STATE OF MICHIGAN

IN THE COURT OF APPEALS

AMERICAN CIVIL LIBERTIES UNION
OF MICHIGAN,

Plaintiff-Appellant,

v

CALHOUN COUNTY SHERIFF'S OFFICE,

Defendant-Appellee.
_____/

Court of Appeals No. 352334

Lower Court Case No. 2019-002106-CZ

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PLAINTIFF/APPELLANT

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INTEREST OF AMICI CURIAE[1]

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.

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

[1]Pursuant to MCR 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.

implement and execute immigration laws in a manner that comports with due process and transparency.

The National Immigrant Justice Center ("NIJC"), a program of the Heartland Alliance for Human Needs and Human Rights, is a Chicago-based, not-for-profit organization that provides legal representation to low-income immigrants, refugees, and asylum seekers across the country. Together with over 1,500 pro bono attorneys, NIJC represents thousands of individuals annually, including individuals in immigration custody. Through FOIA litigation and initiatives like its Transparency and Human Rights Project, NIJC investigates conditions and systemic problems in immigration detention centers and has authored or co-authored a number of reports regarding inhumane conditions in the immigration detention system.

INTRODUCTION

This case is about Appellee Calhoun County's refusal to produce records to Jilmar Ramos-Gomez, a United States citizen, in response to his state FOIA request for information regarding his harrowing, wrongful transfer to and subsequent detention in Immigration and Customs Enforcement (ICE) custody. Appellee relies on a federal regulation, 8 CFR 236.6, to withhold records about Mr. Ramos-Gomez's detention that otherwise would be released under the Michigan Freedom of Information Act (FOIA). Amici ask this Court to reject this position. State FOIA laws must be given effect, in the interest of government transparency and accountability. These laws constitute an important mechanism particularly where the operations of federal immigration agencies, such as Immigration and Customs Enforcement (ICE), are implicated. ICE has a well-documented history of troubling enforcement practices including mistreatment of individuals held in its detention facilities. An agency that routinely avoids scrutiny under the federal FOIA statute, ICE continues to operate in secrecy, and through 8 CFR

236.6, seeks to enlist its state contracting partner, Appellee Calhoun County, in its resistance to transparency. This is particularly problematic because reliance on the federal FOIA process and 8 CFR 236.6 is misplaced. The regulation was enacted after the events of September 11, 2001 – an extraordinary period in U.S. history - and the regulation must be contemplated in that context. The regulation bypassed normal rulemaking procedures and stands on shaky legal authority. Even if the Court were to find the regulation was properly promulgated, it must construe it narrowly and find that the regulation cannot preclude release of records to Mr. Ramos Gomez, a formerly detained individual who seeks records about himself, records which encompass those exclusively created and/or in the possession of Appellee.

Mr. Ramos-Gomez's case demonstrates the importance of facilitating public access to records regarding governmental operations. Public scrutiny is especially crucial in instances of governmental misconduct and overreach. Mr. Ramos-Gomez should have access to information through the Michigan Freedom of Information Act as well as the federal Freedom of Information Act (FOIA), 5 USC 552. and the Privacy Act, 5 USC 552a. Without access to both state and federal FOIA laws, there will not be full scrutiny and accountability of his wrongful transfer to and time in ICE detention.

SUMMARY OF ARGUMENT

Mr. Ramos-Gomez, a United States citizen wrongly incarcerated in a state facility that contracts with the federal government to detain immigrants should have access to state and federal FOIA processes to uncover details about his detention. To require that he rely strictly on the federal FOIA process to obtain information about the state facility where he was detained merely because the state facility contracts with the federal government erroneously interprets the law and results in harm to the public's right to inquire about government activities. Further,

ICE's compliance with the federal FOIA laws is often ineffective and slow and cannot provide access to state records that are not in ICE's possession. In addition, ICE, through various measures, has attempted to avoid scrutiny of its enforcement and detention practices. Barring access to the state FOIA process - a legitimate and effective form of information gathering – would contribute to this lack of transparency. Numerous examples of successful efforts to obtain information about ICE detention through state FOIA requests demonstrate the importance of this avenue for transparency and accountability. Moreover, Appellee Calhoun County is incorrect in its assessment that 8 CFR 236.6 bars the release of information through the state FOIA process. The statutes purportedly granting the authority for the regulation do not suggest that the agency may bar access to state records as it has done in this case, nor should they be construed to preclude such access.

ARGUMENT

I. State FOIA laws are Critical to Understanding the Experience of Individuals Detained in State Facilities that Contract with the Federal Government

In December of 2018, Immigration and Customs Enforcement (ICE) took Mr. Ramos-Gomez, a United States citizen born in the state of Michigan, into its custody.[2] At the time that ICE detained him, Mr. Ramos-Gomez was 27 years old and a military veteran.[3] He enlisted in the Marines directly from high school and served as a lance corporal and tank crewman in the U.S. Marines.[4] Having served honorably in Afghanistan, he was awarded a National Defense Service Medal, a Global War on Terrorism Service Medal, an Afghanistan Campaign Medal, and

[2] Eli Rosenberg, The Washington Post, *A Latino Marine veteran was detained for deportation. Then ICE realized he was a citizen* <https://www.washingtonpost.com/national-security/2019/01/17/latino-marine-veteran-was-detained-deportation-then-ice-realized-he-was-citizen/?outputType=amp> (January 16, 2019) (accessed February 21, 2021).
[3] *Id.*
[4] *Id.*

a combat action ribbon.[5] Like many military veterans, Mr. Ramos-Gomez suffers from Post-Traumatic Stress Disorder (PTSD).[6] And like many individuals, including veterans, suffering from mental health illnesses, Mr. Ramos-Gomez came into contact with the criminal system. He was arrested in connection with pulling a fire alarm at a hospital.[7] Mr. Ramos-Gomez eventually pled guilty to a misdemeanor charge of trespassing in Kent County, Michigan.[8] Mr. Ramos-Gomez was to be released on December 14, 2019. Instead, inexplicably, ICE took him into custody.[9] Subsequently, Mr. Ramos-Gomez and his family learned that a state officer had been the one to alert ICE to his presence at the county jail, based on nothing more than apparent racial profiling.[10] Mr. Ramos Gomez then pursued answers via the federal and MI FOIA statutes.[11]

The pipeline from criminal arrest to immigration detention, which encompasses state collaboration with the federal government, is the subject of much debate and public concern given its susceptibility to due process and civil rights violations.[12] An area of heightened concern

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[5] *Id*.
[6] *Id.*, see also David Finkel, The New Yorker, *The Return: The traumatized veterans of Iran and Afghanistan* <https://www.newyorker.com/magazine/2013/09/09/the-return> (September 2, 2013) (accessed February 22, 2021)
[7] Hamed Aleaziz, "*Could You Please Check His Status?": Records Show How A US-Born Marine Ended Up In ICE Custody*, BuzzFeed News <https://www.buzzfeednews.com/amphtml/hamedaleaziz/jilmar-ramos-gomez-ice-detained-veteran-records-aclu> (February 25, 2019) (accessed February 22, 2021)
[8] *Id*.
[9] Sarah Rahal, Detroit News, *ACLU: Government mistakenly sought to deport Michigan vet* <https://amp.detroitnews.com/amp/38906691> (January 16, 2019)
[10] Niraj Wariku, Detroit Free Press, *Grand Rapids officer who turned Marine veteran over to ICE is reinstated* <https://amp.freep.com/amp/3614256002> (April 30, 2019) (accessed February 23, 2021)
[11] Dustin Dwyer and Cheyna Roth, *Michigan Radio, ACLU sues ICE for failing to release records in case involving Marine combat vet* <https://www.michiganradio.org/post/aclu-sues-ice-failing-release-records-case-involving-marine-combat-vet> (November 20, 2019) (accessed February 23, 2021)
[12] Nayna Gupta and Heidi Altman, National Immigrant Justice Center, *Disentangling Local Law Enforcement from Federal Immigration Enforcement*

is the erroneous detention by ICE of United States citizens. Unquestionably, ICE's authority to detain individuals is circumscribed to individuals who are not U.S. citizens and ICE guidance reflects policies against the detention of U.S. citizens.[13] Yet ICE continues to erroneously detain U.S. citizens.[14] Such detention is further troubling when it occurs within an immigration enforcement system imbued with troubling practices and conditions of confinement. How this happens and why warrants scrutiny, both by individuals like Mr. Ramos-Gomez who are ensnared in this system, as well as the public at large.

A. ICE Avoids Scrutiny of Its Detention Practices

The discussion about the importance of providing a complete record of an individual's treatment in immigration detention must occur within a broader conversation about ICE's lack of transparency and lack of compliance with the federal Freedom of Information (FOIA) statute. ICE's lack of transparency is no more acute than with respect to its role as a jailer of tens of

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<https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2021-01/Policy-brief_disentanglement_Jan2021_FINAL.pdf> (January 2019) (accessed February 24, 2021); Emma Winger, American Immigration Council, *The Jail-to-Deportation Pipeline Turns Deadly for Immigrants in the Pandemic*, at <https://immigrationimpact.com/2020/07/16/death-ice-detention-covid/#.YDVBVGhKg2w> (posted July 16, 2020) (accessed February 24, 2021

[13]8 USC 1226(a)(authorizing arrest, detention and release of noncitizens); Immigration and Customs Enforcement, *Investigating the Potential U.S. Citizenship of Those Encountered by ICE* < https://www.ice.gov/sites/default/files/documents/Document/2017/16001.2.pdf> (June 15, 2015) (accessed February 14, 2021)

[14] Cassandra Burke Roberston and Irina Manta, The Conversation, *A long-running immigration problem: The government sometimes detains and deports US citizens* <https://theconversation.com/amp/a-long-running-immigration-problem-the-government-sometimes-detains-and-deports-us-citizens-119702> (July 8, 2019) (accessed February 24, 2021;Paige St. John and Joel Rubin, The Los Angeles Times, *ICE held an American man in custody for 1,273 days. He's not the only one who had to prove his citizenship* <https://www.latimes.com/local/lanow/la-me-citizens-ice-20180427-htmlstory.html> (April 27, 2018) (accessed February 24, 2021) David J. Bier, Cato Institute, *U.S. Citizens Targeted by ICE: U.S. Citizens Targeted by Immigration and Customs Enforcement in Texas* <https://www.cato.org/immigration-research-policy-brief/us-citizens-targeted-ice-us-citizens-targeted-immigration-customs> (August 29, 2018) (accessed February 24, 2021)

thousands of immigrants. 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."[15] At times in 2019, ICE detained over 56,000 people - a historic number of individuals.[16] 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.[17] 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.[18] 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.[19]

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

[16] 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

[17] Yuki Noguchi, NPR, *Unequal Outcomes: Most ICE Detainees Held in Rural Areas Where Deportation Risks Soar* <https://www.npr.org/2019/08/15/748764322/unequal-outcomes-most-ice-detainees-held-in-rural-areas-where-deportation-risks> (August 15, 2019) (accessed February 24, 2021).

[18] 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* <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf> June 26, 2018) (accessed February 24, 2021)

[19] 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_acludwnnijc.pdf> (Feb. 2016) (accessed February 24, 2021) (describing efforts to compel transparency around detention conditions at Eloy Detention Facility).

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.[20] ICE's oversight of its detention facilities has been criticized by the DHS Office of Inspector General (DHS OIG) as ineffective in identifying and correcting poor detention conditions and ensuring consistent compliance with governing detention standards.[21] 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.[22]

In a recent effort to avoid scrutiny, ICE requested that thousands of immigration records detailing abuse and mistreatment in detention facilities be destroyed.[23] In December 2019, the National Archives (NARA) approved ICE's request to destroy numerous categories of documents addressing abuses immediately or after short periods of time and almost no records to be permanently preserved.[24] Though agencies are permitted to destroy certain records according to a schedule approved by NARA, the ICE schedule has caused widespread concern because the records slated for destruction contain vital details about people's treatment in immigration

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[20] 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).

[21] See note 18, Off. Inspector Gen., Dep't Homeland Sec., OIG-18-67, 4.

[22] National Immigrant Law Center, *Blazing a Trail: The Fight for Right to Counsel in Detention and Beyond* (March 2016), 4-6 available at <https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf (accessed February 20, 2021).

[23] National Archives and Records Administration, *ICE Request for Records Disposition Authority*, Schedule No. DAA-0567-2015- 0013. A.R. 171 (December 12, 2019), available at <https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-homeland-security/rg-0567/daa-0567-2015-0013_sf115.pdf> (accessed February 24, 2021)

[24] *Id*.

detention.[25] They include information about deaths in detention, investigations into sexual and physical abuse, and medical and civil rights complaints.[26] The records scheduled to be destroyed have already proven to be important sources of information for researchers, historians, and advocates who have relied on ICE records that span multiple years to provide necessary analysis of ICE's role in enforcement and detention.[27] Without documents such as the ICE's Enforcement and Removal Operations (ERO) Detainee Death Review Files, Detainee Segregation Reports, Detention Monitoring Reports and DRIL Hotline Reports – all records that would be destroyed under the ICE disposition schedule – in many cases, the research and public understanding of ICE detention practices would not have been possible. Advocates concerned about the welfare of detained individuals have relied and will continue to rely on these records to assess the state of the U.S. detention system and the mistakes of the recent past in an effort not to repeat them.

Most recently, ICE has withheld critical information about its response to the COVID-19 pandemic as the virus tears through its facilities, infecting thousands of individuals in ICE detention facilities.[28] The predictable widespread outbreak in ICE facilities has sparked habeas

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[25] David S Ferriero, The New York Times, *The National Archives Responds* <https://www.nytimes.com/2020/02/07/opinion/letters/national-archives.html> (February 7, 2020) (accessed February 24, 2021)

[26] See note 23, Nat'l Archives and Records Administration, *Approved ICE Request for Records Disposition Authority*, Schedule No. DAA-0567-2015- 0013. A.R. 171.

[27] See e.g., Patler, Sacha, & Branic, *The Black Box Within a Black Box: Solitary Confinement Practices in a Subset of U.S. Immigrant Detention Facilities*, 35 J. Population Rsch. 435 (2018); Ryo & Peacock, *A National Study of Immigration Detention in the United States*, 92 S. Cal. L. Rev. 1 (2018).

[28] Immigration and Customs Enforcement, *ICE Guidance on COVID-19: ICE Detainee Statistics* <https://www.ice.gov/coronavirus> (accessed February 24, 2021) (confirming 9,569 individuals have tested positive for COVID-19 since testing began in February 2020); 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.[29] 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.[30]

B. ICE's Systemic Delays Under the Federal FOIA Statute and Commitment to Secrecy Have Made It Increasingly Difficult to Obtain Records

ICE routinely violates the federal FOIA statute. The FOIA requires that agencies respond to requests for public information within 20 working days.[31] Agencies may invoke a 10-day extension in the case of unusual circumstances.[32] ICE responses to FOIA requests often take far longer than the twenty or thirty days permitted under the statute, exemplified by its chronic backlog. Exacerbating matters, ICE is not transparent or accurate in its accounting of chronic delays in responding to FOIA requests. 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

[29] 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).

[30] See e.g., *Am. Immigration Council v. United States Dep't of Homeland Sec,* Memo. Op., *15, No. 20-1196, U.S. Dist. LEXIS 117862 (DDC July 6, 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); *Fraihat v. United States Immigration & Customs Enforcement,* Ord. Granting Class Cert. Mot., *22, No. 19-1546, 2020 U.S. Dist. LEXIS 72015 (CD Cal. April 20, 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").

[31] 5 USC 552(a)(6)(A)(i).

[32] 5 USC 552(a)(6)(B)(i).

would need to be assessed the following year.[33] In the most recent U.S. Department of Homeland Security (DHS) FOIA Report, the backlog again totaled a relatively modest 1,493 for fiscal year 2019, but a notation indicated that an additional 59,123 FOIA requests were not recorded during the reporting period.[34] This nontransparent accounting was recently highlighted in a court order granting class certification to a nationwide class of individuals whose FOIA requests for individual records have been unlawfully delayed by ICE.[35] The court indicated the critical need for timely responses, citing the importance of individual immigrant records in assessing eligibility to apply for immigration benefits as well as defending against deportation.[36]

In addition to delaying responses for agency records, ICE recently found a new way to avoid scrutiny of its actions: it requested and received a designation as a "security/sensitive agency."[37] According to a government memo, the designation ensures that "all relevant personally identifiable information (PII) of all ICE personnel" will be withheld or redacted by the Office of Personnel Management (OPM) when processing FOIA requests.[38] This includes agency officials' names, duty stations, and salaries- information key to investigating complaints or allegations of abuse by certain officers. Though ICE claimed personnel have experienced

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[33] 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 February 20, 2021) ("DHS 2018 FOIA Report").

[34] Department of Homeland Security, *2019 Freedom of Information Act Report* (2020), 14, 27, available at <https://www.dhs.gov/sites/default/files/publications/dhs_fy2019_foia_report_final_1.pdf> (accessed February 20, 2021) ("DHS 2019 FOIA Report").

[35] *Nightingale v. U.S. Citizenship & Immigr. Servs.*, No. 19-03512, 333 F.R.D. 449, *462 (ND Cal., Oct. 15, 2019).

[36] *Id*. at 453.

[37] Ken Klippenstein, The Nation, *ICE Just Became Even Less Transparent* <https://www.thenation.com/article/politics/ice-security-agency/> (July 2, 2020) (accessed February 24, 2021)

[38] *Id.*

more threats and intimidation in recent years, the memo provides no examples indicating FOIA releases have resulted in those threats.[39] The new security designation places ICE officials on the same level as officials with the Federal Bureau of Investigations (FBI) and Secret Service. Exemptions under FOIA are already liberally applied by ICE to withhold information in responses to requests for information.[40] Given existing exemptions that allow the agency to withhold law enforcement sensitive information,[41] the new designation is an unnecessary attempt to further shield ICE activities from public oversight.

The systemic problems faced by individuals attempting to access their own immigration records, including chronic delay, have informed a debate about whether FOIA is even the proper mechanism for individuals to obtain records about themselves. The National Archives' FOIA Advisory Committee – composed of members of the FOIA requester community and agency representatives – recently recommended that government agencies explore an alternative to FOIA, so that individuals potentially would receive more efficient and complete responses to their FOIA requests. The committee emphasized the importance of access to "first-person" records separate from the need for public disclosure and agency accountability:

> "[M]any government agencies have come to rely on FOIA to address other needs for access to information by the public beyond the worthy goals of transparency and accountability . . . There are numerous legitimate reasons why citizens (and non-citizens) require access to government information and records other than to hold the government accountable. A substantial volume of FOIA requests are requests by 'individuals seeking records about themselves: for example, their own medical files, immigration records, or investigation files – often known as 'first-person' FOIA requests.'"[42]

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[39] *Id.*
[40] See note 34, DHS 2019 FOIA Report.
[41] See 5 USC 552(b).
[42] Freedom of Information Act Fed. Advisory Comm., *2018-2020 Committee Term Final Report and Recommendations* (July 9, 2020), pp 26-28, available at <https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2020-07-09.pdf> (accessed February 20, 2021)

In imagining a new process for access to individual records, the committee recommended that agencies undertake an assessment to determine a way to guarantee access to the "same amount of records or more records than is possible under FOIA within a quicker time frame."[43]

II. State FOIA Laws Are a Critical Accountability Tool.

The importance of obtaining records through state FOIA requests cannot be overstated where ICE consistently fails to provide timely and complete responses to requests for information through the federal FOIA process. Where there are state alternatives to accessing individuals' records or opportunities to obtain records through state open records laws that would supplement records obtained through the FOIA and Privacy Act, those processes must be available to individuals who endure ICE detention.

A. State Records Requests Compliment the Federal FOIA Process and Bring Important Information About ICE Detention to Light

Given ICE's ongoing challenges in providing important to individuals through the federal FOIA system, state FOIA laws provide an important complimentary avenue to obtaining records. Individuals and organizations look to state FOIAs to obtain information not possessed by federal authorities, particularly when that information relates to immigration detention.

In a recent effort to learn more about the policies and guidance used to prevent the spread of COVID-19 in state facilities, 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 the COVID-19 outbreak.[44] In response to NIJC requests, local officials released records with

[43] *Id.* at 28.
[44] National Immigrant Justice Center, *Holding Local Governments Accountable for Jailing Immigrants,* <https://immigrantjustice.org/transparency/local-state> (accessed February 24, 2021) ("NIJC: Holding Local Govts Accountable")

outdated internal guidance, showing a lack of preparedness for COVID-19.[45] Though local officials publicly released newer guidance showing the jails were following Center for Disease Control and Prevention (CDC) guidelines to control the spread of the virus, testimonies from individuals detained in the same facilities reported different conditions, including denial of basic hygienic products like hand sanitizers.[46] In other cases, local officials said they had no records responsive to the requests for information, illustrating a concerning lack of communication between ICE and the officials responsible for people detained on behalf of ICE.[47]

The Southern Poverty Law Center (SPLC) submitted a similar public records request to and later filed a lawsuit against Alabama's Tuscaloosa County's Sheriff's Department.[48] The requesters learned that the Sheriff's Department had not developed written protocols to address COVID-19 in violation of CDC guidance.[49] The Tuscaloosa Sheriff's Department failed, according to the SPLC, 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.[50] In another case, SPLC sued the Florida Department of Corrections to

[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] 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)
[49] 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).
[50] *Id.*

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.[51]

To obtain information about standards of care for individuals incarcerated at the Theo Lacy Facility, a maximum-security jail complex in Orange County, California, the organization Community Initiatives for Visiting Immigrants in Confinement (CIVIC) requested records through a California Public Records Act request. CIVIC uncovered guidance stipulating that individuals with a medical condition that cannot be "'reasonably managed in an outpatient ambulatory care setting' should not be admitted into Orange County Sheriff's Department care."[52] 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 incarcerated individuals.[53]

State records requests allow access to documents that organizations otherwise have not been able to obtain through federal FOIA efforts. Through state open records requests, the NIJC has obtained information about contracts between local governments and ICE to detain individuals. For example, FOIA requests have been critical to better understanding the "middleman contracting" scheme which was found to be improper under federal procurement

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[51] 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 February 24, 2021).

[52] *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 February 24, 2021) (citing Orange County Sheriff's Department IGSA with ICE – Medical Services, response to CIVIC's California Public Records Act request).

[53] *Id*.

law and stifled accountability of violations of detention standards at the facilities.[54] One FOIA uncovered a contracting scheme that involved an ICE detention facility in Farmville, Virginia, where the town of Farmville served as a pass-through for funding for an ICE facility.[55] The Farmville facility has been the subject of complaints regarding medical care, use of force and restraints, lack of religious accommodation, environmental health and safety, and other abusive conditions of detention. In June 2019, after ICA Farmville suspended lawyer visits in response to a mumps outbreak, detained immigrants organized a "meal strike" in protest of the restricted freedoms. Guards cracked down on the protesters, using pepper spray and putting some into solitary confinement.[56]

Access to information about individuals held in facilities contracting with ICE is vital to ensuring individuals have a full record of their treatment in detention. Applying 8 CFR 236.6 to deny access to the state FOIA process in this case would place an unnecessary chokehold on the flow of information about a state facility. In this case, where the subject of the detention was a U.S. citizen who was wrongly detained because of significant errors by ICE, the application of a regulation to favor ICE's approach to information sharing would be both improper and appallingly ironic.

III. This Court Should Not Rely on 8 CFR 236.6 to Preclude the Release of Records Under the Michigan Freedom of Information Act

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

[54] See note 44, NIJC: Holding Local Govts Accountable.
[55] National Immigrant Justice Center, *The Dark Money Trial Behind Private Detention: Immigration Centers of America-Farmville* (October 7, 2019), available at <https://immigrantjustice.org/research-items/policy-brief-dark-money-trail-behind-private-detention-immigration-centers-america> (accessed February 20, 2021).
[56] *Id.*

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 it allegedly interprets. 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. Despite this narrow justification, the federal government has applied it broadly and in an unduly restrictive manner. Beyond the need to protect national security or sensitive law enforcement investigations, including safeguarding witnesses – concerns not implicated in Mr. Ramos-Gomez's case, and only rarely, in others – there is no principled reason why a state entity cannot release records in its possession to which an individual requester is entitled.

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.[57] The basis for detaining individuals in connection with the events of September included possible criminal prosecution as well as civil immigration violations.[58] 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.[59] In the wake of the mass arrests, legal rights groups grew concerned about potential violations of civil rights violations, and the ability of arrested individuals to access counsel.[60] Litigation ensued to seek the release of names of individuals held in federal custody in state or county facilities under state records laws.[61] While the litigation was ongoing, the former Immigration and Naturalization Service (INS), housed under the Department of Justice (DOJ),[62] enacted 8 CFR 236.6, bypassing the normal process for rulemaking outlined by the Administrative Procedure Act (APA).[63] 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

[57] *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 February 23, 2021)

[58] *Co of Hudson*, 352 NJ Super at 58

[59] *Id*.

[60] *Id*. at 56.

[61] *Id*.

[62] 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)

[63] 67 Fed. Reg. 19508 (April 22, 2002).

> 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.[64]

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.[65] 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.[66] 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 enforcement matters, or, as in Mr. Ramos-Gomez's case where he seeks records about himself, any privacy interest concerns.[67]

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.[68] Where the statute's language is clear, its intent must be given

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[64] 8 CFR 236.6.
[65] 67 Fed. Reg. at 19510; 5 USC 553(b)(3)(B), (d)(3).
[66] 67 Fed. Reg at 19509.
[67] *Id*.
[68] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 843,104 S.Ct. L.Ed.2d 694 (1984)

effect.[69] If the statute is ambiguous, then the agency can supply a meaning; nonetheless, its interpretation must be reasonable.[70]

In this case, the former INS cited 8 USC 1103(a)(1) as the authority for promulgation of the rule.[71] 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.[72] 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).

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.[73] Nothing in the statutory text suggests that the Secretary's authority encompasses

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[69] *Id*. at 842.
[70] *Id*.
[71] 67 Fed. Reg. at 19509.
[72] 8 USC 1103(a)(1); 8 CFR 1001.1(c).
[73] *Mt. Clemens Auto Center 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. F.D.I.C.*, 782 F.2d 633, 636 (CA 6, 1986)

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.[74] 18 USC 4002 relates to employment for federal prisoners in state prisons. 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.

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.[75] The Privacy Act, which specifically applies to U.S. citizens like Mr. Ramos-Gomez, directs an agency to release records

[74] 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."
[75] 5 USC 552 *et seq*.; 5 USC 552a et seq.

to the subject of those records.[76] In enacting the federal FOIA statutes, it is clear that Congress designed it to be "not a withholding statute but a disclosure statute."[77] 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.[78]

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 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."[79]

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 that the regulation was properly promulgated pursuant to the Attorney General's authority.[80] Other courts have distinguished the circumstances to which the regulation applies.[81] However, these courts have not fully explored the question of whether the agency's regulation is a reasonable construction of 8 USC 1103(a)(1).

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[76] 5 USC 552a(b)
[77] S. Rep. No. 89-813, at 5 (1965).
[78] 5 USC 552(b)(5),(7); (c); 5 USC 552a(b).
[79] *Co of Hudson* at 77 Nonetheless, in a strained conclusion overlooking 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.
[80] *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)
[81] See e.g., *U.S. v. California*, 2018 WL 3361055 at *1 (ED Cal, 2018) (affirmed by *U.S. v. California*, 921 F.3d 865 (CA 9, 2019) on other grounds).

Because the statutory authority cited by the former INS for 8 CFR 236.6 plainly does not authorize the regulation, the Court should not find that the regulation properly precludes Calhoun County from releasing records to Mr. Ramos-Gomez. Amici urge the Court, in considering Appellee's obligations under MCL 15.243(1)(d), to read the federal regulation in a manner that gives effect to the spirit of transparency intended behind open access laws. As the *Hudson* court suggested, at best, the statutory basis for the regulation is ambiguous.[82] In this regard, Amici urge that any ambiguity must account for the many important policy considerations implicated when a member of the public seeks records to which he is entitled.[83] These considerations are especially important in this case, because they implicate governmental overreach and misconduct, as well as a systemic resistance to public scrutiny, as discussed in Section I.

C. Even if Valid, Government Transparency Requires a Narrow Reading 8 CFR 236.6

Even if the Secretary's authority to control the release of public information in the custody of state entities is broad or ambiguous and a proper basis for the promulgation of the regulation at issue in this case, Amici urge the Court to apply the regulation narrowly, as Mr. Ramos-Gomez urges.[84] As such, the Court should find that individuals who make requests in Mr. Ramos-Gomez's posture – that is, their own records or records that have been created or are possessed solely by a state entity - are entitled to such.

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[82] *Co of Hudson* at 77.

[83] See *American Textile Mfrs. Institute, Inc. v. The Limited, Inc.*, 190 F.3d 729, 738–39 (CA 6, 1999)

[84] See Appellant's Brief at 16-19. Further, Amici strongly endorse Mr. Ramos-Gomez's argument that, to the extent that 8 C.F.R. § 236.6 is a valid regulation, its scope is clearly intended to cover detained individuals, and not, as in Mr. Ramos-Gomez's case, formerly detained individuals. Appellant's Brief at 19-27.

It is clear from the discussion regarding 8 CFR 236.6 in the Federal Register, from the history surrounding its promulgation, and from the regulation's clear language, that the regulation was intended to apply in narrow circumstances. That is, the regulation was intended to preclude non-Federal entities from releasing the personally identifying information of individuals detained in these facilities in a public forum.[85] The justification further was to protect national security concerns, sensitive ongoing investigations into criminal and terrorist activity, and the personal safety of those cooperating with the federal government, as well as their families.[86] The regulations language clearly reflects this, *e.g*., "... 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."[87] At issue in the *Hudson* litigation was the release of the names of detained individuals for anyone in the public to access, in accordance with New Jersey public access laws, which call for the public posting of names of incarcerated individuals and certain information.[88] The regulation was thus directed at this specific type and form of release of information. The Federal Register announcing the regulation repeatedly reinforces this limitation: "...the release of information about a particular detainee or group of detainees could have a substantial adverse impact on security matters as well as the detainee's privacy;" "specific aliens detained under administrative arrest warrants may possess significant foreign intelligence or counterintelligence information that is sought by the United States;" "... [r]elease of information about a specific detainee or group of detainees could also have a substantial adverse

[85] 67 Fed. Reg. at 19509; *Co of Hudson* at 78.
[86] 67 Fed. Reg. at 19509.
[87] 8 CFR 236.6
[88] *Co of Hudson* at 56.

impact on ongoing investigations being conducted by federal law enforcement agencies in conjunction with the Service;" "[I]n certain instances, the detention of a specific alien could alert that alien's coconspirators to the extent of the federal investigation and the imminence of their own detention, thus provoking flight to avoid detention, prosecution and removal from the United States."[89] The *Hudson* court echoed and relied on these justifications to sanction the regulation, stating "We accept as not patently unrealistic the government's assertion that the regulation bears upon the privacy interests of those detainees who may not want to have their names made public and that it tends to affect the safety of the detainees and their families as well as others involved in the detention scheme."[90]

Amici's concerns about 8 C.F.R. 236.6 are further exacerbated by ICE practice in recent years in which it has applied the regulation more broadly than the agency itself indicated was the intention. For example, in a recent case, ICE intervened to preclude a county authority from releasing general information regarding the detention of noncitizen minors in the county's jail.[91] The requester in that case – a professor at the University of Washington - sought data that would not implicate the privacy interests of the minors under the state of Washington's open records law (or under federal law).[92] Cowlitz County had previously sought declaratory relief from the state court to release information to UW, as opposed to the public release of information, in

[89] 67 Fed. Reg. at 19509.
[90] *Co of Hudson* at 78; see also *County of Berks v. Pennsylvania Office of Open Records*, 204 A.3d 534, 538 n.3 (2019), describing 8 C.F.R. § 236.6 as precluding "state and local government entities from disclosing the name or personal information of immigration detainees residing at a federally managed facility."
[91] *Cowlitz Co v Univ of Washington*, 2020 WL 1890616, at *1 (WD Wash, April 20, 2020)
[92] *Id*.

keeping with its understanding of 8 CFR 236.6.[93] However, ICE intervened to preclude the release of records pursuant to 8 CFR 236.6.[94]

Moreover, Mr. Ramos-Gomez's case represents the absurdly illogical result of ICE's broad application – he is precluded from obtaining his own records or those records that are exclusive to Calhoun County, to which he would be entitled under the Privacy Act. These examples demonstrate why the federal FOIA and state open records laws were enacted: the public's right to know what its government is up to. The Court should not give broad meaning to a regulation that was hurriedly promulgated in the aftermath of extraordinary events and specifically aimed to be a response to those tragic events.

CONCLUSION

Amici urge this Court to safeguard transparency and decline from giving 8 CFR 236.6 the weight that Appellee argues applies in this matter. The federal regulation is based on precarious authority, and even if properly promulgated, its narrow language cannot have the broad application that Appellee seeks. The end result must be that Mr. Ramos-Gomez should obtain records about himself in state and federal custody, in the most comprehensive manner, so that he and the public can fully understand what went wrong in his case – and that government be held accountable.

Respectfully submitted,

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[93] *Id*. at *2.
[94] *Id*.

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