

IN THE MICHIGAN SUPREME COURT

Appeal from the Court of Appeals
Murray, C.J., and M.J. Kelly and Rick, JJ.

AMERICAN CIVIL LIBERTIES UNION
OF MICHIGAN,

Plaintiff-Appellant,

MSC No:
COA No: 163235
Trial Court No: 2019-002106-CZ

v

CALHOUN COUNTY SHERIFF'S OFFICE,

Defendant-Appellee.

**BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL**

Table of Contents

Interest Of Amici Curiae..... 1

Introduction..... 5

Argument 7

 I. This Court Must Grant Leave To Address The Importance Of The State Of Michigan’s FOIA Law In Facilitating Public Access To Information..... 7

 A. State Entanglement With Federal Immigration Enforcement Initiatives Warrants Public Scrutiny..... 7

 1. Transparency Is Critical Where ICE Collaborates With State And Local Law Enforcement.....7

 2. ICE Routinely Avoids Scrutiny Over Its Enforcement And Detention Practices.....9

 B. Federal FOIA Is Not A Substitute For State Open Records Law In Ensuring Transparency And The Public’s Access To Information. 12

 1. Records Created By State And Local Entities Are Often Not Obtainable Through The Federal FOIA Process.....13

 2. The Federal FOIA System Suffers From Chronic Delays That Result In The Unlawful Withholding Of Government Records.....14

 3. State FOIA Requests Yield Crucial Public Information.....15

 II. 8 CFR 236.6 Exceeds Statutory Authority 18

 A. The Promulgation Of 8 CFR 236.6 199

 B. The Regulation Is Not A Valid Interpretation Of The Federal Statutes It Purports To Interpret. 21

Conclusion 24

Table of Authorities

Cases

Abdur-Rashid v New York City Police Dep't,
31 NY3d 217 (2018) 13

Am Civil Liberties Union of New Jersey, Inc v Co of Hudson,
352 NJ Super 44; 799 A2d 629 (2002) 19, 23

Am Immigration Council v United States Dep't of Homeland Sec, Memo. Op.,
*15, No. 20-1196, US Dist LEXIS 117862 (DDC, 2020) 11

Chevron USA, Inc v Natural Resources Defense Council, Inc,
467 US 837; 104 S Ct. L Ed 2d 694 (1984) 20, 21

Comm'r of Correction v Freedom of Info Com'n,
307 Conn 53; A3d 636 (2002)..... 23

Cowlitz Co v Univ of Washington,
2020 WL 1890616 (WD Wash, 2020) 17

First American Nat Bank-Eastern v FDIC,
782 F2d 633 (CA 6, 1986) 21

Fraihat v United States Immigration & Customs Enforcement, Ord. Granting Class Cert. Mot.,
*22, No. 19-1546, 2020 U.S. Dist. LEXIS 72015 (CD Cal, 2020)..... 11

Kissinger v Reporters Comm for Freedom of the Press,
445 US 136; 100 S Ct 960; 63 L Ed 267 (1980)..... 13

Lyttle v US, 867
F Supp 2d 1256 (MD Ga, 2012)..... 8

Morales v Chadbourne,
793 F3d 208 (CA 1, 2015) 8

Mt Clemens Auto Ctr Inc v Hyundai Motor America,
897 F Supp 2d 570 (ED Mich, 2012)..... 21

Nightingale v US Citizenship & Immigration Servs,
507 F. Supp. 3d 1193 (ND Cal, 2020) 15

Rojas v Fed Aviation Admin,
989 F3d 666 (CA 9 2021) 13

State News v Michigan State Univ,
274 Mich App 558, 735 NW2d, 649 (2007) 7, 12

Transgender Law Ctr v US Immigration & Customs Enforcement,
2020 WL 7382113 (ND Cal, 2020)..... 14

US Dep’t of Justice v Tax Analysts,
492 US 136; 109 S Ct 2841; 106 L Ed 2d 112 (1989) 13

US Dept of Justice v Reporters Committee for Freedom of the Press,
489 US 749, 109
S Ct 1468 (1989) 6

US v California,
2018 WL 3361055 at *1 (ED Cal, 2018) 23

US v California,
921 F3d 865 (CA 9, 2019) 23

Voces De La Frontera, Inc v Clarke,
373 Wis 2d 348; 2017 WI 16; 91 NW2d 803 (2017)..... 23

Statutes

18 USC 4002..... 21, 22

18 USC 4013(a)(4)..... 21, 22

5 USC 552 *et seq*..... 18, 22

5 USC 552(a) *et seq* 18

5 USC 552(a)(6)(A)(i) 14

5 USC 552(a)(6)(B)(i)..... 14

5 USC 552(a)(b)..... 22

5 USC 552(b)(5),(7)..... 23

5 USC 552(c) 23

5 USC 553(b)(3)(B) 20

5 USC 553(d)(3) 20

8 USC 1103(a)(1)..... 21, 23

8 USC 1103(a)(2)..... 21, 22

8 USC 1103(a)(3)..... 13

8 USC 1103(a)(9)(A) 21

8 USC 1226..... 21, 22

8 USC 1231..... 21, 22

MCL 15.231 (1976) 5, 6

MCL 15.231 *et seq.*..... 18

MCL 15.231(2) 7

MCL 15.243(1)(d)..... 24

MCR 7.212(H)(3) 1

P.L. 107-296 (Nov. 25, 2002)..... 19

Other Authorities

ACLU, Detention Watch Network & National Immigrant Justice Center, *Fatal Neglect: How ICE Ignores Deaths in Detention* (February 2016) 10

American Immigration Council, *FOIA Request for Records Related to U.S. Immigration and Customs Enforcement (ICE) Response to COVID-19* (March 19, 2020)..... 10

Department of Homeland Security, *2018 Freedom of Information Act Report* (2019)..... 14

Department of Homeland Security, *2020 Freedom of Information Act Report* (March 2021) 15

Drew Knight, KVUE, *Civil Rights Groups Suing ICE Over COVID-19 Safety in Texas Detention Facilities* (April 15, 2020)..... 11

Email from James L. Dyer, Corporation Counsel and FOIA Coordinator for Calhoun County, to My Khanh Ngo, ACLU Immigrant Rights Project (July 19, 2021, 5:31 PM) 12

Email from My Khanh Ngo, Staff Attorney ACLU Immigrants’ Rights Project to FOIA Officer (July 14, 2021, 1:48 PM)..... 12

Emily Kassie, The Guardian, *Detained: How the U.S. Built the World’s Largest Immigration Detention System* (September 24, 2019) 9

Esmey Jimenez, Oregon Public Broadcasting, *1 of Last Youth in Jails in the Country that holds Undocumented Youth to end Contract with ICE* (February 9, 2021)..... 17

Government Accountability Office, *Immigration Detention – Actions Needed to Improve Planning, Documenting and Oversight of Detention Facility Contracts* (Jan. 2021)..... 8

Government Accountability Office, *IMMIGRATION ENFORCEMENT Actions Needed to Better Track Cases Involving U.S. Citizenship Investigations* (July 2021) 8

Human Rights Watch, *US: Deaths in Immigration Detention* (July 7, 2016)..... 10

Immigration and Customs Enforcement, *ERO FY 2019 Achievements*..... 9

Immigration and Customs Enforcement, *ICE Guidance on COVID-19:ICE Detainee Statistics* 10

Intergovernmental Service Agreement Between ICE and Dorchester County, MD, available at <<https://www.documentcloud.org/documents/20694056-igsa-contract-order-signed-12221>> 16

Laura Cassels, Florida Phoenix, *Southern Poverty Law Center Sues for Access to State Prison Records as COVID-19 Spreads Among Inmates* (May 15, 2020) 16

Letter to DHS Inspector General Roth, et al. from Community Initiatives for Visiting Immigrants in Confinement (CIVIC) (December 4, 2015), available at <<https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/5a9db86d24a694de0463ac20/1520285806260/>>..... 17

Lisa Riordan Seville, Hannah Rappleye and Andrew W. Lehren, NBC News, 22 *Immigrants Died in ICE Detention Centers During the Past 2 Years* (January 6, 2019) 10

National Immigrant Justice Center, *Clay County, IN* 16

National Immigrant Justice Center, *Holding Local Governments Accountable for Jailing Immigrants* 15, 16

National Immigrant Justice Center, *Immigration Centers of America Farmville, VA*..... 16

National Immigrant Law Center, *Blazing a Trail: The Fight for Right to Counsel in Detention and Beyond* (March 2016) 10

Niraj Warikoo, Detroit Free Press, *Michigan has more Immigrant Detainees, Inmates with Coronavirus* (May 6, 2020)..... 11

Off. Inspector Gen., Dep’t Homeland Sec., *OIG-18-67, ICE’s Inspection and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systematic Improvements* (June 26, 2018) 9, 10

S Rep. No. 89-813, at 5 (1965) 23

Southern Poverty Law Center, *Lawsuit Dismissed Against Tuscaloosa Sheriff Due to Lack of COVID-19 Record* (February 8, 2021)..... 16

Southern Poverty Law Center, *SPLC Sues Tuscaloosa Sheriff for Failing to Release Public Records About Covid-19 at the Jail* (November 23, 2020) 16

Tanvi Misra, Roll Call, *ACLU Asks for Humanitarian Release of Vulnerable ICE Detainees* (March 16, 2020) 11

U.S. Immigration and Customs Enforcement, *ICE Detainers: Frequently Asked Questions* (December 28, 2011)..... 8

US Immigration and Customs Enforcement, *Bahamian man in ICE Custody Passes away in Michigan* (February 8, 2021)..... 11

Yuki Noguchi, NPR, *Unequal Outcomes: Most ICE Detainees Held in Rural Areas Where Deportation Risks Soar* (August 15, 2019)..... 9

Regulations

67 Fed Reg 19508 (April 22, 2002)..... 18, 19

67 Fed Reg 19509 18, 20, 21

67 Fed Reg 19510 20

8 CFR 1001.1(c)..... 19

8 CFR 236.6..... 7, 11, 13, 17, 18, 19, 20, 23

INTEREST OF AMICI CURIAE¹

The American Immigration Council (“the Council”) is a tax-exempt, not-for-profit educational and charitable organization. Founded in 1987, the Council works toward a more fair and just immigration system and provides information and data to the public regarding federal immigration agencies’ operations and activities. Through its research and analysis, the Council is a resource for media and policymakers at the national, state, and local levels who seek to understand U.S. immigration law and policy and to develop fact-based policies. The Council also seeks, through court action and other measures, to hold the government accountable for unlawful conduct, restrictive interpretations of the law, withholding of information, and for failing to implement and execute immigration laws in a manner that comports with due process and transparency.

American Oversight is a nonpartisan, nonprofit section 501(c)(3) organization committed to the promotion of transparency in government, the education of the public about government activities, and ensuring the accountability of government officials. Through research, federal FOIA requests, and state public records requests, American Oversight uses the information it gathers, and its analysis of it, to educate the public about the activities and operations of federal and state government actors through reports, published analyses, press releases, and other media. American Oversight frequently requests records (and litigates as necessary to obtain them) with the potential to shed light on immigration policy and activities, including conditions in detention facilities, and has published those records (often with analysis of what they reveal) in order to inform the public on these matters of widespread concern.

¹ Pursuant to MCL 7.212(H)(3), Amici state that no counsel for a party authored the brief in whole or in part and no counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief.

The Center for Constitutional Rights (“CCR”) is a national, nonprofit legal, educational, and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution and international law. Founded in 1966 in support of the Civil Rights Movement, CCR believes government transparency is essential for democratic accountability and for access to justice for marginalized communities. CCR has litigated numerous cases challenging federal and state agencies' attempts to withhold records and information from the public, including numerous actions against DHS and ICE, such as *Austin Sanctuary Network, et al v ICE* (SDNY Dkt No 20-cv-1686) and *National Day Laborers Organizing Network v ICE, et al* (SDNY Dkt No 10-cv-3488).

Citizens for Responsibility and Ethics in Washington (“CREW”) is a nonpartisan, nonprofit organization committed to promoting accountability, transparency, and integrity in government. CREW seeks to protect the right of citizens to be informed about the activities of government officials and to empower citizens to have an influential voice in government decisions through the dissemination of information, including information CREW obtains through FOIA.

Founded in 1868, the Michigan Press Association is the official trade association for more than 290 print and digital newspapers in Michigan and dedicated to promoting the freedom of the press throughout the State. The MPA’s members report on issues of great importance to Michiganders, including the operations of their local governments. The Freedom of Information Act is an essential tool for the MPA’s members to fulfill their duty to the public. On behalf of its members, the MPA offers this brief in aid of FOIA’s purpose: fostering transparent government to safeguard our free society.

The MuckRock Foundation is a tax-exempt, not-for-profit educational and charitable organization. Founded in 2010, it brings together journalists, researchers, and the general public to help file, track, and share public records requests as well as produce reporting and public collaborations to put that information in context. Through its network of services and news partnerships, the organization works with about 3,000 newsrooms and reaches between 40 and 80 million readers per month with its primary source materials. Its investigations and collaborations have led to Congressional hearings, legislative changes, and policy reforms.

The National Immigration Project of the National Lawyers Guild (“NIPNLG”) is a nonprofit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants’ rights and secure a fair administration of the immigration and nationality laws. NIPNLG litigates and advocates for the rights of noncitizens, frequently utilizing public records laws. NIPNLG also provides legal training and assistance to the bar and the bench, hosts continuing legal education seminars on the rights of noncitizens, and is the author of numerous practice advisories, as well as *Immigration Law and Crimes* (2013 2 ed.) and three other treatises published by Thomson-West. NIPNLG has participated as *amicus* in several significant immigration-related cases before the U.S. Supreme Court, the federal courts of appeals, and the Board of Immigration Appeals.

The Michigan Immigrant Rights Center (“MIRC”) is a statewide nonprofit legal resource center for Michigan's immigrant communities. MIRC works to build a thriving Michigan where immigrant communities experience equity and belonging. Low-income immigrants who cannot afford counsel are not provided counsel at government expense, and MIRC is one of only two free legal services providers listed on the Immigration Court pro bono legal services list given to all respondents in removal proceedings. We accept free calls from detainees from all contracted

immigration detention facilities in Michigan, including the Calhoun County Correctional Facility. Statewide, we provide free legal services to more than 3,000 immigrant clients per year, including many detainees. We are also part of the National Qualified Representative Program, which provides appointed counsel to detained immigrants who have been found by an Immigration Judge or the Board of Immigration Appeals (BIA) to be incompetent to represent themselves in their immigration proceedings because of a serious mental disorder.

Immigrant Legal Defense (“ILD”) is a nonprofit organization based in Oakland, California, dedicated to providing legal services to marginalized immigrant communities in California and throughout the U.S. Among those that ILD represents and advocates for are individuals in Immigration and Customs Enforcement (ICE) custody. ILD strives to pursue strong due process and human rights protections for these individuals. As such, ILD is committed to pressing for the transparency and accountability of federal immigration agencies, including robust access to public information via federal and state Freedom of Information Act (FOIA) laws.

Professor Ingrid Eagly teaches and writes about immigration law, criminal law, evidence and public interest lawyering at UCLA School of Law and serves as Faculty Director of the Criminal Justice Program. Professor Eagly is an expert in the intersection between immigration enforcement and the criminal legal system. Her recent work explores a range of topics, including the criminalization of migration, police policymaking, and U.S. immigration courts. In 2017 she received UCLA’s Distinguished Teaching Award. The listing of her titles and institutional affiliations are for identification purposes only and does not imply any endorsement of the view expressed herein by amicus’s institution.

Professor Angelina Godoy teaches human rights at the University of Washington in Seattle, where she holds the Helen H. Jackson Endowed Chair in Human Rights and directs the University of Washington Center for Human Rights (UWCHR). Under her leadership, the UWCHR has conducted research on contemporary immigrant rights issues, using FOIA and state public records laws as key tools for obtaining information. In 2019, Cowlitz County, Washington, filed suit against her and the University of Washington in response to her request for information under the Washington State Public Records Act about juveniles detained for ICE in the County's youth jail, and ICE elevated the case to federal court. The listing of her titles and institutional affiliations are for identification purposes only and does not imply any endorsement of the view expressed herein by amicus's institution.

Professor Emily Ryo teaches law and sociology at the USC Gould School of Law. Her current research focuses on immigration, criminal justice, legal attitudes and legal noncompliance, and procedural justice. She has been awarded the ABF/JPB Access to Justice Fellowship and the Andrew Carnegie Fellowship to support her scholarship. She is the recipient of the 2021 William A. Rutter Distinguished Teaching Award. The listing of her titles and institutional affiliations are for identification purposes only and does not imply any endorsement of the view expressed herein by amicus's institution.

INTRODUCTION

This case implicates the importance of facilitating public access to records regarding governmental operations under state open records laws, such as Michigan's Freedom of Information Act ("FOIA"), MCL 15.231 (1976). Public scrutiny is especially crucial in immigration enforcement and more so in instances of governmental misconduct and overreach, as is the case for Mr. Jilmar Ramos-Gomez, a U.S. citizen and veteran wrongfully held in

immigration custody. Mr. Ramos-Gomez should be able to access information about his wrongful detention through Michigan's FOIA. Access to information through state open records laws like MCL 15.231 is crucial, particularly when it comes to records created when a state or local entity collaborates with the federal government to engage in immigration enforcement. Appellee Calhoun County failed to uphold the State of Michigan's commitment to government transparency and denied a request for records that can shed light on the wrongful detention of a U.S. citizen veteran. Calhoun County erroneously determined that a federal regulation prevents access to those records. In doing so, Calhoun County unnecessarily impedes the public right to know what its government is "up to." *US Dept of Justice v Reporters Committee for Freedom of the Press*, 489 US 749, 772, 109 S Ct 1468, 1481 (1989).

The denial of access to information in this context is problematic for various reasons. First, state open records laws such as MCL 15.231 constitute a crucial mechanism for obtaining information regarding the detention of immigrants, particularly where state and local law enforcement agencies collaborate with Immigration and Customs Enforcement ("ICE"), the immigration enforcement branch under the Department of Homeland Security ("DHS"). Collaboration by local entities such as Calhoun County with ICE warrants public scrutiny. Because state and local law enforcement agencies create and maintain their own records, which are often neither created by ICE nor in its custody, state FOIA laws properly require the release of those records when members of the public request them. While the public can access related information via the federal FOIA process, this mechanism is simply not a substitute for accessing public information through state open records laws because certain information is not available by making a federal FOIA request. Moreover, the federal FOIA process is plagued by delays in responding to requests for public information. Additionally, state FOIA laws are an especially

important mechanism for obtaining public information given ICE’s history of shielding itself from scrutiny. Finally, the federal regulation that Calhoun County relied on to deny the request for records in this case, 8 CFR 236.6, is *ultra vires* to the immigration statutes that purportedly give it its authority and should not serve as a basis to restrict public disclosure of information.

For all these reasons, Amici urge the Court to grant the petition for leave to appeal in this case to ensure that the State of Michigan’s commitment to transparency is not unduly restricted.

ARGUMENT

I. THIS COURT MUST GRANT LEAVE TO ADDRESS THE IMPORTANCE OF THE STATE OF MICHIGAN’S FOIA LAW IN FACILITATING PUBLIC ACCESS TO INFORMATION.

A. STATE ENTANGLEMENT WITH FEDERAL IMMIGRATION ENFORCEMENT INITIATIVES WARRANTS PUBLIC SCRUTINY.

1. TRANSPARENCY IS CRITICAL WHERE ICE COLLABORATES WITH STATE AND LOCAL LAW ENFORCEMENT.

Michigan law strongly favors the principle of government transparency while rejecting government secrecy. “It is the public policy of this state that all persons . . . are entitled to full and complete information regarding the affairs of government.” MCL 15.231(2). Central to both the broad policy and the implementing mechanisms of FOIA is the concept of accountability. *State News v Michigan State Univ*, 274 Mich App 558, 567–68, 735 NW2d, 649, 656 (2007) (*rev'd in part*, 481 Mich 692, 753 NW2d 20 (2008)).

This commitment to transparency is vital when it involves state and local collaboration with ICE – an agency that has, time and again, engaged in the mistreatment of noncitizens it apprehends and detains. Since the implementation of 8 CFR 236.6 in 2001, the federal regulation that Calhoun County relied on to deny the release of records in this case, the arrest and detention of noncitizens in local and state-run jails has proliferated. This proliferation was made

possible through ICE’s involvement with state and local governments to assist in its federal immigration enforcement. This entanglement includes contractual relationships via Intergovernmental Service Agreements (“IGSA”),² through which ICE contracts with local detention facilities to provide additional detention space in local jails. This is the type of agreement in place between Calhoun County and ICE. As a result of agreements like these, local jails have taken a central role in U.S. immigration detention. Additionally, through the use of ICE detainer requests – notices issued by ICE to federal, state and local LEAs that ICE intends to assume custody of the individual in the LEA’s custody³ – it is likely that Michigan LEAs will continue to detain individuals at the behest of ICE. This involvement of LEAs in immigration enforcement and detention deserves careful public scrutiny.

Like Mr. Ramos-Gomez, a subset of individuals that ICE erroneously arrests, detains and mistreats are U.S. citizens. Due to ICE’s reliance on state and local cooperation in its enforcement practices, state and local LEAs often also play a role in enforcement of immigration laws against U.S. citizens. The Government Accountability Office issued a report stating that from 2015 to 2020 ICE erroneously arrested 674 U.S. citizens, detained 121, and even removed 70 from the United States.⁴ The report notes that many encounters, much like in Mr. Ramos-Gomez’s case, begin with an individual’s encounter with local law enforcement.⁵ These cases⁶

² Government Accountability Office, *Immigration Detention – Actions Needed to Improve Planning, Documenting and Oversight of Detention Facility Contracts* (Jan. 2021), p 11, available at <<https://www.gao.gov/assets/720/711798.pdf>> (accessed Aug. 18, 2021).

³ U.S. Immigration and Customs Enforcement, *ICE Detainers: Frequently Asked Questions* (December 28, 2011), <<https://www.ice.gov/identify-and-arrest/detainers/ice-detainers-frequently-asked-questions>> (archived content) (accessed Aug. 28, 2021).

⁴ Government Accountability Office, *Immigration Enforcement: Actions Needed to Better Track Cases Involving U.S. Citizenship Investigations* (July 2021), p 21-24, available at <<https://www.gao.gov/assets/gao-21-487.pdf>> (accessed Aug. 29, 2021).

⁵ *Id.* at 36, n.33.

⁶ See, e.g. *Lytle v US*, 867 F Supp 2d 1256, 1266 (MD Ga, 2012) (ICE erroneously detained a U.S. citizen of diminished capacity who spoke no Spanish and removed him to Mexico); *Morales v Chadbourne*, 793 F3d 208, 212-213 (CA 1, 2015) (the Rhode Island Adult Correctional Institution wrongfully detained and held a U.S. citizen

highlight why public scrutiny of state and local facilities that play a role in immigration detention merit further scrutiny, as in Mr. Ramos-Gomez's case.

2. ICE ROUTINELY AVOIDS SCRUTINY OVER ITS ENFORCEMENT AND DETENTION PRACTICES

Amici consider it of utmost importance that this Court consider how crucial it is for an individual to seek information through a state FOIA given ICE's long-standing history of avoiding public scrutiny and accountability over its detention practices. ICE manages an immigration detention system comprised of hundreds of prisons and jails throughout the country where ICE detains thousands of men, women, and children. Its capacity to detain individuals has exploded over the years, "grow[ing] more than twentyfold since 1979."⁷ At times in 2019, ICE detained over 56,000 people - a historic number of individuals.⁸ As ICE expands its immigration detention system, it increasingly targets prisons and jails in rural areas where access to attorneys and other legal resources is difficult.⁹ ICE's detention system involves a patchwork of detention facilities, including those that ICE directly owns and runs and those that ICE contracts with and are owned and operated by private companies, states, and counties.¹⁰

because ICE erroneously issued a detainer for Ms. Ada Morales, a U.S. citizen after the Cranston, Rhode Island Police Department arrested her on charges ultimately dismissed. Ms. Morales had been previously the subject of an erroneous detainer issued by ICE.).

⁷ Emily Kassie, The Guardian, *Detained: How the U.S. Built the World's Largest Immigration Detention System* (September 24, 2019) <<https://www.theguardian.com/us-news/2019/sep/24/detained-us-largest-immigrant-detention-trump>> (accessed February 14, 2021).

⁸ Immigration and Customs Enforcement, *ERO FY 2019 Achievements* <<https://www.ice.gov/features/ERO-2019#:~:text=In%20FY%202019%2C%20ICE's%20Enforcement,removals%20from%20the%20prior%20year>> (accessed August 31, 2021).

⁹ Yuki Noguchi, NPR, *Unequal Outcomes: Most ICE Detainees Held in Rural Areas Where Deportation Risks Soar* (August 15, 2019) <<https://www.npr.org/2019/08/15/748764322/unequal-outcomes-most-ice-detainees-held-in-rural-areas-where-deportation-risks>> (accessed August 31, 2021).

¹⁰ See Off. Inspector Gen., Dep't Homeland Sec., *OIG-18-67, ICE's Inspection and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systematic Improvements* (June 26, 2018), p 1, available at <<https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>> (accessed August 31, 2021).

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Groups that advocate for and represent individuals in immigration detention have highlighted ICE's failure to address longstanding, inefficient and dangerous conditions of confinement, often with an emphasis on ICE's lack of transparency.¹¹ Among these troubling conditions, ICE has developed a track record for failing to provide adequate medical care to individuals in its custody, which has resulted in countless preventable deaths to date.¹² ICE's oversight of its detention facilities has been criticized by the DHS Office of Inspector General as ineffective in identifying and correcting poor detention conditions and ensuring consistent compliance with governing detention standards.¹³ Compounding the lack of transparency around its detention practices, ICE fails to provide detained individuals with adequate access to counsel, limiting another avenue for oversight.¹⁴

Most recently, ICE has withheld critical information about its response to the COVID-19 pandemic as the virus tears through the jails it uses, infecting thousands of individuals in ICE custody.¹⁵ The predictable widespread outbreak in ICE jails sparked the mass filing of habeas

¹¹ ACLU, Detention Watch Network & National Immigrant Justice Center, *Fatal Neglect: How ICE Ignores Deaths in Detention* <https://www.aclu.org/sites/default/files/field_document/fatal_neglect_acludwnnjc.pdf> (February 2016) (accessed February 24, 2021) (describing efforts to compel transparency around detention conditions at Eloy Detention Facility).

¹² Human Rights Watch, *US: Deaths in Immigration Detention* <<https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention>> (July 7, 2016) (accessed February 24, 2021); Lisa Riordan Seville, Hannah Rappleye and Andrew W. Lehren, NBC News, *22 Immigrants Died in ICE Detention Centers During the Past 2 Years* <<https://www.nbcnews.com/politics/immigration/22-immigrants-died-ice-detention-centers-during-past-2-years-n954781>> (January 6, 2019) (accessed February 24, 2021).

¹³ *Supra* note 10 at p 4 (ICE inspections "...do not ensure adequate oversight or systemic improvements in detention conditions, [with] certain deficiencies remain[ing] unaddressed for years.").

¹⁴ National Immigrant Law Center, *Blazing a Trail: The Fight for Right to Counsel in Detention and Beyond* (March 2016), p 4-6, available at <<https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf>> (accessed August 31, 2021).

¹⁵ Immigration and Customs Enforcement, *ICE Guidance on COVID-19: ICE Detainee Statistics* <<https://www.ice.gov/coronavirus>> (accessed August 31, 2021) (confirming 26,284 confirmed COVID-19 cases of individuals who have been detained by ICE since testing began in February 2020)**Error! Bookmark not defined.**; American Immigration Council, *FOIA Request for Records Related to U.S. Immigration and Customs Enforcement (ICE) Response to COVID-19* <https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/requesting_ice_records_about_detained_individuals_at_risk_of_exposure_to_covid-19.pdf> (March 19, 2020) (accessed February 19, 2021).

petitions on behalf of vulnerable detained individuals across the country.¹⁶ In granting requests for relief, courts have emphasized ICE's lack of transparency in sharing critical information about health and safety measures taken to protect detained individuals at risk of infection.¹⁷

These dire conditions of confinement are commonplace in all ICE detention facilities, including in the state and local jails with which ICE contracts to detain individuals charged with immigration violations. These have included jails in the state of Michigan. For example, in May 2020, an immigration attorney expressed to the Detroit Free Press her concerns with the conditions of confinement for immigrants at the St. Clair County Jail, stating some inmates with coronavirus symptoms lacked food and were held in solitary confinement.¹⁸

Equally troubling, on February 8, 2021, Jesse Jerome Dean Jr. died while detained by ICE at the Calhoun County Jail after he completed his criminal jail sentence.¹⁹ When requesters tried to obtain information about Mr. Dean's death, Calhoun County cited 8 CFR 236.6, as well as the Court of Appeals' unpublished decision in this case, to deny requesters access to

¹⁶ See, e.g., Drew Knight, KVUE, *Civil Rights Groups Suing ICE Over COVID-19 Safety in Texas Detention Facilities* <<https://www.kvue.com/article/news/local/texas/ice-sued-over-coronavirus-safety-in-detention-centers/269-58dcf2fb-8d11-49d4-8b31-4d70c07a0a14>> (April 15, 2020) (accessed February 24, 2021) (habeas lawsuit filed on behalf of individuals in three South Texas detention facilities); Tanvi Misra, Roll Call, *ACLU Asks for Humanitarian Release of Vulnerable ICE Detainees* <<https://www.rollcall.com/2020/03/16/aclu-asks-for-humanitarian-release-of-vulnerable-ice-detainees/>> (March 16, 2020) (accessed February 24, 2021) (habeas lawsuit on behalf of individuals detained in Seattle-area detention facility).

¹⁷ See *Fraihat v United States Immigration & Customs Enforcement*, Ord. Granting Class Cert. Mot., *22, No. 19-1546, 2020 U.S. Dist. LEXIS 72015 (CD Cal, 2020) (noting that ICE detention facilities did not report on the individuals in ICE detention facilities "most vulnerable to severe illness or death from COVID-19" or "provide information about any independent tracking they conduct with regard to disabled or medically vulnerable individuals before or during the pandemic"); see also *Am Immigration Council v United States Dep't of Homeland Sec*, Memo. Op., *15, No. 20-1196, US Dist LEXIS 117862 (DDC, 2020) (explaining decision to grant a preliminary injunction in a FOIA case seeking records about health and safety measures in ICE detention facilities in response to COVID-19).

¹⁸ Niraj Warikoo, Detroit Free Press, *Michigan has more immigrant detainees, inmates with coronavirus* <<https://www.freep.com/story/news/local/michigan/2020/05/04/immigrant-detainees-michigan-coronavirus/3062831001/>> (May 6, 2020) (accessed August 18, 2021).

¹⁹ U.S. Immigration and Customs Enforcement, *Bahamian man in ICE custody passes away in Michigan* <www.ice.gov/news/releases/bahamian-man-ice-custody-passes-away-michigan> (February 8, 2021) (accessed August 18, 2021).

information.²⁰ Requesters also filed a federal FOIA request for information about Mr. Dean's treatment, but ICE apparently lost the request,²¹ creating doubt that the agency will timely respond to the request.

Amici therefore urge that ICE's resistance to scrutiny constitutes an important consideration in assessing the bounds of Michigan's state FOIA statute.

B. FEDERAL FOIA IS NOT A SUBSTITUTE FOR STATE OPEN RECORDS LAW IN ENSURING TRANSPARENCY AND THE PUBLIC'S ACCESS TO INFORMATION.

There are numerous reasons why the federal FOIA process must not serve as the only avenue for obtaining records that are created or maintained by state entities. First, in Amici's collective experience, ICE often does not produce documents created or possessed by state and local entities via a federal FOIA request. The fact that disclosure under a state FOIA statute is the only way that a requester might obtain certain documents held by a state entity weighs heavily in favor of release. Second, the federal FOIA process is plagued with delays. Third, state open records laws are crucial mechanisms for obtaining important information regarding immigration detention and enforcement.

Neither the federal FOIA, nor Michigan's FOIA, were created to substitute one another. To the extent there are concerns about the improper release of sensitive information – law enforcement-related information, for example – through a state FOIA, there are safeguards in place to prevent this type of release.²² The comity between the federal and state governments

²⁰ Email from James L. Dyer, Corporation Counsel and FOIA Coordinator for Calhoun County, to My Khanh Ngo, ACLU Immigrant Rights Project (July 19, 2021, 5:31 PM) (on file with author).

²¹ Email from My Khanh Ngo, Staff Attorney ACLU Immigrants' Rights Project to FOIA Officer (July 14, 2021, 1:48 PM) (on file with author) (stating that although the agency assigned a receipt number to the request, the FOIA website showed a message that said, "There is no FOIA request in the system for that number.")

²² See, e.g., *State News*, 274 Mich App at 574 (the Court of Appeals held that the trial court must meticulously review the record to determine whether certain parts of police reports created after a series of assaults in Michigan

must serve to create parallel tracks for the access to information: one for documents under the custody of the federal government and a separate one for those held by state entities. Thus, these two tracks are not interchangeable because certain documents, such as those at issue here, were simply not created, nor are they controlled, by the federal government.

1. RECORDS CREATED BY STATE AND LOCAL ENTITIES ARE OFTEN NOT OBTAINABLE THROUGH THE FEDERAL FOIA PROCESS.

The federal FOIA process does not apply to certain documents held by local law enforcement agencies. The federal FOIA statute “only obligates [a federal agency] to provide access to those [records] which it in fact has created and retained.” *Kissinger v Reporters Comm for Freedom of the Press*, 445 US 136, 152; 100 S Ct 960; 63 L Ed 267 (1980). The U.S. Supreme Court articulated two elements that must be met to determine whether an “agency record” is subject to the federal FOIA’s disclosure requirements: (1) an agency must either create or obtain the requested materials and (2) the agency must be in control of the requested materials at the time the FOIA request is made. *US Dep’t of Justice v Tax Analysts*, 492 US 136, 145; 109 S Ct 2841; 106 L Ed 2d 112 (1989). Also, documents that are not in an agency’s possession do not constitute “agency records” even if the agency could have obtained them by asking a third party to produce them. *Rojas v Fed Aviation Admin*, 989 F3d 666, 677 (CA 9 2021) (citing *US Dep’t of Justice v Tax Analysts*, 492 US at 144).

As discussed more fully later in Section III, a close look at one of the statutes that purportedly authorizes 8 CFR 236.6 supports the conclusion that the federal FOIA statute only applies to documents that belong to ICE. In 8 USC 1103(a)(3), Congress only gave authority to the Attorney General to control, direct, and supervise “all files and records *of the Service*”

State’s campus could be released under the law enforcement exception); *see also Abdur-Rashid v New York City Police Dep’t*, 31 NY3d 217, 225–26 (2018) (national security concerns justified withholding of records under NY open records law).

(emphasis added). Here, there is no dispute that certain records Mr. Ramos-Gomez sought were not in ICE's possession and never would be released through a federal FOIA request. ICE failed to produce records related to his time in custody at Calhoun County including disciplinary records, health records, and other records relating to his interactions with Calhoun County staff. (Appellant's Br 11.) ICE's failure to provide these records frustrates the remedy that would be provided by the federal FOIA and highlights the necessity of applying Michigan's FOIA to the information sought.

2. THE FEDERAL FOIA SYSTEM SUFFERS FROM CHRONIC DELAYS THAT RESULT IN THE UNLAWFUL WITHHOLDING OF GOVERNMENT RECORDS.

The federal FOIA process is plagued with delays rendering it a poor and ineffective alternative to a state FOIA process. Even though the federal FOIA statute requires that agencies respond to requests for public information within 20 working days and may invoke a 10-day extension in unusual circumstances,²³ ICE responses to FOIA requests often take far longer than the time permitted under the statute.²⁴ Moreover, it is difficult to assess the extent of ICE's FOIA delays. In a 2018 Report, ICE reported a backlog of over 1,000 cases, but stated in a footnote that 17,043 FOIA additional cases were not accounted for and would need to be assessed the following year.²⁵ Despite litigation challenging these systemic delays, leading to a

²³ 5 USC 552(a)(6)(A)(i) & (B)(i).

²⁴ *Transgender Law Ctr v US Immigration & Customs Enforcement*, 2020 WL 7382113, at 7–8 (ND Cal, 2020) (finding that ICE's failure to respond to a FOIA request within the statutory period, only to respond after requesters filed a lawsuit flouted Congress intention in enacting FOIA.).

²⁵ Department of Homeland Security, *2018 Freedom of Information Act Report* (2019), p 6, 19, available at <https://www.dhs.gov/sites/default/files/publications/dhs_fy2018_foia_report_updated.pdf> (accessed August 17, 2021).

slight improvement,²⁶ the most recent available DHS FOIA Report states that the number of ICE FOIA requests pending at the end of the fiscal year 2020 was 12,847.²⁷

The case at bar demonstrates how a federal FOIA effort cannot adequately substitute for a state FOIA request. Mr. Ramos-Gomez submitted a request for information about his detention under the federal FOIA statute on March 29, 2019. (Appellant’s Br. 10.) Eight months after ICE failed to produce any documents, the American Civil Liberties Union filed suit in federal court to obtain these records. ICE has not produced records maintained by Calhoun County, which are the records that Appellant requested in this litigation. *Id.* Thus, any suggestion that reliance on the federal FOIA process is an adequate alternative disregards the chronic delays in ICE’s response time to a request under the federal FOIA, which makes this alternative inadequate and inefficient.

3. STATE FOIA REQUESTS YIELD CRUCIAL PUBLIC INFORMATION.

State FOIA laws have been particularly helpful in exposing dangerous and unlawful conditions in immigration detention. Last year, several state FOIA requests regarding the treatment of individuals detained in state-run jails during the COVID pandemic have underscored the importance of this avenue for transparency and accountability. Amicus, the National Immigrant Justice Center (“NIJC”) filed a series of local open records requests to shed light on how local jails and elected officials were responding to safeguarding the health of immigrants during the COVID-19 outbreak.²⁸ In response to the requests, local officials released records with outdated internal guidance or revealed that they had no relevant guidance, showing

²⁶ *Nightingale v US Citizenship & Immigration Servs*, 507 F. Supp. 3d 1193, 1203 (ND Cal. 2020).

²⁷ Department of Homeland Security, *2020 Freedom of Information Act Report* (March 2021), p 15 available at <https://www.dhs.gov/sites/default/files/publications/dhs_fy2020_foia_report_cleared.pdf> (accessed August 17, 2021).

²⁸ National Immigrant Justice Center, *Holding Local Governments Accountable for Jailing Immigrants*, <<https://immigrantjustice.org/transparency/local-state>> (accessed August 31, 2021).

a lack of preparedness for COVID-19 and lack of communication with ICE.²⁹ More recently, NIJC made several requests under state open records laws to LEAs to scrutinize conditions of detention for immigrants detained in local jails. One such example is Clay County, Indiana, which provided NIJC with contracts with ICE, invoices for reimbursement to the LEA for detaining individuals charged with immigration violations, and data about the LEA’s immigrant detainee population.³⁰ NIJC also obtained several IGSAs between LEAs and ICE to shed light on detention practices.³¹

Similarly, the Southern Poverty Law Center (“SPLC”) submitted a public records request to the Tuscaloosa County Sheriff’s Department in Alabama to learn more about COVID preparedness in that state.³² After suing the Sheriff’s Department, requesters learned that the Sheriff’s Department had not developed written protocols to address COVID-19 in violation of CDC guidance.³³ In another case, SPLC sued the Florida Department of Corrections to obtain records about the state’s plan to address COVID-19, taking into account the nearly 96,000 incarcerated individuals at risk of contracting COVID-19.³⁴

²⁹ *Id.*

³⁰ National Immigrant Justice Center, *Clay County, IN* <<https://immigrantjustice.org/issues/transparencyandhumanrights/clay-county-in>> (accessed August 24, 2021).

³¹ See Intergovernmental Service Agreement Between ICE and Dorchester County, MD, available at <<https://www.documentcloud.org/documents/20694056-igsa-contract-order-signed-12221>> (accessed August 24, 2021); see also National Immigrant Justice Center, *Immigration Centers of America Farmville, VA* <<https://immigrantjustice.org/issues/transparencyandhumanrights/immigration-centers-america-farmville-va>> (accessed August 24, 2021).

³² Southern Poverty Law Center, *SPLC Sues Tuscaloosa Sheriff for Failing to Release Public Records About Covid-19 at the Jail* <<https://www.splcenter.org/presscenter/splc-sues-tuscaloosa-sheriff-failing-release-public-records-about-covid-19-jail>> (November 23, 2020) (accessed February 20, 2021).

³³ Southern Poverty Law Center, *Lawsuit Dismissed Against Tuscaloosa Sheriff Due to Lack of COVID-19 Record* <<https://www.splcenter.org/presscenter/lawsuit-dismissed-against-tuscaloosa-sheriff-due-lack-covid-19-records>> (February 8, 2021) (accessed February 20, 2021) (the Tuscaloosa Sheriff’s Department failed to develop a “written communication plan to share critical information to incarcerated persons, staff and visitors” and “up-to-date policies about COVID” among other preventative measures.)

³⁴ Laura Cassels, Florida Phoenix, *Southern Poverty Law Center Sues for access to state prison records as COVID-19 spreads among inmates* <<https://www.floridaphoenix.com/2020/05/15/southern-poverty-law-center-sues-for-access-to-state-prison-records-as-covid-19-spreads-among-inmates/>> (May 15, 2020) (accessed August 24, 2021).

State FOIA requests also have shed light on the substandard medical care provided in state-contracted jails. In California, the organization Community Initiatives for Visiting Immigrants in Confinement (“CIVIC”) requested records through a California Public Records Act request to obtain information about standards of care for individuals incarcerated at the Theo Lacy Facility, a maximum-security jail complex in Orange County, California. CIVIC’s state public records request uncovered guidance stipulating detention standards that ICE and local officials had agreed to uphold.³⁵ Obtaining this information helped provide a framework for documenting the Sheriff’s Department’s violation of its own standards of care and neglect of the medical needs of immigrant detainees.³⁶

Advocates concerned about the welfare of detained individuals have relied, and will continue to rely, on state open records laws that often present the only pathway to obtain information regarding noncitizens’ detention. In *Cowlitz Co v Univ of Washington*, 2020 WL 1890616 at 1 (WD Wash, 2020), the Center for Human Rights sought documents relating to the detention of minors held at the Cowlitz County Jail pursuant to a contract with ICE. Despite the county’s original willingness to cooperate with the requesters, ICE prohibited the state agency from releasing documents by citing to 8 CFR 236.6. *Id.* Nonetheless, public scrutiny, including the use of state open records laws, along with pressure, played an important role in Cowlitz County’s decision to end its contract with ICE.³⁷

³⁵ See Letter to DHS Inspector General Roth, et al. from Community Initiatives for Visiting Immigrants in Confinement (CIVIC) (December 4, 2015), p 3, available at <<https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/5a9db86d24a694de0463ac20/1520285806260/>> (accessed August 31, 2021).

³⁶ *Id.*

³⁷ Esmy Jimenez, Oregon Public Broadcasting, *1 of last youth in jails in the country that holds undocumented youth to end contract with ICE* <<https://www.opb.org/article/2021/02/10/cowlitz-county-youth-services-center-longview-washington/>> (February 9, 2021) (accessed August 19, 2021).

II. 8 CFR 236.6 EXCEEDS STATUTORY AUTHORITY

The federal regulation that Appellee relies on in this matter to refrain from disclosing records to Mr. Ramos-Gomez, 8 CFR 236.6, cannot support nondisclosure of records that are properly subject to release under the Michigan Freedom of Information Act, MCL 15.231 *et seq.* As an initial matter, the regulation strays beyond the scope of the federal statutes from which it allegedly derives its authority.³⁸ These statutes simply do not speak to the question of the release of public information, much less support nondisclosure. To the extent that these statutes are ambiguous regarding whether they authorize the interpretation by the federal agency implicated here – Immigration and Customs Enforcement – public policy supports an interpretation favoring disclosure.

A reading of the regulation that favors transparency is necessary because, in promulgating the regulation, the agency was silent about federal statutes that do govern the release of information, the Freedom of Information Act, 5 USC 552 *et seq.*, and the Privacy Act, 5 USC 552a *et seq.* Further, the rationale for the promulgation of this regulation was a narrow one tethered to the safeguarding of national security and ongoing criminal investigations in the wake of the extraordinary events of September 11, 2001.³⁹ Despite this narrow justification, the federal government has applied it broadly and uses it to unduly restrict the release of information. The justifications for implementing the regulation are simply non-existent in this case – and only rarely in others – and there is no articulable reason why a state or local entity

³⁸ 67 Fed Reg 19508 (April 22, 2002).

³⁹ 67 Fed Reg 19509.

cannot disclose records in its possession, given that the regulation's authorizing statutes do not address the release of information that an individual is entitled to on the basis of state law.

A. THE PROMULGATION OF 8 CFR 236.6

The context in which ICE promulgated 8 CFR 236.6 was one of the most precarious periods for national security in United States history. Following the tragic events of September 11, 2001, various federal law enforcement agencies engaged in widespread arrests of individuals suspected of participating in the attacks or otherwise engaged in terrorist activity.⁴⁰ The basis for detaining individuals in connection with the events of September 11th included possible criminal prosecution as well as civil immigration violations.⁴¹ Individuals apprehended in these mass arrests were often held in state or county jails which contracted with the federal government to detain individuals in federal custody.⁴² In the wake of the mass arrests, legal rights groups grew concerned about potential civil rights violations, and the ability of arrested individuals to access counsel.⁴³ Litigation ensued to seek the release of names of individuals held in federal custody in state or county facilities under state records laws.⁴⁴ While the litigation was ongoing, the former Immigration and Naturalization Service (“INS”), housed under the Department of

⁴⁰ *Am Civil Liberties Union of New Jersey, Inc v Co of Hudson*, 352 NJ Super 44, 58; 799 A2d 629 (2002). Many of these arrests triggered concerns with a lack of transparency and due process, including arbitrary detention and denial of access to counsel; see Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, (August 2002), Vol. 14, No. 4 (G), available at <<https://www.hrw.org/reports/2002/us911/USA0802.pdf>> (accessed August 31, 2021).

⁴¹ *Co of Hudson*, 352 NJ Super at 58.

⁴² *Id.*

⁴³ *Id.* at 56.

⁴⁴ *Id.*

Justice,⁴⁵ enacted 8 CFR 236.6, bypassing the normal process for rulemaking outlined by the APA.⁴⁶ In its entirety, 8 CFR 236.6 reads as follows:

Information regarding detainees.

No person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of the Service (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee. Such information shall be under the control of the Service and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders. Insofar as any documents or other records contain such information, such documents shall not be public records. This section applies to all persons and information identified or described in it, regardless of when such persons obtained such information, and applies to all requests for public disclosure of such information, including requests that are the subject of proceedings pending as of April 17, 2002.⁴⁷

Relying on Presidential Proclamation 7534, issued by former President Bush on September 14, 2001, the agency invoked the “good cause” exemption to the traditional rulemaking procedure, meaning the agency quickly enacted the regulation without notice to the public and the opportunity for comment.⁴⁸ The primary rationale by the agency for invoking the exception involved concerns about post-9/11 national security, ongoing sensitive law enforcement investigations, and the privacy rights of individuals who could face retaliation for cooperating with the federal government.⁴⁹ Despite the narrow language of 8 CFR 236.6, the regulation has been applied by ICE in cases that raise no national security concerns, ongoing sensitive law

⁴⁵ In response to the events of September 11, 2001, the former Immigration and Naturalization Service, which was previously housed under the Department of Justice (DOJ), was dismantled when Congress created the Department of Homeland Security (DHS), naming the Secretary of DHS as the Department Head. See Homeland Security Act of 2002, P.L. 107-296 (Nov. 25, 2002). DHS in turn subsumed the federal immigration agencies, including ICE. Technical amendments subsequently changed references in the immigration statute to reflect the change in duties from the Attorney General to the Secretary of DHS, where applicable. 8 CFR 1001.1(c).

⁴⁶ See 67 Fed Reg 19508.

⁴⁷ 8 CFR 236.6.

⁴⁸ See 67 Fed Reg 19510; 5 USC 553(b)(3)(B), (d)(3).

⁴⁹ 67 Fed Reg 19509.

enforcement matters, or, as in Mr. Ramos-Gomez's case where he seeks records about himself, any privacy interest concerns.⁵⁰

B. THE REGULATION IS NOT A VALID INTERPRETATION OF THE FEDERAL STATUTES IT PURPORTS TO INTERPRET.

Federal agencies may engage in rulemaking to interpret Congressional statutes that they are tasked with administering.⁵¹ Where the statute's language is clear, its intent must be given effect.⁵² If the statute is ambiguous, then the agency can supply a meaning; nonetheless, its interpretation must be reasonable.⁵³

In this case, the former INS cited 8 USC 1103(a)(1) as the authority for promulgation of the rule.⁵⁴ That statutory provision recognizes the DHS Secretary's authority to oversee "...the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens..." and exempts matters otherwise designated to other federal agencies.⁵⁵ Further, while not explicitly citing any other authority for the rule, the former INS noted that the regulation was "necessary and proper" for the execution of the Attorney General's duty with respect to other statutory provisions: to carry out the detention of noncitizens, 8 USC 1226 and 1231; to control, direct and supervise all Service files and records, 8 USC 1103(a)(2); to contract for the provision of "...clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by the Service pursuant to Federal law," 8 USC 1103(a)(9)(A)) and generally cited to 18 USC 4002, 4013(a)(4).

⁵⁰ *Id.*

⁵¹ *Chevron USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837, 843; 104 S Ct 2778, 2782; 81 L Ed 2d 694 (1984).

⁵² *Id.* at 842.

⁵³ *Id.*

⁵⁴ 67 Fed Reg 19509.

⁵⁵ 8 USC 1103(a)(1).

By its plain terms, 8 USC 1103(a)(1) purports to define the Secretary's duties as encompassing the enforcement of the immigration statute, and specifically, "laws relating to the immigration and naturalization of aliens." The plain language thus describes the authority at 8 USC 1103(a)(1) as circumscribed to the administration and enforcement of immigration and naturalization.⁵⁶ Nothing in the statutory text suggests that the Secretary's authority encompasses the ability to restrict the release of records by non-Federal entities relating to detained noncitizens, much less restrict the release of records that are otherwise subject to public disclosure.

Similarly, none of the other statutes cited in the rule's publication in the Federal Register support a broad interpretation of the Secretary's authority to restrict the release of records. Nothing in 8 USC 1226 and 1231, statutes that contain the Attorney General's authority to detain noncitizens pre- and post-removal, bear any connection to the handling of records or otherwise public information. 8 USC 1103(a)(2), as it existed at the time of the regulation's issuance, relates to administrative recordkeeping.⁵⁷ Section 18 USC 4002 relates to employment for federal prisoners in state prisons. And 18 USC 4013(a)(4) governs primarily the authorization to expend federal funds for the care and housing of federal prisoners in non-federal facilities. None of these statutes can be read to encompass any basis for DHS's interpretation that it can preclude the release of records otherwise not subject to withholding or exemption under public access laws.

⁵⁶ *Mt Clemens Auto Ctr Inc v Hyundai Motor America*, 897 F Supp 2d 570, 574 (ED Mich, 2012) ("In construing the meaning of a statute, the court must seek the intent of the legislature and refer first to the statute's plain language.") (citations omitted); *see also First American Nat Bank-Eastern v FDIC*, 782 F2d 633, 636 (CA 6, 1986).

⁵⁷ In its entirety, 8 USC 1103(a)(2) reads: "[the Secretary] shall have control, direction, and supervision of all employees and of all the files and records of the Service."

Not only did the former INS explicitly rely on statutes that do not deal with or mention the release of government records to the public, including individual requesters such as Mr. Ramos-Gomez, but it did not address or engage with the federal statutes that do speak directly on this obligation. Both the federal FOIA statute and the Privacy Act provide a framework by which individuals and the public can make requests for records.⁵⁸ The Privacy Act, which specifically applies to U.S. citizens like Mr. Ramos-Gomez, directs an agency to release records to the subject of those records.⁵⁹ In enacting the federal FOIA statutes, it is clear that Congress designed it to be “not a withholding statute but a disclosure statute.”⁶⁰ Importantly, both statutes account for the concerns expressed in the promulgation of 8 CFR 236.6, the protection of personally identifiable information (PII) as to third parties as well as records relating to criminal investigations or sensitive national security concerns.⁶¹

Indeed, in *ACLU v County of Hudson*, the court addressed the agency’s purported authority for promulgating 8 CFR 236.6, suggesting it was not as expansive as it might appear:

“...it may be open to question whether 8 CFR 236.6 actually ‘relates’ to immigration and naturalization, for the rule itself does not purport to regulate the conduct or status of aliens, nor does it address the legal processes afforded INS detainees. Rather, the regulation deals solely with public access to records concerning detainees. Thus, the real focus of the regulation, as evidenced by the rationale presented in its preamble, may be seen to be on the facilitation of law enforcement efforts in the wake of September 11.”⁶²

Courts that have subsequently examined 8 CFR 236.6 in this context, that is, as preempting the release of records pursuant to state open records laws, have concluded, or otherwise accepted

⁵⁸ 5 USC 552 *et seq.*; 5 USC 552a *et seq.*

⁵⁹ 5 USC 552a(b).

⁶⁰ S Rep No 89-813, at 5 (1965).

⁶¹ 5 USC 552(b)(5),(7); (c)).

⁶² *Co of Hudson* at 77. Nonetheless, in a conclusion that overlooked the plain language of the statute, the court in *Hudson* stated that it would “breach overarching principles of our federalism if we were to see this case as an occasion for viewing the grant of authority to the Commissioner as anything but very broad.” *Id.* at 78.

that the regulation was properly promulgated pursuant to the Attorney General's authority.⁶³ Other courts have distinguished the circumstances to which the regulation applies.⁶⁴ However, these courts have deferred to the government's stated justifications for promulgating the rule, and have thus failed to fully analyze the question of whether the agency's regulation is a reasonable construction of 8 USC1103(a)(1).

Because the statutory authority cited by the former INS for 8 CFR 236.6 plainly does not authorize the regulation, the Court should grant leave to appeal to fully consider Appellee's obligations under MCL 15.243(1)(d) vis-à-vis a federal regulation that does not comport with statutory authority. At minimum, as Appellant argues, the regulations must be applied in a manner that gives effect to the spirit of transparency intended behind open access laws. These considerations are especially important in this case because they implicate governmental overreach and misconduct, as well as a systemic resistance to public scrutiny.

CONCLUSION

For the foregoing reasons, Amici request this Court grant Appellant's request for leave to appeal in order to consider the important question of whether Michigan's state FOIA statute has been properly curtailed in this case. Amici strongly maintain that it has not, and the Court must grant leave to appeal to fully consider the adverse implications for transparency that the lower court's holding will generate. This is particularly so in the context of state and federal agreements to engage in immigration enforcement. Such entanglements warrant public scrutiny via the state FOIA process, which is a crucial mechanism for assuring the public's right to know.

⁶³ *Voces De La Frontera, Inc v Clarke*, 373 Wis 2d 348; 2017 WI 16; 91 NW2d 803 (2017); *Comm'r of Correction v Freedom of Info Com'n*, 307 Conn 53; 52 A3d 636 (2002).

⁶⁴ See *US v California*, 2018 WL 3361055 at *1 (ED Cal, 2018) (affirmed by *US v California*, 921 F3d 865 (CA 9, 2019) on other grounds).

The federal FOIA process is not an appropriate alternative given ICE's track record of avoiding scrutiny, combined with its chronic FOIA delays. Moreover, the federal regulation that the lower court determined to have preclusive effect on the release of information via the state FOIA process simply does not have statutory justification and must not serve as the basis to impede Michigan's state FOIA process. Amici thus ask this Court to grant leave to appeal and give full consideration to the issues at stake in this case.