

# Civil Rights and State Courts in the Trump Era

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## INTRODUCTION

At around 10:00 p.m. on Saturday, January 28, 2017, I threw on a suit and joined my co-counsel at federal court in Boston for an emergency hearing on President Donald J. Trump's original travel ban. The ban, issued the day before, had suddenly excluded people from seven Muslim-majority countries, including visa holders and refugees.<sup>1</sup> Two University of Massachusetts professors returning home from a conference, both Iranian nationals, had been detained at Logan Airport. As lawful permanent U.S. residents, they could have been forgiven for believing that their place in this country was *lawful* and *permanent*. Together with immigrants' rights attorneys, my colleagues and I at the American Civil Liberties Union (ACLU) of Massachusetts filed a complaint on the professors' behalf, and two federal judges agreed to hear their case in the dead of night.<sup>2</sup>

At around 2:00 a.m., we secured what was then the country's broadest injunction: an order temporarily restraining the government from removing or even detaining anyone pursuant to the travel ban.<sup>3</sup> News of the order spread, and the ACLU of Massachusetts briefly became a call center for people seeking safe haven from the ban. Pro bono lawyers from Mintz Levin, Foley Hoag, and other law firms helped us respond to countless requests for help. Non-legal assistance was also vital. ACLU supporters brought us coffee. Three women wearing their babies in carriers brought cupcakes. Someone even bought us burritos.<sup>4</sup>

Those events in Boston, and triumphs across the country,<sup>5</sup> marked a dramatic start to civil rights litigation in the Trump era. Yet the early days of the travel ban might *not* supply litigators with a complete blueprint for confronting threats posed by the Trump administration.

There are significant and perhaps increasing limitations on what federal litigation against the Trump administration can accomplish. Any given lawsuit may run into trouble. For example, the Trump administration has par-

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<sup>1</sup> See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

<sup>2</sup> See Transcript of Hearing Regarding Temporary Restraining Order at 1, 2, *Tootkaboni v. Trump*, 17-cv-10154 (D. Mass. Jan. 29, 2017).

<sup>3</sup> See *Tootkaboni v. Trump*, No. 17-cv-10154, 2017 WL 386550 (D. Mass. Jan. 29, 2017) (granting temporary restraining order).

<sup>4</sup> They were delicious.

<sup>5</sup> See, e.g., *Darweesh v. Trump*, No. 17 Civ. 480 (AMD), 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017) (granting nationwide temporary injunction); *Washington v. Trump*, No. 17-cv-00141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (granting temporary restraining order).

tially stymied travel ban litigation by twice revising the ban,<sup>6</sup> and after opting not to review the second ban,<sup>7</sup> the Supreme Court has allowed the third version of the ban to go into effect while legal challenges proceed.<sup>8</sup> More fundamentally, even if a lawsuit is wildly successful, no one lawsuit can defeat the Trump administration's broader assault on civil rights and civil liberties. And *all* federal lawsuits could soon encounter a different judiciary than existed in January 2017, when the original travel ban struck. Since then, President Trump has appointed one Supreme Court justice and nominated dozens of other federal judges.<sup>9</sup>

These developments suggest that federal litigation, though vital, cannot be counted on to thoroughly defeat President Trump's unlawful actions. To the contrary, it would be a mistake for litigators to respond to the Trump administration exclusively by suing the Trump administration.

Drawing from my experience as an ACLU attorney, this article argues that strategic *state* litigation can also substantially advance the individual rights placed at risk by the Trump administration, even when such litigation does not name federal officials as defendants. Part I describes how President Trump's attempts to curtail civil rights and civil liberties often rely not only on direct federal action, but also on assistance from state and local officials. Part II provides examples of how state lawsuits can be used to fight back against that recruitment of state and local officials. And Part III draws lessons from these examples that advocates may wish to consider as they seek to safeguard civil rights and civil liberties in the Trump era.

## I. PRESIDENT TRUMP'S RELIANCE ON STATE AND LOCAL AUTHORITIES TO CURTAIL CIVIL RIGHTS

Although presidents can influence individual rights directly—for example, through the Departments of Justice and Homeland Security—civil rights and civil liberties are often mediated at the state and local levels. In 2008 there were more than six times as many sworn, full-time state and local law

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<sup>6</sup> See Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

<sup>7</sup> See *Trump v. Int'l Refugee Assistance Project*, No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017) (mem.), *vacating as moot* 857 F.3d 554 (4th Cir. 2017); *Trump v. Hawaii*, No. 16-1540, 2017 WL 4782860 (U.S. Oct. 24, 2017) (mem.), *vacating as moot* 859 F.3d 741 (9th Cir. 2017).

<sup>8</sup> See Adam Liptak, *Supreme Court Allows Trump Travel Ban to Take Effect*, N.Y. TIMES (Dec. 4, 2017), [https://www.nytimes.com/2017/12/04/us/politics/trump-travel-ban-supreme-court.html?\\_r=0](https://www.nytimes.com/2017/12/04/us/politics/trump-travel-ban-supreme-court.html?_r=0) [<https://perma.cc/V2Q7-9V6L>].

<sup>9</sup> See Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html> [<https://perma.cc/AZR4-J2NY>]; Allan Smith, *Trump is quietly moving at a furious pace to secure 'the single most important legacy' of his administration*, BUS. INSIDER (July 27, 2017, 10:03 AM), <http://www.businessinsider.com/trump-judges-attorneys-nominations-2017-7> [<https://perma.cc/95CC-DGT3>]; see also SENATE COMM. ON THE JUDICIARY, JUDICIAL NOMINATIONS, <https://www.judiciary.senate.gov/nominations/judicial> [<https://perma.cc/2WJE-95TC>] [hereinafter JUDICIAL NOMINATIONS].

enforcement officers (765,000) as federal law enforcement officers (120,000).<sup>10</sup> Thus, a president who wishes to curtail civil rights and civil liberties will require state and local assistance.

Mr. Trump is such a president; after all, bigotry is his stock-in-trade. He launched his political career by denying the citizenship of America's first Black president.<sup>11</sup> He began his presidential campaign by claiming that Mexican nationals in the United States are drug dealers and "rapists,"<sup>12</sup> and he has alleged that U.S. District Judge Gonzalo Curiel was being unfair to him because the judge was supposedly "Mexican."<sup>13</sup> He has rallied for a "total and complete shutdown of Muslims" entering the United States,<sup>14</sup> and bragged about sexually assaulting women.<sup>15</sup> He has described a white supremacist rally in Charlottesville, Virginia, as an effort to preserve "history and culture."<sup>16</sup> The list goes on and on.

President Trump has sought to recruit state and local officials to help with actions motivated by his bigotry. Rather than attempt to catalog all the civil rights issues for which President Trump's actions have implicated state and local government, this article considers two: immigrants' rights and voting rights. I have chosen these issues partly because they involve different kinds of state officials. The Trump administration's immigration crackdown relies on state and local law enforcement, while its voter suppression efforts

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<sup>10</sup> See BRIAN A. REAVES, U.S. DEPT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008 1 (Catherine Bird & Jill Thomas, eds., 2011), <https://www.bjs.gov/content/pub/pdf/cslea08.pdf> [<https://perma.cc/C2S5-X7PA>]; BRIAN A. REAVES, U.S. DEPT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, FEDERAL LAW ENFORCEMENT OFFICERS, 2008 1 (Catherine Bird & Jill Thomas, eds., 2012), <https://www.bjs.gov/content/pub/pdf/fleo08.pdf> [<https://perma.cc/F7YB-U9G5>].

<sup>11</sup> See Gregory Krieg, *14 of Trump's most outrageous 'birther' claims — half from after 2011*, CNN (Sept. 16, 2016), <http://www.cnn.com/2016/09/09/politics/donald-trump-birther/index.html> [<https://perma.cc/KGX4-B3YB>].

<sup>12</sup> *Here's Donald Trump's Presidential Announcement Speech*, TIME (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/> [<https://perma.cc/PQ7R-FEEX>].

<sup>13</sup> Judge Curiel is a U.S. citizen; he was born in Indiana. See Reena Flores, *Donald Trump rails against Hispanic judge in Trump University case*, CBS NEWS (May 28, 2016, 12:44 PM), <http://www.cbsnews.com/news/donald-trump-judge-trump-university-case-election-2016/> [<https://perma.cc/5E2M-J3PL>].

<sup>14</sup> Jeva Lange, *A short history of Trump using the word 'ban'*, WEEK (Feb. 1, 2017), <http://theweek.com/speedreads/677356/short-history-trump-using-word-ban> [<https://perma.cc/D8JN-2MM3>]. The statement was later removed from the Trump campaign website; see also Helena Horton, *Muslim Ban statement 'removed' from Donald Trump's website*, TELEGRAPH (Nov. 10, 2016, 10:18 AM), <http://www.telegraph.co.uk/news/2016/11/10/muslim-ban-statement-removed-from-donald-trumps-website/> [<https://perma.cc/4ASP-CRZH>].

<sup>15</sup> See David A. Fahrenthold, *Trump recorded having extremely lewd conversation about women in 2005*, WASH. POST (Oct. 8, 2016), [https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4\\_story.html?utm\\_term=.2ee7894ba001](https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html?utm_term=.2ee7894ba001) [<https://perma.cc/362B-NEK8>].

<sup>16</sup> Michael D. Shear & Maggie Haberman, *Defiant, Trump Laments Assault on Culture and Revives a Bogus Pershing Story*, N.Y. TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/17/us/politics/trump-charlottesville-confederate-statues.html> [<https://perma.cc/JWC4-RQNX>].

rely on assistance, or at least non-intervention, from state and local election officials. Yet, precisely because they involve distinct pathways of federal-state interaction, these two issues illustrate how President Trump's actions inevitably result in the federal government's recruitment of state and local officials.

### A. *Immigrants' Rights*

President Trump has banned, arrested, and deported thousands of people,<sup>17</sup> with the greatest increases in arrests affecting people with no criminal records.<sup>18</sup> His manifest purpose is to force out noncitizens and limit the number who can become naturalized citizens.<sup>19</sup> As explained below, President Trump has pursued this goal not only by expanding the federal government's deportation force, but also by securing assistance from state and local officials.

Within a week of taking office, President Trump signed three discriminatory executive orders.<sup>20</sup> The most infamous is the travel ban, which prohibited the admission of all refugees, immigrants, and visitors from seven Muslim-majority countries.<sup>21</sup> According to one estimate, the original ban affected about 90,000 people.<sup>22</sup> Families were divided; refugees were stranded;

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<sup>17</sup> See, e.g., IMMIGRATION AND CUSTOMS ENFORCEMENT, *ICE ERO Immigration Arrests Climb Nearly 40%* (Aug. 2, 2017), <https://www.ice.gov/features/100-days> [<https://perma.cc/4VDB-HVNU>]; Maria Sacchetti, *Deportation orders increase under Trump; fewer migrants prevail in court*, CHI. TRIB. (Aug. 8, 2017, 6:52 PM), <http://www.chicagotribune.com/news/nationworld/politics/ct-deportation-orders-trump-20170808-story.html> [<https://perma.cc/9XQS-23XL>].

<sup>18</sup> See IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 17 (describing a "rise in non-criminal arrests . . . from approximately 4,200 in 2016 to more than 10,800 in 2017").

<sup>19</sup> Cf. *DoD Announces Policy Changes to Lawful Permanent Residents and the Military Accessions Vital to the National Interest (MAVNI) Pilot Program*, U.S. DEP'T OF DEF. (Oct. 13, 2017), <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1342317/dod-announces-policy-changes-to-lawful-permanent-residents-and-the-military-acc/> [<https://perma.cc/8637-R6XC>] (temporarily halting all military naturalizations of current service members).

<sup>20</sup> See Cecilia Wang, *Trump's most recent shout to white supremacists: I'm with you*, WASH. POST (Aug. 23, 2017), [https://www.washingtonpost.com/opinions/trumps-most-recent-shout-to-white-supremacists-im-with-you/2017/08/23/91fabdde-8838-11e7-961d-2f373b3977ee\\_story.html?tid=ss\\_tw&utm\\_term=.169e1a912d8f](https://www.washingtonpost.com/opinions/trumps-most-recent-shout-to-white-supremacists-im-with-you/2017/08/23/91fabdde-8838-11e7-961d-2f373b3977ee_story.html?tid=ss_tw&utm_term=.169e1a912d8f) [<https://perma.cc/TB7P-A4ST>].

<sup>21</sup> See Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017). In March 2017, President Trump replaced the first travel ban with a modified ban that omitted Iraq and removed one of the initial ban's most discriminatory provisions: a carve-out for the admission of some refugees, which was designed to aid Christians. See Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6 2017).

<sup>22</sup> See Glenn Kessler, *The number of people affected by Trump's travel ban: About 90,000*, WASH. POST (Jan. 30, 2017), [https://www.washingtonpost.com/news/fact-checker/wp/2017/01/30/the-number-of-people-affected-by-trumps-travel-ban-about-90000/?utm\\_term=.6ab65bd6576d](https://www.washingtonpost.com/news/fact-checker/wp/2017/01/30/the-number-of-people-affected-by-trumps-travel-ban-about-90000/?utm_term=.6ab65bd6576d) [<https://perma.cc/8H7W-3UD9>]; see also Eblal Zazkok, *Trump travel ban 3 may shatter my family forever – and it's not even needed*, USA TODAY (Oct. 16, 2017), <https://www.usatoday.com/story/opinion/2017/10/16/trump-travel-ban-3-shatter-my-family-forever-wont-make-america-safer-eblal-zazkok-columns/766036001/> [<https://perma.cc/KYB3-LQ7Q>].

professional work was interrupted; and people all over the world were left wondering what would happen to them.<sup>23</sup>

Although the two other orders from President Trump's first week have received less attention than the ban, they are significant. On January 25, 2017, President Trump issued an order calling for a border wall between the United States and Mexico<sup>24</sup> and an order enlarging the federal government's deportation force.<sup>25</sup> Together with implementing memoranda, these orders envision large-scale exclusion and detention, to be facilitated by hiring 10,000 additional Immigration and Customs Enforcement (ICE) officers and 5,500 additional Customs and Border Patrol (CBP) agents and officers.<sup>26</sup>

What is more, new Trump administration guidance supplies immigration agents with virtually unbridled discretion to treat nearly any noncitizen as an enforcement priority. Although President Barack Obama had prioritized noncitizens with criminal records, President Trump has called for immigration enforcement "against *all* removable aliens,"<sup>27</sup> no matter the cost in human misery.

But the federal deportation force does not act alone: it relies on state and local assistance. For example, the Trump administration's executive orders envision deputizing more local law enforcement officers as immigration enforcement agents under Section 287(g) of the Immigration and Nationality Act.<sup>28</sup> The 287(g) program permits local law enforcement officers to double

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<sup>23</sup> See generally Michelle Gallardo & Eric Horng, *Families splintered, stranded by Trump's immigration order*, ABC NEWS (Jan. 30, 2017), <http://abc7chicago.com/news/families-splintered-stranded-by-trumps-immigration-order/1728752/> [<https://perma.cc/APM8-YFWU>]; Krista Mahr, *How Trump's Executive Order Left Somali Refugees Stranded in Kenyan Camps On The Brink of Closure*, NEWSWEEK (Feb. 7, 2017, 7:23 AM), <http://www.newsweek.com/2017/02/17/trump-executive-order-stranded-somali-refugees-kenya-travel-ban-553057.html> [<https://perma.cc/6KZA-L8E5>]; Kevin Lui, *Trump's Immigration Order Separates a Boy Urgently Needing Surgery From His Family*, TIME (Jan. 31, 2017), <http://time.com/4656179/badly-burned-iraqi-child-separated-family-trump-immigration-executive-order/> [<https://perma.cc/4Y69-QX5C>]; Sarah Kaplan, *How Trump's travel ban could hurt science*, WASH. POST (Jan. 30, 2017), [https://www.washingtonpost.com/news/speaking-of-science/wp/2017/01/29/how-trumps-travel-ban-could-hurt-science/?utm\\_term=.58d36305a64e](https://www.washingtonpost.com/news/speaking-of-science/wp/2017/01/29/how-trumps-travel-ban-could-hurt-science/?utm_term=.58d36305a64e) [<https://perma.cc/8VSD-X448>].

<sup>24</sup> See Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017) [hereinafter Border Security EO].

<sup>25</sup> See Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) [hereinafter Public Safety EO].

<sup>26</sup> See generally Border Security EO, *supra* note 24; U.S. DEPT. OF HOMELAND SECURITY, IMPLEMENTING THE PRESIDENT'S BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS POLICIES (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf) [<https://perma.cc/3GS5-QDPS>] [hereinafter DHS Border Security Memo].

<sup>27</sup> See Public Safety EO, *supra* note 25, at § 4 (emphasis added); see also *id.* at § 5(a)–(c) (calling for the removal of aliens who have committed, been convicted of, or simply been charged with any "criminal offense").

<sup>28</sup> See Omnibus Consolidated Appropriations Act, 1997 (Illegal Immigration Reform and Responsibility Act of 1996), Pub. L. No. 104-208, § 133, 110 Stat. 3009, 3009–563–64 (codified as amended at 8 U.S.C. § 1357(g) (2012)) (amending § 287 of the Immigration and Nationality Act, Pub. L. 82-414, 66 Stat. 163 (1952); see also Public Safety EO, *supra* note 25, at §§ 8(a)–(c); DHS Border Security Memo, *supra* note 26, at §§ B, D; Border Security EO, *supra* note 24, at §§ 2(e), 10(a)–(c).

as federal immigration agents and, once armed with federal powers, to investigate, arrest, and detain persons who may be in violation of the immigration laws.<sup>29</sup> ICE's website boasts of 287(g) agreements with sixty law enforcement agencies and asserts that it has "trained and certified more than 1,822 state and local officers to enforce immigration law."<sup>30</sup>

The Trump administration has also sought to shame, threaten, and cajole state and local law enforcement officers to enforce ICE detainers, which ask state and local authorities to detain a noncitizen until federal authorities can take that noncitizen into custody.<sup>31</sup> Significantly, these federal requests ask state and local authorities to detain specific noncitizens for up to forty-eight hours *after* they would otherwise be required to be released under applicable state law.

Initially, President Trump sought to secure local compliance with ICE detainers by compiling a list of municipalities that did not do as the federal government requested.<sup>32</sup> Then in July 2017, the government announced new conditions for local law enforcement agencies that apply for federal funds through the Edward Byrne Memorial Justice Grant Program.<sup>33</sup> Under these conditions, applicants for Byrne grants must agree to allow Department of Homeland Security (DHS) personnel to access the locality's prison and jail populations so that DHS can "meet with an alien . . . and inquire as to his or her right to be or remain in the United States."<sup>34</sup> The government has also insisted that localities give DHS at least forty-eight hours advance notice before releasing noncitizens who are the subjects of ICE detainers.<sup>35</sup>

These actions confirm that although the federal government sets immigration policy, its current immigration crackdown depends substantially on state and local help. Precisely for that reason, advocacy geared toward local government may help to curtail the Trump administration's efforts. Indeed, such advocacy may sometimes be more effective than advocacy at the federal level. For example, acting ICE Director Thomas Homan has described the Trump administration's approach as "taking the handcuffs" off of ICE.<sup>36</sup> But apparently what ICE does when it is not "handcuffed" is tear families

<sup>29</sup> See 8 U.S.C. § 1357(g) (2012).

<sup>30</sup> *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT (Oct. 3, 2017), <https://www.ice.gov/287g> [<https://perma.cc/4P8W-XULC>].

<sup>31</sup> See, e.g., Public Safety EO, *supra* note 25 at § 9(b) (directing the Secretary of the Department of Homeland Security to "make public a comprehensive list" of jurisdictions that "ignore[ ] or otherwise fail[ ] to honor any [ICE] detainers . . . ."); cf. Lynn Sweet, *AG Jeff Sessions bashes Rahm Emanuel in sanctuary city speech*, CHI. SUN-TIMES (Aug. 16 2017, 6:01 PM), <https://chicago.suntimes.com/news/ag-sessions-to-bash-rahm-in-sanctuary-city-speech-in-miami/> [<https://perma.cc/5N4R-C3BE>].

<sup>32</sup> See Public Safety EO, *supra* note 25, at § 9(b).

<sup>33</sup> See generally Edward Byrne Memorial Justice Assistance Grant Program, 34 U.S.C.A. § 10151–10158 (West 2017).

<sup>34</sup> U.S. Dep't of Justice, OMB No. 1121-0329, EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT PROGRAM: FY 2017 LOCAL SOLICITATIONS 30 (2017).

<sup>35</sup> See *id.*

<sup>36</sup> See Dianne Solis (@DiSolis), TWITTER (July 31, 2017, 1:51 PM), <https://twitter.com/disolis/status/892125709082255360> [<https://perma.cc/D9YD-UQ9Q>] (".@realDonaldTrump

apart. As part of its increased targeting of non-criminals,<sup>37</sup> noncitizens have been repeatedly detained and slated for deportation after showing up for scheduled check-ins with ICE.<sup>38</sup> Similarly, in Massachusetts, ICE arrested and detained Francisco Rodriguez, a janitor at MIT who has strong support from his family and community. He and his wife have four children, the youngest of whom was born while Mr. Rodriguez was in ICE detention.<sup>39</sup> ICE has also detained Niberd Abdalla, an Iraqi man of Kurdish ethnicity who fled to the United States at the age of fifteen. He is now fifty-seven, a cherished member of his community and a threat to no one. Nevertheless, ICE has kept him locked up since June 2016.<sup>40</sup>

State and local law enforcement agencies, unlike the federal government, are responsible for maintaining productive relationships in the communities where these enforcement actions occur. They might reasonably wonder whether devoting time and energy to assisting the federal government's immigration crackdown is worthwhile, and state courts might reasonably ask when it is permissible.

### B. Voting Rights

Because elections are generally administered at the state level,<sup>41</sup> the federal government's efforts to influence voting rights typically implicate its relationship with the states. In years past, the federal government has used this relationship to protect voting rights.<sup>42</sup> But under President Trump, it is doing just the opposite.

One of President Trump's tools for promoting voter suppression is his repeated insistence that illegal voting is "very, very common."<sup>43</sup> In 2013, he tweeted that "'DEAD PEOPLE' had 'helped get President Obama

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took handcuffs off ICE agents, says acting @ICEgov chief Tom Homan at Tex sheriffs' convention.").

<sup>37</sup> See Immigration and Customs Enforcement, *supra* note 17; Sacchetti, *supra* note 17.

<sup>38</sup> See Thomas Kennedy, *The Silent Raids That Are Tearing Families Apart*, HUFFINGTON POST (Aug. 2, 2017, 2:45 PM), [https://www.huffingtonpost.com/entry/the-silent-raids-that-are-tearing-families-apart\\_us\\_5981f514e4b02be325be0296](https://www.huffingtonpost.com/entry/the-silent-raids-that-are-tearing-families-apart_us_5981f514e4b02be325be0296) [https://perma.cc/MCD8-JMDH].

<sup>39</sup> See Shannon Dooling, *'I Miss Everything': Chelsea Man Awaits Deportation Ruling Behind Bars*, WBUR (Aug. 8, 2017, 12:53 PM), <http://www.wbur.org/news/2017/08/08/francisco-rodriguez-awaits-deportation-ruling> [https://perma.cc/NN9X-R678].

<sup>40</sup> See Amanda Drane, *County man, an Iraqi who lived in the U.S. for over 40 years, faces deportation*, DAILY HAMPSHIRE GAZETTE (July 10, 2017), <http://www.gazettenet.com/Abdallahg-071117-11207130> [https://perma.cc/XG9Z-FC7W]. The ACLU of Massachusetts is assisting Mr. Abdalla.

<sup>41</sup> See, e.g., U.S. CONST. art. I, § 4, cl. 1.

<sup>42</sup> See, e.g., Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.) (limiting racial discrimination in voting); National Voter Registration Act of 1993, Pub. L. 103-31, 107 Stat. 77 (codified as amended at 52 U.S.C. §§ 20501–20511 (2012)) (making it easier to register to vote and maintain registration).

<sup>43</sup> Brian Tashman, *Trump and Kobach's Voter Fraud Lies Are Making More Voters Lose Confidence in Our Elections, Says New Poll*, ACLU SPEAK FREELY BLOG (Aug. 11, 2017, 11:00 AM), <https://www.aclu.org/blog/voting-rights/fighting-voter-suppression/trump-and-kobachs-voter-fraud-lies-are-making-more> [https://perma.cc/XC6X-BRSP].

elected.”<sup>44</sup> After the 2016 election, in which he received 2.9 million fewer votes than Hillary Clinton, President Trump alleged that “millions of people . . . voted illegally.”<sup>45</sup> This allegation is, of course, invented.<sup>46</sup> Its purpose is not to describe reality, but instead to justify measures that will diminish the number of people who are permitted to vote.

Consistent with these invented claims of voter fraud, the Trump administration has created a misleadingly-named and recently disbanded “Commission on Election Integrity.”<sup>47</sup> The commission’s vice chairman, Kansas Secretary of State Kris Kobach, has endorsed President Trump’s wild claim that “the number of illegal votes cast [in 2016] exceeds the popular vote margin between [Donald Trump] and Hillary Clinton.”<sup>48</sup>

The Trump administration’s apparent claim that voter fraud is imperiling election “integrity” is, in turn, influencing how the administration deals with the states. Not surprisingly, one of Kobach’s first actions on the commission was to ask all fifty states to turn over sensitive data about their residents.<sup>49</sup> Many states, understandably, either refused to comply or provided only information that was publicly available under state law.<sup>50</sup>

Likewise, the Trump administration has staked out new positions in federal voting rights litigation involving voter suppression by states. Voter suppression measures at the state level, of course, precede the Trump presidency. These measures include a North Carolina law that targeted black voters “with almost surgical precision”<sup>51</sup>; Wisconsin’s curtailment of early voting, which was designed “to suppress the reliably Democratic vote” of Milwaukee’s black residents<sup>52</sup>; and Texas’s repeated attempts to discriminate

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See BRENNAN CENTER FOR JUSTICE, N.Y.U., DEBUNKING THE VOTER FRAUD MYTH (Jan. 31, 2017), [https://www.brennancenter.org/sites/default/files/analysis/Briefing\\_Memo\\_Debunking\\_Voter\\_Fraud\\_Myth.pdf](https://www.brennancenter.org/sites/default/files/analysis/Briefing_Memo_Debunking_Voter_Fraud_Myth.pdf) [https://perma.cc/HEN8-CE79] (citing studies that show voter fraud incident rates between 0.0003% and 0.0025%).

<sup>47</sup> Michael Tackett & Michael Wines, *Trump Disbands Commission on Voter Fraud*, N.Y. TIMES (Jan. 3, 2018), <https://www.nytimes.com/2018/01/03/us/politics/trump-voter-fraud-commission.html> [perma.cc/24C9-LD8L].

<sup>48</sup> Hunter Woodall, *Kris Kobach agrees with Donald Trump that ‘millions’ voted illegally but offers no evidence*, KANSAS CITY STAR (Nov. 30, 2016, 12:18 PM), <http://www.kansascity.com/news/politics-government/article117957143.html> [https://perma.cc/PA6F-BVY8]; see also Brian Tashman, *Kris Kobach, the Man Charged With Enhancing Americans’ Confidence in Elections, Says That We May Never Know Who Won The Election*, ACLU SPEAK FREELY BLOG (July 26, 2017, 4:15 PM), <https://www.aclu.org/blog/voting-rights/fighting-voter-suppression/kris-kobach-man-charged-enhancing-americans-confidence?redirect=blog/speak-freely/kris-kobach-man-charged-enhancing-americans-confidence-elections-says-we-may-never> [https://perma.cc/KK7Q-6AED].

<sup>49</sup> See Tal Kopan, *Pence-Kobach voting commission alarms states with info request*, CNN (July 1, 2017, 11:39 AM), <http://www.cnn.com/2017/06/30/politics/kris-kobach-voter-commission-rolls/index.html> [https://perma.cc/9N98-Y876].

<sup>50</sup> *Election Integrity Commission – State Responses*, ACLU (July 7, 2017), <https://www.aclu.org/issues/voting-rights/election-integrity-commission-state-responses> [https://perma.cc/8KN3-WZ9Q].

<sup>51</sup> N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016), *cert. denied sub nom.*, North Carolina v. N.C. State Conference of NAACP, 137 S. Ct. 1399 (2017).

<sup>52</sup> One Wisconsin Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896, 904 (W.D. Wis. 2016).



against its black voters.<sup>53</sup> But now advocates of such measures appear to have an ally in the White House.

In July 2017, the Department of Justice argued to a federal district court that a revision to Texas's strict voter ID law had "remove[d]" any discriminatory intent that the Department of Justice (DOJ), under President Obama, had said could be found in a version of the law.<sup>54</sup> In August 2017, the court found that "[n]ot one of the discriminatory features of [the old law had been] fully ameliorated," and it ruled that the new law was unconstitutional.<sup>55</sup> Also in August 2017, the DOJ filed a Supreme Court brief arguing that federal law does not prohibit Ohio's practice of purging its voter lists of people who have gone years without voting or confirming their registrations.<sup>56</sup> In doing so, the DOJ reversed its position under President Obama.<sup>57</sup>

It is sad to see a U.S. president exacerbate, rather than remedy, voter suppression at the state level. No president should do that. But, as shown below, because states can be conduits for President Trump's voter suppression efforts, they can also be vehicles for resistance.

## II. CASE STUDIES: STATE LITIGATION ON IMMIGRANTS' RIGHTS AND VOTING RIGHTS

President Trump likes to be the center of attention, and it is tempting to make him the center of all civil rights litigation. After all, it is President Trump who is cracking down on immigrants' rights and trying to erode voting rights. And it is President Trump who has turned the White House into a megaphone for bigotry.

But President Trump need not be the center of all civil rights litigation. In addition to suing President Trump, civil rights litigators should develop robust *state* litigation strategies that seek to mitigate the harmful effects of the Trump administration's actions. As shown by the following cases in which the ACLU of Massachusetts participated, state litigation can achieve important victories even, and sometimes especially, in lawsuits that do not name a Trump administration official as a defendant.<sup>58</sup>

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<sup>53</sup> See generally Ari Berman, *Texas Republicans Intentionally Discriminated Against Minority Voters, Court Rules*, MOTHER JONES (Aug. 16, 2017, 10:31 AM), <http://www.motherjones.com/politics/2017/08/texas-republicans-intentionally-discriminated-against-minority-voters-court-rules/> [https://perma.cc/3YBH-SGLV].

<sup>54</sup> Brief of the United States Regarding Remedies at 1, *Veasey v. Abbott*, No. 2:13-cv-00193 (S.D. Tex. July 5, 2017).

<sup>55</sup> *Veasey v. Abbott*, No. 2:13-CV-193, 2017 WL 3620639, at \*11 (S.D. Tex. Aug. 23, 2017).

<sup>56</sup> See Brief for United States as Amicus Curiae Supporting Petitioner, *Husted v. A. Philip Randolph Inst.*, 137 S. Ct. 2188 (Aug. 7, 2017) (No. 16-980), 2017 WL 3485554.

<sup>57</sup> See Brief for United States as Amicus Curiae Supporting Plaintiffs-Appellants & Urging Reversal, *Ohio A. Philip Randolph Inst. v. Husted*, 838 F.3d 699 (6th Cir. 2016) (No. 16-3746), 2016 WL 3923034.

<sup>58</sup> Likewise, responses to President Trump have included activism, legislation, and other non-litigation advocacy. That advocacy, though vital, is beyond the scope of this article.

A. *State Litigation on Immigrants' Rights: Lunn v. Commonwealth*

Federal litigation aimed at President Trump's immigration crackdown has been important and, at times, wildly successful. It has halted the travel ban<sup>59</sup> and the rapid deportation of Iraqi nationals facing persecution.<sup>60</sup> But one of the most significant cases about immigrants' rights in the Trump era did not involve federal court. It occurred in the Massachusetts Supreme Judicial Court, with some ancillary federal litigation thrown in for good measure.

The litigation centers on a man named Sreynuon Lunn. Mr. Lunn was born in a Thai refugee camp in 1985, after his Cambodian parents fled the Khmer Rouge.<sup>61</sup> When he was seven months old, Mr. Lunn was lawfully admitted to the United States as a refugee, and he later obtained lawful permanent resident status.<sup>62</sup> But he has had a difficult life, which has included run-ins with the law.<sup>63</sup>

In 2008, the federal government secured an order to remove Mr. Lunn from the United States to Cambodia.<sup>64</sup> On several occasions, the government has seized Mr. Lunn and held him in immigration detention, ostensibly for the purpose of removing him to Cambodia.<sup>65</sup> Yet each time, Cambodia declined to issue travel documents because it does not regard Mr. Lunn as a Cambodian citizen.<sup>66</sup>

The most recent detention began in late 2016, when Mr. Lunn was arrested for an alleged unarmed robbery.<sup>67</sup> This charge was dismissed in state court on February 6, 2017.<sup>68</sup> Still, ICE had issued a detainer asking Mr. Lunn's Massachusetts custodians to keep him locked up so that the federal government could take him into immigration custody. With the apparent consent of a state judge, court officers detained Mr. Lunn for four hours after his state case was dismissed. The federal government then picked him up and took him into immigration custody.<sup>69</sup>

The next day, February 7, 2017, Mr. Lunn filed a petition in state court challenging the authority of Massachusetts officers to hold people on ICE

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<sup>59</sup> See, e.g., *Tootkaboni v. Trump*, No. 17-cv-10154, 2017 WL 386550 (D. Mass. Jan. 29, 2017) (order granting temporary restraining order); *Darweesh v. Trump*, No. 17 Civ. 480 (AMD), 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017) (order granting nationwide temporary injunction); *Washington v. Trump*, No. 17-cv-00141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (order granting temporary restraining order); *Hawaii v. Trump*, No. 17-00050, 2017 WL 4639560 (D. Haw. Oct. 17, 2017) (order granting temporary restraining order).

<sup>60</sup> See *Hamama v. Adduci*, No. 2:17-cv-11910, 2017 WL 3124331 (E.D. Mich. July 24, 2017) (order granting preliminary injunction).

<sup>61</sup> Pet. for a Writ of Habeas Corpus at 3, *Lunn v. Smith*, No. 1:17-cv-10938 (D. Mass. May 22, 2017) [hereinafter *Lunn Petition*].

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 4.

<sup>64</sup> *Id.* at 3–4.

<sup>65</sup> *Id.* at 3–5.

<sup>66</sup> *Id.*

<sup>67</sup> *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1147 (Mass. 2017).

<sup>68</sup> *Lunn Petition*, *supra* note 61, at 3–4.

<sup>69</sup> *Lunn*, 78 N.E.3d at 1147–48.

detainers.<sup>70</sup> Represented by the National Immigrant Justice Center and the Committee for Public Counsel Services (the Massachusetts public defender agency), Mr. Lunn argued that when court officers held him on the ICE detainer, they undertook an illegal warrantless arrest that was not supported by probable cause. In response, Massachusetts Attorney General Maura Healey laudably conceded on behalf of the commonwealth that, in fact, its officers cannot detain people based solely on ICE detainers.<sup>71</sup>

Stunningly, the Trump administration did not claim otherwise. In an amicus brief, it argued only that the court officers' detention of Mr. Lunn did not violate federal immigration law or the Fourth Amendment to the U.S. Constitution.<sup>72</sup> The DOJ declined to take any position on whether the officers' detention of Mr. Lunn, *undertaken at the federal government's request*, complied with either Massachusetts law or the Massachusetts Constitution.<sup>73</sup>

Although a federal court might have dismissed this sort of case—because Mr. Lunn was no longer being held on the detainer when he filed his case—the Massachusetts Supreme Judicial Court decided it. In July 2017, the court ruled that “nothing in the statutes or common law of Massachusetts [had] authorize[d] court officers” to take Mr. Lunn into custody on the ICE detainer.<sup>74</sup> The court also clarified that other law enforcement officers in Massachusetts have no greater power than court officers. Thus, the court's opinion prohibited all officers in Massachusetts from taking people into custody based solely on ICE detainers.

But the story does not end there. Mr. Lunn also challenged his immigration detention by filing a habeas corpus petition in federal court.<sup>75</sup> The petition primarily argued that the federal government could not permissibly subject Mr. Lunn to immigration detention because it had no reasonable prospect of actually removing him to Cambodia.<sup>76</sup> And just as it had done in the state litigation, the government attempted to avoid taking a position on whether what happened to Mr. Lunn was lawful. Three days after his peti-

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<sup>70</sup> *Lunn*, 78 N.E.3d at 1145, 1148.

<sup>71</sup> Brief of Commonwealth of Massachusetts and Suffolk County Sheriff, *Lunn v. Commonwealth*, 78 N.E.3d 1143 (Mass. 2017) (No. SJC-12276). The national ACLU and the ACLU of Massachusetts submitted a brief on behalf of several criminal defense organizations, which argued that Massachusetts officers who take people into custody based solely on ICE detainers violate both Massachusetts law and the Massachusetts Constitution. See Brief for Bristol County Bar Advocates, Inc., et al. as Amici Curiae, *Lunn*, 78 N.E.3d 1143 (No. SJC-12276).

<sup>72</sup> Brief of United States as Amicus Curiae in Support of Neither Party, *Lunn*, 78 N.E.3d 1143 (No. SJC-12276).

<sup>73</sup> *Id.* at 3 n.2.

<sup>74</sup> *Lunn*, 78 N.E.3d at 1146.

<sup>75</sup> The ACLU of Massachusetts and Ropes & Gray LLP represent Mr. Lunn in the federal case. See Akilah Johnson, *ACLU sues over Mass. voter registration deadline*, BOS. GLOBE (Nov. 2, 2016), <https://www.bostonglobe.com/metro/2016/11/02/aclu-sues-over-mass-voter-registration-deadline/DLcQIRox2gjMzDHEfaOIFJ/story.html> [https://perma.cc/ZE7N-4MYV].

<sup>76</sup> See *Lunn* Petition, *supra* note 61, at 7.

tion was filed, the government released Mr. Lunn from immigration detention.<sup>77</sup>

Together, this combination of state and federal litigation yielded powerful results.

Most importantly, it produced a groundbreaking state supreme court decision holding that state and local law enforcement lack the authority to arrest people on ICE detainees.<sup>78</sup> If the Supreme Judicial Court's *Lunn* decision is duplicated elsewhere, it could limit state and local involvement with the Trump administration's detention and deportation machine.

The *Lunn* litigation is also a cautionary tale for state and local officials whom the Trump administration asks to assist with immigration enforcement. The court officers who detained Mr. Lunn may have believed that they were allowed to enforce the ICE detainer. But it turns out that they were both violating Massachusetts law and (according to Mr. Lunn's habeas petition) paving the way for illegal immigration detention. Worse yet, the federal government induced this behavior by Massachusetts court officers without bothering to check if it was lawful for those officers to do the federal government's bidding.

It was as though the federal government had reenacted the infamous frozen-pole scene from *A Christmas Story*: it "triple dog dared" state officials to do something risky, knowing that those officials would be the ones left out in the cold if something went wrong.<sup>79</sup>

#### B. *State Litigation on Voting Rights: Chelsea Collaborative v. Galvin*

The weak American federal protections for voting rights open the door to suppression. It is true, as explained above, that some state officials have been willing to disenfranchise people, especially people of color, if doing so will win elections.<sup>80</sup> And it is equally true that the Trump administration seems poised to support those efforts.<sup>81</sup> But voter suppression is imaginable only because federal voting rights remain fragile. The Supreme Court has not recognized strong voting rights under the U.S. Constitution,<sup>82</sup> and it has struck down key parts of the Voting Rights Act.<sup>83</sup> Accordingly, though federal litigation can beat back some of the most egregious voter suppression

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<sup>77</sup> After releasing Mr. Lunn, the federal government unsuccessfully moved to dismiss his habeas petition as moot. The case is now proceeding on the merits. *See* Order at 2, *Lunn v. Smith*, No. 1:17-CV-10938 (D. Mass. July 11, 2017) (order denying motion to dismiss petition for writ of habeas corpus).

<sup>78</sup> *Lunn*, 78 N.E.3d at 1155.

<sup>79</sup> *See* *A CHRISTMAS STORY* (Metro-Goldwyn-Mayer 1983).

<sup>80</sup> *See supra* notes 50–54.

<sup>81</sup> *See supra* section I.B.

<sup>82</sup> *See, e.g.,* *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.").

<sup>83</sup> *See* *Shelby County v. Holder*, 133 S. Ct. 2612 (2012).

measures, it cannot fully overcome the core vulnerability that makes voter suppression possible.

That is why state litigation defending the right to vote is so essential. Stronger voting rights backed by case law at the state level can become a bulwark against voter suppression, including by the Trump administration. And one way to strengthen voting rights is to bring state litigation challenging voting restrictions that are unnecessary, even if they are not obviously discriminatory or malicious.

Take Massachusetts. Its Constitution protects the right to vote,<sup>84</sup> yet every year that right is denied to thousands of people based on the state's twenty-day voter registration deadline.<sup>85</sup> By statute, otherwise-eligible Massachusetts residents cannot vote unless they register at least twenty days before Election Day.<sup>86</sup> In each of the last three presidential elections, nearly seven thousand citizens in Massachusetts were barred from voting because they registered after the cutoff.<sup>87</sup> Tens of thousands more—perhaps over 118,000 in 2014 alone—were deterred from registering after missing the cutoff date.<sup>88</sup>

Unlike voting restrictions that target people of color or members of a particular political party, the Massachusetts voter cutoff law was not designed to harm any specific group. In theory, it is merely an attempt to improve election administration. But that is cold comfort to the thousands of people it disenfranchises.

So, in November 2016, three individuals who missed the cutoff, together with the voting rights organizations Chelsea Collaborative and Mass-VOTE, challenged the deadline in state court.<sup>89</sup> Represented by the national ACLU, the ACLU of Massachusetts, and the law firm Ropes & Gray, they argued that the twenty-day deadline violated the right to vote guaranteed by the Massachusetts Constitution.<sup>90</sup>

And they won.<sup>91</sup> In a ruling that may have been the first of its kind, Superior Court Judge Wilkins ruled in July 2017 that the twenty-day registration deadline violates the Massachusetts Constitution.<sup>92</sup> Rather than interpret the right to vote as barring voting restrictions only when enacted in bad faith, Judge Wilkins applied precedent holding that Massachusetts prohibits

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<sup>84</sup> See MASS. CONST. amend. art. III; MASS. CONST. part 1, art. IX.

<sup>85</sup> See Catie Edmondson, *Judge rules state's voter registration deadline is unconstitutional*, BOS. GLOBE (July 24, 2017), <https://www.bostonglobe.com/metro/2017/07/24/judge-overturns-state-voter-registration-deadline/B4Ah02C1GW9hMMOQNrkftL/story.html> [https://perma.cc/6RW7-UNVS].

<sup>86</sup> See MASS. GEN. LAWS ANN. ch. 51, §§ 1, 1f, 26, 34 (West, Westlaw through Chapter 74 of 2017 1st Ann. Sess. (2008)).

<sup>87</sup> See *Chelsea Collaborate v. Galvin*, No. SUCV20163354D, 2017 WL 4125039, at \*6 (Mass. Super. Ct. July 25, 2017).

<sup>88</sup> See *id.* at \*17.

<sup>89</sup> See generally Class Action Complaint, *Chelsea Collaborative v. Galvin*, No. 16-3354 (Mass. July 25, 2017), 2017 WL 4125039.

<sup>90</sup> See Johnson, *supra* note 75.

<sup>91</sup> See *Chelsea Collaborative*, 2017 WL 4125039, at \*37.

<sup>92</sup> See *id.* Massachusetts Secretary of State William Galvin is appealing the court's ruling. See Edmondson, *supra* note 85.

any law that is *more restrictive than necessary* to identify eligible voters and assure orderly elections.<sup>93</sup>

Applying that standard, Judge Wilkins concluded that Massachusetts' voter cutoff law is not remotely necessary.<sup>94</sup> For example, with the benefit of twenty-first-century technology, registrations can be processed quickly, in as little as two or three minutes.<sup>95</sup> In fact, election officials routinely process registrations that come in after the twenty-day deadline but before the election. Yet voters who submit those registrations are *affirmatively purged* from the lists of voters permitted to cast ballots on Election Day.<sup>96</sup> Moreover, Massachusetts implemented early voting for the first time in 2016.<sup>97</sup> Early voting began just five days after the registration deadline, and it went smoothly.<sup>98</sup> That experience, Judge Wilkins found, "prove[s] convincingly that 20 days is not necessary to process voter registrations, ensure the accuracy of voting lists and conduct orderly balloting."<sup>99</sup>

Like the *Lunn* litigation for immigrants' rights, the *Chelsea Collaborative* litigation has profound implications for voting rights in the Trump era, even though President Trump's name appears nowhere in the court's opinion.

For starters, the strong view of voting rights expressed in the *Chelsea Collaborative* opinion could, if adopted widely, put vote suppressors out of business. In Massachusetts, if Judge Wilkins's ruling is upheld on appeal, literally thousands more people will be expected to vote in each election. More broadly, if voting restrictions are consistently struck down whenever they are unnecessary, then courts could not possibly uphold laws that disenfranchise thousands of people just to shadowbox the imaginary problem of voter fraud.

Even better, a strong view of voting rights could move the country from voter suppression to voter maximization. One of the many risks of voter ID laws and other malicious voter restrictions is that they can inure courts and advocates to restrictions that are not quite so awful. Strong constitutional protections for the right to vote should overturn *any* law that needlessly disenfranchises people.

Indeed, Massachusetts' twenty-day registration deadline may have been passed in good faith, but it nevertheless relies on an assumption that the legislature may simply disenfranchise people if they miss a needless and arbitrary deadline. That is absurd. As Judge Wilkins put it, "The voters pass judgment on elected officials, not the other way around."<sup>100</sup> That is voter

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<sup>93</sup> See *Chelsea Collaborative*, 2017 WL 4125039, at \*26–27.

<sup>94</sup> See *id.* at \*27.

<sup>95</sup> See *id.*

<sup>96</sup> See *id.* at \*28.

<sup>97</sup> See *id.* at \*4.

<sup>98</sup> See *id.* at \*5.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at \*32.

maximization, and it should be the antidote to voter suppression by President Trump or anyone else.<sup>101</sup>

### III. THE FUTURE OF STATE LITIGATION IN THE TRUMP ERA

Forty years ago, after Presidents Richard Nixon and Gerald Ford had appointed several new Supreme Court justices, Justice William J. Brennan, Jr. took to the *Harvard Law Review* to urge advocates to protect individual rights in state court.<sup>102</sup> “[S]tate courts no less than federal,” he wrote, “are and ought to be the guardians of our liberties.”<sup>103</sup> Justice Brennan reasoned that state courts can interpret their own constitutions to provide “even more protection” than the U.S. Constitution and that some courts might even be motivated to provide that protection due to their “disagree[ment] with” U.S. Supreme Court decisions that, in Justice Brennan’s view, were “pull[ing] back” from a tradition of protecting individual rights.<sup>104</sup>

Justice Brennan’s advice remains pertinent in today’s America, where President Trump is simultaneously reshaping the federal judiciary and enlisting state and local officials to curtail individual rights. The above examples demonstrate, moreover, that strategic state court litigation can succeed. This article suggests that President Trump’s assaults on civil rights and civil liberties, as well as the resistance those assaults have generated, have at least three implications for a state litigation defense of individual rights in the Trump era.

*First*, advocates should consider crafting state litigation as part of any overall litigation strategy for protecting civil rights and civil liberties in the Trump era. As demonstrated by the *Lunn* and *Chelsea Collaborative* cases, state litigation that does not mention President Trump can still guard against the threats he poses to civil rights and civil liberties. In fact, one of the perceived weaknesses of state litigation—that it cannot directly restrain federal officials—can at least occasionally be a strength. Precisely because it relates only indirectly to federal actions, state litigation can create protections that are immune from federal interference. The Trump administration cannot compel state and local officials to take people into custody based on ICE detainers,<sup>105</sup> and thus it cannot easily circumvent the Supreme Judicial

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<sup>101</sup> See also Matthew Segal, *Moving from suppression to maximization: Why challenging voter registration cutoff laws is critical to democracy*, ACS BLOG (Aug. 23, 2017), <https://www.acslaw.org/acsblog/moving-from-suppression-to-maximization-why-challenging-voter-registration-cutoff-laws-is> [https://perma.cc/CVG8-XJLX].

<sup>102</sup> See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

<sup>103</sup> *Id.* at 491.

<sup>104</sup> *Id.* at 495; see also William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

<sup>105</sup> See Defendant’s Opposition to Plaintiff’s Motion for Preliminary Injunction at 3, *City of Chicago v. Sessions*, No. 17-CV-5720, 2017 WL 4784787 (N.D. Ill. Aug. 24, 2017) (arguing, on behalf of Attorney General Jeff Sessions, that new conditions for seeking Byrne JAG

Court's ruling in *Lunn*. Likewise, the Trump administration does not administer elections in Massachusetts, and thus it cannot easily circumvent Judge Wilkins's ruling in *Chelsea Collaborative*.

True, not all advocates have the luxury of litigating in Massachusetts, where courts have traditionally taken civil rights and civil liberties very seriously.<sup>106</sup> But, as Arizona Supreme Court Associate Justice Clint Bolick has observed, there is a rich and nationwide tradition of state courts interpreting certain state constitutional provisions to provide broader protections than the U.S. Constitution.<sup>107</sup> Advocates can bring strategic litigation based on what *can* be accomplished in their states, and nationwide advocacy organizations can bring cases where they have the best chance to succeed.

*Second*, civil rights litigators should be on the lookout for areas in which state-based responses to President Trump have yet to be attempted. Although this essay highlights two hot-button issues—immigrants' rights and voting rights—state litigation is equally warranted where the connection to President Trump might be less obvious.

Consider policing. Most policing occurs at the state and local level, and President Trump has taken actions that seem calculated to make that policing more violent. He has encouraged police brutality.<sup>108</sup> He has lifted limits on the military gear that the federal government supplies to state and local police.<sup>109</sup> Perhaps most infamously, he has pardoned a law enforcement official—Joe Arpaio, the former sheriff of Maricopa County, Arizona—whose

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Program funds do not require municipalities to detain noncitizens beyond their otherwise applicable release dates and times).

<sup>106</sup> See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003) (recognizing a right to equal marriage under the Massachusetts Constitution).

<sup>107</sup> See Clint Bolick, *State Constitutions: Freedom's Frontier*, 2016-2017 CATO SUP. CT. REV. 15, 21–22 n.9 (2017) (citing *Baily v. Myers*, 76 P.3d 898, 903 (Ariz. Ct. App. 2003) (specifying that the Arizona state constitution provides “considerably” more protection against eminent domain than the U.S. Constitution)); see also *People v. Bigelow*, 488 N.E.2d 451, 455 (N.Y. 1985) (declining to extend U.S. Supreme Court’s “good-faith” exception to police warrants without probable cause as a matter of state constitutional law); *State v. Jones*, 706 P.2d 317, 324 (Alaska 1985) (“[T]he state constitutional guarantee against unreasonable searches and seizures is broader in scope than Fourth Amendment guarantees under the United States Constitution.”); *In re Certification of a Question of Law (Elbe)*, 372 N.W.2d 113, 117 (S.D. 1985) (striking down a state law that allowed public schools to lend books to private schools, finding that it violated the state constitution’s ban on aid to sectarian schools, despite U.S. Supreme Court precedent that this practice does not violate the Establishment or Free Exercise Clauses); *DuPree v. Alma Sch. Dist. No. 30 of Crawford Cty.*, 651 S.W.2d 90 (Ark. 1983) (holding that unequal funding of public schools violated the state constitution’s equal protection clause, despite U.S. Supreme Court precedent holding that this practice does not violate the U.S. Constitution’s Equal Protection Clause).

<sup>108</sup> See *Remarks by President Trump to Law Enforcement Officials on MS-13*, WHITE HOUSE: OFFICE OF THE PRESS SEC’Y (July 28, 2017, 2:09 PM), <https://www.whitehouse.gov/the-press-office/2017/07/28/remarks-president-trump-law-enforcement-officials-ms-13> [<https://perma.cc/4WRE-H8DN>] (“[W]hen you see these thugs being thrown into the back of a paddy wagon — you just see them thrown in, rough — I said, please don’t be too nice.”).

<sup>109</sup> See Exec. Order No. 13,809, 82 Fed. Reg. 41,499 (Aug. 28, 2017); Adam Goldman, *Trump Reverses Restrictions on Military Hardware for Police*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/2017/08/28/us/politics/trump-police-military-surplus-equipment.html?mcubz=0> [<https://perma.cc/5EZS-P8NQ>].



conduct in office included discriminating against Latinos, violating a court order, and subjecting people to tortures ranging from excessive heat to insufficient food.<sup>110</sup>

State litigation can be part of the response. For example, defense attorneys in Iowa and Massachusetts are challenging pretextual traffic stops, which occur when an officer stops someone for a minor offense, like a seat belt violation, in order to investigate that person for something the officer regards as more serious, like drug dealing.<sup>111</sup> The U.S. Supreme Court has held that these stops do not violate the Fourth Amendment.<sup>112</sup> But pretextual stops have yielded significant racial disparities in traffic stops,<sup>113</sup> and the deaths of numerous black civilians, including Sandra Bland, Philando Castile, Samuel DuBose, and Walter Scott.<sup>114</sup> State precedents allowing these stops were worth challenging before President Trump took office, as the problem of police violence had already reached a crisis point. These police tactics deserve even more vigorous litigation now that President Trump has championed police violence.

*Third*, although advocates should of course bring federal lawsuits that directly confront President Trump's assault on civil rights and civil liberties,<sup>115</sup> developing a state litigation strategy may take on greater importance as the Trump era proceeds. President Trump has so far filled one Supreme Court vacancy and has made nominations to fill nearly sixty other federal court vacancies.<sup>116</sup> One commentator reviewing the philosophies of these nominees has described them as "Scalias All the Way Down."<sup>117</sup> As Trump-

<sup>110</sup> Nathan J. Robinson, *Wait, Do People Actually Know Just How Evil This Man Is?*, CURRENT AFFAIRS (Aug. 26, 2017), <https://static.currentaffairs.org/2017/08/wait-do-people-actually-know-just-how-evil-this-man-is> [https://perma.cc/WKP4-R6YU]; Mark Joseph Stern, *White Nationalist Rule Is Already Here*, SLATE (Aug. 15, 2017), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/08/donald\\_trump\\_is\\_considering\\_pardoning\\_former\\_sheriff\\_joe\\_arpaio.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/08/donald_trump_is_considering_pardoning_former_sheriff_joe_arpaio.html) [https://perma.cc/6P6P-SL92]; Gabriel Eber & Eric Balaban, *Marty Atencio (1967-2011): Another Victim of Sheriff Joe Arpaio's Jails*, ACLU SPEAK FREELY BLOG (Oct. 23, 2012), <https://www.aclu.org/blog/mass-incarceration/marty-atencio-1967-2011-another-victim-sheriff-joe-arpaio-jails> [https://perma.cc/BND8-JTUK].

<sup>111</sup> See *Commonwealth v. Buckley*, No. SJC-12344 (Mass. Jun. 28, 2017) (WL, Mass. Case Law).

<sup>112</sup> See *Whren v. United States*, 517 U.S. 806 (1996).

<sup>113</sup> See STANFORD OPEN POLICING PROJECT, FINDINGS: THE RESULTS OF OUR NATIONWIDE ANALYSIS OF TRAFFIC STOPS AND SEARCHES, <https://openpolicing.stanford.edu/findings/> [https://perma.cc/935V-G6FZ]; Emma Pierson et al., *A large-scale analysis of racial disparities in police stops across the United States* 5 (Stanford Open Policing Project, Working Paper, 2017), <https://sharad.com/papers/traffic-stops.pdf> [https://perma.cc/4ZTH-MK8B].

<sup>114</sup> See Brief for American Civil Liberties Union of Massachusetts as Amicus Curiae at 2, *Commonwealth v. Buckley*, No. SJC-12344 (Mass. Jun. 28, 2017) 2017 WL 4443931, at \*2–3.

<sup>115</sup> See *Stone v. Trump*, No. 1:17-cv-02459-MJG, 2017 WL 3704509 (D. Md. Aug. 28, 2017) (challenging Trump's ban on military service by transgender individuals); see also *Kamoski v. Trump*, No. C17-01297MJP, 2017 U.S. Dist. LEXIS 167232 (D. Wash. Oct. 10, 2017).

<sup>116</sup> See JUDICIAL NOMINATIONS, *supra* note 9.

<sup>117</sup> Kimberly Strassell, *Scalias All the Way Down*, WALL STREET J. (Oct. 12, 2017), <https://www.wsj.com/articles/scalias-all-the-way-down-1507847435> [https://perma.cc/8MQV-YAT2].

appointed judges proliferate, the success of federal litigation aimed at President Trump's policies may decline.

Likewise, because Trump-appointed judges will continue to serve long after the end of Mr. Trump's presidency, state litigation may become increasingly crucial not only in confronting President Trump's policies but also in protecting civil rights and civil liberties over the long term. State courts have long been trailblazers in protecting and breaking new ground on civil rights issues,<sup>118</sup> in everything from data privacy<sup>119</sup> to equal marriage.<sup>120</sup> For as long as Donald Trump is president, and perhaps for as long as his nominees populate the federal judiciary, state courts may need to be incubators of freedom and liberty. Civil rights litigators can help them.

### CONCLUSION

For civil rights litigators, President Trump represents the challenge of a lifetime. Yes, that challenge requires suing President Trump. Often. But it also requires innovative litigation in state court that will protect the Trump administration's intended victims. With each new Trump nomination to the federal bench, that job becomes more essential.

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<sup>118</sup> See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 82 n.1 (1986) (noting that decisions by federal courts of appeals holding that peremptory strikes used to remove black jurors may violate the Sixth Amendment were "[f]ollowing the lead of a number of state courts construing their State's Constitution"); see also *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003) (recognizing a right to equal marriage under the Massachusetts Constitution).

<sup>119</sup> See, e.g., *Commonwealth v. Augustine*, 4 N.E.3d 846 (Mass. 2014) (recognizing state constitutional protections for cell phone location data); see also *State v. Earls*, 70 A.3d 630 (N.J. 2013).

<sup>120</sup> See, e.g., *Goodridge*, 798 N.E.2d at 969–70.