or their family members. In so doing, these findings expose a major gap in the Department of Homeland Security's "protected areas" policy, which directs ICE officers to generally refrain from enforcement that would "restrain people's access to essential services or engagement in essential activities" in "protected areas" like schools and social service agencies.[247] While this policy generally prohibits a range of enforcement actions, including arrests and the *service* of subpoenas in

241. See Combined FOIA Data.

242. See, e.g., 2021-ICLI-00047, at 236, 240; St. Paul Logs Fiscal Year 2010–2011.

243. See, e.g., 2021-ICLI-00047, at 138, 448, 2620; Seattle Log Fiscal Year 2015; St. Paul Log Fiscal Year 2009.

244. See 2021-ICLI-00047, at 138 (seeking the last known address of a student's parent, who was "the subject of an official investigation"); see also 2021-ICLI-00047, at 498, 2620 (demanding information on "parental figures").

245. See, e.g., 2021-ICLI-00047, at 149, 498. ICE also reported seeking "all records" about students, "identification documents," and "student info," which would likely have covered these records as well. See, e.g., 2021-ICLI-00047, at 2295; Seattle Logs 2016–2022; St. Paul Logs, Fiscal Year 2012–2013.

246. In this sense, it reaffirms and expands on the concerns that Professor Makhlouf and others have raised about the risks of subpoenas issued by DHS officers to sensitive locations. See, e.g., Makhlouf, supra note 15, at 30 (discussing prior DHS policy that did not limit the service of subpoenas at even sensitive locations).

247. 2021 Protected Areas Guidance, supra note 154, at 2.

these locations, it does not limit the *issuance* of subpoenas at all.[248] By showing why ICE subpoenas these entities—to facilitate arrests and removal—this study demonstrates why issuing immigration subpoenas to these entities burdens access to these services nearly as much as arrests on site and, consequently, why this gap should be closed.

This clearer understanding of ICE subpoenas to schools and other sites of essential services also exposes the privacy and federalism concerns that these subpoenas present. As Part III details, these data surface an important new dimension to the federalism debate by showing the myriad ways immigration subpoenas can affect states' and localities' relationships with constituents who rely on them for core functions and essential services. They show the particular risks these subpoenas pose in low-income communities, which often rely on schools and other local government entities for critical welfare services that require sensitive information about students and their households.[249] And these findings signal broader harms to state and local government than previously known: They show that these subpoenas not only distort lines of political accountability for states' and localities' role in immigration-related arrests but also jeopardize future participation in state and local democracy by imposing potentially prohibitive costs on public education for children in immigrant and mixed-status families.[250]

4. *Employers, Tech Companies, and Other Providers of Indispensable Services.* — While the immigration subpoena power presents unique issues when deployed against other sovereigns, it's important to understand its reach into private domains as well. Private sector entities comprise nearly half (45.0%) of all subpoena recipients in the data and a large—if perhaps diminishing—proportion of the subpoenas issued annually.[251] Moreover, ICE's use of immigration subpoenas in the private sector covers a wide range of entities—and inquires into some intimate and traditionally protected aspects of people's lives.[252] This section will focus primarily on

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248. See id.; see also 8 C.F.R. § 287.4(a)–(c) (2024) (distinguishing between subpoena service and issuance).

249. See Fanna Gamal, The Private Life of Education, 75 Stan. L. Rev. 1315, 1341–45 (2023) ("As schools are structurally tasked with providing food, medical care, mental health services, and other social services they will invariably collect greater amounts of private student information.")

250. See Plyler v. Doe, 457 U.S. 202, 223 (1987) ("By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions . . . ."); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[Education] is the very foundation of good citizenship."); Eisha Jain, The Interior Structure of Immigration Enforcement, 167 U. Pa. L. Rev. 1463, 1486 (2019) [hereinafter Jain, Interior Structure] (describing how some noncitizens avoid school and health care for fear of immigration-related arrests).

251. See supra Figures 2, 3. That percentage excludes the eighty-two unknown recipients.

252. See, e.g., 2021-ICLI-00047, at 204, 207, 450, 503 (demanding social security numbers, home and work addresses, call records, text messages, "private messages" from

the two largest categories of private subpoena recipients: employers and telecommunications providers, which collectively comprise approximately 29.3% of the subpoena recipients in the dataset, are indispensable to modern survival, and now control massive amounts of private data about individuals' whereabouts, movements, and personal lives.[253] Indeed, as the Supreme Court recently explained, many of these companies hold detailed records that reveal people's locations, movements, and, consequently, their "familial, political, professional, religious, and sexual associations"—in short, they hold information that reveals Fourth Amendment–protected "privacies of life."[254]

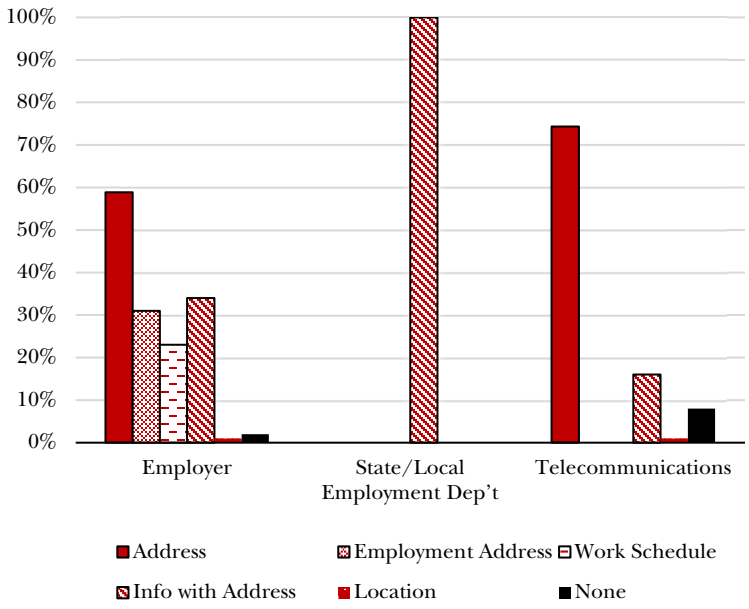
This study indicates that, in fact, this information about location is precisely what ICE wants. The records suggest that subpoenas issued to telecommunications providers and employers overwhelmingly sought information that could be used to locate ICE's targets. For example, of the 124 employer subpoenas produced, 122 of them sought location information, often seeking multiple types at once. The subpoena forms to telecommunications providers were similarly focused, with 90.8% of them (139 out of 153) seeking this type of information as well.

social media, medication information, and other personal information); Washington Logs (subpoenaing employers, cell phone carriers, social media companies, and housing providers).

253. See Combined FOIA Data.

254. Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018).

FIGURE 5. SUBPOENA FORMS IN DATASET THAT DEMAND LOCATION INFORMATION, BY RECIPIENT TYPE AND INFORMATION TYPE[255]



What type of location information did ICE seek? As Figure 5 shows, subpoenas to obtain information from employers most often sought home addresses—frequently by explicitly demanding the addresses of their current or former employees, but also by compelling information that would necessarily include addresses.[256] At times, ICE sought people's employment information to locate their loved ones, for example demanding that employers provide location information for employees' spouses or emergency contacts as well.[257] Many subpoenas went much further in compelling employers to provide location information about employees: ICE demanded employment addresses, daily worksite

255. For this figure, *n*=357. This represents the number of requests within the subpoena forms, rather than the quantity of unique forms to these entities (296). The figure does not include the two subpoenas in these categories in which it was unclear whether the subpoenas sought location or address-related information. The data for this figure were drawn exclusively from subpoena forms because, although some logs reflected subpoenas seeking this type of data, they did not consistently contain enough detail to accurately code. Subpoenas to subfederal government employment departments were included in this illustration of subpoenas to private actors because these subpoenas frequently demanded information initially collected by employers.

256. See Combined FOIA Data (reflecting, for example, subpoenas for employment-related records, such as I-9 forms).

257. See, e.g., 2021-ICLI-00047, at 262, 264, 270 (subpoenaing employee records, "wife's numbers, etc.," and emergency contacts); Washington Log Fiscal Year 2012 (similar); St. Paul Log Fiscal Year 2019 (similar); see also 2021-ICLI-00047, at 2961 (seeking the address of an ICE target's family members).

locations, and specific work schedules, allowing ICE to ambush and arrest the employee not only at home but also at work.[258] Indeed, one field office's subpoena log makes the arrest motive in seeking this information clear; it contains notations next to subpoenas issued to the New Mexico Department of Labor demanding employment records indicating that the "agency complied, employment record led to arrest" and similar language reflecting that demands for employment records led to arrests.[259] And, in some cases, ICE used subpoenas to compel an employer to even more actively help with location and arrests by demanding that a company, in one case, arrange a meeting on site with their employee, and, in another, bring multiple noncitizens—with their passports—to a deportation officer.[260]

Similarly, nearly every subpoena issued to telecommunications providers sought subscribers' addresses or "subscriber information," which is used to locate—and likely arrest—the subscriber.[261] In some instances, ICE demanded data showing people's movements over long periods of time or in real time. For example, it has demanded information such as weeks' worth of cell-site location data—that is, digital information about cell phone users' location that is produced by users' phones, often without their knowledge; this type of data allows ICE to create a "comprehensive" and intimate picture of the cell phone user's movements over time.[262] In other instances, ICE demanded that providers "ping" people's phones, which is generally done to ascertain a target's location in real time.[263] In other words, the data show that ICE subpoenas employers and telecommunications companies for largely the same ultimate purpose as those issued to public entities: to obtain information and other assistance that will allow the agency to locate, arrest, and detain targets.

Understanding how ICE uses subpoenas in the private sector has important implications for people, doctrine, and policy. It is, of course, critical for noncitizens and their families to understand the risks of providing personal information to these entities. It also expands and adds nuance to our conception of worksite immigration enforcement, which has understandably tended to focus on employer sanctions, verification of

258. See Combined FOIA Data.

259. 2021-ICLI-00047, at 2959; see also, e.g., 2021-ICLI-00047, at 2949–50 (reporting, for a subpoena to the New Mexico Department of Labor seeking employment records, "agency complied, positive response, arrested"); id. at 2950 (reporting "agency complied, arrested").

260. 2021-ICLI-00047, at 234, 2728.

261. See Combined FOIA Data; see also United States v. Caira, 833 F.3d 803, 804 (7th Cir. 2016) (describing how an internet service subscriber's information allows law enforcement to locate them).

262. See Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018) (describing how using cell phone–generated location data can "provide an all-encompassing record of the holder's whereabouts"); 2021-ICLI-00047, at 13–15, 5214–16 (subpoenaing cell phone location/cell tower information for specific dates and times).

263. See, e.g., 2021-ICLI-00047, at 5337-5340 (Los Angeles Log).

employment authorization documents, and large on-site raids.[264] Particularly given the well-recognized harms that worksite enforcement imposes on noncitizen workers and the labor market as a whole, this subpoena-based enforcement raises significant questions about whether current limits on "highly visible" worksite raids are sufficient to mitigate the less visible—but similarly impactful—consequences that flow from worksite enforcement via subpoenas.[265] It deepens our understanding of the consequences of both worksite enforcement and subpoenas; it shows how ICE's demands for employment information can incentivize records-free (i.e., under-the-table) employment even for noncitizens who are lawfully present, drive these workers deeper into the shadows, deprive them of worksite protections, and depress labor conditions more broadly. And finally—but importantly—the use of immigration subpoenas to compel private information from these critical entities raises significant Fourth Amendment concerns. Indeed, as described in Part III, these practices may—and in some cases likely did—violate constitutionally protected privacy rights, which has implications for doctrine, the subjects of these records, and the subpoena process more broadly.

C. *How ICE Subpoenas*

Shining a light on ICE's subpoena practice as a whole also illuminates some of its tactics.[266] In many ways, this study reveals phenomena that scholars have observed in other aspects of immigration enforcement: the regional variation and "street-level bureaucracy" that emerge as guidance deficits empower lower-level officers to develop policies and practices of their own.[267] But two particularly consequential—and unlawful—tactics emerge sharply and consistently in the nationwide data. This section describes them and their implications.

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264. See, e.g., Memorandum from Alejandro N. Mayorkas, Sec'y, DHS, to Tae D. Johnson, Acting Dir., ICE, Ur M. Jaddou, Dir., USCIS, & Troy A. Miller, Acting Comm'r, Customs & Border Prot. 2–3 (Oct. 12, 2021), https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf [https://perma.cc/46EM-T2SG] [hereinafter Mayorkas, Worksite Enforcement Memorandum] (discussing these features of ICE's worksite enforcement); Brandon L. Garrett, Corporate Crimmigration, 2021 U. Ill. L. Rev. 359, 374–78 (same); Rebecca Smith, Ana Avendaño & Julie Martínez Ortega, Iced Out: How Immigration Enforcement Has Interfered With Workers' Rights 5–6, 10–11, 24–25 (2009), https://www.nelp.org/app/uploads/2015/03/ICED_OUT.pdf [https://perma.cc/5GR7-HD7F] (discussing, inter alia, worksite raids and employer verification).

265. Mayorkas, Worksite Enforcement Memorandum, supra note 264, at 3.

266. For example, it shows that ICE convinces third parties to disclose records by merely threatening to serve subpoenas. See, e.g., 2021-ICLI-00047, at 2169–70 (discussing an airline which provided requested information to ICE after a mere threat of serving a subpoena). It also shows that ICE uses subpoenas in contravention of public policy. See, e.g., Washington Logs (compelling an immigration attorney to turn over a client record that could have incriminated their client or facilitated their deportation).

267. Fahey, supra note 6, at 1050–52; see also Marouf, supra note 17, at 1624 (discussing regional variation in ICE enforcement practices).

1. *Demands for Objects and Action.* — The few limits on today's immigration subpoena power derive largely from the authorizing statute, which permits officers to subpoena testimony and "the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States."[268] Thus, the statute provides ICE with broad power to compel information but—unlike other statutes that authorize broader compulsion[269]—limits this power to the forms enumerated: testimony, books, papers, and documents.

But the records show that ICE uses immigration subpoenas well beyond these statutory bounds, deploying them to force recipients to provide a range of objects and actions to assist with immigration enforcement. The records demonstrate that ICE uses subpoenas to compel a wide array of objects, including cell phones, other devices, telephone and video recordings, and digital image files.[270] In recent years, ICE has begun regularly using subpoenas to compel actions as well. For example, it has demanded that telecommunications companies "ping" people's phones, which allows ICE to ascertain the owner's location.[271] ICE has also used this type of subpoena to command the recipient to schedule a pretextual meeting with ICE's target on the company's premises, presumably to help ICE effect an arrest.[272] Similarly and more commonly, ICE has ordered local law enforcement to affirmatively provide notifications—in perpetuity—if and when the times, dates, or locations for the release of people in state or local custody change.[273] And, while the limits of the available data make it impossible to know how often ICE uses subpoenas to compel recipients to turn over objects and take action,[274] this type of demand appears, in at least some jurisdictions, to be standard practice for subpoenas to sanctuary jurisdiction law enforcement.[275]

The data thus expose a pattern of immigration subpoena abuse, one in which ICE has regularly—and overtly—exceeded even its broad statutory powers. They show that ICE routinely uses subpoenas to compel

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268. 8 U.S.C. § 1225(d) (2018).

269. See, e.g., 15 U.S.C. § 57b-1(c)(1) (2018) (permitting the agency to compel "tangible things").

270. See, e.g., 2021-ICLI-00047, at 281, 335, 5371 (phone call recordings); id. at 2971 (phones and other devices); id. at 5340 (video); id. at 5600 (video footage); id. at 5626 (digital thumbprints).

271. Id. at 5339.

272. See, e.g., id. at 234.

273. See, e.g., id. at 2842, 2845, 2855, 2875 (requiring "[n]otification of any subsequent rescheduled date, time, and location of [the subpoena] subject's release"); see also supra section II.B.2.

274. Because the logs generally do not capture this type of detail about these demands, information about this practice was drawn largely from the subpoena forms produced.

275. This type of demand was contained in, for example, all of the individual subpoenas produced by the Chicago field office and many subpoenas produced by the Boston field office that were issued to subfederal law enforcement governed by sanctuary laws in 2020 and 2021. See Chicago Logs; 2021-ICLI-00047, at 5310–31 (Boston Logs).

people and entities to assist with immigration enforcement in ways that are not permitted by the subpoena statute. The statute does not offer "books," "papers," "documents," and testimony as examples of a broader body of things that might be compelled: It specifies four discrete sources of information that may be subpoenaed.[276] Thus, basic statutory interpretation[277] as well as background subpoena norms[278] and the way courts have considered similar textual specificity in other subpoena provisions[279] all point in the same direction: The enumerated categories constitute the full and complete list of what may be compelled. Moreover, it would lead to absurd results to conclude that, when Congress provided a defined list of things that an agency can compel, it actually intended to empower the agency to use subpoenas to compel any thing or action it desires or to impose indefinite, prospective obligations.[280] Against this backdrop, it is difficult to imagine how ICE would justify these demands in court, but it does not appear that ICE has ever had to try. In fact, the data on compliance—though limited—suggest that recipients of even these plainly ultra vires subpoenas often comply.[281] In other words, the records show consistent, fairly obvious agency overreach and the failure of existing checks to correct it.

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276. 8 U.S.C. § 1225(d) (2018); see also supra notes 268–269 and accompanying text.

277. See Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002) (applying the canon of expressio unius est exclusio alterius); Requests for Information Under the Electronic Communications Privacy Act, 32 Op. O.L.C. 145, 147 (2008) [hereinafter OLC ECPA Memo] (invoking expression unius to interpret a similar provision for compelling information and reaching a similar conclusion).

278. See, e.g., In re Order Authorizing Prospective and Continuous Release of Cell Site Location Records, 31 F. Supp. 3d 889, 894–95 (S.D. Tex. 2014) (explaining that administrative subpoenas are "typically satisfied by a one time production of documents" and "do not involve ongoing surveillance"); erinMedia, LLC v. Nielson Media Rsch., Inc., No. 05-CV-1123-T-24, 2007 WL 1970860, at *4 (M.D. Fla. July 3, 2007) ("A subpoena addresses itself to documents in existence as of the date the subpoena is responded to, not documents created thereafter.").

279. See, e.g., MetroPCS v. Thomas, 327 F.R.D. 600, 614 (N.D. Tex 2018) (refusing to permit a party to subpoena testimony when federal rules only authorized document productions or inspections); Haaf v. Grams, 355 F. Supp. 542, 546 (D. Minn. 1973) (refusing to permit a party to compel the provision of a voice exemplar when federal rules only permitted compulsion of "tangible evidence"); see also OLC ECPA Memo, supra note 277, at 147 (interpreting a statute's list of information that may be compelled to "foreclose[] an interpretation that would add other types of information" to that list).

280. Congress has sharply distinguished between law enforcement authority to demand prospective-location information sharing (surveillance) and to make a one-time information demand. See *In re Order Authorizing Prospective and Continuous Release of Cell Site Location Records*, 31 F. Supp. 3d at 894–95 (noting that, in the limited instances Congress has permitted prospective surveillance, it has imposed significant restrictions on it (providing wiretaps, pen registers, and tracking devices as examples)).

281. See, e.g., 2021-ICLI-00047, at 2169–70 (emails reflecting target compliance following the threat of a subpoena); CAPHQ Log, supra note 179 (reflecting a high compliance rate).

2. *Gag Orders.* — At least, it has been said, immigration subpoenas are more transparent than some other law enforcement information demands.[282] After all, some statutes authorizing compulsory process permit agencies to obtain court orders that gag administrative subpoena recipients, prohibiting them from disclosing the substance and even existence of the agency's demand for some potentially lengthy period of time.[283] And certain national security–related statutes even permit investigating agencies themselves to issue limited nondisclosure orders to prevent recipients of "national security letters" (NSLs, essentially a version of administrative subpoenas) from disclosing certain information demands as well.[284] But, the argument goes, the agency's immigration subpoena practice is more transparent because the immigration subpoena statute—like virtually all administrative subpoena provisions—doesn't permit this type of constraint.[285]

It is true that subpoena recipients' freedom to speak is important. The ability to speak about subpoenas is of course necessary for recipients to challenge subpoenas they've received, as they must disclose the subpoena to legal counsel and court staff to raise legal claims.[286] In the context of subpoenas to third-party record holders, recipients' ability to disclose subpoenas is also essential to allow them to notify the person whose records are at issue—and thereby enable that person to raise challenges of their own.[287] And recipients' ability to speak about these subpoenas is critical for structural reasons as well; without it, agency practices would be "effectively immune" from judicial and other external scrutiny.[288] Indeed, when Congress empowered the FBI to issue NSLs that imposed all-encompassing, indefinite gag orders on recipients, courts made this very point.[289] Courts explained that NSL recipients' ability to speak about NSLs

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282. Bhuiyan, supra note 191 (explaining that administrative subpoenas are usually "one of the more transparent ways law enforcement can request user information from tech companies").

283. For example, the Stored Communications Act, which regulates government access to stored wire and electronic communications, provides this authority and enumerates the factors that should guide this judicial determination. 18 U.S.C. § 2705(b) (2018).

284. In re Nat'l Sec. Letter, 33 F.4th 1058, 1063 (9th Cir. 2022) (explaining that NSLs are "best understood as a form of administrative subpoena").

285. Doe v. Ashcroft (*Doe I*), 334 F. Supp. 2d 471, 485 (S.D.N.Y. 2004) (observing that "most administrative subpoena laws either contain no provision requiring secrecy, or allow for only limited secrecy in special cases," for example, when a court so orders), vacated as moot sub nom. Doe v. Gonzales, 449 F.3d 415 (2d Cir. 2006).

286. See id. at 494–95 (discussing the importance of disclosing information demands to counsel for effective judicial review).

287. See Aziz Z. Huq & Rebecca Wexler, Digital Privacy for Reproductive Choice in the Post-*Roe* Era, 98 N.Y.U. L. Rev. 555, 629 (2023) ("Notice . . . enables the actual target of the investigation to assert their privacy rights and mount legal challenges . . . in court.").

288. *Doe I*, 334 F. Supp. 2d at 506; see also Rozenshtein, supra note 36, at 149–53 (discussing the ways that targets of surveillance can trigger external scrutiny, including by alerting policymakers).

289. See *Doe I*, 334 F. Supp. 2d at 492.

was "important to an ongoing, national debate about the intrusion of governmental authority into individual lives," and they enjoined the legislation allowing the agency to indefinitely prevent the "very people who might have information regarding investigative abuses and overreaching" from sharing it with the public and legislators.[290] So in theory, the immigration subpoena regime is constrained, in important ways, by virtue of the fact that subpoena recipients can speak freely about these demands.

Except that, in reality, many can't. The data show a widespread, longstanding, and previously unknown practice of ICE-issued gag orders in immigration subpoenas. As Figure 6 shows, in more than a quarter of the subpoena forms in the dataset (26.6%, *n*=187), ICE formally "command[ed]" recipients to refrain from disclosing the subpoena's content or existence—indefinitely.[291] Virtually all (99.0%, *n*=185) of these gag orders forbade the recipient from speaking to *anyone* about the subpoena indefinitely. (The other two gag orders were also indefinite in duration, but prohibited disclosure only to the subject of the records.[292]) In some cases, ICE officers have even imposed nondisclosure orders on courts, ordering one to consider "the existence of [the subpoena]" sealed and therefore not subject to disclosure.[293] And, in another 5.5% (*n*=39) of the subpoenas, ICE added nondisclosure requests, telling recipients that disclosure may damage "an official law enforcement investigation" and asking for their silence.[294]

290. Doe v. Gonzales (*Doe CT*), 386 F. Supp. 2d 66, 75, 82 (D. Conn. 2005); see also *Doe I*, 334 F. Supp. 2d at 506.

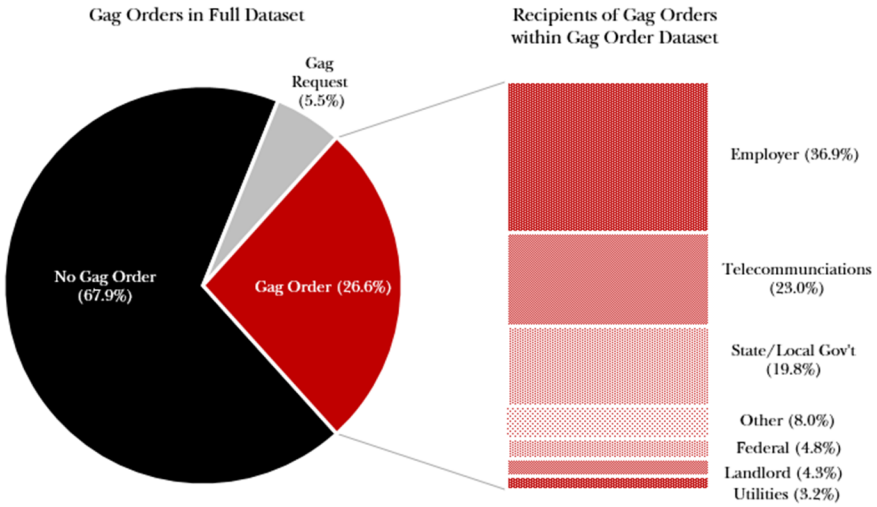
291. For example, one recent subpoena stated: "You are hereby commanded not to divulge the existence of this subpoena at any time, as any disclosure could impede an investigation, unless ordered to do so by a competent judicial administrative authority of the United States of America." 2021-ICLI-00047, at 30. An additional subpoena apparently intended to issue this same command but erroneously omitted a portion of the sentence. Id. at 2971.

292. Id. at 2248, 2249.

293. Id. at 2252, 2777.

294. See Combined FOIA Data.

FIGURE 6. ICE-ISSUED GAG ORDERS AND GAGGED ENTITIES IN DATASET[295]



This revelation has major implications. First, and perhaps most obviously, it offers a powerful (if partial) explanation for the silence surrounding modern immigration subpoena practice. Subpoena recipients under official order to refrain from disclosure to anyone cannot inform their attorneys about these subpoenas, much less notify the media, government watchdogs, or courts about even patently unlawful agency demands. And while there's no indication that ICE could lawfully penalize someone for failing to comply with one of its gag orders or persuade a court to do so,[296] recipients may never know that (given the prohibition on disclosure even to counsel), would presumably be disinclined to risk violating such a direct official command, and, even if informed and resourced enough to take on that fight, may lack the incentive to do so on behalf of the noncitizens in ICE's crosshairs.

Second, this finding reveals nearly insurmountable obstacles to external constraints. Indeed, the data show an agency practice that, by prohibiting disclosure to *anyone* (including counsel and courts), renders judicial review impossible in a large proportion of cases. For similar

295. The data for this figure were drawn from the subpoena forms issued by ERO offices nationwide (n=703). This figure does not include the two subpoenas in which it was not clear whether ICE included a nondisclosure command or request. No subpoena log tracked this information. The "other" category consists primarily of private businesses, including insurance and hospitality companies, a bail-bond company, social media/email providers, and one unknown recipient.

296. Just as the immigration subpoena statute and regulations do not provide for or mention these gag orders, they also do not provide a mechanism for enforcement of gag orders. See supra note 285 and accompanying text.

reasons, it significantly limits the potential for the extrajudicial strategies that, in other arenas, record holders and the public have developed for input and debate.[297] In short, these gag orders do what courts feared when invalidating the NSL gag order legislation in the early aughts: They prevent many of the people with the most knowledge about the agency's practices from sharing that information and virtually guarantee that those subpoenas will remain insulated from checks.[298] And, because these ICE-issued gag orders have not been discussed in any publicly available source, this practice creates different and in some ways more intractable threats to transparency and constraints than even the NSL gag order statute.

Third, the data expose an agency practice that violates the law. Specifically, as these gag orders are ultra vires, ICE lacks the statutory authority to issue all or virtually all of them. The immigration subpoena statute provides no authority of this sort.[299] And although Congress did enact new, more limited statutory provisions that allow agencies to issue narrower gag orders in NSLs after courts found the broader NSL gag orders unconstitutional,[300] none of the amended NSL statutes authorize these immigration subpoena gag orders either. Among other distinguishing features, two of the five provisions only vest authority to issue nondisclosure orders in the FBI.[301] And the three that vest this authority in non-FBI agencies permit these orders only in specific circumstances and to specific recipients (e.g., financial institutions, credit agencies)—not the types of subpoenas in which ICE ordered nondisclosure.[302] And even if these statutes did apply to these immigration

297. Cf. Rozenshtein, supra note 36, at 149–54 (describing how surveillance intermediaries can promote congressional oversight by publicizing information about agencies' use of surveillance tools).

298. See *Doe I*, 334 F. Supp. 2d 471, 492, 506 (S.D.N.Y. 2004) ("[T]he absence of meaningful judicial review . . . may also lead to violation of [NSL targets'] constitutional rights."), vacated as moot sub nom. Doe v. Gonzales, 449 F.3d 415 (2d Cir. 2006).

299. See 8 U.S.C. § 1225(d) (2018).

300. See In re Nat'l Sec. Letter, 33 F.4th 1058, 1063 (9th Cir. 2022).

301. See 15 U.S.C. § 1681u(d)(1) (2018) (permitting NSLs only for demands for counterintelligence-related information issued by the FBI and to consumer reporting agencies if they are subject to strict procedures for certification of harm and permit disclosure to counsel); 18 U.S.C. § 2709 (2018) (permitting NSLs only for demands for counterintelligence-related information issued by the FBI to electronic communications services or remote computing services, subject to strict procedures for certification of harm, if they permit disclosure to counsel).

302. Compare 12 U.S.C. § 3414 (2018) (permitting NSLs to financial institutions, subject to strict procedures for certification of harm, if they permit disclosure to counsel), and 15 U.S.C. § 1681v(c)(1) (permitting NSLs only to consumer reporting agencies for international terrorism investigations if they are subject to strict procedures for certification of harm and permit disclosure to counsel), and 50 U.S.C. § 3162 (2018) (permitting NSLs only to certain financial institutions, consumer reporting agencies, and other commercial entities related to foreign travel by executive branch employees if they are subject to strict procedures for certification of harm and permit disclosure to counsel), with infra Figure 6 (showing the breadth of those targeted by ICE gag orders). The "Other" category contains only one subpoena issued to a financial institution, but even if it otherwise fit within one of

subpoenas (which they don't), they would still not authorize the indefinite, all-encompassing gag orders that ICE has issued; gag orders under the amended NSL statutes are much more limited because they permit some disclosure (e.g., to legal counsel), are generally time limited, and allow recipients to challenge them in court.[303] In fact, the only statute that *might* authorize any of these gag orders is a terse provision nestled in the Family Educational Rights and Privacy Act (FERPA), a statute designed to protect the privacy of student education records by, inter alia, imposing a default requirement of notice to subjects of educational records before the school discloses them even pursuant to compulsory process.[304] But although FERPA itself contains some language that recognizes that agencies can overcome that default through nondisclosure orders, it is not clear whether it actually provides authority to issue nondisclosure orders because the regulation implementing the provision simply exempts law enforcement subpoenas with nondisclosure orders from FERPA's default notice rule.[305] To the extent FERPA does authorize these gag orders, it could at most be the basis for the eight gag orders that ICE issued to school/education departments, but even then it is difficult to know whether these orders would survive judicial scrutiny without NSL-like constraints because there is no case law on this provision. In fact, although all or nearly all of ICE's gag orders would likely be found ultra vires, nonbinding,[306] and unconstitutional,[307] none of these ICE-issued gag orders have been litigated to a reported decision (if ever raised) in court.[308]

D. *Why ICE Subpoenas*

The previous sections show an administrative subpoena regime that has shifted dramatically from one focused on obtaining evidence for the adjudication of substantive questions of immigration law and toward one focused on obtaining location information to facilitate arrests. They also show a practice heavily, likely increasingly, focused on compelling

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these statutes (which is not clear from the records), it was all-encompassing and did not permit disclosure to counsel. See 2021-ICLI-00047, at 392 (seeking identity and address information related to certain financial transactions from Western Union).

303. See supra notes 296–297; see also *In re Nat'l Sec. Letter*, 33 F.4th at 1066–67 (outlining the features of the amended statute); FBI, Termination Procedures for National Security Letter Nondisclosure Requirement 2–4 (2015), https://www.fbi.gov/file-repository/nsl-ndp-procedures.pdf [https://perma.cc/6TWG-CQN6].

304. See 20 U.S.C. § 1232g(B)(1)(J)(ii) (2018).

305. See 34 C.F.R. § 99.31(a)(i)(9)(ii)(B) (2024).

306. See, e.g., United States v. Zadeh, No. 4:14-CV-106-O, 2015 WL 418098, at *14 (N.D. Tex. Jan. 31, 2015) (finding a nondisclosure order issued alongside a Controlled Substances Act subpoena ultra vires and nonbinding).

307. See infra section III.C.

308. Westlaw searches of federal cases, as of September 19, 2024, for "immigration and nondisclosure /s order! or provision! and subpoena! /s 1225! or 235!" and "immigration and nondisclosure /s order or provision and subpoena!" return no on-point decisions.

information from state and local government entities. But considering the vast amount of data that ICE obtains from private "data brokers" (companies that amass and sell personal data),[309] one may wonder why ICE uses subpoenas to obtain information at all. Put differently, given the other surveillance and information-gathering tools at its disposal, what makes ICE decide to use an immigration subpoena? Although this is a difficult question due to the limits of the data and of government transparency laws,[310] this section offers some insights and partial answers.

As an overarching theme, the records strongly suggest that ICE uses these subpoenas in significant part to obtain current address and precise location information that other sources do not provide. ICE has explained that attempting to obtain this type of information from commercial databases and other aggregated government data sources is more resource-intensive with no guaranteed success because even databases that pool this information are "often incomplete, incorrect, or outdated."[311] And these sources generally lack the details that make arrests easiest for ICE: people's work schedules, updated addresses, exact locations, and times, dates, and places arrested noncitizens will leave state or local custody.[312] Thus, while it appears that ICE can get much of the substantive information relevant to removal cases through other sources,[313] it often

309. See, e.g., Nina Wang, Allison McDonald, Daniel Bateyko & Emily Tucker, Ctr. on Priv. & Tech., Georgetown Univ. L. Ctr., American Dragnet: Data-Driven Deportation in the 21st Century 3, 5, 17, 30 (2022), https://americandragnet.org/report-english [https://perma.cc/DRF9-9AH5] ("By contracting with private data brokers, ICE has been able to access utility record information belonging to over 218 million utility customers . . . ."); Fahey, supra note 6, at 1022–26 (describing the breadth of information in criminal history databases). For more, see generally Just Futures L. & Mijente, The Data Broker to Deportation Pipeline: How Thomson Reuters & LexisNexis Share Utility & Commercial Data With ICE, https://static1.squarespace.com/static/62c3198c117dd661bd99eb3a/t/62df020189b0681d1b9398a8/1658782211567/Commercial+and+Utility+Data+Report.pdf [https://perma.cc/L37B-J6TB] (last visited Sept. 19, 2024).

310. See, e.g., 5 U.S.C. § 552(b)(5), (b)(7)(E) (2018) (exempting certain information from agency disclosure requirements).

311. Wang et al., supra note 309, at 35 n.185 (internal quotation marks omitted) (quoting Administrative Record at 24, Lewis-McCoy v. Wolf, No. 1:20-cv-01142-JMF (S.D.N.Y. filed Apr. 24, 2020), ECF No. 43-1 (ICE Memorandum)); see also Thompson Aff., supra note 225, ¶¶ 47–48 (explaining that the NCIC database and other resources often contain outdated addresses and that using outdated information "wastes resources").

312. See, e.g., Thompson Aff. , supra note 225, ¶¶ 47–48 (explaining that, in issuing the subpoenas, ICE sought "contact information that the aliens provided to DSD upon their arrests," which is "the most up-to-date contact information for these individuals"); 2023-ICLI-00031, at 470–71 (seeking a subpoena to obtain the addresses the targets gave upon intake at the jail).

313. See, e.g., ICE, Secure Communities (SC) Standard Operating Procedures (SOP) 7, https://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf [https://perma.cc/NTW5-VVTS] (last visited Sept. 15, 2024) (detailing how fingerprints taken by subfederal law enforcement officers allow ICE to obtain, inter alia, immigration status, arrest, and conviction information); Response to Petition to Enforce Administrative Subpoenas at 4–5, Immigr. & Customs Enf't v. Gomez, 445 F. Supp. 3d 1213

turns to subpoenas to quickly and cheaply (in terms of resources) obtain current or near real-time location information to make arrests.[314]

The longer history of ICE programs using subfederal law enforcement to make immigration arrests shows just how much this updated location and release information matters for ICE's detention scheme. For decades, ICE obtained information from and effectuated arrests through subfederal law enforcement using immigration "detainers"—ICE-issued forms requesting that state or local law enforcement either (1) detain someone they arrest beyond the time that person should be released from criminal custody to allow ICE to pick them up, or (2) notify ICE when subfederal law enforcement plans to release the person so ICE can arrest the person as they step out of subfederal law enforcement's doors.[315] This assistance and real-time information about a person's release made immigration arrests easy and cheap; it allowed ICE to funnel people directly from subfederal to immigration custody.[316] So the wave of subfederal "sanctuary" legislation prohibiting law enforcement from providing this assistance to ICE not only de-linked states and localities from immigration enforcement in a major way,[317] it meant that, if ICE wanted to make an arrest, it would have to do that work itself.

Since late 2019, ICE has issued many immigration subpoenas to state and local law enforcement, first driven by a desire to retaliate against sanctuary jurisdictions and then to recreate this local-arrest-to-immigration-detention pipeline.[318] Initially, as part of the Trump Administration's attempt to use subpoenas in its public battle against sanctuary jurisdictions, ICE leadership launched an initiative focused on

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(D. Colo. 2020) (identifying other sources from which ICE could have obtained criminal history information to determine removability); Gomez Reply, supra note 225, at 10–11 (responding by focusing largely on subpoenaed location data that ICE could not otherwise obtain).

314. See sources cited supra note 309. One of the limited categories of information that headquarters retains about immigration subpoenas is a folder of "Arrested I-138 [Immigration Subpoena Form] Lead[s]" from sanctuary jurisdiction subpoenas. 2023-ICLI-00031, at A-436.

315. See Form I-247A, DHS (2017), https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf [https://perma.cc/8DEW-6783].

316. See Markowitz, supra note 17, at 1046 (discussing the local-enforcement-to-ICE pipeline); Eisha Jain, Arrests as Regulation, 67 Stan. L. Rev. 809, 830 (2015) [hereinafter Jain, Arrests] (noting that this approach can "conserve enforcement dollars").

317. Markowitz, supra note 17, at 1045 (noting that many states and localities have refused to become "entangled" with immigration enforcement). Most of these laws generally disentangle subfederal law enforcement from federal civil immigration enforcement, but some contain exceptions based on the nature of any underlying conviction or for certain enforcement types. See, e.g., Pham & Van, supra note 8, at 143 (noting that California's legislation, though "positive and pro-immigration," contains such exceptions).

318. See, e.g., 2023-ICLI-00031, at 459–60; supra section II.B.2.

generating negative press and outrage for sanctuary jurisdictions.[319] Through at least mid-2020, this appeared to drive much of ICE's decisionmaking about when and against whom to issue these subpoenas. Field offices would "nominate" sanctuary jurisdictions to target with immigration subpoenas, and, once headquarters leadership selected sanctuary jurisdiction targets, headquarters leadership directed field office leadership to identify set numbers of cases with facts that would play well in the media and courts: ones with "recent arrests/declined detainers, egregious criminals, and[—]ideally[—]prior removals so that alienage is not an issue."[320] And ICE officers around the country identified cases with these facts even while, at times, wondering what they could possibly subpoena since the person was already in ICE custody.[321]

By August 2020, ICE leadership sought to routinize this practice and use it to replicate the pipeline it had lost in sanctuary jurisdictions. To that end, it issued a detailed policy directive and training specifically for subpoenas to subfederal law enforcement that refused to comply with ERO's requests for information, "including advance notification of release dates pursuant to an immigration detainer."[322] As might be expected given ICE's focus on enforcement against noncitizens who have had contact with the criminal legal system,[323] the directive required that these subpoenas be directed at noncitizens with criminal convictions, others ICE deems public safety threats, and those with prior removal orders.[324] And while this policy permitted ICE officers to subpoena any information that would "reasonably . . . lead to an enforcement . . . action" and was not otherwise "feasible" to obtain, it was clearly aimed at facilitating arrests immediately upon or shortly after release from subfederal custody.[325] As for process, the directive required that, for this single category of subpoena, enforcement officers prepare summaries explaining why the subpoena was justified, update a national log, obtain headquarters approval, and report back on

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319. ICE leadership's goal, as one internal email explained, was to select cases that would allow ICE to "mirror the outrage (significant media attention)" that resulted from the subpoena offensive of January 2020. 2023-ICLI-00031, at 488.

320. 2023-ICLI-00031, at 71, 488–92 (indicating, in May 2020, that he (an assistant field office director) was getting pressure from headquarters to find cases for immigration subpoenas and indicating that he needed more time).

321. See 2021-ICLI-00047, at 5806–07 (noting, after summaries showing that cases met the requested criteria, "[i]n custody" and "[n]ot sure what to subpoena").

322. 2023-ICLI-00031, at 8; id. at 34 (ICE Policy Directive 11165).

323. See Hausman, supra note 214, at 975 (arguing that the "law of deportation depends on criminal charges and convictions"); Jain, Arrests, supra note 316, at 829–30 (discussing ICE's reliance on criminal arrests in enforcement decisions).

324. See 2023-ICLI-00031, at 35.

325. Id. (explaining that this directive was only for "noncompliant" jurisdictions that refused to cooperate with detainers and other enforcement actions and suggesting that officers could use them to seek "release dates" and "post-arrest whereabouts," among other things).

resulting arrests.[326] ICE leadership emailed this directive to all ERO employees, announcing this now widely available tool for pushing back on "non-compliant law enforcement agencies" that refused to "cooperat[e]."[327] And, under this policy, field offices around the country have used immigration subpoenas to force sanctuary jurisdiction actors to help facilitate arrests into the Biden era and likely to the present day.[328]

Outside of the sanctuary-law enforcement context, the criteria for subpoena use are far less clear. As noted, even the guidance encouraging their use is silent about when or why to issue one.[329] Some subpoenas are clearly aimed at establishing specific facts, but again here, a large proportion appear to be focused on obtaining location information and facilitating arrests.[330] The subpoena forms and logs generally do not reflect the facts of the underlying cases or, in most instances, reliably indicate the type of violation suspected.[331]

E. *How Often ICE Subpoenas*

One lingering question about the immigration regime is a basic one: How frequently does ICE subpoena? And, perhaps equally important for some of the issues these subpoenas raise, how often does it subpoena specific entities? Due to the limits of the data, this study cannot provide comprehensive or fully satisfying answers. But this section sketches out some suggestions from the available data and some issues for further research.

Given ICE's coordinated effort to use subpoenas to counteract sanctuary legislation, one might wonder about the scale of this practice and how it compares to the number of detainers those jurisdictions decline. It is difficult to know. On the high end of subpoena issuers in the dataset is the San Diego field office, which has directed its officers to initiate a subpoena every time a detainer is declined[332] and which issued approximately 167 subpoenas in 2023 (amounting to nearly one every

326. Id. at 16–30.

327. Id. at 146.

328. See Combined FOIA Data.

329. See, e.g., 2023-ICLI-00031, at 272–73 (providing an email to the Los Angeles field office which purportedly gives instructions on "issuing ICE [s]ubpoenas" but does not specify when they should be issued); see also supra note 219 and accompanying text.

330. See supra section II.B.4.

331. As might be expected given ERO's primarily civil enforcement mission, the government confirmed that the majority of the subpoenas produced relate to civil matters. See supra note 178. The limited data on this front showed that all or nearly all recent subpoenas to sanctuary jurisdiction law enforcement relate to civil administrative matters. See CAPHQ Log, supra note 179. The data also indicate that some subpoenas are issued in connection with criminal matters (often status-based offenses—such as unlawfully reentering after a prior removal order, 8 U.S.C. § 1326 (2018), or investigations of both civil and criminal matters). See, e.g., St. Paul Logs.

332. 2023-ICLI-00031, at 426 (requiring ERO officers in the "Criminal Alien Program" to initiate the process each time a detainer is declined).

other day) to local law enforcement covered by California's sanctuary law.[333] The Washington field office also appears to issue immigration subpoenas to a single sanctuary jurisdiction police department frequently; its log shows that it issued twenty-three such subpoenas in the first three-and-a-half months of 2023, amounting to more than twice a week.[334] The Chicago field office, for its part, issued at least eighteen subpoenas to the Illinois Department of Corrections in 2021 (through mid-September 2021), approximately one every other week.[335] Other field offices in areas with major sanctuary jurisdictions issued this type of subpoena as well, likely in smaller numbers, but logs from those field offices were generally too unreliable to provide a sense of frequency in this period.[336] But even if these data were complete enough to provide reliable numerators (which seems unlikely), we lack an appropriate denominator to evaluate their relative use in the sanctuary battles (as ICE does not publish information about the number of detainers these entities declined during this period)[337] or in civil enforcement investigations more broadly (since ICE does not publish that data either). Even so, it is worth noting that neither the data nor other records suggest that the scale of subpoena use has approached the quantity of detainers ICE issues or of arrests it makes in the interior.[338]

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333. This number is approximate because it includes data from multiple sources whereas the headquarters log indicates 161 subpoenas. See CAPHQ Log, supra note 179. Though, that log is not complete. See infra note 336. For more on deduplication across different data sources, see infra Appendix.

334. See Combined FOIA Data. The log from this field office ended in mid-April 2023, a few months before ICE produced it in litigation. See Washington Log Fiscal Year 2023.

335. See Combined FOIA Data. ICE represented that the Chicago field office at some point stopped issuing subpoenas due to a governing sanctuary law. See Stipulation and Proposed Order, supra note 10, at 2. This representation is consistent with the data produced but doesn't explain the absence of pre-2020 Chicago field office logs and logs covering private entities not governed by the state sanctuary law.

336. See supra section II.B.2. The headquarters log was also not a reliable indicator—for example, it did not contain any of the subpoenas from the Washington field office—and at least one other field office only became aware that it needed to use the headquarters log and process through the FOIA litigation. See 2023-ILCI-00031, at 288–89 ("After dealing with this latest FOIA . . . I think we'll all need to get together on this to make sure we are doing everything correct.").

337. See New Data on ICE Immigrant Detainers Show Sharp Drop Since Start of Biden Administration, Transactional Recs. Access Clearinghouse (June 20, 2023), https://trac.syr.edu/reports/719/ [https://perma.cc/2SWP-G2JK] [hereinafter TRAC, Data on Ice Detainers] (explaining that ICE has conceded that past reports of declined detainers were inaccurate and that this information "does not appear to be reliably kept by the agency").

338. See ICE Enforcement and Removal Operations Statistics, ICE, https://www.ice.gov/spotlight/statistics [https://perma.cc/4Q8M-EUK9] (last visited Sept. 15, 2024) (arrest statistics); ICE Detainers, Transactional Recs. Access Clearinghouse, https://trac.syr.edu/phptools/immigration/detention/ (on file with the *Columbia Law Review*) (custody statistics).

Agency records also indicate that the presidential transition shortly after the sanctuary subpoena initiative launched may have slowed its growth and spread. Internal agency communications suggest that, under the Biden Administration, leadership's demands that officers find cases for subpoenas may have died down.[339] It appears that the Biden Administration had far less appetite to litigate when sanctuary jurisdictions raised hurdles in response to ICE's demands.[340] And it seems likely that the new prosecutorial discretion policies played a role as well; the Biden Administration's policy of being more judicious about when to make arrests in the nation's interior has meant fewer instances in which ICE seeks subfederal assistance for arrests.[341]

Resource considerations may affect the frequency with which ICE issues subpoenas as well. Though ICE has attempted to streamline its process for sanctuary jurisdiction subpoenas,[342] officers must still engage in *some* internal process to obtain sign-off from issuing officers, serve the subpoena, wait for a response, and sometimes follow up. To be sure, records of the process suggest that, in practice, ICE has ignored some of its own sanctuary jurisdiction directive's requirements and simply issued subpoenas based on its desire to arrest the target, the target being in the custody of sanctuary jurisdiction law enforcement that will not help ICE make that arrest, and vague assertions of a public safety threat based on (even minor or mere allegations of) criminal history.[343] But these steps still take time and do not guarantee an in-custody arrest. Consequently, while ICE's new subpoena policy and practice is alarming because it has succeeded in piercing sanctuary laws where ICE's other efforts have generally failed,[344] political and practical factors may have limited its growth and spread.

The limits of the data make it even more difficult to know how often ICE uses immigration subpoenas outside the sanctuary law enforcement context. The records indicate that some of ICE's twenty-five field offices issue subpoenas regularly but don't suggest that any field office issued

339. See 2023-ICLI-00031, at 231–35 (showing an ICE officer in the Denver field office asking, in June of 2021, whether the immigration subpoena initiative was "in full swing").

340. See id. (showing a U.S. Attorney's Office finding the desired address information through means other than suing for contumacy); id. at 148 (showing that, in response to pushback in April 2021, ICE declined to bring suit).

341. See TRAC, Data on ICE Detainers, supra note 337 (showing a decrease in ICE detainers once Biden took office).

342. See 2023-ICLI-00031, at A-424–37 (showing that ICE created step-by-step instructions, templates, and electronic systems for uploading and obtaining sign-off for these subpoenas).

343. See, e.g., 2021-ICLI-00047, at 6355 (describing the entirety of a target's criminal history as a single DUI arrest); id. at 6349 (same for a single DUI conviction and prior arrests).

344. See, e.g., Pham & Van, supra note 8, at 149–150 (discussing ICE raids and attempts to eliminate certain federal funding to sanctuary jurisdictions).

more than 200 total a year.[345] Others, like the San Antonio and Dallas field offices, may issue few or none at all annually.[346] At least some of ICE's 188 suboffices keep separate records, and, while ICE only produced a few suboffice logs, the ones produced show those suboffices issuing between one and sixteen subpoenas a year.[347] But again, field offices and suboffices appear to vary significantly in this and other respects, and, without a reliable numerator (number of subpoenas) or denominator (number of investigations), it's difficult to quantify further. And of course, it's worth underscoring that issued subpoenas may be only the tip of the iceberg. Given that ICE can use the mere threat of a subpoena to compel "voluntary" compliance with its demands,[348] the number of instances in which ICE uses its subpoena power to compel information and assistance may be far greater than the number of subpoenas actually issued.

* * *

Ultimately, this examination shows not only how ICE wields the immigration subpoena power but also the ways that its use of this tool amplifies the agency's power to detain, exceeds its statutory bounds, and implicates protected—even vital—relationships between states, localities, and their constituents. This study bears out the early concerns about the scope of compulsory process in this realm and its potential to magnify the enforcement agency's already extraordinary powers to deprive people of liberty, family, and more. It also shows that, although this power is no longer focused on enhancing the enforcement of overtly racist laws, it continues to serve its original racialized purpose by facilitating similarly discriminatory modes of enforcing our removal laws.[349] And it shows how this power has become, perhaps most of all, a mechanism for forcing state and local government to assist with federal enforcement. Indeed, it reveals that this aspect has transformed in recent years and become a systemized process for conscripting the resources and political capital of states and localities unwilling to devote them to federal goals.

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345. See Combined FOIA Data.

346. See Stipulation and Proposed Order, supra note 10, at 2 (stating that the Dallas and Chicago field offices stopped issuing subpoenas); 2021-ICLI-00047, at 5811–12 (showing just five subpoenas issued by San Antonio from 2017–2020) .

347. Compare 2021-ICLI-00047, at 5349 (Stewart suboffice log), with 2021-ICLI-00047, at 5350–52 (San Juan suboffice log).

348. See supra note 266.

349. See, e.g., Juliana Morgan-Trostle & Kevin Zheng, Black All. for Just Immigr. & N.Y.U. L. Immigrants' Rts. Clinic, The State of Black Immigrants 20 (2020) (describing the extent to which Black immigrants are disproportionately represented in removal proceedings); Cecilia Menjívar, The Racialization of "Illegality", Dædelus, Spring 2021, at 91, 91–92 (similar with "Latina/o" immigrants).

III. BOUNDING IMMIGRATION SUBPOENAS

While the preceding Parts show an immigration subpoena regime that operates well beyond its statutory limits, in violation of the agency's rules, and in conflict with important norms, that information, on its own, may not spur change. That's because the doctrinal barriers that people—especially targets of enforcement—face in litigation pose significant, often insurmountable, hurdles to challenges on statutory or regulatory grounds.[350] But the practices documented above also have troubling implications for core constitutional protections and rights. And understanding these constitutional concerns is critical, not only because they illuminate the deeper stakes of an unchecked immigration subpoena regime but also because challenges on these bases would avoid pitfalls that doom so many nonconstitutional claims and open paths to judicial constraint in immigration subpoenas' virgin doctrinal terrain.

This Part begins where this Article started, by focusing on the implications of a federal immigration subpoena scheme that targets state and local government. It lays out the serious federalism concerns that this practice creates, argues that it conflicts with the Tenth Amendment's rule against federal commandeering of state and local resources, and suggests an anticommandeering interpretation of the immigration subpoena statute. Next, this Part turns to the privacy implications of this regime. It argues that ICE's tactics raise a range of Fourth Amendment questions and that recognizing the constitutionally protected privacy rights at stake in this regime has important implications for procedure and doctrine. Finally, it turns to questions of transparency and free speech, describing how ICE's widespread gag orders vitiate critical First Amendment rights. In sum, this Part sketches out how and why courts should recognize the constitutional bounds of the immigration subpoena power.

A. *Federalism and Commandeering Avoidance*

When it comes to the clash between sanctuary jurisdictions and the federal government, federalism questions virtually always loom large. After all, in our dual-sovereign system, states and localities stand on special ground when it comes to federal demands. Indeed, the whole concept of state and local sanctuary laws is based on this constitutional distribution of power—the idea that, although federal law is supreme in some domains, the Tenth Amendment's protection of "powers . . . reserved to the States" has been construed to prohibit the federal government from commandeering state and local resources for use in federal regulation.[351]

The Supreme Court articulated this constitutional anticommandeering rule perhaps most clearly in *Printz v. United States* when considering a federal law that required state and local law enforcement to assist with

350. See supra notes 168–172 and accompanying text.

351. U.S. Const. amend. X; Printz v. United States, 521 U.S. 898, 935 (1997).

federal gun control efforts by performing "research" in subfederal government's recordkeeping systems and other tasks to screen prospective gun buyers.[352] Although the federal government argued that the database searches the law required imposed only minimally on subfederal officers, the Supreme Court rejected this distinction, finding that this federal mandate nevertheless violated the Tenth Amendment because it effectively "command[ed] the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[353] In other words, the Court held that assigning subfederal officers even those mundane tasks unlawfully "[]commandeer[ed]" them, which infringed on states' resources, democratic accountability for their actions, and sovereignty.[354] Thus, when sanctuary states and municipalities began declining to assist with federal immigration enforcement, it was widely understood that the Tenth Amendment's anticommandeering rule prevented the federal government from forcing them to do so.[355]

Given this, one might think that the immigration subpoena question would be easily resolved, that unwilling states and localities could simply decline to comply with ICE-issued subpoenas on Tenth Amendment grounds. Indeed, Professor Robert Mikos argued as much more than a decade ago, persuasively explaining why federal administrative subpoenas and other information-gathering tools constituted unlawful commandeering when used against cities and states.[356] This argument is complicated by the fact that *Printz* left open the question of whether federal "reporting requirements" imposed on states created the same unlawful commandeering problem that the background check tasks did.[357] And, on this basis, some courts have found that certain federal information demands don't constitute the type of compelled enforcement that the

352. 521 U.S. at 903–04.

353. Id. at 935.

354. Murphy v. NCAA, 138 S. Ct. 1461, 1476–77 (2018).

355. See, e.g., United States v. California, 921 F.3d 865, 889–91 (9th Cir. 2019) (finding that "California has the right, pursuant to the anticommandeering rule, to refrain from assisting with federal [immigration enforcement] efforts"); City of Philadelphia v. Sessions, 280 F. Supp. 3d 579, 651 (E.D. Pa. 2017) (finding Philadelphia likely to succeed in a Tenth Amendment–based challenge to the federal government's efforts to compel their assistance with immigration enforcement), aff'd in part, rev'd in part, City of Philadelphia v. Att'y Gen. of the U.S., 916 F.3d 276, 292 (3d Cir. 2019); N.Y. Att'y Gen., Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions 7 (2017), https://ag.ny.gov/sites/default/files/sanctuary_guidance_and_supplements.pdf [https://perma.cc/QPK8-LUJW] (discussing the limits that the Tenth Amendment imposes on the federal government's demands that states and localities provide assistance with immigration enforcement).

356. See Mikos, supra note 6, at 154–59, 171. More recently, Professor Bridget Fahey provided additional reasons why the anticommandeering rule applies to data-sharing, arguing that data is a governmental resource that requires voluntary surrender and that opting to surrender data is subfederal policymaking. See Fahey, supra note 6, at 1062.

357. *Printz*, 521 U.S. at 936 (O'Connor, J., concurring); see also Mikos, supra note 6, at 138–39.

anticommandeering rule prohibits, reasoning that those information demands did not infringe on state sovereignty because they imposed little economic or political burden on subfederal governments' gathering of that information anyway.[358] As Mikos pointed out, federal subpoenas requiring state and local employees to gather and report information *do* obligate them to enforce—because subpoenas essentially force them to investigate—and raise the very concerns that impelled the decision in *Printz*.[359] Nevertheless, courts have continued to suggest that there may be a distinction between at least some of ICE's information demands and the federally compelled "enforcement" that *Printz* forbids.[360]

Perhaps because of this case law, Tenth Amendment challenges to federal administrative subpoenas are rare. In other high-profile clashes over federal administrative subpoenas directing states to turn over confidential information about their residents, states have not even raised this claim.[361] Nor did most sanctuary cities confronted with immigration subpoenas; even those that came out punching when initially confronted with the Trump-era subpoenas ultimately backed down instead of resting on this defense.[362] And in *ICE v. Gomez*—the single case in which the issue *was* squarely decided—the court rejected the municipal defendant's (Denver's) anticommandeering defense.[363] The *Gomez* court recognized that, in some circumstances, information demands could theoretically raise commandeering concerns.[364] But its decision turned on the scope of the agency's information demands. The court distinguished the agency's limited, "sterile request for specific identifying information" in that case

358. See, e.g., Freilich v. Upper Chesapeake Health, Inc., 313 F.3d 205, 214 (4th Cir. 2002) (holding that a federal law which merely required states to forward information did not violate the Tenth Amendment); Pierson v. Orlando Reg'l Healthcare Sys., Inc., 619 F. Supp. 2d 1260, 1295 (M.D. Fla. 2009) (same), aff'd, 451 F. App'x 862 (11th Cir. 2012); United States v. Brown, No. 07 Cr. 485 (HB), 2007 WL 4372829, at *6 (S.D.N.Y. Dec. 12, 2007) (same), aff'd on other grounds, 328 F. App'x 57 (2d Cir. 2009). But see City of Chicago v. Sessions, 321 F. Supp. 3d 855, 871 (N.D. Ill. 2018) (declining to find an information-sharing exception to the anticommandeering doctrine based on *Printz*'s dicta), aff'd sub nom. City of Chicago v. Barr, 961 F.3d 882 (7th Cir. 2020).

359. See Mikos, supra note 6, at 154, 158.

360. See, e.g., New York v. Dep't of Just., 951 F.3d 84, 114 (2d Cir. 2020) (noting but declining to decide this open question); Immigr. & Customs Enf't v. Gomez, 445 F. Supp. 3d 1213, 1217 (D. Colo. 2020) (finding that a "sterile" ICE demand for "specific" information did not violate the anticommandeering rule but also noting that any demands for "ongoing cooperation" would present a different issue).

361. See, e.g., Dep't of Just. v. Utah Dep't of Com., No. 16-cv-611-DN, 2017 WL 3189868, *1, *7 (D. Utah July 27, 2017) (involving a DEA subpoena for patients' medical prescription records in a state database); Or. Prescription Drug Monitoring Program v. Drug Enf't Admin., 998 F. Supp. 2d 957, 961–62 (D. Or. 2014) (same), rev'd, 860 F.3d 1228 (9th Cir. 2017); Complaint ¶¶ 1–18, *Or. Prescription*, 998 F. Supp. 2d 957 (No. 12-cv-02023), 2012 WL 5898554 (same).

362. See CAPHQ Log, supra note 179 (showing widespread compliance); supra note 4.

363. See 445 F. Supp. 3d at 1217.

364. Id.

from the "ongoing cooperation" that the anticommandeering rule prohibits.[365] It continued that "[i]f such subpoenas become a regular occurrence, then some day a federal court may have a more difficult decision," but made clear that "this is not that day. . . . [T]his is a unique process in the history of ICE."[366] Thus, the court drew a constitutional line between a recurring practice of federal information demands and what it believed to be a discrete, limited instance.

But this study indicates that ICE uses the immigration subpoena regime to make precisely the type of enforcement demands that *Printz* forbids. As described above, it shows that the agency has used these subpoenas, across the country and in large numbers in some jurisdictions, to demand significant assistance from state and local governments.[367] Part II documents how ICE routinely uses these subpoenas to force state and local employees to conduct wide-ranging searches of databases and local files for "any and all records" that might establish certain facts, determine whether these employees believe the documents establish those facts, and even play surveillance and lookout roles for ICE arrests.[368] It also shows ways that ICE's demands can harm state and local government, because ICE uses these subpoenas to compel information from schools, foster and health care agencies, licensing boards, and other governmental actors that play vital roles in their communities.[369] Specifically, it demonstrates how subpoenas can create major impediments to subfederal governments' ability to carry out core local functions, particularly for low-income communities that depend on these services the most.[370] In short, the data show that ICE has routinely deployed these subpoenas to compel state and local employees to do the same resource-intensive research and analysis—with the same sovereignty- and accountability-infringing effects—that the Court forbade in *Printz*. (And in some cases, ICE has gone even further by forcing subfederal employees to actively facilitate federal arrests.[371]) As a result, this examination offers the very facts that the *Gomez* litigants were missing—facts which the *Gomez* court suggested would present a serious Tenth Amendment question—and aligns these subpoenas with the federal demands found unlawful in *Printz*.

Of course, since *Printz*, the Court has clarified that not every act that requires states and localities to play some role in federal enforcement runs afoul of the Tenth Amendment.[372] As it explained most recently, the

365. Id.

366. Id.

367. See supra section II.B.

368. See supra section II.B.

369. See supra section II.B.

370. See Khiara M. Bridges, The Poverty of Privacy Rights 9–10, 67 (2017) (describing the relationship between poverty, government assistance, and privacy rights).

371. See supra section II.B.1.

372. See, e.g., Murphy v. NCAA, 138 S. Ct. 1461, 1478–79 (2018) (explaining that the doctrine does not apply "when Congress evenhandedly regulates an activity in which both

anticommandeering doctrine does not apply when the federal government "evenhandedly regulates an activity in which both States and private actors engage."[373] At first blush, this might seem to eliminate the commandeering concerns here, as the immigration subpoena statute appears to sweep broadly when it comes to subpoena recipients, and ICE in fact issues subpoenas to state, local, and private entities alike. But this study demonstrates that ICE has used its power against these entities in very different ways. As discussed in Part II, ICE organized and launched public and internal campaigns focused exclusively on the use of these subpoenas against state and local entities, encouraging and creating a unique system to facilitate their use against sanctuary jurisdictions. ICE also uses subpoenas to obtain information and assistance from state and local government entities in a way that generally imposes far more burdensome demands, requires more active investigation assistance, and intentionally thwarts state and local policies of declining to participate in federal enforcement.[374] In other words, it documents ICE's intention and broad success in using these subpoenas to do what Professor Fahey has convincingly argued is prohibited commandeering under *Printz*: compelling information to undercut subfederal policymaking regarding when and how to share data.[375] And finally, Part II indicates that these subpoenas to states and localities are very different when it comes to volume: They comprise the overwhelming majority of the subpoenas that at least some field offices issue, and at least one field office makes initiating the subpoena process mandatory for a large category of removal cases.[376] In short, this study shows that, as a matter of policy and practice, ICE does not use its subpoena power evenhandedly against subfederal versus private entities.

Ultimately, courts may not need to decide the precise contours of the anticommandeering rule for each and every subfederal government subpoena. Given that the immigration statute does not specify that it permits the federal government to subpoena subfederal entities and that the Supreme Court requires an "unmistakably clear" statement in the statutory text for federal legislation to be considered binding on states,[377]

States and private actors engage"); Reno v. Condon, 528 U.S. 141, 143 (2000) (holding that a federal law regulating the disclosure and resale of drivers' personal information by states did not violate the doctrine because it was generally applicable and regulated states only as owners of databases).

373. *Murphy*, 584 S. Ct. at 1478–79.

374. To put this in the language of what Professors Heather Gerken and Jessica Bulman-Pozen have termed "uncooperative federalism," this subpoena initiative was specifically launched to quell the productive "state-centered dissent" that subfederal entities have expressed through sanctuary laws and policies. See Jessica Bulman-Pozen & Heather K. Gerken, Uncooperative Federalism, 118 Yale L.J. 1256, 1259 (2009); see also infra note 382.

375. Fahey, supra note 6, at 1062.

376. See 2023-ICLI-00031, at 426 (requiring that officers, upon rejection of an immigration detainer, begin the process to issue an immigration subpoena).

377. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

courts may be able to avoid the commandeering concerns by simply construing the subpoena statute to *not* authorize ICE-issued subpoenas to states and localities.[378] Or, considering the multiple other indications that Congress constructed the Immigration and Nationality Act to avoid this type of commandeering problem,[379] courts could follow the Supreme Court's approach in *United States v. Minker* and construe the immigration subpoena provision to not apply to subfederal governments in light of this statutory structure.[380] After all, in crafting the provisions addressing state and local interactions with the immigration enforcement agency, Congress made clear that the INA permitted *willing* states and localities to assist (under federal control), but that it was not requiring—or authorizing the federal agency to compel—information, investigation, or other enforcement assistance from states or localities.[381] This anticommandeering interpretation may be novel, but it is supported by the statutory text, context, and current doctrine, and it would avoid the serious constitutional concerns raised here. But regardless of whether this question is resolved on constitutional or statutory grounds, this study

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378. See, e.g., Nixon v. Mo. Mun. League, 541 U.S. 125, 140 (2004) (interpreting the statute to avoid federal preemption of a state telecommunication regulation in the absence of a clear statutory statement to the contrary); Nina A. Mendelson, A Presumption Against Agency Preemption, 102 Nw. U. L. Rev. 695, 699 (2008) ("We should not assume that Congress authorized a federal agency to preempt state law unless that authority is clearly delegated.").

379. For example, consider 8 U.S.C. § 1373(a) (2018), which explicitly governs communication between state and local governments and federal actors. This section bars states and localities from adopting any law intended to restrict state and local employees from sharing two discrete types of information (citizenship or immigration status information) with the federal government. See id. But Congress pointedly chose not to mandate that states and localities provide immigration status—or any—information, and the government's current construction of the subpoena statute would render § 1373(a) superfluous. After all, if Congress had thought that, simply by signing a subpoena form, the federal enforcement agency could force state and local actors to provide citizenship and immigration status information regardless of any state or local prohibitions on disclosure, there would have been little point in enacting § 1373(a). Similarly, consider 8 U.S.C. § 1357(g) (2018), which governs the "[p]erformance of immigration officer functions" by state and local employees. This provision authorizes agreements between ICE and subfederal government actors that permit subfederal officers to perform certain immigration enforcement functions. See id. It shows that Congress created a scheme to allow willing state and local officers to assist with enforcement (subject to federal direction and control) while going out of its way to dispel any suggestion that states or localities could be compelled to participate. Congress's evident desire to avoid these federalism concerns is even more understandable because it was considering these provisions just as *Printz* went to the Supreme Court. Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), cert. granted sub nom. Printz v. United States, 518 U.S. 1003 (1996) (granting certiorari on June 17, 1996); Printz v. United States, 854 F. Supp. 1503, 1506 (D. Mont. 1994); H.R. 3610, 104th Cong. (1996) (proposing amendments to § 1357(g)).

380. See supra note 101 and accompanying text.

381. See supra note 372 and accompanying text.

reveals an important constitutional question with implications in the immigration regime and beyond.[382]

B. *Privacy, Vindicable Rights, and Notice*

While the federalism implications of the immigration subpoena regime are profound, state and local governments are not the only ones with underappreciated rights at stake. This Article's examination of the immigration subpoena regime also reveals constitutionally protected privacy rights held by immigration subpoena targets and shows how the agency's subpoena practices may—and in some cases almost certainly do—violate the Fourth Amendment in previously unrecognized ways.

On some level, the idea that someone whose personal information is being compelled would have certain privacy rights may sound unremarkable. It seems intuitive since their personal information is on the line. But in a world in which most of the personal information that the government seeks is held by third parties—schools, cell service companies, employers, and more—that assumption would be wrong.[383] That's because decades ago, the Supreme Court concluded that the subjects of personal records lack Fourth Amendment–protected privacy interests in even sensitive information when that information was retained by third parties.[384] And courts have adhered to this idea—known as the "third-party doctrine"—for decades, even as technology has radically changed the amount of personal data that third-party record holders collect and retain.[385]

The third-party doctrine has shaped the modern administrative subpoena landscape. This concept—that the people whose personal records are at stake have no constitutionally protected privacy rights in information held by third parties—is the very reason that courts have upheld subpoena schemes that don't provide notice to the subject of the records. Specifically, just after endorsing the third-party doctrine, the Supreme Court considered a case challenging an agency's failure to notify the subject of the subpoenaed records that it was demanding their

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382. It also adds to the literature on uncooperative federalism by offering these subpoenas as an example of the blunt force commandeering that "stifle[s]" rather than generates productive state dissent. See Charles W. Tyler & Heather K. Gerken, The Myth of the Laboratories of Democracy, 122 Colum. L. Rev. 2187, 2237–38 (2022) (recognizing that "[s]ome forms of commandeering . . . stifle state experiments that countermand federal policy" and arguing for a more "calibrated" commandeering doctrine).

383. See Slobogin, Privacy, supra note 39, at 825–26 (noting the general lack of Fourth Amendment protection "for personal records held by third parties").

384. See id. at 824–25; see also Smith v. Maryland, 442 U.S. 735, 743–44 (1979) (finding no Fourth Amendment protection for information held by a third-party phone company); United States v. Miller, 425 U.S. 435, 443 (1976) (same for financial records held by a bank).

385. See, e.g., United States v. Gayden, 977 F.3d 1146, 1152 (11th Cir. 2020) (finding no protection for a doctor's prescribing records disclosed via an automated "computerized tracking system" to a third party); United States v. Caira, 833 F.3d 803, 806–07 (7th Cir. 2016) (same for IP addresses shared automatically with Microsoft upon logging into email).

personal information.[386] Relying exclusively on the third-party doctrine, the Court held that the Fourth Amendment did not require the agency to notify the subject of the records that it was compelling their personal information because they would have no constitutionally protected privacy rights to vindicate in a challenge anyway.[387] Thus, the belief that subjects of the records being compelled have no constitutional rights to vindicate in challenges to third-party subpoenas has not only dramatically limited the universe of actors who could contest these demands, it has also shaped procedural protections within administrative subpoena practice.

But more recent case law has changed the calculus. Even as it seemed well established that people lack constitutionally protected privacy interests in information retained by third parties, courts began limiting the reach of that doctrine by recognizing that subpoenas to third-party record holders that seek particularly personal information from someone who is not under investigation fall into a different category.[388] That is, courts recognized that people who are not an investigation's target "have a greater 'reasonable expectation of privacy'" under the Fourth Amendment than do the investigation's targets in some cases and, consequently, unique constitutional bases to challenge third-party subpoenas.[389]

In 2018, the scope of the third-party doctrine changed far more dramatically when the Supreme Court decided *Carpenter v. United States*.[390] In *Carpenter*, the Supreme Court disavowed the longstanding notion that people necessarily lose constitutional privacy interests simply because the information is held by a third party.[391] It made clear that the third-party doctrine would continue to apply in many contexts, but recognized that people—even targets of investigations—can retain constitutionally protected privacy rights in information held by third parties and identified a number of factors—including the knowing and voluntary nature of the information-sharing—for determining when they do.[392] And while the question presented in *Carpenter* focused on what the Fourth Amendment required of an agency seeking a person's cell-site (digital location) information from telecommunication providers, it has been clear from the

386. Sec. & Exch. Comm'n v. Jerry T. O'Brien, Inc., 467 U.S. 735, 737–38, 751 (1984).

387. Id. at 743, 751.

388. See McVane v. Fed. Deposit Ins. Corp. (In re McVane), 44 F.3d 1127, 1137 (2d Cir. 1995) (finding that a target's family members who are not involved in the object of an inquiry have a greater privacy interest in their own personal records than does the investigation's target); see also Fed. Deposit Ins. Corp. v. Garner, 126 F.3d 1138, 1144 (9th Cir. 1997) (adopting but distinguishing *McVane* because the agency's subpoena here provided "explicit allegations" linking the target's family's information to the alleged misconduct).

389. *In re McVane*, 44 F.3d at 1137 (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)).

390. 138 S. Ct. 2206, 2223 (2018).

391. Id.

392. Id. at 2220.

outset that its holding would apply more broadly, including in the administrative subpoena context.[393]

Of course, these newer recognitions of constitutionally protected privacy interests are fact specific and won't bear equally on every subpoena or scheme. But this Article's look inside the immigration subpoena regime reveals their import here; it shows new, highly consequential Fourth Amendment questions and even violations of recognized Fourth Amendment rights.

First, this examination reveals that ICE has used subpoenas to seek people's personal information to conduct enforcement against their family members.[394] As described in Part II, it shows that ICE uses subpoenas to seek children's personal information from schools to target their parents and people's personal information from employers to target their spouses—and, given the limits of the records produced, this tactic might be even more common than the available records show. Thus, understanding how and why ICE uses these subpoenas demonstrates that at least some of the people whose information ICE demands via subpoena likely "have a greater 'reasonable expectation of privacy'" in the records at issue,[395] and, consequently, significant, previously unrecognized constitutional rights at stake in these subpoenas.

Second, this examination shows that ICE has used these subpoenas to obtain information that, under *Carpenter*, is likely—and in some cases almost certainly—constitutionally protected as well.[396] For example, it shows that ICE used these subpoenas to obtain cell-site location information from telecommunications providers before *Carpenter* found it unconstitutional to do so without a judicial warrant, and at least once even afterward, when it was clear that doing so violated the Fourth Amendment.[397] The records also show that ICE *still* uses these subpoenas to obtain targets' location data from telecommunications providers—

393. Id. at 2234 (Kennedy, J., dissenting) (arguing that the majority "calls into question the subpoena practices" of many investigative bodies); see also Matthew Tokson, The Aftermath of *Carpenter*: An Empirical Study of Fourth Amendment Law, 2018–2021, 135 Harv. L. Rev. 1790, 1800, 1829 (2022) (arguing that *Carpenter* opens the door to challenge "pervasive government surveillance" and discussing the application of *Carpenter* to cases involving subpoenas).

394. See supra sections II.B.1–.B.4.

395. McVane v. Fed. Deposit Ins. Corp. (In re McVane), 44 F.3d 1127, 1137 (2d Cir. 1995) (quoting Katz v. United States, 389 U.S. 347, 360 (1967)); see also, e.g., Fed. Deposit Ins. Corp. v. Garner, 126 F.3d 1138, 1144 (9th Cir. 1997) (adopting *McVane*'s standard but distinguishing its facts).

396. Although *Carpenter* was a criminal case, it has been applied it in the context of civil matters as well. See, e.g., Naperville Smart Meter Awareness v. City of Naperville, 900 F.3d 521, 527 (7th Cir. 2018). This is logical in the context of an investigative tool, considering the often vanishingly thin line between civil and criminal offenses and since, in an investigation, the investigator may not know whether they will bring civil or criminal charges.

397. See supra section II.B.4.

including through phone pings, which reveal information that multiple courts have already found is constitutionally protected under *Carpenter*.[398] And the records show similar *Carpenter*-based questions outside the telecommunications sphere. For instance, ICE has used subpoenas to order primary schools and education departments to turn over the very personal information that children are required to provide when enrolling (and when enrollment was required by states' compulsory attendance laws).[399] Accordingly, given *Carpenter*'s focus on whether disclosure to the third-party record holder was truly voluntary and the data showing that ICE has compelled information from schools that students are legally obligated to provide, there is good reason to believe that students targeted by ICE subpoenas retain constitutionally protected privacy interests in the records demanded as well.[400]

This is not to say that all targets of immigration subpoenas have constitutionally protected privacy interests in the records that ICE seeks; many surely will not. But some immigration subpoenas clearly do implicate these rights.[401] And this, in turn, has important implications for the targets of immigration subpoenas and for subpoena procedure. It means that subpoena targets may have constitutional bases to object to subpoenas

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398. See, e.g., Commonwealth v. Reed, 647 S.W.3d 237, 246–48 (Ky. 2022) (holding that real-time cell-site data obtained by "pinging" a phone is constitutionally protected); State v. Sylvestre, 254 So. 3d 986, 991 (Fla. Dist. Ct. App. 2018) (same).

399. Compare 2021-ICLI-00047, at 149, 448, 451, 498 (subpoenas to schools for birth certificates, identity documents, addresses, contact information, information on minors' parents, "responsible adults," extended family, and more), with Registration Requirements, Syracuse City Sch. Dist., https://www.syracusecityschools.com/districtpage.cfm?pageid=1657 [https://perma.cc/6KEM-MMXZ] (last visited Sept. 14, 2024) (requiring submission of extensive documentation as part of school registration), and Pre-Registration Checklist, NYC Dep't of Educ., https://www.schools.nyc.gov/docs/default-source/default-document-library/pre-registration-checklist [https://perma.cc/BG9D-JDUE] (last visited Sept. 14, 2024) (same), and N.Y. Educ. Law § 3205 (McKinney 2024) (requiring school attendance by minors age six-to-sixteen).

400. Of course, the voluntary nature of the information-sharing is not the only factor in determining Fourth Amendment privacy interests; the sensitivity of the information shared is another important factor. See Matthew Tokson, The Emerging Principles of Fourth Amendment Privacy, 88 Geo. Wash. L. Rev. 1, 13–15 (2020) [hereinafter Tokson, Emerging Principles] (describing "the intimacy of the place or thing targeted by the government" as an important factor). But school and some telecommunication records are considered private or quasi-private even to a general population. See Christopher Slobogin, Government Data Mining and the Fourth Amendment, 75 U. Chi. L. Rev. 317, 337 (2008) (drawing on a study of the perceived intrusiveness of different types of investigation). And that information would likely be considered even more intimate in communities disproportionately affected by policing and enforcement. See, e.g., Jain, Interior Structure, supra note 250, at 1486, 1509–10 (describing the significant extent to which targeted communities seek to avoid sharing personal information with external entities).

401. As Professor Tonja Jacobi and attorney Dustin Stonecipher have made clear, *Carpenter*'s reach is still emerging. See Tonja Jacobi & Dustin Stonecipher, A Solution for the Third-Party Doctrine in a Time of Data Sharing, Contract Tracing, and Mass Surveillance, 97 Notre Dame L. Rev. 823, 863–66 (2022) (arguing that the decision "raises more questions than it answers").

issued to third parties, empowering them to affirmatively challenge disclosure even if the record holders themselves do not. It also means that the central reason that agencies are excused from notifying targets about subpoenas of their personal records—the assumption that they have no constitutional rights to vindicate[402]—does not necessarily hold true in the immigration space. This, coupled with the structural obstacles that prevent violations of these privacy rights from being remedied in the immigration system and the agency's inability to prevent those violations,[403] provides reason to consider imposing a default requirement of notifying the targets of immigration subpoenas and to rethink the obstacles that make it so difficult for targets to raise and vindicate these rights. These changes would, of course, increase the resources that the agency would have to expend when using these subpoenas, but that could be beneficial too: As Professor Matthew Tokson has pointed out, higher-cost tools for compelling surveillance (and presumably other information) are, as particularly relevant here, "more likely to be narrowly applied," more judiciously used, and, due to their "greater budgetary and political salience," less likely to be abused.[404]

C. *Free Speech and Restraints on Restraints*

Of course, judicial review is not the only way to ensure that administrative investigations stay within bounds. As Professors Alan Rozenshtein and Rebecca Wexler have shown, administrative subpoena recipients have played a powerful role in other contexts by sounding the alarm and pushing for constraints through advocacy within and without the judicial domain.[405] But this dynamic—and the pressure this public pushback generates—has not played out the same way in the immigration subpoena space. This may be partially due to the fact that, unlike the tech giants who have played this role in other arenas,[406] the small businesses and local government entities subpoenaed by ICE have far fewer resources

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402. See Sec. & Exch. Comm'n v. Jerry T. O'Brien, Inc., 467 U.S. 735, 741–44 (1984) (finding that target had no Fourth, Fifth, or Sixth Amendment rights to vindicate in a subpoena challenge).

403. See supra section I.C; see also supra Part II.

404. Tokson, Emerging Principles, supra note 400, at 23–24; see also Michael C. Pollack, Taking Data, 86 U. Chi. L. Rev. 77, 83 (2019) (arguing that imposing costs for privacy invasions can force the government to internalize "privacy-related externalities generated by" investigations and make their efforts more "thoughtful" and "tailor[ed]").

405. Rozenshtein, supra note 36, at 149–54 (surveillance intermediaries); Rebecca Wexler, Warrant Canaries and Disclosure by Design: The Real Threat to National Security Letter Gag Orders, 124 Yale L.J. Forum 158, 164–73 (2014), https://www.yalelawjournal.org/pdf/WexlerPDF_xpc2ib9k.pdf [https://perma.cc/K9NN-A5EZ] (tech companies).

406. See, e.g., In re Nat'l Sec. Letter, 33 F.4th 1058, 1069 (9th Cir. 2022) (involving a challenge brought by, inter alia, CREDO Mobile); At CREDO, Your Privacy Is Not for Sale, CREDO Mobile, https://blog.credo.com/at-credo-your-privacy-is-not-for-sale/ [https://perma.cc/6HMZ-KSBC] (last visited Sept. 14, 2024).

and, often, incentives to resist.[407] But, as Part II showed, a significant proportion of subpoena recipients cannot play this role *or* notify targets to allow them to advocate for themselves because the recipients are indefinitely subject to ICE-imposed gag orders.[408]

This practice is, as described, ultra vires, but it also impinges on core First Amendment rights. The First Amendment only permits restrictions "'abridging the freedom of speech'" in certain instances and provided they can survive the appropriate level of scrutiny.[409] When the government restricts speech based on its content, that restriction only passes constitutional muster if it is "narrowly tailored to serve compelling state interests."[410] And even if the government could constitutionally impose a particular content-based restriction, it generally may not do so by imposing "prior administrative restraints."[411] Such ex ante restraints on speech are "presumptively unconstitutional"[412] and only permitted if implementing officials have "narrow, objective, and definite standards"[413] to guide them and if the system contains "procedural safeguards that reduce the danger of suppressing constitutionally protected speech."[414] Such safeguards include, as relevant here, the availability of "expeditious judicial review" and the assurance that any pre-review restraint be brief.[415]

The litigation surrounding the national security–related administrative subpoenas (the NSLs discussed above) shows how this analysis applies here, in the context of administrative gag orders and subpoenas. The early NSL gag orders, like ICE-issued gag orders, imposed indefinite, ex ante restrictions on recipients' speech, indefinitely forbade recipients from speaking to anyone about the subpoena or accompanying gag orders, and lacked any mechanism for judicial review.[416] And every court to consider

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407. Subfederal law enforcement may also have competing interests. For example, limits on federal techniques could easily wind up limiting subfederal investigations, or subpoenas could offer helpful cover for subfederal officers to circumvent subfederal limits on information sharing. Still, in at least some cases, subpoena recipients are inclined to speak up and doing so—even nonpublicly—may dramatically affect ICE's practices. See infra note 458 and accompanying text.

408. See supra section II.C.2.

409. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (quoting U.S. Const. amend. I).

410. Id. (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115, 118 (1991)).

411. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

412. Dawn C. Nunziato, First Amendment Protections for "Good Trouble", 72 Emory L.J. 1187, 1192 (2023).

413. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975) (internal quotation marks omitted) (quoting Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969)).

414. Id. at 559 (citing *Bantam Books*, 372 U.S. at 71).

415. Thomas v. Chi. Park Dist., 534 U.S. 316, 321 (2002) (internal quotation marks omitted) (quoting FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 227 (1990) (plurality opinion)).

416. See *Doe I*, 334 F. Supp. 2d 471, 476, 492 (S.D.N.Y. 2004) (describing these features of one of the then-existing NSL statutes); National Security Letter from Marion E. Bowman,

these NSL gag orders found that these restrictions on speech violated core First Amendment rights.[417] Specifically, courts concluded that these NSL gag orders were subject to strict scrutiny because they were a prior restraint on speech, a content-based restriction, or both.[418] Moreover, these courts found, these all-encompassing gag orders flatly failed that test: Given the blanket prohibition on speech, indefinite duration, and dearth of opportunities for judicial review, they lacked adequate safeguards and were not narrowly tailored to even legitimate government interests in national security.[419] In addition, one court explained, the harms of this constitutional violation extended well beyond those who were gagged and seriously undermined the First Amendment's purpose of "protect[ing] the free discussion of governmental affairs."[420]

Because the immigration subpoena gag orders exposed through this study are virtually identical to the early NSL gag orders in terms of their all-encompassing scope, indefinite nature, and preclusion of judicial review, they almost certainly violate the First Amendment in the same ways. Indeed, the outcome is even clearer here, as the government cannot seriously claim the same interest in restricting speech or risk of harm in these civil immigration matters as in the NSL realm.[421] Moreover, as Professor Hannah Bloch-Wehba described in the context of NSLs, these indefinite gag orders do not just permanently bar constitutionally protected speech, they impinge on expressive, associational, religious, and even media rights as well.[422] Thus, this examination has revealed yet another way that this regime raises serious constitutional concerns, one that has significant consequences for individual liberties, is likely ongoing, and has undermined structural constraints in a significant way.[423]

Senior Couns., Nat'l Sec. Affs., Off. of the Gen. Couns., FBI (2004) (on file with the *Columbia Law Review*) (prohibiting disclosure "to any person").

417. See, e.g., *Doe I*, 334 F. Supp. 2d at 476.

418. See In re Nat'l Sec. Letter, 33 F.4th 1058, 1072 (9th Cir. 2022) (content-based); *Doe CT*, 386 F. Supp. 2d 66, 73–75, 82 (D. Conn. 2005) (prior restraint); *Doe I*, 334 F. Supp. 2d at 511–12 (both) .

419. *Doe CT*, 386 F. Supp. 2d at 82; *Doe I*, 334 F. Supp. 2d at 524.

420. *Doe CT*, 386 F. Supp. 2d at 72 (internal quotation marks omitted) (quoting Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 838 (1978)); id. at 81.

421. National security violations are generally understood to involve significant risk to the nation's safety, for example terrorism or espionage. See DOJ, Just. Manual, § 9-90.000 (2018) (discussing the scope of national security prosecutions and work). Civil immigration violations are not similarly understood; in fact, courts routinely exercise their discretion to grant relief to people who are removable, including those ICE detains. See Speeding Up the Asylum Process Leads to Mixed Results, Transactional Recs. Access Clearinghouse (Nov. 29, 2022), https://trac.syr.edu/reports/703 [https://perma.cc/G6KB-SB2F] (showing grant rates for asylum (a discretionary form of relief) by custody status).

422. Hannah Bloch-Wehba, Process Without Procedure: National Security Letters and First Amendment Rights, 49 Suffolk U. L. Rev. 367, 381 (2016).

423. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587–88 (1980) (Brennan, J., concurring in the judgment) (describing the First Amendment's "structural" role).

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Fleshing out the constitutional implications of the modern immigration subpoena regime shows the magnitude of the harms that the agency's subpoena practices impose on targets, communities, subfederal governments, and the public. It shows the myriad and widely distributed costs of vesting an enforcement agency with such expansive powers in a system with few remedies or restraints. But importantly, it offers opportunity too. It breaks new ground by illuminating paths toward change, as these new constitutional bases for challenge can empower impacted parties to make judicial review meaningful and bring this power into compliance with critical, long-neglected constraints.

IV. BEYOND IMMIGRATION SUBPOENAS

It is easy to read the preceding account as an immigration story, as part of a larger narrative about ICE or, perhaps, the costs of treating immigration procedure as simultaneously ordinary (regulatory adjudication meriting no special protections) and exceptional (immune to many rights claims and constraints). But, as this Part shows, this first-of-its-kind account of how an agency operationalizes its subpoena power provides lessons that transcend the immigration realm. First, this fuller view raises important questions about trans-substantive subpoena doctrine, in particular the presumption of regularity that plays such a significant role in the administrative subpoena space. Specifically, it shows why courts should recognize that, when presented with evidence of systemic irregularities, they should not presume regularity. Second, this fine-grained account of agency practice contributes to the growing body of scholarship on internal administrative law.[424] It shows just how little litigation, statutes, and even agency policy may tell us about how agencies actually wield authority day to day, and it offers important insights for studying and shaping administrative power on the ground.[425] Third, it suggests some ways to impose limits on these practices outside the law.

A. *Presumption of Regularity*

The presumption of regularity is a sprawling and powerful—if undertheorized—principle of deference to agency decisionmaking.[426] It

424. See, e.g., Gillian E. Metzger & Kevin M. Stack, Internal Administrative Law, 115 Mich. L. Rev. 1239, 1266 (2017); Christopher J. Walker & Rebecca Turnbull, Operationalizing Internal Administrative Law, 71 Hastings L.J. 1225, 1229 (2020).

425. See, e.g., Nicholas R. Parrillo, Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries, 36 Yale J. on Regul. 165, 167, 170 (2019) ("[L]itigation is only the tip of the iceberg. The iceberg itself is administrative practice . . . ." (footnote omitted)); Walker & Turnbull, supra note 424, at 1229 (arguing for increased attention to internal agency procedures and practices).

426. See Aram A. Gavoor & Steven A. Platt, In Search of the Presumption of Regularity, 74 Fla. L. Rev. 729, 731, 733, 748, 757 (2022) [hereinafter Gavoor & Platt, Presumption]

allows courts to presume that executive officers are acting lawfully in undertaking a wide range of administrative actions, and it "heavily weigh[s] in favor of the government in administrative law litigation."[427] It does so by dramatically limiting inquiry into administrative officers' decisionmaking processes and motivations, cutting off litigants' access to evidence of agency decisionmaking and narrowing the scope of judicial review.[428] As a result, it insulates agency decisionmaking—especially in the context of enforcement[429]—from scrutiny by the judiciary and any external actor.

This presumption rests heavily on courts' confidence in administrators' discipline, conscience, and competence.[430] And although the presumption of administrators' good faith may be technically distinct,[431] it often bleeds into the concept of regularity too.[432] This makes some sense, because a disciplined and competent execution of the law frequently requires an intention to faithfully apply it, that is, to act in good faith.[433] But this presumption is not based on any sort of study of administrators' faith or agency decisionmaking. And though initially applied to administrators and agency action in a very different era of the

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(arguing that there are at minimum fourteen unique ways that courts have applied the presumption); Z. Payvand Ahdout, Enforcement Lawmaking and Judicial Review, 135 Harv. L. Rev. 937, 957 (2022) (noting that the presumption of regularity is "lesser-studied"); Note, The Presumption of Regularity in Judicial Review of the Executive Branch, 131 Harv. L. Rev. 2431, 2432 (2018) ("The Court often invokes the [presumption of regularity] without elaboration . . . ."). Important exceptions include some of the work cited here.

427. Gavoor & Platt, Presumption, supra note 426, at 733.

428. See id. at 733–34.

429. See Eloise Pasachoff, Executive Branch Control of Federal Grants: Policy, Pork, and Punishment, 83 Ohio St. L.J. 1113, 1191 (2022) (noting that the presumption has "particular bite in the enforcement context").

430. See Gavoor & Platt, Presumption, supra note 426, at 745; see also United States v. Armstrong, 517 U.S. 456, 464 (1996) (discussing the presumption in the context of a challenge to prosecutorial decisionmaking); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (noting that a searching inquiry "into the mental processes of administrative decisionmakers is usually to be avoided" (citing United States v. Morgan, 313 U.S. 409, 422 (1941))); *Morgan*, 313 U.S. at 421 (explaining that administrative officers may be presumed to be of "conscience and intellectual discipline, capable of judging a particular controversy fairly").

431. See Gavoor & Platt, Presumption, supra note 426, at 750; see also Tecom, Inc. v. United States, 66 Fed. Cl. 736, 761–62 (2005) (discussing the history of the presumption of good faith).

432. *Tecom*, 66 Fed. Cl. at 762 (noting that the "presumptions of regularity and of good faith" come together "in cases such as *Armstrong*"); *Armstrong*, 517 U.S. at 464; see also, e.g., United States v. Lewis, 517 F.3d 20, 25 (1st Cir. 2008) (treating the presumption of good faith as part of the presumption of regularity); Fed. Trade Comm'n v. Invention Submission Corp., 965 F.2d 1086, 1091 (D.C. Cir. 1992) (finding that both presumptions can be rebutted with evidence of bad faith); Fed. Trade Comm'n v. Owens-Corning Fiberglas Corp., 626 F.2d 966, 975 (D.C. Cir. 1980) (same).

433. *Armstrong*, 517 U.S. at 464; *Tecom*, 66 Fed. Cl. at 762.

administrative state,[434] this presumption has grown along with it, extending to the issuance of administrative subpoenas and a range of other agency officers and actions.[435]

The presumption of regularity has left a heavy imprint in the administrative subpoena space.[436] It has been important in decisions that place onerous burdens on litigants challenging administrative subpoenas,[437] limit opportunities for discovery in challenges to administrative subpoenas,[438] and deflect concerns about the risk of agency abuse.[439] Of course, it is only a presumption. But the burden to rebut it is high,[440] perhaps prohibitively so in the administrative subpoena context due to the short timeline for responding to subpoenas and the intense informational disadvantage that subpoena-challengers face. And this presumption appears to frequently carry the day and likely discourages many litigants from even raising challenges.[441] In brief, this assumption that administrative officers are lawfully discharging their duties makes it far more difficult or even impossible to show that they are not.

This Article shows the fallacy of this presumption in the immigration subpoena realm and raises serious questions about its application in related spaces. It depicts a regime in which agency actors—from the top

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434. See United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926) (articulating the presumption of regularity before much of the critical growth and change in the administrative state).

435. See, e.g., Gavoor & Platt, Presumption, supra note 426, at 751; supra notes 430–431 (collecting cases). But see Conley v. United States, 5 F.4th 781, 790–91 (7th Cir. 2021) (distinguishing the presumption as articulated in *Armstrong* from selective enforcement challenges to "street-level police investigations").

436. See infra notes 437–439.

437. See, e.g., *Owens-Corning Fiberglas Corp.*, 626 F.2d at 975 (reversing the district court's grant of additional protections for subpoenaed information because of the presumption of regularity to be afforded to the agency in the absence of evidence showing bad faith); Lightning Rod Mfrs. Ass'n v. Staal, 339 F.2d 346, 347 (7th Cir. 1964) (applying a presumption that the enforcement officer did their duty); Hyster Co. v. United States, 338 F.2d 183, 187 (9th Cir. 1964) (same); Am. Pharm. Ass'n v. Dep't of Just., Antitrust Div., 344 F. Supp. 9, 12 (E.D. Mich. 1971) (finding, despite plaintiff's allegations of wrongdoing, that "the court is . . . bound [by the presumption of regularity] to believe the affidavits of the Assistant Attorney General"), aff'd sub nom. Am. Pharm. Ass'n v. Dep't of Just., 467 F.2d 1290 (6th Cir. 1972).

438. See, e.g., Sec. & Exch. Comm'n v. Dresser Indus., Inc., 628 F.2d 1368, 1388 (D.C. Cir. 1980) (permitting discovery in a subpoena challenge only if the plaintiff can raise doubts about the agency's good faith); Fed. Trade Comm'n v. Match Grp., Inc., No. 1:22-mc-54 (RJL/GMH), 2023 WL 3181351, at *18 (D.D.C. May 1, 2023) (same).

439. See, e.g., United States v. Zuskar, 237 F.2d 528, 534 (7th Cir. 1956) (finding that, though it "would be unrealistic to ignore [the] possibility that . . . subpoenas could become a device for pre-viewing and turning up" suspects, the presumption of regularity supports official acts).

440. The burden is often considered to require "clear evidence" that officials did not properly discharge their duties. See Gavoor & Platt, Presumption, supra note 426, at 753, 765.

441. Id. at 754.

ranks to the rank-and-file—violated the agency's rules, statutory constraints, and likely constitutional mandates. It shows widespread dysfunction, problematic exercises of discretion, and disregard for constraints in one of the only administrative subpoena regimes that has been studied in such a granular way.[442] And this vitiates the very basis of this presumption—the belief that agency officials can be presumed to act with discipline, competence, conscience, and good faith. Rather, it supports the assumption that there's a significant risk that administrators *have not* properly discharged their duties in the immigration and perhaps other subpoena regimes.

Of course, a single study does not mean that all administrative subpoena regimes should be presumed so problematic. Many regimes have more guardrails that may minimize and catch these abuses, including statutory and regulatory constraints,[443] different relationships between regulators and regulated parties,[444] and regulated parties' greater resources. But while this presumption may be justifiable when mechanisms for checks and input are more robust—especially when affected parties have greater legal resources and political power—this study suggests that it may be deeply misguided and more difficult to overcome in other, highly consequential domains.

As such, this examination offers a simple but important lesson for trans-substantive administrative subpoena doctrine: It suggests the need for a principle that, when there is evidence of systemic abuse in an agency's subpoena regime, that agency ought to lose the presumption of regularity for that scheme. After all, this presumption does not require courts to blindly defer in the face of conflicting facts,[445] and doing so would undermine the legitimacy of the presumption when it should apply. So when the data reflect widespread abuses of discretion in an agency's subpoena regime, courts should decline to afford the agency any initial presumption of regularity when it comes to its subpoena practice. This is particularly true given the time and resources that would be required of

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442. While this is the only such scholarly examination to my knowledge, some offices of inspectors general have investigated other regimes. See, e.g., Off. of Inspector Gen., DEA, A Review of the Drug Enforcement Administration's Use of Administrative Subpoenas to Collect or Exploit Bulk Data 3–4 (Mar. 2019), https://oig.justice.gov/reports/2019/o1901.pdf [https://perma.cc/U8GV-5SL7]; Off. of Inspector Gen., DHS, Management Alert—CBP's Use of Examination and Summons Authority Under 19 U.S.C. § 1509 2 (Nov. 16, 2017), https://www.oversight.gov/sites/default/files/oig-reports/OIG-18-18-Nov17.pdf [https://perma.cc/Y26F-D3LZ].

443. See supra section I.C.

444. See, e.g., Shalini Bhargava Ray, Rethinking the Revolving Door 7–10 (May 21, 2024) (on file with the *Columbia Law Review*) (unpublished manuscript) (describing some of the benefits of the "revolving door" between regulators and regulated parties in other areas of administrative enforcement).

445. Dep't of Com. v. New York, 139 S. Ct. 2551, 2573–75 (2019) ("[Courts] are 'not required to exhibit a naiveté from which ordinary citizens are free.'" (quoting United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977))).

parties attempting to rebut this presumption in individual cases.[446] Admittedly, it will not always be easy to know whether data reflecting irregularity are representative or how to weigh the trappings of regularity (e.g., guidance and systems) against evidence of problems in practice. But given the informational disadvantage that challengers face, their burden should be relatively low; this would still give agencies an opportunity to rebut, incentivize them to retain the records to do so, and at most, simply put the parties in "equipoise" when it comes to resolving the substantive challenge.[447]

The idea that a bad actor might lose the presumption of regularity is not wholly new. During the tumult of the Trump Administration, some scholars argued that the wide range of Trump-era irregularities provided strong evidence for rebutting the presumption or rethinking it entirely,[448] and at least one scholar suggested that it would warrant stripping the Trump Administration of deference "as a general matter across contexts and issues," at least until it was earned back.[449] In their seminal study of this presumption, Professors Aram A. Gavoor and Steven A. Platt resisted the notion of a "deference detention box" for particular administrative officials or actors, arguing that it lacks a limiting principle that would not politicize the judiciary, may require courts to decide issues not before them, and may not meaningfully change the standard of review.[450] But tying the loss of the presumption to a particular agency and scheme would not create the same risk of politicized judicial decisionmaking or extra-case fact finding because the determination would be task- and fact-based; it would not require courts to cast judgment on all actions of a public official or a presidential administration as a whole.

It's worth clarifying what, to Professors Gavoor and Platt's point, eliminating this presumption would actually do. For one thing, it would put the parties on a more even playing field in terms of burdens of proof

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446. It would be nearly impossible to document some of the problems described above in the short time between the receipt of a subpoena and the response deadline. Compare section II.A (documenting the years of litigation needed to obtain records), with Combined FOIA Data (showing that ICE often demanded information within three days, even "immediately" or "ASAP").

447. Michael J. Wishnie, "A Boy Gets Into Trouble": Service Members, Civil Rights, and Veterans' Law Exceptionalism, 97 B.U. L. Rev. 1709, 1771 (2017).

448. See, e.g., Ming Hsu Chen & Daimeon Shanks, The New Normal: Regulatory Dysfunction as Policymaking, 82 Md. L. Rev. 300, 353–54 (2023) (arguing that we should assume "predictable irregularity" and aim to prevent misuse of irregularities that lead to policymaking dysfunction); Leah Litman, Revisiting the Presumption of Regularity, Take Care Blog (Jan. 28, 2019), https://takecareblog.com/blog/revisiting-the-presumption-of-regularity [https://perma.cc/F53U-23KD] (identifying Trump-era irregularities that may rebut this presumption).

449. Dawn Johnsen, Judicial Deference to President Trump, Take Care Blog (May 8, 2017), https://takecareblog.com/blog/judicial-deference-to-president-trump [https://perma.cc/EH8V-TVRY].

450. Gavoor & Platt, Presumption, supra note 426, at 770.

by lifting the thumb on the scale for the agency.[451] Probably more importantly here, dispensing with this presumption would eliminate a significant obstacle to discovery for litigants challenging subpoenas.[452] To see why this matters, recall the *Gomez* litigation: the single instance in which a sanctuary jurisdiction (Denver) resisted the Trump Administration's subpoenas in court.[453] There, the court recognized that the challenged subpoenas could raise significant constitutional concerns if they were part of a larger effort to compel resources from state and local governments, but it rejected Denver's challenge because neither Denver nor the court knew that ICE was launching an initiative to use subpoenas precisely that way. Had Denver been permitted discovery that would have allowed it to uncover that information, the outcome in that case (and other sanctuary jurisdictions) might have looked very different.

To be sure, more inquiry into process would add some delay and costs to the use of some subpoenas. But that could be reduced by using the independent government investigations and audits of these schemes that the next section recommends.[454] In addition, raising the costs of these demands to some degree could have important benefits.[455] And finally, agencies' desire to streamline decisions on this question and demonstrate that they have earned a presumption is all the more reason for agencies to develop and retain evidence of practice. In sum, eliminating the presumption of regularity based on an agency's track record would have multiple practical advantages, including reducing the asymmetries that can doom meritorious subpoena challenges and increasing the odds of meaningful judicial review.

B. *Internal Administrative Law*

That said, considering the vast amount of regulatory action that is never subject to judicial review, scholars have increasingly turned to internal administrative law as a source of order and constraint.[456] As Professors Gillian Metzger and Kevin Stack explain, this source of law—the "processes, guidelines, and policy issuances" created by the agency (or the executive branch) to "structure the actions of [their] own officials"—

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451. See Wishnie, supra note 447, at 1771 (arguing that elimination of the presumption of regularity—for veterans applying for a discharge upgrade—would put the "burden of proof" in "equipoise").

452. See supra note 438 and accompanying text.

453. See supra notes 363–366 and accompanying text.

454. See John Doe, Inc. v. Mukasey, 549 F.3d 861, 879–80 (2d Cir. 2008), as modified (Mar. 26, 2009) (relying on an OIG report finding that an agency violated the law and internal guidelines and then concluding that the risk of administrative error was significant and required an adequate judicial review procedure).

455. See supra note 404 and accompanying text.

456. See, e.g., Metzger & Stack, supra note 424, at 1240–41; Walker & Turnbull, supra note 424, at 1231 (encouraging the exploration of internal administrative law as a source of constraint).

holds real promise for administrative governance.[457] As they describe it, this type of internal law can instill "traditional rule-of-law values of consistency, certainty, transparency, and reason giving" and play a valuable role in constraining agency action.[458] And this instinct toward internal administrative law may be especially strong when considering agencies' investigative power, where judicial review is notoriously relaxed and enforcement discretion is at its apex.[459]

But major questions remain about internal administrative law in the trenches.[460] Indeed, Professor Christopher Walker and Rebecca Turnbull recently underscored this point when it comes to agency enforcement, observing the need for more work in this arena and calling for "a more-sustained scholarly inquiry" into internal administrative law's "effectiveness in constraining agency overreach" in particular.[461]

This Article responds to that call but suggests that the prospects for internal administrative law—at least from within the agency—may be dim in some enforcement spaces. The immigration subpoena regime can claim at least some features of internal administrative law: management structures; some internal, "centrally generated" guidance; and high-level decisionmakers (i.e., subpoena-issuers).[462] It's of course possible that there's just not enough, that more centralization, guidance, and leadership involvement could resolve some of these problems. But that seems unlikely to ameliorate the larger concerns about how the agency uses its discretion in this context. After all, the decisions to *not* mandate restraint, to *not* use tracking software, to *not* conduct oversight, to generally *not* provide guidance, and to *not* prohibit issuing subpoenas to sensitive locations were all choices—ones made by leadership at that. And while some top-down direction (e.g., the initiative to target sanctuary jurisdictions) did achieve some consistency and predictability, that only created additional cause for concern about ICE's decisionmaking and use of discretion. In short, this study suggests that, in some enforcement spaces, the problems may go far beyond compliance and systematization and be—as they were here—as much top-down as bottom-up. Ultimately this study provides reason to doubt the potential for internal administrative law from within the agency to constrain overreach in the immigration scheme and administrative regimes with similar features. In this sense, it builds on the observations of Professors Shalini Bhargava Ray, Emily

457. Metzger & Stack, supra note 424, at 1248.

458. Id.

459. See id. at 1278.

460. See id. at 1307; see also Emily S. Bremer & Sharon B. Jacobs, Agency Innovation in *Vermont Yankee*'s White Space, 32 J. Land Use & Env't L. 523, 542 (2017) (describing potential future lines of research).

461. Walker & Turnbull, supra note 424, at 1229.

462. Metzger & Stack, supra note 424, at 1256. Most subpoenas produced were issued by assistant field office directors—high-level officers. See Combined FOIA Data (recording the title of issuing officers).

Chertoff, and others that traditional administrative law principles may not map well onto the immigration and other police-like regimes.[463]

Yet internal administrative law interventions from outside the agency may offer more hope. The immigration subpoena scheme—and others that can impose similar harms—should, at minimum, be monitored and audited by independent, non–law enforcement officials, in some ways similar to the audits Congress mandated for NSLs (under amended NSL statutes) after the early aughts litigation raised serious concerns.[464] These monitors and audits should review and publicly report on agencies' compliance with recordkeeping and other procedural requirements as well as the legal validity of their subpoenas and the agency's use of discretion.[465] This examination should also prompt the Administrative Conference of the United States (ACUS) to study and issue recommendations for investigative administrative subpoenas—focusing on regimes that can impose harsh penalties on individual people.[466] And this study counsels in favor of externally imposed mandates requiring agency consideration prior to, and reasoned explanations for, subpoena decisions.[467] These mandates should require agencies to evaluate the impact of subpoena use beyond the enforcement mission, including the effect on targets' rights, risks of burdening access to essential services, and ramifications for state and local interests.[468] That's because, while the

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463. See, e.g., Emily R. Chertoff, Violence in the Administrative State, 112 Calif. L. Rev. 1941, 1957–59 (2024); Shalini Bhargava Ray, Immigration Law's Arbitrariness Problem, 121 Colum. L. Rev. 2049, 2110 (2021).

464. See, e.g., USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 119, 120 Stat. 192, 219 (2006) (requiring OIG audits of the FBI's use of NSLs).

465. Providing the public with more information about agencies' practices is an important first step in broadening opportunities for input, but affording meaningful input opportunities may also require creating new mechanisms. See Michael Sant'Ambrogio & Glen Staszewski, Democratizing Rule Development, 98 Wash. U. L. Rev. 793, 813, 842–43 (2021) (describing ways to improve meaningful public access in rulemaking); see also Christopher S. Havasy, Relational Fairness in the Administrative State, 109 Va. L. Rev. 749, 787 (2023) (outlining important considerations for ensuring "relational fairness" between agencies and affected persons).

466. Encouragingly, ACUS launched a study on agency investigative procedures last year. Agency Investigative Procedures, Admin. Conf. U.S., https://www.acus.gov/projects/agency-investigative-procedures [https://perma.cc/RJ4D-97U8] (last visited Sept. 15, 2024).

467. See Bijal Shah, Administrative Subordination, 91 U. Chi. L. Rev. 1603, 1650–51, 1655 (2024) (examining how agencies subordinate regulated parties' interests to institutional priorities, for example, efficiency and costs, and recommending detailed reason-giving guidance as a potential solution). To balance agency resource and time constraints, it seems possible that, at least in some circumstances, this could be done categorically instead of subpoena by subpoena.

468. See Shah, supra note 467, at 1650–51, 1655; see also Anya Bernstein & Cristina Rodríguez, The Accountable Bureaucrat, 132 Yale L.J. 1600, 1668 (2023) ("[P]olicymaking in a democratic polity requires that government actors provide reasoned justifications for

decision to issue an investigative subpoena is in some sense an initial, exploratory step in an enforcement action, it's also a decision on its own—one that can have radiating effects and far-reaching harms.

Finally, this study offers insights as others take up Walker and Turnbull's call for inquiry. It first highlights the potential to be misled by the facade of internal administrative law—for example, policy memoranda, processes, and high-level decisionmakers—while missing the lawlessness in practice. That is, it shows just how important it is to look beyond certain markers of internal administrative law and to wade through case records, forms, and other indicia of practice to study internal administrative law in action. Second, it shows the exceptional obstacles that external actors face in doing so, demonstrating the need for the government to facilitate these inquiries and for more scrutiny from independent, non–law enforcement government actors.

C. *Limits Beyond Law*

Yet one of the most effective constraints on overreach and abuse may lie outside the law. Limiting legislative amendments, regulatory self-restraint, and robust judicial policing could offer important victories, but generally require resources and lawyers already in too short supply. This study ends by surfacing some alternative and powerful ways that the public can help shape this type of agency decisionmaking: by making it less easy, less cheap, and more public—in short, by forcing law enforcement to bear greater costs from using this tool.

This study—and the silence surrounding this regime—indicate that ICE generally faces little resistance even to fairly obviously unlawful demands.[469] But this study also suggests that, when pushback happens, it may powerfully affect agency practice. Compare, for example, the recent immigration subpoena experiences in Chicago and San Diego. Although the Chicago field office had issued subpoenas to law enforcement covered by Illinois's sanctuary law for nearly two years, the federal government recently represented that ICE stopped doing so in or after the fall of 2021 because of a governing sanctuary law.[470] But the Chicago field office had been issuing subpoenas to Illinois law enforcement not only in spite of, but *because of* Illinois' sanctuary law,[471] and it appears that Illinois law

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their choices and that those choices . . . take into account the needs and views of affected publics . . . .").

469. See, e.g., 2021-ICLI-00047, at 2169–70 (showing a subpoena canceled by ICE after the target complied prior to service); CAPHQ Log, supra note 179 (showing a high compliance rate).

470. See supra note 335.

471. See, e.g., 2021-ICLI-00047, at 2923–24 (explaining that Illinois's sanctuary laws preclude notification to ICE prior to release of the target and justifying the subpoena by saying that the target was in the Illinois Department of Corrections' custody); see also supra section II.D.

enforcement generally complied.[472] So what caused this sudden change? It is difficult to be certain, but emails between ICE and Illinois officials suggest that ICE changed its position because Illinois law enforcement changed its response: Illinois employees started raising questions and pushing back.[473] That starkly contrasts with the experience of the San Diego field office, whose primary subpoena recipient is a local sheriff's department that has chafed against California's sanctuary law and has been a willing subpoena participant.[474] And, perhaps relatedly, the San Diego field office now issues the most subpoenas to sanctuary law enforcement of any ICE office in the dataset.[475] Or, as another example, consider the developments in Dallas. After employers who received subpoenas from the Dallas field office told their employees about the subpoenas, the Dallas field office stopped issuing subpoenas entirely.[476] Though limited, these anecdotes imply that recipient pushback—even outside of courts and Congress—can significantly affect agency practice.

It is not clear whether this pushback forced ICE to reconsider legal risks, norms, or simply the costs of doing business via subpoena. But regardless, these experiences suggest a powerful way to help shape a previously impenetrable regime. And this, in turn, indicates that education and pressure may be valuable parts of remedying overreach in administrative subpoena practice. Education is critical to ensure that recipients know that they can question subpoenas and raise challenges. It would also help recipients understand that ICE-issued gag orders are likely unlawful and unenforceable. Pressure—from political advocacy to boycotts—may be important to persuade unmotivated recipients to actually exercise those rights. And these strategies can be important to foster productive pushback not only when subpoenas are formally issued but also in the space law rarely mediates: the instances in which recipients are intimidated into "voluntarily" complying with agencies' informal but forceful demands.

But strategies to limit rather than proceduralize the use of these subpoenas could understandably raise questions about the risk of diminishing an agency's access to information. In many contexts, the

472. See, e.g., CAPHQ Log, supra note 179.

473. See 2023-ICLI-00031, at 148–49 (noting, in April 2021, that the Illinois Department of Corrections was reevaluating its policy and raising questions about how the target fit within ICE's prosecution guidelines); id. (reporting that ICE was not seeking to sue regarding the subpoena even though it was a high priority case).

474. See 2021-ICLI-00047, at 6349, 6354–55 (noting that, even after California's prohibitory sanctuary law was signed into law in 2017, the San Diego Sheriff's Office "continued to notify [the San Diego field office] regarding inmates being released from county custody" until 2019); see also Nash, Violating Sanctuary, supra note 230, at 7 (discussing the office's pushback against the California sanctuary law).

475. See Combined FOIA Data.

476. Stipulation and Proposed Order, supra note 10, at 2 (confirming that the Dallas field office stopped issuing subpoenas because employers had informed employees about records subpoenas).

impulse might be to consider whether there are other, better alternatives to allow agencies to get this information: Is there another way to ensure agency access to this information while minimizing problematic consequences? But another question we might ask focuses on the alternative of the agency not getting the particular piece of information it seeks: What are the potential social and individual costs of the agency's demands, and what are the costs if the agency doesn't get it? This Article shows a regime in which the social and individual harms can be extensive, reverberating, and potentially irreparable. And one where the value of the information—often details that make it easier and cheaper for the agency to execute civil arrests—is comparatively low.[477] As such, the more reasonable alternative in those circumstances is accepting the risk that the agency may not get the details that make enforcement easiest or cheapest. This calculus will be different in other contexts with different externalities and social costs. But this type of consideration—and the availability of other meaningful opportunities for input—should, and presumably would, inform the extent of public and recipient pushback. Ultimately here, in a regime otherwise insulated from judicial, media, and public scrutiny, introducing some justified and productive friction could have enormous benefits.

CONCLUSION

In sum, the federal government has used the immigration subpoena power to violate some of the most sacred spaces and relationships in our communities in its effort to detect, detain, and deport. It has used these subpoenas to neutralize efforts—by states and municipalities—to divest from immigration enforcement; burden people's access to essential survival services; and undercut one of the most significant immigrant-protective movements of our time.

Yet, as this Article has shown, this past need not be prologue. Shedding light on these tactics reveals the widespread violations and problematic practices that permeate this regime and empowers the many parties affected by these abuses to impose meaningful constraints. It also offers broadly applicable lessons about the extent to which high-level subpoena doctrine applies—or doesn't—on the ground, particularly in regimes focused on enforcement against historically marginalized populations who often lack resources and political power.

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477. It appears ICE can often use other techniques to obtain location information if it believes it important enough, even if doing so is more resource intensive. Off. of the Inspector Gen., DHS, OIG-20-13, Immigration and Customs Enforcement's Criminal Alien Program Faces Challenges 6, 9 (2020), https://www.oig.dhs.gov/sites/default/files/assets/2020-02/OIG-20-13-Feb20.pdf [https://perma.cc/BX9H-YGXQ] (explaining that arrests become more costly without this information, but not suggesting that they become impossible).

APPENDIX

This Appendix provides additional detail on the data analyzed in this Article. While the Article summarizes how the underlying agency records were obtained from ICE through FOIA requests and litigation and this Article's methodology for analyzing them, this Appendix offers a detailed description of how the data were extracted, coded, and analyzed.

A. *Obtaining the Data*

To obtain information about the immigration subpoena practices of ERO, I submitted and ultimately litigated two FOIA requests. The first FOIA request sought data reflecting the immigration subpoenas that ERO issued to state and local governments from 2003 onwards.[478] But due to the nature of the records that contained this information, negotiations and partial settlement agreements for particular searches,[479] and ICE's FOIA processing practices, the records that ICE produced in litigation were not limited to subpoenas to state and local entities. Specifically, because ICE was required to produce full subpoena logs rather than only portions responsive to the state- and local-government-focused FOIA request, the data drawn from logs were not limited to subpoenas to state and local government entities. Since seven of the fifty-nine field office and suboffice logs only contained subpoenas to subfederal government entities, I sought to confirm whether ICE produced the full logs; ICE reissued one of those logs in full and confirmed that the remainder were the full, unabridged logs.[480] When it comes to individual subpoena forms, ICE does not appear to have limited its production to state and local entities either; the forms produced include subpoenas issued to a wide range of entities from the private, federal, and nonprofit sectors.

The second FOIA request was focused on internal policies and procedures. Specifically, it sought (1) guidance regarding the standards, procedures, and requirements that govern (and limit) ICE employees' issuance of administrative subpoenas and (2) guidance regarding any requirements and standards that ICE officers must follow in recording the issuance of these subpoenas and any responses to these subpoenas.[481] Given the nature of ICE's dissemination of internal policies and directives,

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478. See Complaint exh.A at 1–2, *Nash I*, No. 21-cv-4288 (S.D.N.Y. filed May 12, 2021).

479. For example, following ICE's consistent difficulties in identifying comprehensive records from field offices, one partial settlement agreement required subpoena-issuing ERO officers at seven ERO field offices to search their email for all records from January 1, 2021, to November 30, 2023, that contained the term "I-138" (the immigration subpoena form number); this agreement and the resulting productions were not limited to subpoenas to state and local government entities. See Stipulation and Order at 2–3, *Nash I*, No. 21-cv-4288 (S.D.N.Y. filed Dec. 1, 2023), ECF No. 44 [hereinafter *Nash I* Stipulation and Order].

480. Stipulation and Proposed Order, supra note 10, at 2 (confirming that the field office logs are complete).

481. Complaint exh.A at 1, *Nash II*, No. 23-cv-6994 (S.D.N.Y. filed Aug. 8, 2023).

the request sought not only formal policies but also informal guidance contained in emails, trainings, and the like.

These requests generated a large amount of data about ICE's immigration subpoena use and practices. In response to these requests, ERO produced aggregate data (fifty-nine unique logs from nineteen of its twenty-five field offices and suboffices[482] and two versions of a headquarters-level log[483]), and other primary documents (including 705 individual immigration subpoena forms (I-138 forms) and related internal communications). Together, these data reflect the details of 3,159 immigration subpoenas issued between 2007 and 2023.[484] For the reasons described in this Article, the limits of ERO recordkeeping mean that these data may not necessarily reflect the frequencies of nationwide use.[485] It also meant that, at times, it was impossible to determine or even extrapolate the frequency, geographic reach, or temporal scope of certain occurrences in the data. Nevertheless, this large dataset provides a powerful view of how ERO has wielded the immigration subpoena power and reveals a number of highly consequential patterns and practices.

In response to the second request, ERO produced records that included previously undisclosed policy memoranda, numerous communications among agency staff, and some communication between agency staff and subpoena recipients. In addition, ERO provided significant information about its immigration subpoena regimes through communications in the course of the FOIA litigation.

B. *Compiling the Data*

Using the forms and logs produced by ICE, I created a comprehensive, original dataset that compiles data about the immigration subpoenas that ERO has issued since 2007.[486] To create this original

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482. The field offices and suboffices that retained the logs are all part of ERO, which primarily issues subpoenas for civil immigration enforcement. See Stipulation and Proposed Order, supra note 10, at 2 (confirming that the majority of subpoenas ERO issues are for civil immigration purposes).

483. The only log of ERO-issued subpoenas that ICE identified in the custody of its headquarters was one dedicated to tracking subpoenas against sanctuary jurisdictions. See CAPHQ Log, supra note 179.

484. Redactions in the final set of subpoena forms and logs were fairly minimal. With respect to the subpoena forms and logs, ICE generally redacted personally identifying information (including names, addresses, and unique identifying numbers). See, e.g., 2021-ICLI-00047, at 11–12 (showing these redactions). In many cases, ICE redacted the subpoena tracking number—the purportedly unique tracking number that ICE assigns to each subpoena—as well. Id. Despite the name "tracking" numbers, these numbers often did not allow ICE to track the subpoena to the underlying case or associated target of the subpoena.

485. In some instances, multi-year field office logs do appear to provide an indication of frequency and issuance trends for specific jurisdictions and time periods. See, e.g., Washington Logs (providing logs by fiscal year from 2008 to 2023).

486. All logs and all but four of the forms were produced as a result of the FOIA litigation described above. The other four subpoena forms were obtained from filings in

dataset, I constructed two subsets of data: one from subpoena forms (I-138 forms, which had relatively more information about each subpoena) and one from subpoena logs maintained by ERO headquarters and field offices.[487]

To create the dataset from the subpoena forms, my research assistants and I recorded eleven types of information from each of the 705 subpoena forms. I checked this information against the subpoena forms and coded it for the following variables (described as necessary in more detail below):

(1) name of the recipient;
(2) function of the subpoena recipient;
(3) whether the subpoena was issued to a subfederal (i.e., state, county, or municipal) government versus a private, federal, or "other" (generally nonprofit) entity;
(4) field office that issued the subpoena;
(5) position of the ICE officer who issued the subpoena;
(6) date associated with the subpoena (generally when it was issued or, if not available, when it was served);
(7) whether the subpoena was issued in connection with a criminal or civil (at times described as "administrative") investigation;
(8) nature of the records or testimony sought;
(9) whether the subpoena sought address/location information and, if so, what type;
(10) whether the subpoena imposed a nondisclosure order upon the recipient, requested nondisclosure, or sought neither; and
(11) time period (in days) between the date the subpoena was issued and the deadline for the recipient's response.

I used a similar process to create the dataset from the subpoena logs. My research assistants and I compiled data from each of the fifty-nine unique subpoena logs. I then coded this dataset for variables (1)–(8); the logs did not contain sufficient data to code for variables (9)–(11). The log dataset also contains data, if available, regarding recipients' compliance with subpoenas.

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recent subpoena enforcement actions. See, e.g., Declaration of Kimberly M. Joyce in Support of Respondents' Motion to Dismiss the Petition for Mootness exh.A at 1, United States v. City of New York, No. 1:20-mc-00256 (E.D.N.Y. filed Feb. 18, 2020), ECF No. 7-1 (attaching one such subpoena).

487. The dataset includes entries for unique subpoenas produced pursuant to the above-described FOIA litigation from July 2021 through July 2024. Because ICE was unable to find some of the specific subpoena forms that it was required to produce, ICE produced a set of more than fifty subpoena forms in August 2024 in an attempt to resolve the dispute. See August Joint Status Update, supra note 171, at 1–2. But because many of the subpoenas appeared to be merely duplicates of previously produced subpoenas and because of the limits of the production timeline for this Article, the unique subpoenas (if any) in that production were not included.

I also attempted to fill in any gaps in the form and log information. For example, because many of the logs did not contain the name of the field office that issued the subpoenas, I obtained a list from ICE that correlated the logs to their respective field offices through a partial settlement of certain disputes in the FOIA litigation.[488] I merged the field office names from that list with the dataset. Similarly, because some of the logs contained only the locations of the local ICE offices rather than the corresponding field office, I used an ICE-generated map to identify the relevant field offices.[489] Likewise, in instances in which the subpoena forms did not contain the location of the local ICE office that issued them, I identified the issuing ICE office using the area code of the phone number that the issuing office provided on the form. And, since some of the subpoenas and many of the logs contained only partial names, acronyms, and even illegible text where they should have indicated the subpoena recipient, I used a variety of methods to obtain this information. I negotiated a separate partial settlement agreement with ICE requiring it to provide additional information to confirm some pieces of missing information.[490] (This was complicated by the fact that, in many instances, ICE was unable to find subpoena forms or, in some cases, even identify the underlying cases associated with subpoena log entries.) In other instances, I was able to reasonably infer missing, partial, or ambiguous data points by searching the acronym and location of the issuing field office, the recipient address, etc., to identify those recipients. When I was not able to obtain the information to make these reasonable inferences, the data points were coded as "unknown."

In producing records under FOIA, ICE uses technology that assists it with "de-duplication" to remove duplicate records prior to production.[491] But since productions may nevertheless contain duplicates, I took significant measures to identify and remove them. I reviewed each subpoena form for duplicates and removed all subpoenas that I thought

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488. See Nash v. ICE, Project ICE (on file with the *Columbia Law Review*) (providing a corresponding field office for portions of the production). ICE had difficulty determining which subpoena log was from which field office, and twice produced lists that it later recognized were incorrect. The final list ICE produced appears to be accurate, except that it incorrectly attributes the Buffalo field office's log to the Boston field office. Using details in the hard copies of the subpoena forms and the logs, I was able to match the underlying subpoenas to the entries in the log; the forms indicate that the subpoenas in that log were issued by high-level officers in the Buffalo field office, so I coded it as a Buffalo field office log.

489. ICE, 2022 Report, supra note 205, at 3.

490. For example, the Boise suboffice log indicates that it sent certain subpoenas to "DOL." See Boise log. I was able to identify this as the Idaho Department of Labor based on the office's regular use of subpoenas to the Idaho Department of Labor and by obtaining two of the underlying "DOL" subpoenas through a negotiated agreement with ICE.

491. DHS, 2024 Chief Freedom of Information Act Officer Report Submitted to the Attorney General of the United States 31 (2024), https://www.dhs.gov/sites/default/files/2024-07/24_0729_PRIV_2024-Chief-FOIA-Officer-Report.pdf [https://perma.cc/LG35-6TXJ].

were likely to be duplicates based on my comparison of the text of the subpoenas, dates issued, subpoena tracking numbers (when ICE did not redact them), and other details. To guard against double-counting a single subpoena that appears in both the form and log datasets, I manually searched for each form subpoena in the log dataset and removed (from the log dataset) entries that I believed were likely duplicates. Nevertheless, because (1) ICE redacted personally identifying information and most of the unique tracking numbers assigned to subpoenas and (2) the logs contain sparser details, I could not identify duplicates with complete certainty. This was particularly difficult for field offices that regularly subpoena the same entities.[492] For the vast majority of this process, however, the available information was sufficient.

In creating the dataset, I generally removed the (few) subpoenas marked as not having been served or as having been canceled. The only exceptions to this were the few instances in which the subpoenas were canceled post-issuance because the threat of the subpoena produced the same result.[493] I included those subpoenas because they were issued and served their purpose, even if they were technically canceled after the fact. Of course, the scope of the FOIA litigation did not include the subsequent history of each subpoena issued (nor does it appear that ICE could have produced all of the subpoenas' subsequent histories since it could not find the subpoena forms or associated case file for some entries in the logs). Given that, it is possible that other subpoenas were subsequently modified or withdrawn. I also removed one subpoena form in which, due to redactions, it was not possible to discern the subpoena recipient *or* the type of subpoena request, making it essentially impossible to extract any useful information from the form.[494]

Finally, it is important to note that some of the subpoena forms that ICE produced are incomplete. In some cases, the subpoenas issued by certain field offices do not contain signatures from the issuing officers. In other cases, the subpoena forms are signed, but the certificates of service are not filled out. To determine whether this was a flaw in ICE's recordkeeping or an indication that ICE ultimately did not issue the subpoena, I (1) checked to see whether other records (such as the logs) indicated that subpoenas like this were nevertheless issued and served or (2) obtained final, issued versions of subpoenas from these field offices through a partial settlement agreement with ICE.[495] (This second method

492. For example, the Chicago field office produced a log that did not contain dates related to individual subpoenas. See Chicago Log. Since that field office frequently subpoenaed the same state law enforcement agency, it was impossible to know whether the undated subpoenas were unique or duplicates of the Chicago field office–issued subpoenas reflected in the CAPHQ Log, so that spreadsheet has not been added to the dataset.

493. See, e.g., 2021-ICLI-00047, at 2169–70 (emails reflecting target compliance following the threat of a subpoena).

494. 2021-ICLI-00047, at 104.

495. See, e.g., *Nash I* Stipulation and Order, supra note 479, at 2–3.

of verification was complicated by ICE's inability to find some subpoena records.[496]) These inquiries generally indicated that some field offices had a practice of saving unsigned copies of subpoenas even when they did indeed issue the subpoenas. Given the results of these checks and the fact that the underlying FOIA request sought only subpoenas that had been actually issued by ERO, I concluded that the absence of a signature did not mean that the field office did not issue or serve the subpoena.[497]

C. *Coding Subpoena Recipients*

To understand the types of entities from which ERO demands information and other assistance, I coded subpoena recipients in two ways. First, I coded them by function category. To provide just a few examples of how I categorized recipients by function, the "Social Media/Email Providers" category includes entities like Facebook and Myspace. The "Financial" category includes institutions such as banks and credit unions. The "Businesses Other" category includes a range of businesses from Lyft to hotels to medical facilities to insurance providers. Second, I categorized subpoena recipients according to their sector, coding them as one of the following: private entity; federal entity; state or local entity; "other" (which includes nonprofit entities); and "unknown."

It is worth noting that, at times, some entities could be subpoenaed in connection with their public-facing function, for example, as a hotel or medical care provider, or in connection with their role as employers. To disaggregate the two, I coded entities as "employers" when they were subpoenaed in connection with records about an employee and by their public-facing function in all other cases.[498] In some instances (largely in the logs), the absence of detail about the demand made it difficult to know whether the entity subpoenaed was subpoenaed in its capacity as an employer or as a business. In those cases, I coded the entity by its function. As a result, Figure 1 may underestimate the proportion of subpoenas that were issued to entities in their capacity as employers.

In categorizing the subpoena recipients, I also relied on information that I gleaned from the dataset as a whole. For example, the data showed that subpoenas to entities such as apartment complexes and real estate management companies virtually always sought information about tenants and, as a result, were issued to them in their capacity as landlords. Accordingly, I coded subpoenas to these entities as "landlord" subpoenas

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496. Id.

497. This conclusion is also informed by other aspects of ICE's immigration subpoena practice that reflect a lack of attention to detail in subpoena issuance and recordkeeping. This includes, for example, instances in which the subpoena's return date precedes the date the subpoena was served or even issued.

498. I concluded that entities were subpoenaed in their capacity as employers based on the substance of the demands, for example, demands for I-9 (employment eligibility verification) forms, employee work schedules, and "identity docs."

even when the logs did not explicitly state the type of information sought from them. Similarly, when the subpoena log indicated that it sought personnel records (such as an I-9 form), but did not list the employer, I coded those subpoenas as subpoenas to private entities because virtually all of the employer subpoenas that were clear in the data were issued to private rather than governmental employers. I also used field office–specific practices to make inferences.[499] This same logic applies to instances in which tenant info was subpoenaed; because the available data indicated that all subpoenas that sought tenant information sought it from private landlords, I coded subpoenas seeking tenant information as subpoenas to private actors. Of course, this research and these inferences did not allow me to reasonably infer the function of every subpoena recipient. In those eighty-two cases, I coded the function as "unknown."

D. *Dating Subpoenas*

To understand changes in subpoena-issuing practices over time, the dataset reflects (and Figure 2 charts) the subpoena data by year. In most cases, the year was recorded based on the date that the subpoena was issued. In some cases, ERO only recorded the date that the subpoena was served upon the recipient or the "return date," that is, the date that the recipient was obligated to respond to the subpoena. In those instances, I used the year of the service date if available and, if not, the year of the return date. I concluded that this method was appropriate because the records indicated that subpoena return dates were typically close to the date of issuance (often between three days and three weeks from the date of issuance) and that the service date was generally even closer to the date of issuance.

In certain instances, ERO officers neglected to record any date associated with the subpoena in the logs. In some of those instances, I could infer the date based on when they were recorded in a chronologically arranged log. In some instances, I was not able to reliably infer return, service, or issuance dates associated with subpoenas (for example, the subpoenas recorded by the El Paso field office). Those subpoenas are therefore not included in Figure 2's visualization of subpoena use over time.

E. *Immigration Subpoenas to State and Local Law Enforcement*

The table below reflects field office issuance of subpoenas to state and local law enforcement before 2019 and from 2019 on, drawn from both

499. For example, many field office logs consistently used the term "work history" and "employment history" to describe employment-related records sought from state departments of labor whereas they used terms like "I-9" and "identity docs" to describe information sought from private employers. By contrast, the Washington field office appeared to use "employment records" mostly or exclusively when seeking them from employers, so I coded those as requests to private employers. See Combined FOIA Dataset.

the self-reports provided by most field offices in internal agency emails and from subpoena-issuance records.[500] These data reflect the use of subpoenas in the covered periods, but may not reflect current practice. The data below also do not generally reflect the volume of subpoenas issued during these periods, which varied significantly across field offices in the dataset. These data also pertain to ERO's field offices, but as discussed below, the practices of suboffices within the jurisdiction of those field offices may vary.

TABLE 1. CHANGE IN ERO FIELD OFFICE ISSUANCE OF SUBPOENAS TO STATE AND LOCAL LAW ENFORCEMENT

Field Office	Pre-2019	2019 to Present
Atlanta	No	Yes
Baltimore	Yes	Yes
Boston	No	Yes
Buffalo	Yes	Yes
Chicago	Unknown	Yes[501]
Dallas	Likely Not	Likely Not
Denver	No	Yes
Detroit	Likely Not	Likely Not
El Paso	No	Yes
Harlingen	Unknown	Unknown
Houston	Unknown	Unknown
Los Angeles	No	Yes
Miami	No	Likely Not
Newark	Likely Not[502]	Yes
New Orleans	No	Unknown

500. For purposes of this table, "state or local law enforcement" refers to state or local government entities conducting law enforcement within the criminal legal system, such as police, jails, prisons, correctional departments, and probation departments.

501. The Chicago field office used immigration subpoenas regularly during the Trump Administration and into the Biden era. See, e.g., CAPHQ Log, supra note 179; 2021-ICLI-00047, at 2928, 2931 (subpoenas from 2021). In litigation, the government represented that the Chicago field office stopped issuing immigration subpoenas at some point after September 2021. See Stipulation and Proposed Order, supra note 10, at 2.

502. When asked in 2019 whether it then issued subpoenas to state and local field offices in 2019, the Newark field office answered "maybe," and indicated that it may start to do so. 2021-ICLI-00047, at 2325.

New York City	Yes	Yes
Philadelphia	No	Yes
Phoenix	No	Unknown
Salt Lake City	No	Unknown
San Antonio	No	Likely Not
San Diego	No	Yes
San Francisco	No	Unknown
Seattle	No	Yes
St. Paul	Yes	Yes
Washington	Yes[503]	Yes

Pre-2019. In general, field office self-reports were consistent with the available data. As long as the data did not deviate by more than three subpoenas from the field office's self-report, I accepted (and used) the field office's self-report as a statement of its general policy and practice.[504] In one instance, however, the data diverged by more than three subpoenas from the office's self-report; in that case, I relied on the practice reflected by the data.

The records produced did not contain a self-report from all field offices regarding the issuance of subpoenas to state and local law enforcement. When the record did not provide the field office's self-report, I concluded that a field office did "likely not" issue subpoenas pre-2019 if ICE produced records from that field office from that time period and there was no evidence that they issued subpoenas to state or local law enforcement during that time (and in consideration of ICE's statements that ICE had historically not issued subpoenas to state and local law enforcement). In some instances, the field office did not produce any data or self-reports for the pre-2019 period; in those instances, I coded the practice as "unknown."

503. In 2019, the Washington field office reported that it did not issue subpoenas to state and local law enforcement, but the data show that it had issued at least eight such subpoenas before 2019 (including several in each of 2016 and 2017). Compare 2021-ICLI-00047, at 2326 (claiming the Washington field office does not issue subpoenas to state and local law enforcement agencies), with, e.g., Washington Logs Fiscal Year 2016–2017 (showing several such subpoenas).

504. Note that two field offices (Miami and Boston) reported in 2019 that they did not issue this type of subpoena, but the data show that the Hartford suboffice of the Boston field office had independently issued subpoenas to state and local law enforcement before then and that the San Juan suboffice of the Miami field office may have done so, depending on the capacity in which it subpoenaed the Puerto Rico Institute of Forensic Science. See Hartford suboffice log (showing subpoenas issued by the Hartford suboffice from 2013 to 2015 to, among others, police departments and correctional centers); 2021-ICLI-00047, at 5350–52 (San Juan suboffice log).

2019 to Present. For purposes of this table, I concluded that field offices did issue subpoenas if they issued two or more subpoenas to state or local law enforcement during this period. I concluded that field offices did "likely not" issue this type of subpoenas from 2019 on if (1) I had relatively comprehensive-appearing logs reflecting the field office's subpoena use for that period and there was no evidence that it issued such subpoenas in that period or (2) other information (such as the government's representations in litigation) indicated that the field office did not issue subpoenas in that period. In some instances, the field office did not produce any data or produced only obviously incomplete data for the post-2019 period; in those instances, I coded the practice as "unknown."