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Using 42 U.S.C. § 1985(2) to Challenge Dragnet Immigration Enforcement at State Courthouses

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Shortly into the Trump presidency in 2017, Immigration and Customs Enforcement (ICE) began to have an active presence at the municipal court in Gardendale, Alabama. When individuals were brought in on minor offenses or violations, court personnel used racial markers such as language and surname to identify them as potential targets for removal. ICE would then close in to interrogate, detain, and deport them in short order. This collaboration between court personnel and ICE was corroborated by documents obtained in response to a 2017 Freedom of Information Act request. Specifically, an email chain in the documents confirmed that ICE had received support from municipal police, court administrators, and the judge.[1]

Because of ICE's aggressive enforcement tactics—resulting in an overinclusive dragnet that has targeted Latinxs[2] *generally and swept up citizens as well as noncitizens—this Note considers the viability of 42 U.S.C. § 1985 (Section 1985), a Reconstruction Era statute, to challenge ICE's collusion with law enforcement at state courts. Specifically, this Note considers whether Adelante Alabama Worker Center (Adelante), a non-profit organization in Hoover, Alabama with predominantly Latinx membership, would have standing to sue.*[3] *ICE's enforcement in and around the Gardendale Municipal Court and apparent collusion*

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1. The redacted emails acknowledge "Gardendale's cooperation with ICE on a recent enforcement action at the courthouse" and a related "protest at the Gardendale municipal courthouse hosted by Ad[e]lante Alabama." The memorandum attached to the emails outlines an upcoming enforcement action conducted by the ICE/ERO Birmingham Fugitive Operations Team, noting that the "Gardendale Police Department, Court Administrators and Judges support th[e] action and will provide assistance." *See* E-mail from Supervisory Detention and Deportation Officer to Thomas N. Byrd (Sept. 15, 2017, 12:41 PM) (on file with author); *see also* U.S. IMMIGRATION & CUSTOMS ENF'T, ERO NEW ORLEANS -ENFORCEMENT ACTION AT COURTHOUSE (2017) (on file with the author).

2. "Latinx" is a gender-neutral word for people of Latin American descent. *See 'Latinx' and Gender Inclusivity*, MERRIAM WEBSTER, https://www.merriam-webster.com/words-at-play/word-history-latinx [https://perma.cc/CR7Q-XCWN] (last visited Apr. 2, 2019).

3. Adelante seeks to unite day laborers, domestic workers, and other low-wage and immigrant workers and their families. *See* ADELANTE ALABAMA WORKER CENTER, http://adelantealabama.org/ [https://perma.cc/2C5S-Q4X3] (last visited Apr. 2, 2019).

with court personnel impacted Adelante members, some of whom have been questioned and detained inside the courthouse.

Notwithstanding the inherent limits of Section 1985, which is unavailing to noncitizen plaintiffs, this Note suggests that citizens suspected of being undocumented by virtue of their race or national origin and pulled into ICE's "dragnet" may bring a claim under the state court prong of 42 U.S.C. § 1985(2). By characterizing ICE's collusion with local officials as not only intentionally discriminatory, but deliberately or recklessly indifferent, those citizen plaintiffs (or perhaps an organizational plaintiff representing them like Adelante) might be able to demonstrate harm to not only those physically restrained in the courthouse, but also to those deterred from attending, and secure injunctive relief against future enforcement actions.

INTRODUCTION

Gardendale: A "Ground Zero" for Immigration Enforcement in Alabama

In Gardendale, the municipal court hears cases involving minor offenses and city ordinance violations, such as traffic tickets, and handles thousands of cases per year—in 2016 alone, it handled over 3,454 filed cases.[4] More serious cases are handled fifteen minutes to the south in Birmingham at the Jefferson District Court. Over the summer of 2017, the municipal court and its elected judge, Kenneth Gomany,[5] came under public scrutiny after police officers detained several Latinx community members at the court and turned them over to the United States Immigration and Customs Enforcement (ICE).[6]

In the wake of aggressive immigration enforcement at the court, Adelante members were terrified to go to court unaccompanied, even for the most routine or minor transactions. On one occasion, Jessica Vosburgh, the Legal Director of Adelante, felt compelled to accompany an individual member to pay a ticket for driving without his license—a matter most people would resolve on their own. After the member paid for his ticket, Ms. Vosburgh drove him to his car at an undisclosed location. ICE not only followed Ms. Vosburgh, but proceeded to follow the Adelante member onto the highway where they pulled him over, took him into custody, and ultimately deported him. In September of 2017, Adelante and the Alabama Coalition for Immigrant Justice organized an action outside of the court to raise awareness of the new and aggressive enforcement tactics. During the action, Ms. Vosburgh filed an official request under Alabama's state open records law "seek[ing] documentation and 'information about the nature of Gardendale's collusion with ICE.'"[7]

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4. ALA. ADMIN. OFFICE OF COURTS, FISCAL YEAR 2016 ANNUAL REPORT AND STATISTICS 163 (2016), http://www.alacourt.gov/Annual%20Reports/2016AOCAnnualReport.pdf [https://perma.cc/PVY2-L4ZP].

5. In October of 2017, Southern Poverty Law Center (SPLC) sued Judge Gomany, the City of Gardendale, and Private Probation Services, alleging that the defendants collectively exploited low-income defendants. The lawsuit resulted in a settlement between the parties, prohibiting the municipality and the court from "entering into a new agreement for the provision of probation-related or money-collection-related services to the court, where individuals are charged fees for those services." *See SPLC Settles Federal Lawsuit Over Illegal Private Probation Scheme in Gardendale, Alabama*, S. POVERTY L. CTR. (Mar. 7, 2018), https://www.splcenter.org/news/2018/03/07/splc-settles-federal-lawsuit-over-illegal-private-probation-scheme-gardendale-alabama [https://perma.cc/4Q9Z-JWEU]. At the same time, SPLC filed a separate judicial ethics complaint with the Judicial Inquiry Commission of Alabama against Judge Gomany for his role in the scheme, delegating judicial functions to the private probation company, failing to provide counsel to those who could not afford it, and failing to provide interpreters to those who did not speak English. *See SPLC Sues Private Company, City of Gardendale, Ala. and Judge Over Illegal Probation Scheme*, S. POVERTY L. CTR (Oct. 24, 2017), https://www.splcenter.org/news/2017/10/24/splc-sues-private-company-city-gardendale-ala-and-judge-over-illegal-probation-scheme [https://perma.cc/R4WH-QDUE].

6. *See* Connor Sheets, *'We Feel Attacked': Protesters Decry Immigration Enforcement Tactics at Gardendale Court*, AL.COM (Sept. 15, 2017), https://www.al.com/news/index.ssf/2017/09/we_feel_attacked_protesters_de.html [https://perma.cc/U7DX-YDME].

7. *Id.*

Judge Gomany's court has not only failed to protect low-income defendants' constitutional rights, but affirmatively violated those rights by supporting and facilitating the enforcement actions of ICE—the federal law enforcement agency responsible for apprehending and removing persons present in violation of immigration law. Adelante has reason to believe that ICE has access to the court's docket ahead of time, since some of the documents released after a Freedom of Information Act (FOIA) request show that ICE plans to apprehend specific people who have court on a given day.[8]

Furthermore, Adelante members observed that court personnel—including Judge Gomany and the courtroom interpreter—identify individuals on the docket as potential targets for removal by proxy of racial markers (e.g., language, last name, or color of skin) or their national origin (e.g., when an individual is not in possession of a driver's license and the only form of identification she can produce is a foreign passport). Once identified by the court, ICE agents have approached the individuals upon exiting the courtroom for questioning, sometimes holding them in custody inside the court building. In this way, a referral-like practice has emerged where Gardendale court personnel tell ICE where to cast its net and detain the identified individuals.

For example, in May of 2017, MC,[9] a Latinx resident of Gardendale, Alabama, went to the municipal court to pay a ticket for driving without a license. At her hearing, MC was among the first people to be called before Judge Gomany, after a court interpreter identified individuals with Latinx last names who required Spanish interpretation on the docket. Judge Gomany sentenced MC to twenty-four hours in the local jail, conveniently located in the police station attached to the courthouse. When a police officer escorted MC out of the courtroom to pay her fine to the cashier, she was approached by plainclothes ICE agents who asked for her identification without identifying themselves to her. After MC produced a Mexican passport, the agents questioned her about her immigration status and scanned her fingerprint on a mobile device. Gardendale police proceeded to detain MC in the municipal jail. There, ICE placed an "immigration hold" on MC, requesting the jail transfer her to federal custody at the end of her term, and issued a Notice to Appear against her.

MC's arrest is not an isolated incident in Gardendale, which has "swiftly emerged as ground zero for aggressive immigrant enforcement in Alabama."[10] In June of 2017, ICE detained JX, another undocumented Latinx Gardendale resident, who came to the Municipal Court to resolve a traffic violation.[11] When JX

8. *See* E-mail from Supervisory Detention and Deportation Officer to ICE Fugitive Operations Program (June 2, 2017, 1:56 PM) (on file with author); U.S. IMMIGRATION & CUSTOMS ENF'T, ERO NEW ORLEANS - ENFORCEMENT ACTION AT COURTHOUSE (2017) (on file with the author).

9. This Note uses initials to refer to affected individuals to preserve their anonymity.

10. Sheets, *supra* note 6.

11. *See* Stephon Dingle, *Undocumented Immigrant Goes to Court for Traffic Violation, Gets Detained by ICE Agents*, CBS 42 (June 5, 2017), http://www.cbs42.com/news/

accompanied his attorney to get court documents from the clerk, ICE agents closed in and took him to a separate room for questioning.[12]

ICE's enforcement is notably imprecise, pulling in citizens as well as noncitizens. At or around the same time as MC's run-in with ICE, ICE interrogated and detained CV, a Latinx Gardendale resident and United States citizen. Federal agents targeted CV as a removable noncitizen at his court appearance for driving under the influence, a misdemeanor offense. When CV pled guilty to the charge, he was sentenced to probation and instructed to meet with the private probation company located inside the court. Upon exiting the courtroom, three plainclothes ICE agents led CV to a room; interrogated him about his status, his family, and his country of origin; and threatened to detain him.

CV is not the only United States citizen to be apprehended by ICE. A 2016 study by National Public Radio revealed that 818 citizens were held in ICE detention between 2007 and 2015, and an additional 693 were held in local jails on federal detainers.[13] Furthermore, a 2011 UC Berkeley study found that approximately 3,600 United States citizens were arrested by ICE between 2009 and 2011 as part of the Secure Communities partnership between ICE and local law enforcement.[14]

ICE Courthouse Arrests in the National Enforcement Landscape

Courthouse arrests are not an invention of the Trump administration,[15] but they are on the rise.[16] In New York courthouses, the Immigrant Defense Project, a nonprofit legal service provider, documented a 1200% increase in reports of ICE arrests and attempted arrests in 2017 from the previous year.[17] These arrests impact

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undocumented-immigrant-goes-to-court-for-traffic-violation-gets-detained-by-ice-agents/868054099 [https://perma.cc/2UGH-8DRC].

12. *See id.*

13. Eyder Peralta, *You Say You're an American, but What If You Had to Prove It or Be Deported?*, NAT'L PUB. RADIO (Dec. 22, 2016), https://www.npr.org/sections/thetwo-way/2016/12/22/504031635/you-say-you-re-an-american-but-what-if-you-had-to-prove-it-or-be-deported [https://perma.cc/RG6G-B84Y].

14. AARTI KOHLI ET. AL., THE CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 4 (2011), https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf [https://perma.cc/HVZ6-66N6].

15. *See* U.S. DEP'T OF HOMELAND PROT., SENSITIVE LOCATIONS FAQS (2016), https://www.cbp.gov/border-security/sensitive-locations-faqs [http://web.archive.org/web/20160802024115/https://www.cbp.gov/border-security/sensitive-locations-faqs] (clarifying that courthouses "do not fall under ICE or CBP's policies concerning enforcement actions at or focused on sensitive locations . . . .").

16. *See* Joanne Lin, *Immigration Arrests at State Courthouses Are on the Rise in 2017. Here's Why That's Dangerous—For All of Us*, ACLU BLOG: SPEAK FREELY (Apr. 6, 2017), https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/immigration-arrests-state-courthouses-are-rise [https://perma.cc/8FXR-5AUD].

17. IMMIGRANT DEF. PROJECT, THE NEW YORK PROTECT OUR COURTS ACT: MODEL LEGISLATION TO REGULATE ICE ARRESTS AT STATE COURTS 11 (2018),

citizens and noncitizens—as well as criminal and noncriminal suspects—across the nation. Over the past year, ICE apprehended an undocumented father in California hoping to gain custody of his children in family court,[18] an undocumented domestic violence survivor in Texas who had just received a protective order against her abuser,[19] an asylum seeker in Maine seeking to resolve his operating under the influence charge,[20] and a documented husband and father in Ohio who accompanied his wife to *her* court hearing.[21]

The uptick in courthouse arrests comes on the heels of President Trump's promise to substantially increase immigration enforcement measures. In January of 2017, during his first week in office, Trump signed two executive orders that directed ICE to

> abandon any priorities in who it should deport, hire 15,000 more officers to effectuate arrests, direct cities and states to assist in enforcing immigration law by punishing sanctuary jurisdictions, build more detention centers to house non-citizens, expand the use of expedited removal. . .and build more wall along the U.S. southern border.[22]

These policies have already had a marked effect on the total number of arrests. During the first half of 2017, ICE agents made 75,045 arrests, up 40% from 2016.[23]

Local Responses to Federal Immigration Enforcement at State Courthouses

ICE's aggressive enforcement actions in and around the courts have been met with resistance by politicians, judges, advocates, and civil society.

In March of 2017, Democrats in Congress introduced bills to include courthouses as "sensitive locations," which would prevent ICE enforcement actions in and around them.[24] Moreover, Chief Justice Tani G. Cantil-Sakauye of the California Supreme Court was the first of five state court chief justices to write to

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https://www.immigrantdefenseproject.org/wp-content/uploads/ICE-Courthouse-Model-Guide.pdf [https://perma.cc/2W7V-ADD6].

18. *See* Sarah Cwiek, *Father Arrested by Immigration Agents at Oakland County Custody Hearing*, MICH. RADIO (Mar. 30, 2017), https://www.michiganradio.org/post/father-arrested-immigration-agents-oakland-county-custody-hearing [https://perma.cc/2PJN-5MPV].

19. *See* Marty Schladen, *ICE Detains Alleged Domestic Violence Victim*, EL PASO TIMES (Feb. 15, 2017), https://www.elpasotimes.com/story/news/2017/02/15/ice-detains-domestic-violence-victim-court/97965624/ [https://perma.cc/ZPG6-9ZNM].

20. *See* Danielle Waugh, *Attorney: ICE Arrests Asylum Seeker in Maine Courthouse*, NECN (Apr. 6, 2017), https://www.necn.com/news/new-england/ICE-Courtroom-Arrest-Portland-Maine-418544273.html [https://perma.cc/DGA4-JCAU].

21. *See* Everton Bailey Jr., *ICE Agents Mistakenly Try to Grab Latino County Worker Near Courthouse*, THE OREGONIAN (Sept. 21, 2017), http://www.oregonlive.com/hillsboro/index.ssf/2017/09/ice_mistakenly_tries_to_grab_l.html [https://perma.cc/N6C8-33FL].

22. Kari Hong, *The Costs of Trumped-Up Immigration Enforcement Measures*, CARDOZO L. REV. De Novo 119 (2017).

23. The Week Staff, *Trump's Immigrant Dragnet*, THE WEEK (Dec. 3, 2017), http://theweek.com/articles/740518/trumps-immigrant-dragnet [https://perma.cc/DRC8-9Y22].

24. Christopher N. Lasch, *A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis*, 127 YALE L.J.F.410, 412 (2017).

Attorney General Jeff Sessions and Department of Homeland Security Secretary John Kelly in March of 2017, urging them to stop federal agents from "stalking courthouses and arresting undocumented immigrants" and using "[c]ourthouses . . . as bait in the necessary enforcement of our country's immigration laws."[25] Chief justices of the highest courts of Washington, Oregon, New Jersey, and Connecticut soon followed by asking the federal government to stop ICE's courthouse arrests.[26] California and New York now have pending legislative proposals to block[27] or limit[28] courthouse immigration arrests.

In February of 2018, the ACLU of Oregon filed a lawsuit against ICE after the agency failed to produce records about enforcement operations in and around courthouses in response to a Freedom of Information Act request. [29] Shortly thereafter, more than 100 public defenders also walked out in protest of ICE's arrest and detention of their clients at a Bronx, New York, courthouse.[30] Later, in March of 2018, a coalition of nonprofit legal service providers in Massachusetts filed a petition in the Commonwealth's highest court, seeking a "writ of protection" to prevent ICE from arresting individuals while attending to court business.[31] That

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25. Tani G. Cantil-Sakauye, Chief Justice of the California Supreme Court, *Chief Justice Cantil-Sakauye Objects to Immigration Enforcement Tactics at California Courthouses*, CAL. CTS. NEWSROOM (Mar. 16, 2017), https://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses [https://perma.cc/Q8ZB-AC5F].

26. *See* Lasch, *supra* note 24, at 412.

27. *See* Marisa Diaz, *LAAW, Joined by Prominent Attorneys and Immigrants' Rights Advocates, Seeks a Statewide Rule Barring Courthouse Immigration Arrests in California*, LEGAL AID WORK (Aug. 1, 2018), https://legalaidatwork.org/releases/laaw-joined-by-prominent-attorneys-and-immigrants-rights-advocates-seeks-a-statewide-rule-barring-courthouse-immigration-arrests-in-california/ [https://perma.cc/XH6D-QDNZ].

28. *See* Zoe Azulay, *Assembly Bill Would Ban ICE Agents From Courthouse Arrests*, WNYC NEWS (June 5, 2018), https://www.wnyc.org/story/bill-ban-ice-agents-arresting-inside-courthouses/ [https://perma.cc/VC5G-U4MT].

29. *See* Katie Shepherd, *In a New Lawsuit, the ACLU of Oregon Seeks Answers About Feds' Arrests of Undocumented Immigrants at Courthouses*, WILLAMETTE WK. (Feb. 7 2018), http://www.wweek.com/news/courts/2018/02/07/in-a-new-lawsuit-the-aclu-of-oregon-seeks-answers-about-feds-arrests-of-undocumented-immigrants-at-courthouses/ [https://perma.cc/MC38-9NDV]; *see also* Sarah Armstrong, *ACLU of Oregon Demands Documents on ICE Practices in Oregon*, ACLU (Oct. 12, 2017), https://www.aclu.org/news/aclu-oregon-demands-documents-ice-practices-oregon [http://web.archive.org/web/20180610075037/https://www.aclu.org/news/aclu-oregon-demands-documents-ice-practices-oregon]; Conrad Wilson, *ACLU Files Suit Against ICE For Details on Courthouse Arrests*, OR. PUB. BROADCASTING (Feb. 7, 2018), https://www.opb.org/news/article/aclu-files-suit-against-ice-for-details-on-courthouse-arrests/ [https://perma.cc/TT4Z-4GSR].

30. *See* The Associated Press, *Public Defenders Walk out in Protest of ICE Court Arrests*, DAILY NEWS (Feb. 9, 2018), http://www.nydailynews.com/newswires/new-york/public-defenders-walk-protest-ice-court-arrests-article-1.3809900 [https://perma.cc/Y6LV-VX9G].

31. LAWYERS' COMM. FOR CIVIL RIGHTS & ECON. JUSTICE, CIVIL RIGHTS, INDIGENT DEFENSE GROUPS ASK SUPREME JUDICIAL COURT TO BLOCK IMMIGRATION ARRESTS AT MASSACHUSETTS COURTHOUSES (2018), https://www.publiccounsel.net/wp-content/uploads/2018/03/Writ-of-Protection-Press-Release.pdf [https://perma.cc/C8M2-NMYL]; *see also* Alanna Durkin Richer, *Civil Rights Groups Call for End to Courthouse ICE Detentions*, NECN (Mar. 15, 2018), https://www.necn.com/news/new-england/Civil-Rights-Groups-Push-for-End-to-Deportations-Outside-Courthouses-476969703.html [https://perma.cc/95AK-TUG9].

same month, Judge Allison Burroughs of the District Court for the District of Massachusetts granted a temporary restraining order mandating that ICE allow an undocumented husband and expectant father to attend his pending state court proceedings where he had initially been taken into ICE custody after attending a pretrial hearing on misdemeanor charges.[32]

Outside the halls of government and the courts, lay people have also taken a stand against courthouse arrests. For example, activists in North Brunswick, New Jersey have banded together to stake out a local courthouse to deter ICE or "observe, document, . . . voice opposition and get information to people under threat."[33]

In the face of escalating courthouse arrests, local resistance has grown to include legislative, legal, and lay efforts, all guided by the principle that courts should be institutions of fair and impartial justice, accessible to all.

ICE's Response to Local Resistance: A Formal Policy of Courthouse Arrests

ICE has launched more aggressive enforcement actions in and around the courts and justified these actions as the consequence of local noncooperation. However, this justification does not map onto Gardendale, which supported ICE enforcement and exposed community members to removal.

In 2011, ICE agreed not to target certain "sensitive locations," including schools, medical treatment and health care facilities, places of worship, religious or civil ceremonies or observances (e.g., weddings, funerals), and public demonstrations (e.g., march, rally, parade), unless there are exigent circumstances, other law enforcement actions have led officers to a sensitive location, or agents have secured prior approval from an appropriate supervisory official.[34] Under that policy, churches, in particular, have provided refuge to hundreds of immigrants on the verge of removal and effectively shielded them from detention by ICE.[35]

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32. *See* Laurel J. Sweet, *Judge Rules ICE Must Allow Immigrant to Contest Charges*, BOS. HERALD (Mar. 16, 2018), http://www.bostonherald.com/news/local_coverage/2018/03/judge_rules_ice_must_allow_immigrant_to_contest_charge [https://perma.cc/KJY6-YWVL]; *see also ICE Officials Are Preventing People in Detention From Their Own Court Hearings*, ACLU MASS. (Mar. 13, 2018), https://aclum.org/uncategorized/ice-officials-preventing-people-detention-court-hearings/ [https://perma.cc/L3CV-KA8Z].

33. Steph Solis, *Volunteers Stake out NJ Courthouse for Signs of ICE*, ASBURY PARK PRESS (Feb. 27, 2018), https://www.app.com/story/news/local/courts/2018/02/27/ice-immigration-courthouses/378019002/ [https://perma.cc/C4TL-5EU7].

34. Memorandum on Enforcement Actions at or Focused on Sensitive Locations from John Morton, Director, U.S. Immigration and Customs Enf't, to Field Office Directors, Special Agents in Charge, and Chief Counsel (2011), https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf [https://perma.cc/CM2X-CERE]; *see also* U.S. IMMIGRATION AND CUSTOMS ENF'T, FAQ ON SENSITIVE LOCATIONS AND COURTHOUSE ARRESTS, https://www.ice.gov/ero/enforcement/sensitive-loc [https://perma.cc/N7BR-CNN8] (last visited Apr. 3, 2019).

35. *See* Sandra Gomez-Aceves, *Norwalk Mother Leaves New Haven Church After Receiving Stay of Deportation*, HARTFORD COURTANT (July 26, 2017), http://www.courant.com/news/connecticut/hc-new-haven-nury-chavarria-case-lawyers-annouced-wedneday-evening-that-an-immig-20170726-story.html [https://perma.cc/BQ5N-TCVB]; Laurie Goodstein, *Immigrant Shielded From Deportation*

Although the courts stand at the center of our system of justice, courthouses are not included on ICE's list of "sensitive locations," and thus remain vulnerable to ICE enforcement tactics. In January of 2018, ICE issued a policy directive explicitly endorsing the practice of making courthouse arrests.[36] Under the revised policy, ICE officers may arrest suspected immigration violators at federal, state, and local courthouses where probable cause exists to believe that such noncitizens are removable from the United States.[37] In justifying the policy, the memorandum scapegoats "jurisdictions [unwilling] to cooperate with ICE in the transfer of custody of aliens from their prisons and jails."[38]

Blaming escalating enforcement tactics on local noncooperation with federal immigration enforcement is a familiar narrative that the Department of Homeland Security has used in the "decades-long struggle . . . [with] states and localities over the[ir] proper role . . . in immigration enforcement."[39] The implication of this narrative of cause and effect is that courthouse arrests have emerged as the federal government's official response to vexatious acts of local resistance, like sanctuary policies and other immigrant protective measures. Gardendale does not fit within the overarching narrative of local resistance where court personnel actively worked to facilitate ICE's enforcement actions in the courthouse.

The Question Presented

How can advocates prevent local and state courts from facilitating federal immigration enforcement? While other challenges may be availing,[40] this Note urges advocates to seriously consider challenging courthouse immigration arrests

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by Philadelphia Church Walks Free, N.Y. TIMES (Oct. 11, 2017), https://www.nytimes.com/2017/10/11/us/sanctuary-church-immigration-philadelphia.html [https://perma.cc/9QY3-BHTN]; Steph Solis, *Indonesian Immigrant Finds Sanctuary in N.J. Church*, USA TODAY (Jan. 13, 2018), https://www.usatoday.com/story/news/nation-now/2018/01/13/indonesian-immigrant-finds-sanctuary-n-j-church/1032219001/ [https://perma.cc/9CTY-3BVH]; Niraj Warikoo, *Immigrant Dad Facing Deportation Who Cares for Ill Wife to Take Refuge in Detroit Church*, DETROIT FREE PRESS (Jan. 16, 2018), https://www.freep.com/story/news/local/michigan/detroit/2018/01/16/immigrant-facing-deportation-whose-wife-has-multiple-sclerosis-takes-sanctuary-downtown-detroit-chur/1035414001/ [https://perma.cc/5S6A-UZ3D]; *Albanian Immigrant Takes Refuge in Detroit Church to Avoid Deportation*, MORNING EDITION, NAT'L PUB. RADIO (Jan. 25, 2018), https://www.npr.org/2018/01/25/580577182/albanian-immigrant-holed-up-in-detroit-church-to-avoid-deportation [https://perma.cc/7J2C-MFLM].

36. *See* U.S. IMMIGRATION & CUSTOMS ENF'T, DIRECTIVE NUMBER 11072.1, CIVIL IMMIGRATION ENFORCEMENT ACTIONS INSIDE COURTHOUSES (2018), https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf [https://perma.cc/F8Z4-D7SQ].

37. *Id.*

38. *Id.*

39. Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 544 (2017).

40. The First Amendment Petition Clause, the Article VI Privileges and Immunities Clause, the Due Process Clauses of the Fifth and Fourteenth Amendments, and the Fourteenth Amendment Equal Protection Clause, for example.

under the second clause of the second subdivision (also known as the state court prong) of 42 U.S.C. § 1985.

Section 1985 is an old and underused Reconstruction Era statute that has confounded litigants and courts alike.[41] The statute was enacted in 1871 as part of the Ku Klux Klan Act, which sought to control Klan violence against blacks in the post-Civil War South, in addition to preserving orderly government and assuring the smooth functioning of the courts.[42] As an idea that was born in history, Section 1985 has important implications for persons of color and of other nationalities seeking to access the courts today.

Part I of this Note analyzes the state court prong of 42 U.S.C. § 1985, Section 1985(2), which proscribes interference with citizen access to *state* court, as it is most relevant to the issue of municipal courthouse arrests in Gardendale, Alabama. Accordingly, this Note fleshes out each element of the second clause of Section 1985(2) with an emphasis on case law in the Eleventh Circuit, where Gardendale sits, and where such case law is lacking, insights from the Supreme Court and other Circuits, as well as case law interpreting 42 U.S.C. § 1985(3), which uses similar equal protection language to that of Section 1985(2).[43]

Part II explores components of a possible claim to be brought by Adelante under Section 1985(2), highlighting the factual allegations necessary to allege a conspiracy, born out of invidious racial animus, to obstruct municipal court access between court personnel and ICE. This Note also examines the plain language of the statute, which requires the intent to deprive a *citizen* of equal protection under the law—suggestive of a more demanding specific intent. Given that the effect of ICE's collusion with municipal court personnel is to chill court attendance, this Note proposes a novel "dragnet" theory of liability, whereby Gardendale court personnel, working in concert with ICE, have developed a racially discriminatory and overinclusive practice of identifying individual targets to sweep in.

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41. *See* Bundy v. United States, No. 2:17-cv-01127-JAD-GWF, 2017 U.S. Dist. LEXIS 186900, at *7 (D. Nev. Nov. 9, 2017) (plaintiff pleaded under wrong subdivision of 42 U.S.C. § 1985); Coker v. Corizon Med. Servs., No. 5:12-cv-01028-SLB-TMP, 2013 U.S. Dist. LEXIS 177659, at *1 (N.D. Ala. Oct. 7, 2013) (reciting the wrong elements of 42 U.S.C. § 1985(2)).

42. *See* Kimble v. D.J. McDuffy, Inc., 648 F.2d 340, 350 (5th Cir. 1981).

43. "If two or more persons . . . conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . [and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do . . . any act in furtherance of the object of such conspiracy, whereby another is injured . . . or deprived of . . . any right or privilege of a citizen of the United States, the party so injured or deprived may have [a cause of] action for . . . damages . . . against [the] conspirators." 42 U.S.C. § 1985(3) (2018).

I. THE STATE COURT PRONG OF THE CIVIL RIGHTS CONSPIRACY STATUTE

42 U.S.C. § 1985(2) proscribes conspiracies to interfere with the administration of justice in federal[44] and state courts.[45] The second clause of Section 1985(2), specifically, creates two causes of action for the obstruction of justice in *state courts* when

> two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating . . . the due course of justice in any State or Territory with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing . . . the right of any person, or class of persons, to the equal protection of the laws[.][46]

Unlike the first clause of Section 1985(2), which concerns interference with *federal court* access,[47] the second clause contains "equal protection" language as an essential element.[48] Accordingly, persons seeking to prove violations of their civil rights under the second clause must allege that the conspiracy was motivated by racial or class-based animus.[49]

A. The Requirement of a "Conspiracy" Between "Two or More Persons"

The first element of the state court prong of Section 1985(2) requires a "conspiracy" between "two or more persons."[50] Accordingly, the following subsection attempts to flesh out what constitutes a "conspiracy" and a "person" within the meaning of Section 1985(2).

1. What Constitutes a Conspiracy Within the Meaning of Section 1985(2)?

The existence of a conspiracy is a factual question essential to a cause of action under any part of Section 1985.[51] An allegation that two or more defendants agreed

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44. *See* McAndrew v. Lockheed Martin Corp., 206 F.3d 1031, 1035 n.2 (11th Cir. 2000) (holding that "court of the United States in § 1985(2) refers only to Article III courts and certain federal courts created by act of Congress, but not to state courts" (citing Shaw v. Garrison, 391 F. Supp. 1353, 1370 (E.D. La. 1975))).

45. *See* 42 U.S.C. § 1985 (2018).

46. *Id.* (emphasis added).

47. "If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any *court of the United States* from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators." *Id.* § 1985(2)-(3).

48. *See id.* § 1985(2).

49. *See* Kush v. Rutledge, 460 U.S. 719, 720 (1983).

50. 42 U.S.C. § 1985(2).

51. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 176 (1970).

to perform the proscribed act is generally sufficient.[52] To that end, plaintiff must present evidence that some overt act was done in furtherance of the conspiracy.[53]

At least one Eleventh Circuit district court has held that the overt act must actually result in "plaintiff's deprivation of a constitutional right," citing to a Fourth Circuit Court of Appeals decision.[54] However, another district court has held that plaintiff's complaint need only "show overt acts related to the promotion of the conspiracy"[55] to violate plaintiff's federally guaranteed rights. The distinction might not matter where the plaintiff's rights under the statute are violated anyway, but the plain language of Section 1985(2) does not seem to require an actual violation.

Although a plaintiff is not required to "produce *direct* evidence of a meeting of the minds, [she] must come forward with specific circumstantial evidence that each member of the alleged conspiracy shared the same conspiratorial objective . . . ."[56] The Eleventh Circuit applies a heightened pleading standard in conspiracy cases because "a defendant must be informed of the nature of the conspiracy which is alleged."[57] As such, "[i]t is not enough to simply aver in the complaint that a conspiracy existed."[58]

Conclusory allegations, without substantiating details, of a conspiracy do not adequately allege a conspiracy. In *Griswold v. Department of Industrial Relations*, a case from the Middle District of Alabama, plaintiff sued her former employer, ADIR, and supervisor, Granger, under Section 1985(2) without specifying which clause she sought to proceed under.[59] Plaintiff alleged, specifically, that ADIR manipulated her work environment in an effort to induce her seemingly "voluntary" termination of employment.[60] Following her termination, moreover, Granger "circulated a memorandum intended to mislead, threaten, coerce and intimidate her former coworkers and chill their willingness to cooperate in any judicial proceeding" against ADIR.[61] The district court held that plaintiff's claim failed because she "never allege[d] that Granger was a conspirator"; rather, she "assert[ed] that his circulation of [an] intimidating memorandum [to ADIR employees] constituted the *orchestration* of a conspiracy under § 1985."[62] The Court reasoned that this conclusory allegation, without more, did not adequately allege a conspiracy among Granger and other

52. *See* Puglise v. Cobb Cty., 4 F. Supp. 2d 1172, 1181 (N.D. Ga. 1998).
53. *See* Kitchen v. Crawford, 326 F. Supp. 1255, 1262 (N.D. Ga. 1970).
54. *See Puglise*, 4 F. Supp. 2d at 1181 (citing Hinkle v. City of Clarksburg, 81 F.3d 416, 421–23 n.4 (4th Cir. 1996)).
55. Croy v. Skinner, 410 F. Supp. 117, 126 (N.D. Ga. 1976).
56. *Puglise*, 4 F. Supp. 2d at 1181 (emphasis added).
57. Fullman v. Graddick, 739 F.2d 553, 557 (11th Cir. 1984).
58. *Id.* at 557.
59. Griswold v. Dep't of Indus. Relations, 903 F. Supp. 1492, 1495, 1500 (M.D. Ala. 1995).
60. *Id.* at 1495–96.
61. *Id.* at 1500.
62. *Id.* at 1501 (emphasis added).

ADIR supervisors where "the linchpin for conspiracy is agreement, which presupposes communication."[63]

By contrast, circumstantial evidence, if sufficiently detailed, may give rise to the inference of a conspiracy. In *Aque v. Home Depot U.S.A., Inc.*, a case of intracorporate conspiracy from the Northern District of Georgia, an employee alleged that she had been discharged for giving deposition testimony in favor of a coworker in his discrimination suit against their mutual employer, Home Depot.[64] According to plaintiff's complaint, "the entire body of Home Depot's Human Resources employees were 'well aware of [her coworker's] pending legal action,' and . . . 'Plaintiff's involvement as a witness in that proceeding.'"[65] When plaintiff submitted applications for other positions at Home Depot, she did not receive a single interview, despite following up with Human Resources personnel and upper management multiple times.[66] The only other employee from plaintiff's department who was not asked to interview for a position was her coworker who brought the discrimination suit. On these factual allegations, the district court held that plaintiff's claim "suggest[ed] 'a reasonable expectation of, and render[ed] plausible' the existence of an agreement to retaliate against her for her assistance in the [discrimination] case.'"[67] Specifically, "[t]he chronology of events alleged in her Complaint [we]re sufficient . . . to state a circumstantial claim that employees within the HR Department were working in concert with one another to specifically deny her requests for an interview as retaliation for her participation in [her coworker's] case."[68]

An action under Section 1985 requires proof of a conspiracy between two or more persons. To that end, plaintiff must show that the parties charged did something, including an act or omission,[69] in furtherance of the object of such conspiracy. Although circumstantial evidence of this agreement may suffice, it must be sufficiently detailed to meet the Eleventh Circuit's heightened pleading standard.

2. Who Is a "Person" Within the Meaning of Section 1985(2)?

Section 1985 does not define who or what entities count as "persons," but at least one Eleventh Circuit district court invokes persuasive precedent from the Seventh, D.C., Third, and Ninth Circuits in holding that the term "person" has the same meaning under Section 1985 as does "person" under Section 1983.[70] This

63. *Id.* at 1501 (quoting Bailey v. Bd. of Cty. Comm'rs of Alachua Cty., 956 F.2d 1112, 1122 (11th Cir. 1992)).

64. *See* Aque v. Home Depot U.S.A., Inc., 629 F. Supp. 2d 1336, 1340–41 (N.D. Ga. 2009).

65. *Id.* at 1346.

66. *See id.* at 1340.

67. *Id.* at 1346 (quoting Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1296 (11th Cir. 2007)).

68. *Id.*

69. *See* Huey v. Barloga, 277 F. Supp. 864, 871 (N.D. Ill. 1967).

70. *See* Hayden v. Ala. Dep't of Pub. Safety, 506 F. Supp. 2d 944, 949 (M.D. Ala. 2007) (quoting Small v. Chao, 398 F.3d 894, 898 (7th Cir. 2005)); Sturdza v. United Arab Emirates, 281 F.3d 1287, 1307 (D.C. Cir. 2002); Rode v. Dellarciprete, 617 F. Supp. 721, 723 n.2 (M.D. Pa. 1985);

interpretation is problematic for the purpose of challenging the actions of ICE, a federal agency, because a "person" under Section 1983 is limited to state and local government actors.

More specifically, Section 1983 imposes liability against "[e]very person" who, acting under color of state law, violates another's federally protected right.[71] "Person" in this context has traditionally been interpreted to encompass state and municipal officials sued in their individual capacities,[72] private individuals and entities that acted under color of state law, [73] and municipal entities (and their officials sued in an official capacity).[74] Although the term does not include states or state agencies, it does include state officials sued for prospective relief.[75] Crucially, however, it does not include the United States or federal agencies.[76]

Although federal agencies may not be liable under Section 1985, some courts—including the District Court for the Northern District of Alabama, which sits in the Eleventh Circuit—have held that federal officers are still subject to suit.[77] In *Perry v. Golub*, an Equal Employment Opportunity Commission (EEOC) employee sued then-Acting Executive Director of the EEOC, Alvin Golub, and sought a preliminary injunction to prevent his permanent reassignment from his position in a district EEOC office.[78] The employee's claim successfully formed the basis for an action under Section 1985(1). His permanent reassignment "constituted an attempt to prevent him from discharging the duties of his office or to injure him in his person or property on account of the lawful discharge of the duties of his office," motivated by the fact that he had protested and eventually reported certain irregularities in his superior's handling of cases to legal authorities.[79] The district court ruled in favor of the employee, finding a substantial likelihood that

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Coggins v. McQueen, 447 F. Supp. 960, 963–64 (E.D. Pa. 1978); DaVinci v. Missouri, No. 06-068-AS, 2007 U.S. Dist. LEXIS [57827], at *7 (D. Or. Jan. 26, 2007) (error in original citation).

71. 42 U.S.C. § 1983 (2016).

72. *See* Kentucky v. Graham, 473 U.S. 159, 166 (1985).

73. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 950 (1982) (holding that a "color of law" inquiry acknowledges that private individuals, engaged in unlawful joint behavior with state officials, may be personally responsible for wrongs that they cause to occur).

74. *See* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 661 (1978).

75. *See* Hutto v. Finney, 437 U.S. 678, 690 (1978).

76. Polsky v. United States, 844 F.3d 170, 173 (3d Cir. 2016) (neither United States nor federal agencies, such as the IRS, is a suable Section 1983 "person"); McCloskey v. Mueller, 446 F.3d 262, 271 (1st Cir. 2006) (claims generally cannot be brought against federal actors and, since complaint failed to allege any tortious activity under color of state law or any extraordinary circumstances that might implicate the federal defendants in state action, district court properly dismissed compliant); Hindes v. FDIC, 137 F.3d 148, 159 (3d Cir. 1998) (federal agencies are not persons subject to Section 1983 liability).

77. Note, however, that there is disagreement among the lower courts where other district courts have held that federal officers are not subject to suit under Section 1985. *See, e.g.*, Moore v. Schlesinger, 384 F. Supp. 163, 165 (D. Colo. 1974) (federal officers are immune to suit under Section 1985 when acting under color of federal law); *accord* Bethea v. Reid, 445 F.2d 1163, 1164 (3d Cir. 1971); Williams v. Halperin, 360 F. Supp. 554, 556 (S.D.N.Y. 1973).

78. Perry v. Golub, 400 F. Supp. 409, 411 (N.D. Ala. 1975).

79. *Id.* at 417.

he would prevail on the merits of his Section 1985 claim, and ordered a preliminary injunction.[80]

Outside of the Eleventh Circuit, other courts have held that Section 1985 can be pleaded against federal officers.[81] The Tenth Circuit Court of Appeals, for example, has squarely held that federal officers can be sued in tandem with state officers for violations of Section 1985(2). In *Anthony v. Baker*, the plaintiff alleged that a county sheriff's department detective—a state officer—and a Bureau of Alcohol, Tobacco, and Firearms agent—a federal officer, named individually and as an agent of the federal government—conspired to make him the target of their investigation, giving false information to the Grand Jury that indicted him, and covering up exculpatory information in the state court proceedings against him.[82] Although the Court of Appeals reaffirmed the district court's directed verdict in favor of the defendant federal agent, it left open the door to pleading a Section 1985(2) claim against state and federal law enforcement officers simultaneously "when they conspire to procure groundless state indictments and charges."[83]

Ultimately, both federal agents and state officers are "persons" liable for Section 1985(2) violations.[84]

B. The Requirement of a Purpose of Impeding, Hindering, Obstructing, or Defeating the Due Course of Justice

The second element of a claim under Section 1985(2) is that defendants conspired with one another for the *purpose* of impeding, hindering, obstructing, or denying the "due course of justice" as demonstrated by some "overt act[]."[85] Neither the Supreme Court nor the Eleventh Circuit has spoken with clarity as to what it means to have an intent to impede, hinder, obstruct, or defeat the due course

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80. *See id.* at 420.

81. *See* Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 931 (10th Cir. 1975) (holding that claim against Secretary of the Interior, the area director of the Bureau of Indian Affairs, and other federal officers under Section 1985 states cause of action); Alvarez v. Wilson, 431 F. Supp. 136, 142 (N.D. Ill. 1977) (holding that federal officers may be sued under Sections 1985(1) and 1985(3) if the complaint alleges racial discrimination).

82. *See* Anthony v. Baker, 767 F.2d 657, 660–62 (10th Cir. 1985).

83. *Id.* at 662.

84. Section 1985(2) provides for money damages and equitable relief. *See infra* Part II(D). However, a Section 1985(2) plaintiff should not sue a government officer in her official capacity for money damages where sovereign immunity would bar recovery from the government in the absence of waiver. *See* Tanvir v. Tanzin, 894 F.3d 449, 461 (2d Cir. 2018*)* (citing Hafer v. Melo, 502 U.S. 21, 25 (1991)). Government officers do not enjoy qualified immunity under Section 1985(2) because the statute requires proof of a racial or otherwise class-based, invidiously discriminatory animus to deprive another of the equal protection of the law. Shahawy v. Lee, No. 95-269-CIV-T-21-B, 1996 U.S. Dist. LEXIS 22854, at *70 (M.D. Fla. Dec. 13, 1996) (Given that "qualified immunity was not available to government officials in certain § 1985(3) actions because of the 'additional protection' that proof of this discriminatory motive provided, it follows that qualified immunity is also no longer available as a defense to government officials in those § 1985(2) actions that require proof of such intent.").

85. *See* Kitchen v. Crawford, 326 F. Supp. 1255, 1262 (N.D. Ga. 1970).

of justice in a state court. Nevertheless, insights from other circuit courts give a sense of how a district court in the Eleventh Circuit would analyze the statute's required purpose.

Racialized threats aimed at dissuading a plaintiff from filing a complaint come within the "impeding" language of Section 1985.[86] In *Jones v. Tozzi*, a case from the Eastern District of California, a father in a child custody dispute sued two attorneys for making racially derogatory remarks to him as part of a conspiracy to "*impede* his access to state court," effectively discouraging him from pursuing contempt charges against the mother of his child, in contravention of 42 U.S.C. § 1985.[87] The district court found that the plaintiff had "sufficiently alleged the existence of . . . a conspiracy" to overcome defendants' motion to dismiss where he claimed to have received "racially derogatory threats expressly aimed at dissuading him from participating in state court proceedings," he detailed the threats, and "was influenced to and did withdraw from certain state court proceedings out of fear generated by these threats."[88]

Harassing a plaintiff also qualifies as attempting to impede[89] or obstruct[90] the due course of justice under Section 1985(2). The plaintiff in *Britt v. Suckle* sustained injuries during his employment at a cast iron foundry and sought to recover worker's compensation benefits.[91] To undermine his claim, plaintiff's employer allegedly told plaintiff's doctor that it would not pay for plaintiff's medical treatment; urged plaintiff's legal counsel to drop plaintiff's case; and persuaded plaintiff's other part-time employer to discharge plaintiff.[92] When plaintiff demonstrated his commitment to the litigation, notwithstanding his employer's multiple efforts to undermine him, the employer proceeded to "discharge . . . plaintiff's daughter from her part-time employment at the foundry."[93] Consequently, plaintiff sued his employer under Section 1985(2) for conspiring to "make an example of any individual who challenges their decision . . . not to compensate workers for injuries caused by the employer's own negligence."[94] In denying the employer's motion to dismiss, the district court held that the foundry's alleged acts constituted a

86. *See* Jones v. Tozzi, No. 1:05-CV-0148 OWW DLB, 2006 U.S. Dist. LEXIS 63278, at *42 (E.D. Cal. Aug. 23, 2006) ("[V]iewing the complaint liberally as is required, . . . Plaintiff is attempting to describe pieces of a larger conspiracy to *impede* his access to state court, specifically to discourage him from pursuing contempt charges against Ms. Chhay.") (emphasis added).

87. 88. *Id.* (emphasis added).

88. *Id.* at *44.

89. Britt v. Suckle, 453 F. Supp. 987, 989 (E.D. Tex. 1978) ("Plaintiff relies particularly on that part of § 1985(2), following the penultimate semicolon, which deals with *impeding* the due course of justice in any State or Territory.") (emphasis added).

90. *Id.* at 997 ("[D]efendants' intent, as alleged by plaintiff Britt, is to *obstruct* the due course of justice, the hearing and vindication of state claims . . . .") (emphasis added).

91. *Id.* at 990.

92. *Id.*

93. *Id.*

94. *Id.* at 991.

conspiracy, the purpose of which was to obstruct plaintiff's equal access to state court, in violation of Section 1985(2).[95]

Although the plaintiffs in *Jones* and *Britt* were *civil* litigants who were found to have been hindered in their efforts to file suit in state court, Section 1985(2) should similarly prohibit conspiracies for the purpose of impeding, hindering, obstructing, or defeating criminal defendants' access to state courts given the plain language of the statue and Eleventh Circuit case law. Regarding the former, the statute seeks to protect "any citizen," without reference to civil or criminal parties, witnesses, or otherwise.[96] To that end, the Supreme Court has held that the Reconstruction Era civil rights acts, such as Section 1985, are to be "'accord[ed] . . . a sweep as broad as [their] language.'"[97] Regarding the latter, the Eleventh Circuit Court of Appeals has recognized that "race-based retaliatory efforts tied to criminal proceedings in the state courts *do* implicate the criminal defendant's . . . right to equal protection of the law" under Section 1985(2).[98]

Furthermore, Section 1985(2)'s protections arguably reach criminal defendants where, in *Britt*, the district court held that "[a]ccess to state courts becomes an issue only when there is already some underlying legal claim."[99] Criminal defendants, as much as civil plaintiffs, are entitled to state court access to mount defenses against criminal charges pending against them, to mitigate any sentence they may face for those charges, and to obtain final resolution in their cases. If ICE and state court officials conspire to compromise a criminal defendant's court access by arresting him before or after he appears in court, they may also dissuade other defendants from facing the charges pending against them or consult with public defenders, who may have offices within the courthouse.[100] This conduct and its chilling effect impede access to the courts within the meaning of Section 1985(2).

To rebut the chilling effect argument, the government might try to argue that ICE's purpose in executing courthouse arrests is not to defeat the due course of justice where the agency actually relies on people coming to court to apprehend them. However, where the agency continues to engage in an overinclusive strategy with a known chilling effect, its conduct arguably rises to a level of deliberate

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95. *See id.*

96. 42 U.S.C. § 1985(2) (2016).

97. Griffin v. Breckenridge, 403 U.S. 88, 97 (1971).

98. Chavis v. Clayton Cty. Sch. Dist., 300 F.3d 1288, 1293–94 (11th Cir. 2002) (finding a violation of the second clause of Section 1985(2) where defendant school district and district officials engaged in "race-based retaliatory conduct aimed against a person who testified truthfully in criminal court in a way that was helpful to a person of a particular race—the 'wrong' race in Defendants' eyes" (citing Powers v. Ohio, 499 U.S. 400, 415 (1991))).

99. *Britt*, 453 F. Supp. at 992 n.8.

100. In the case of Gardendale, the court appoints private attorneys to serve as public counsel. When defendants meet the usually scheduled attorney, the courtroom serves as the attorney's office. By targeting the courthouse, ICE's aggressive enforcement actions directly implicate the right to meaningful consultation with criminal defense counsel.

indifference[101] or, perhaps, reckless indifference[102] to the federally-protected rights of community members called to court. Various circuits have construed both deliberate and reckless indifference as theories of intentional liability in other civil rights actions.[103] By challenging ICE's collusion on a theory of deliberate or reckless indifference, there is a convincing argument to be made that the chilling effect of ICE's dragnet enforcement is just as intentional as any act of physical obstruction or restraint.[104] To support this argument, Adelante might cite to the widely publicized 2016 NPR and 2011 Berkeley studies[105] and other publications highlighting ICE's mistakes, responsive ICE memoranda, and the agency's continued implementation of dragnet enforcement at the municipal court. This kind of evidence might demonstrate ICE's awareness of the problem of overinclusive enforcement and the risk of dragging in the wrong kind of person *every time* by acting on less than sufficient cause.[106]

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101. Deliberate indifference is the general standard of 42 U.S.C. § 1983 liability. Section 1983 provides a civil remedy for persons to sue state actors who, acting under the color of law, violate federally protected rights. Section 1983 defendants act with deliberate indifference when they disregard a known "substantial risk of serious harm" by "failing to take reasonable measures to abate it." Farmer v. Brennan, 511 U.S. 825, 847 (1994). Deliberate indifference is also the standard for compensatory damages under Section 504 of the Rehabilitation Act, which proscribes discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors. Section 504 defendants act with deliberate indifference when they have knowledge "that harm to a federally protected right [i]s substantially likely and . . . fail[] to act on that likelihood." Liese v. Indian River Cty. Hosp. Dist., 701 F.3d 334, 344 (11th Cir. 2012) (quoting T.W. *ex rel.* Wilson v. Sch. Bd. of Seminole Cty., 610 F.3d 588, 604 (11th Cir. 2010)).

102. "Reckless indifference" is the standard for punitive damages under 42 U.S.C. § 1981 liability. Section 1981 provides a civil remedy for race discrimination in employment, in both the public and private sectors, through its application to employment contracts. Section 1981 defendants act with "reckless indifference" when they "discriminate in the face of a perceived risk that [their] actions will violate federal law . . . ." Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 535–36 (1999). This standard requires a "'subjective consciousness' of a risk of injury or illegality." *Id.* (quoting Smith v. Wade, 461 U.S. 30, 38 n.6 (1983)).

103. *Liese*, 701 F.3d at 345 (finding that deliberate indifference is the appropriate standard for showing "intentional discrimination" under Section 504 of the Rehabilitation Act); Archie v. City of Racine, 847 F.2d 1211, 1219 (7th Cir. 1988) (holding reckless infliction of injury constitutes intentional infliction in an action under 42 U.S.C. § 1983); Fagan v. City of Vineland, 22 F.3d 1296, 1324 (3d Cir. 1994) (Cowen, J., dissenting) (reckless indifference qualifies as intentional conduct "[e]ven under the most restrictive test for a § 1983 action").

104. Intent matters where Section 1985(2) requires an intentional theory of liability. 42 U.S.C. § 1985(2) (2016) (defendant must have conspired with "*intent* to deny to any citizen the equal protection of the laws" to be liable) (emphasis added).

105. *See* KOHLI ET AL., *supra* note 14; Peralta, *supra* note 13.

106. Note, however, that equating a theory of deliberate or reckless indifference with intentional discrimination is not without dispute in the courts. Smith v. Wade, 461 U.S. 30, 43 n.10 (1983) ("[T]he *Milwaukee* Court did not say, or come close to saying, that recklessness is *identical* to intent, or that it is material only as *evidence* of intent; rather, it said that recklessness is '*equivalent*' to intent, meaning that the two are equally culpable and deserving of punishment and deterrence.") (emphasis in original); Woodward v. County. of San Diego, No. 17-CV-2369-JLS (KSC), 2018 U.S. Dist. LEXIS 113711, at *10 (S.D. Cal. July 9, 2018) (differentiating between intentional and deliberately indifferent conduct). The relevance of either standard, as it is used in other civil rights statutes, is also questionable, assuming differences in federal purposes and interest. The most cogent objection to incorporating a theory of

In broadening the statute's purpose to include criminal defendants, advocates should consider the rights at stake for criminal defendants in accessing the courts, including the fundamental right of court access under the Due Process Clause and the Sixth Amendment right to counsel. The right of access to the courts, specifically, dates back to at least the early fifteenth century in English common law.[107] Since its introduction into American common law, the Supreme Court has grounded it in several different constitutional provisions, including the First Amendment's Petition Clause,[108] the Due Process Clauses of the Fifth and Fourteenth Amendments,[109] and the Privileges and Immunities Clause of Article IV.[110] Unfortunately, the Petition Clause is inapplicable to criminal defendants who do not initiate the proceedings against themselves. The Privileges and Immunities Clause appears equally unavailing where, as one scholar has argued, simply because a right is protected by the Privileges and Immunities Clause "does not mean that it is a constitutional guarantee for all citizens."[111] However, the Due Process Clause is directly applicable to criminal defendants where it has been found to embrace the more attenuated right of access for prison inmates as well as the literal right of physical access for criminal defendants.

For example, in *Bounds v. Smith*, prisoners successfully alleged that they were denied their right of access to the court under the Due Process Clause because of the State's failure to provide legal research facilities.[112] Admittedly, the right of court access in the prison context does not map well onto the right of court access for out-of-custody noncitizen criminal defendants who allege a more literal deprivation

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reckless indifference, a mental state with origins in tort law, into the state court prong of Section 1985(2) lies in the well-founded fear of transforming Section 1985 into a "general federal tort law," where the statute reaches into areas traditionally under state control. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). However, as long as the state court prong plaintiff has established the element of discriminatory animus, the recklessly indifferent defendant should be liable.

107. *See* Sampson v. Graves, 203 N.Y.S. 729, 730 (N.Y. App. Div. 1924) (noting that "[t]he doctrine of the immunity from arrest of a litigant attending the trial of an action to which he was a party found early recognition in the law of England, and in Viner's Abridgment (Vol. 17 [2d ed.], 510 *et seq.*) is to be found a very interesting collection of cases asserting the privilege dating back to the Year Book of 13 Henry IV, I, B.").

108. *See* Christopher v. Harbury, 536 U.S. 403, 415 n.12 (2012); Borough of Duryea v. Guarnieri, 564 U.S. 379, 387 (2011); Bill Johnson's Rests., Inc. v. NLRB., 461 U.S. 731, 741 (1983); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972); *see also* Bank of Jackson Cty. v. Cherry, 980 F.2d 1362, 1370 (11th Cir. 1993).

109. *See* Bounds v. Smith, 430 U.S. 817, 823 (1977) ("States must 'assure the indigent defendant an adequate opportunity to present his claims fairly.' '[M]eaningful access' to the courts is the touchstone." (quoting Ross v. Moffitt, 417 U.S. 600, 616 (1974))); Wolff v. McDonnell, 418 U.S. 539, 579 (1974).

110. *See* Chambers v. Balt. & Ohio R.R. Co., 207 U.S. 142, 158 (1907).

111. Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 565 (1999) ("'The modern Court's reference to determining whether a right is sufficiently 'fundamental' to be protected by the clause should not be confused with a determination of whether an activity constitutes a fundamental right so as to require strict judicial scrutiny under the due process and equal protection clauses . . . .'") (citation omitted).

112. *See* 430 U.S. at 818.

of physical access, as in the case of CV. Fortunately, "access to the courts" under the Due Process clause also protects physical access, as demonstrated in the case of *Tennessee v. Lane,* in which a paraplegic criminal defendant sued the state of Tennessee under the Americans with Disabilities Act (ADA) for its failure to make the courthouse wheelchair accessible.[113] In *Lane*, the Court held that Title II of the ADA constituted a valid exercise of Congress' authority under § 5 of the Fourteenth Amendment where it implicated the fundamental right of court access, which it grounded in the Due Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment.[114]

ICE's dragnet enforcement also impacts the criminal defendant's Sixth Amendment "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings"[115] and "right to have counsel, which includes the concomitant right to communicate with counsel at every critical stage of the proceedings."[116] Criminal defendants cannot enjoy a meaningful attorney-client relationship when they are dissuaded from facing the charges pending against them and consulting with their public defenders, who may have offices within the courthouse, as is the case in Gardendale.

Ultimately, where harassment aimed at discouraging a plaintiff from even filing suit has qualified as impeding or obstructing the due course of justice under Section 1985(2), the literal obstruction of court access and/or intentional chilling of attendance arguably does as well. This interpretation applies to civil litigants as much as criminal defendants.

C. The Requirement of an Intent to Deny Any Citizen the Equal Protection of the Laws

1. Can Noncitizens Sue Under Section 1985(2)?

Noncitizen plaintiffs cannot sue under Section 1985(2) by the plain language of the statute. In the absence of clarifying case law, the second clause of Section 1985(2) requires an intent by the alleged conspirators to "deny . . . any *citizen* of equal protection of the laws."[117] The deliberate use of "citizen" under Section 1985(2), where Congress identified "any person" under all three subdivisions or "any officer" under Section 1985(1), indicates that Congress did not intend for noncitizen plaintiffs to file suit thereunder. Nevertheless, this language does not foreclose a citizen plaintiff, like CV, who was identified and apprehended as a removable noncitizen, or an organizational plaintiff, like Adelante, that represents the interests of both citizens and noncitizens, from bringing suit.

There is very little authority on organizational or representative standing under Section 1985. At least one case from the District Court for the Western District of

113. *See* Tennessee v. Lane, 541 U.S. 509, 513 (2004).
114. *See id.* at 523, 530.
115. Faretta v. California, 422 U.S. 806, 819 n.15 (1975).
116. Perry v. Leeke, 488 U.S. 272, 298 (1989) (Marshall, J. dissenting).
117. 42 U.S.C. § 1985(2) (2016) (emphasis added).

Louisiana found that a corporate plaintiff had *organizational* standing under the state court prong of Section 1985(2)[118]—even though it did not qualify as a "'citizen' within the meaning of the privileges and immunities clause[—because it was] a '[p]erson' within the meaning of the equal protection and due process of law clauses."[119] This reasoning accords with the statute's legislative history, given that Congress expressly added equal protection language to the state court prong of Section 1985(2) and other clauses "reaching into areas traditionally under state control" to bring them into nexus with the Fourteenth Amendment's Equal Protection Clause.[120] The District Court further held that the corporation could assert a claim for damages under Section 1985(3), but it did not expound upon the requirements for establishing such standing.[121]

Another case from the Middle District of Tennessee held that a nonprofit corporate plaintiff had *representational* standing to seek declaratory and injunctive relief under Section 1985, among other civil rights claims, but not damages, inasmuch as the suit was brought in the corporation's representative capacity and was based on injury to others without any allegation that other claims had been assigned to it.[122]

Conversely, in a case from the Western District of Washington, the District Court expressly held that a corporate plaintiff lacked standing to seek damages under Section 1985(3) because it was not a "natural person[] . . . entitled to the privileges and immunities which Section 1 of the Fourteenth Amendment secures

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118. "[A]lthough the plaintiff in this case, a corporation, cannot maintain a suit for damages under the first sentence of Sec. 1 of the 14th Amendment and Section 43 of Title 8 U.S.C.A., it does have a standing to assert a claim under . . . the last clause of subdivision (2) of Sec. 47 of Title 8 U.S.C.A. providing 'or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.'" Llano Del Rio Co. of Nev. v. Anderson-Post Hardwood Lumber Co., 79 F. Supp. 382, 392 (W.D. La. 1948).

119. *Id.* at 392 (citing Grosjean v. American Press Co., 297 U.S. 233, 244 (1936)).

120. Stephen Crocker, *42 U.S.C. Section 1985(2) Part One: The Inapplicability of the Animus Requirement from* Griffin v. Breckenridge, NW. U. L. REV. 168, 171 (1982) (explaining that Congress employed the equal protection only where necessary, thus allowing federal action in the state realm, and left other clauses "free of fourteenth amendment constraints" where they were "linked to the federal government's power of self protection"); *accord* Andrew J. McMahon, *Civil Rights — Conspiracy — A Plaintiff Need Not Prove Class-based, Invidiously Discriminatory Animus to Recover Under the First Clause of 42 U.S.C. 1985(2)*, 50 U. CIN. L. REV. 158, 163, 165 (1981) (describing the necessity of the "equal protection nexus with the fourteenth amendment" with respect to Section 1985(2), but not Section 1985(1), where Section 1985(2) implicates the "constitutional problems of preempting state authority").

121. *Llano Del Rio Co. of Nev.*, 79 F. Supp. at 392–93.

122. *See* Minority Emps. of Tenn. Dep't of Emp't Sec., Inc., v. Tenn., Dep't of Emp't Sec., 573 F. Supp. 1346, 1349 (M.D. Tenn. 1983) (holding as well established that an association may have standing to represent its members even in the absence of injury to itself (citing Warth v. Seldin, 422 U.S. 490, 511 (1975))).

for 'citizens of the United States.'"[123] The District Court did not address the corporation's standing to seek equitable relief.

The legislative history of the Ku Klux Klan Act of 1871 suggests that both organizational and representational standing should be available. As the Eleventh Circuit Court of Appeals has recognized, "[a] principal concern of the 42nd Congress," which enacted Section 1985 of the Act, "was to protect newly-emancipated blacks, and *those who championed them*, against conspiracy to violate their civil rights, including acts of retribution against those supporting the civil rights of black people."[124] Today, where post-Civil War laws have been held to "protect against all kinds of race-based discrimination,"[125] it is conceivable that an organization like Adelante, fighting to secure the rights of Latinxs, would have standing to bring claims for declaratory and injunctive relief under Section 1985(2).

2. *What Types of Classifications are Protected by Section 1985(2)?*

A Section 1985(2) plaintiff must demonstrate a relationship with a protected class[126] and show that defendants conspired to deprive her of equal protection by virtue of their class-based or invidiously discriminatory animus.[127]

There is a dearth of case law interpreting Section 1985(2)'s animus requirement. Accordingly, case law interpreting Section 1985(3) is illuminating because of the parallel history and scope of Sections 1985(2) and (3).[128] Generally, a Section 1985(3) plaintiff must allege "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."[129] Although the Supreme Court has suggested that the animus requirement in Section 1985(3) can be satisfied by something other than race, the class "unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors."[130] Thus, circuit courts have been left to either extend protection under Section 1985(3) to some classes where the trait

123. Finnish Workers Fed'n v. Horrocks, 42 F. Supp. 411, 412 (W.D. Wash. 1941).

124. Chavis v. Clayton Cty. Sch. Dist., 300 F.3d 1288, 1292 (11th Cir. 2002) (emphasis added).

125. *Id.* n.5.

126. *See* Smith v. Chief, No. 1:08-CV-1835-CAP-WEJ, 2009 U.S. Dist. LEXIS 137972, at *14 (N.D. Ga. Oct. 13, 2009) (discussing cases that have rejected classes deserving of protection).

127. *See* Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (holding that the "language requiring intent to deprive of equal protection, or equal privileges and immunities" under Section 1985(3) "means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."); *see also* Lyon v. Ashurst, No. 08-16778, 2009 U.S. App. LEXIS 24726, at *6 (11th Cir. Nov. 9, 2009) (to state a claim under Section 1985(2), plaintiff must plead a private conspiracy with a racial or otherwise class-based invidiously discriminatory motivation).

128. *See* Shahawy v. Lee, No. 95-269-CIV-T-21-B, 1996 U.S. Dist. LEXIS 22854, at *75–76 (M.D. Fla. Dec. 13, 1996).

129. *Griffin*, 403 U.S. at 102.

130. *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 269 (1993) (rejecting respondents' claim that opposition to abortion reflects an animus against women in general where the "demonstrations [we]re not directed specifically at women, but [we]re intended to protect the victims of abortion, stop its practice, and reverse its legalization").

distinguishing the group is not of racial origin[131] or restrict it to be used only by persons alleging a class based on race.[132]

The Eleventh Circuit has declined to limit the scope of Section 1985(3) to racial animus.[133] Accordingly, the classes protected within the meaning of Section 1985(2) should include—but not be limited to—those traditionally protected under equal protection jurisprudence. Race and national origin are the paradigmatic problematic classifications and have been designated by the Court as "suspect classifications" because they are presumptively irrelevant to lawmaking. This line of reasoning is supported by Justice Souter's concurrence and dissent in *Bray v. Alexandria Women's Health Clinic,* observing the "resonance between *Griffin*'s [Section 1985(3)'s] animus requirement and those constitutional equal protection cases that deal with classifications calling for strict or heightened scrutiny . . . [such as] race, national origin, alienage, gender, or illegitimacy."[134]

3. Alleging an Intentional Theory of Discrimination

Section 1985(2) also likely requires that the alleged conspirators have discriminatory intent in depriving any citizen of the equal protection of the laws.

The Supreme Court has rejected a disparate impact theory of invidiously discriminatory animus under Section 1985(3).[135] For example, in *Bray*, several abortion clinics sued anti-abortion demonstrators for conspiring to deprive women seeking abortions of their right to interstate travel, seeking to enjoin the demonstrators from trespassing on, and obstructing general access to, the premises of the clinics. In alleging that the demonstrators acted with invidiously discriminatory "intent to deny" their clients equal protection under the law, the clinics tried to argue that the demonstrators' opposition to abortion could reasonably be presumed to reflect a sex-based intent. In the alternative, the clinics argued that the defendant's intent was irrelevant and that a class-based animus could be determined solely by effect, but the Supreme Court rejected both contentions.[136] Regarding the latter, the Court held that it would "not suffice for application of § 1985(3) that a protected right be incidentally affected."[137]

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131. *E.g.*, Conklin v. Lovely, 834 F.2d 543, 549 (6th Cir. 1987) (holding that Section 1985(3) actions reach conspiracies aimed at plaintiffs because of their political views); Keating v. Carey, 706 F.2d 377, 388 (2d Cir. 1983) (holding that Section 1985(3) protects against political discrimination).

132. *E.g.*, Deubert v. Gulf Fed. Sav. Bank, 820 F.2d 754, 757 (5th Cir. 1987) (holding "it is well-established in this circuit that the only conspiracies actionable under section 1985(3) are those motivated by racial animus" (citing Daigle v. Local 2286, Gulf States Utils. Co., 794 F.2d 974, 978–79 (5th Cir. 1986))); Eitel v. Holland, 787 F.2d 995, 1000 (5th Cir. 1986); Rayborn v. Miss. State Bd. of Dental Exam'rs 776 F.2d 530, 532 (5th Cir. 1985).

133. Lyes v. City of Riviera Beach, 166 F.3d 1332, 1336 (11th Cir. 1999) (extending Section 1985(3) to conspiracies motivated by sex-based animus against women).

134. *Bray*, 506 U.S. at 295 (citing Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440–41 (1985)).

135. *Id.* at 270, 275–76.

136. *See id.* at 270.

137. *Id.* at 275.

Instead, "[t]he right must be 'aimed at,'" and "its impairment must be a conscious objective of the enterprise."[138]

Although there is no case law under Section 1985(2) expressly rejecting a disparate impact theory, federal courts are likely to subscribe to *Bray* where Section 1985(2) and (3) are "both . . . aimed at prohibiting state level conspiracies that deny equal protection of the law; . . . and consequently, require proof of the *Griffin*[139] specific discriminatory animus,"[140] which *Bray* later interpreted to require intentional discrimination.[141]

Shahawy v. Lee—a case from the Middle District of Florida, which sits in the Eleventh Circuit—illustrates the application of an intentional theory of invidiously discriminatory *racial* animus.[142] Mr. Shahawy, a United States citizen of Egyptian birth and ancestry and practicing physician, sued the county public hospital board and several individual board members under Section 1985(2) and (3) for allegedly conspiring to deprive him of the privileges he sought to practice in a local hospital as a consequence of defendants' national origin.[143] The District Court held that Mr. Shahawy adduced sufficient evidence to support his claim to create material issues of fact precluding summary judgment where the Judicial Review Committee reconsidering plaintiff's application for privileges referred to plaintiff by derogatory phrases; two individual defendants made "derisive statements linking Plaintiff's behavior to 'where he was from'"; and another board member "made a direct statement to the Board that they should put aside their cultural or ethnic differences with the Plaintiff in considering his application, which . . . the Board allegedly did not deny."[144]

In sum, evidence of discrimination by way of disparate impact is unlikely to suffice for liability under Section 1985(2). However, evidence of the defendants' awareness of the disparate impact of their actions, depriving plaintiffs of equal protection under the law, and continued engagement in those actions notwithstanding that awareness might support a finding of intentional discrimination under a theory of deliberate or reckless indifference.[145]

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138. *Id.* at 276.

139. Interpreting 42 U.S.C. § 1985(3).

140. Shahawy v. Lee, No. 95-269-CIV-T-21-B, 1996 U.S. Dist. LEXIS 22854, at *65 (M.D. Fla. Dec. 13, 1996).

141. *Bray*, 506 U.S. at 275.

142. *See Shahawy*, 1996 U.S. Dist. LEXIS 22854, at *58 n.32 (M.D. Fla. Dec. 13, 1996), *vacated*, No. 95-269-CIV-T-21-B, 1999 U.S. Dist. LEXIS 6745 (M.D. Fla. Jan. 2, 1997).

143. *See id.* at *2-4.

144. *Id.* at *78.

145. *Supra* note 104.

II. BRINGING A SECTION 1985(2) CLAIM: A "DRAGNET" THEORY OF INTENTIONAL DISCRIMINATION

Part II of this Note delineates how a citizen plaintiff, like CV, or an organizational plaintiff, like Adelante, might frame a Section 1985(2) claim. Section A discusses how ICE and Gardendale qualify as "persons" with the requisite conspiratorial purpose. Section B considers how ICE and Gardendale have conspired with the intent to deny Latinxs of equal protection under the law under a race-based theory of intentional discrimination. Section C explains how Adelante would have representational or organizational standing. Finally, section D contemplates potential barriers to litigating a Section 1985 claim.

A. ICE and Gardendale Are "Persons" that Share the Requisite Conspiratorial Purpose of Physically Obstructing and Chilling Adelante's Latinx Membership from Attending the Municipal Court

Federal officers may be sued in tandem with state officers for having agreed to impede, hinder, obstruct, or defeat the course of justice under Section 1985(2).[146] As such, a citizen plaintiff should first identify a "meeting of the minds" between at least one federal ICE agent and one Gardendale official to impede, hinder, obstruct, or defeat her access to the court.

With respect to ICE, the complaint might first point to the agency's January 10, 2018 memorandum, which articulates a clear policy of "civil immigration enforcement actions inside courthouses."[147] The complaint could then demonstrate a shared conspiratorial objective between ICE and Gardendale court personnel by describing their referral-like practice to apprehend Latinx litigants. To avoid conclusory allegations, the complaint should describe how court personnel have repeatedly identified and/or isolated criminal defendants of a certain race or national origin as a proxy for lack of United States citizenship for enabling ICE to apprehend. Here, it would be important to use MC's and CV's factual allegations to highlight the discriminatory animus at play when court personnel identify and isolate individuals on the basis of language proficiency or surname.

To bolster a claim of conspiracy between ICE and court personnel, the complaint should cite to email correspondence between ICE officials (or better yet between ICE and court personnel) that link both entities to a common purpose. Adelante Alabama already has several emails of the sort—referring to enforcement actions at the courthouse and public demonstrations against such actions—that were released in response to a FOIA request. These factual allegations and emails are sufficient to allege, upon information and belief, a shared conspiratorial purpose between ICE and court personnel. If Adelante is able to overcome a motion to

146. *Supra* Part I.A (discussing the conspiracy requirement).

147. U.S. CITIZENSHIP & IMMIGRATION SERVS., FEDERAL ENTERPRISE ARCHITECTURE NO. 306-112-002b, CIVIL IMMIGRATION ENFORCEMENT ACTIONS INSIDE COURTHOUSES (2018).

dismiss, then it can move forward to discovery, where it may uncover more hard evidence of a common conspiratorial purpose to prevent access to the municipal court.

Finally, the complaint must describe some overt act in furtherance of the alleged conspiratorial purpose (i.e., impeding, hindering, obstructing, or defeating). ICE and Gardendale's practice of dragnet enforcement—targeting individuals by court personnel, followed by questioning, physical restraint, and/or arrest by ICE—should suffice to satisfy this requirement where indirect harassment has sufficed elsewhere.[148]

B. ICE and Gardendale Officials Have Conspired with Intent to Deny Latinxs Equal Protection Under the Laws

Section 1985(2) requires an intent to deprive a "*citizen* of equal protection" under the law. [149] As such, alienage cannot define the protected class where the plain language of the statute expressly requires that the defendant conspirators believe or realize the substantial probability that the party they seek to deprive of court access is a *citizen*. Notwithstanding this limitation, there is one class-based theory that the citizen plaintiff—apprehended by ICE in error—could advance, rooted in race and national origin discrimination.

Under a theory of intentional discrimination, the citizen plaintiff would have to demonstrate his membership in a protected class—racial, national origin, or both—and allege that ICE agents, colluding with state officials, targeted persons for arrest at the courthouse based on racial markers (e.g., the color of their skin, their language,[150] and the sound of their last name[151]) or citizenship from a foreign country at the court as a proxy for their "removability" or "unlawful presence." Because these markers belong to citizens (i.e., dual citizens, in the case of a foreign passport) and noncitizens alike, an expressed desire to target individuals based on a combination of these markers would suffice to meet the animus requirement.[152]

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148. *Supra* Part I.B (discussing *Britt*, a case involving several instances of indirect harassment).

149. 42 U.S.C. § 1985(2) (2016) (emphasis added).

150. Justice Kennedy, writing for the plurality in *Hernandez v. New York*, recognized that "[i]t may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis." Hernandez v. New York, 500 U.S. 352, 355 (1991).

151. At least one district court has found that surnames, like skin color, may be a surrogate for race. *See, e.g.*, Diaz v. Silver, 978 F. Supp. 96, 103 (E.D.N.Y. 1997) (finding the redistricting of a congressional district unconstitutional because race—through the use of a race-sensitive computer program, voter registration lists, and surname dictionaries to identify Latino and Asian names—was the predominant factor in its creation and it failed to meet the strict scrutiny standard).

152. One issue to flag in advancing this theory of intent is that race or ethnic appearance has emerged as a legal factor in a reasonable suspicion calculus. United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975). However, this case law has been rebuked in the Ninth Circuit where the Supreme Court "relied on heavily now-outdated demographic information" in its reasoning. United States v. Montero-Camargo, 208 F.3d 1122, 1130–31 (2000). Simply because the Supreme Court once recognized racial profiling as a permissible factor under the Fourth Amendment does not mean that it is permissible in the context of Section 1985.

If the court requires an additional showing of specific intent to deprive *citizens* of equal protection, the citizen plaintiff might advance the dragnet theory of liability, alleging that ICE agents, colluding with state officials, knew or had reason to believe that their enforcement strategy was not reasonably calculated to apprehend noncitizens only (i.e., that their strategy could and would likely "drag in" citizens as well as noncitizens). Aware of their overinclusive enforcement, defendant conspirators continued to enforce the policy anyway, relying on the same intentionally discriminatory process of identifying "noncitizens" by proxy of racial markers or national origin, and dragging them into ICE custody, to the same effect. To that end, the complaint would first have to establish the overinclusive nature of ICE enforcement, to the extent it has held citizens in local jails on federal detainers, even deporting them.[153] Careful framing might characterize ICE's practice as the conscious disregard of a known and substantial risk of illegal detention to the extent the agency is aware of false positives (i.e., citizens and other documented individuals identified as removable targets, like CV), yet has failed to change its enforcement strategy to limit the effect of their blunderbuss methods.

C. Adelante Would Have Organizational and/or Representative Standing to Sue Under Section 1985(2)

Adelante is a nonprofit corporation that qualifies as a "person" within the meaning of the Equal Protection Clause. Accordingly, it may have organizational standing for damages under the state court prong of Section 1985(2) if it can demonstrate injury to itself. Adelante might be able to adduce this by showing that it will suffer diminished financial support or membership due to ICE's dragnet enforcement,[154] or that it has been hindered in its efforts to assist others to assert their constitutional or statutory rights, and it has had to devote significant resources to counteract the defendants' actions.[155] Here, Adelante could highlight the chilling effect the defendants' actions have had on its membership, thus diverting it from providing core services in order to accompany membership to court for matters most people would resolve on their own.[156]

Alternatively, if Adelante cannot demonstrate injury to itself, it would have representative standing to litigate its members' claims for equitable relief.[157]

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153. *See* Meredith Hoffman, *The US Keeps Mistakenly Deporting Its Own Citizens*, VICE NEWS (Mar. 8, 2016), https://news.vice.com/article/the-us-keeps-mistakenly-deporting-its-own-citizens [https://perma.cc/NFK4-3FQH].

154. *See* NAACP v. Alabama, 357 U.S. 449, 459–60 (1958).

155. *See* Haven's Realty Corp. v. Coleman, 455 U.S. 353, 379 (1982).

156. For example, accompanying an individual member to pay for a ticket—a matter most members would resolve on their own without legal counsel.

157. *See* Minority Emps. of Tenn. Dep't of Emp't Sec., Inc., v. Tenn., Dep't of Emp't Sec., 573 F. Supp. 1346, 1348 (M.D. Tenn. 1983) ("There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy. Moreover, in attempting to secure relief from injury to itself

Generally, standing requires an injury to the plaintiff that is actual or imminent and concrete and particularized.[158] A prerequisite of representative standing is that the citizen members would have standing in their own right were they to bring suit themselves.[159]

To allege an injury that is sufficiently concrete, Adelante could argue that its membership has suffered a stigmatic injury by virtue of ICE collaboration with the municipality and enforcement at the courthouse (i.e., the stigma of "criminality" or "illegality" ascribed to Latinxs).[160] Adelante could also cite the deprivation of liberty or other harms associated with the denied exercise of other federally protected rights at the courthouse (e.g., CV's interrogation and arrest), coupled with attendant emotional and physical harms that members have suffered, as evidence of actual or "real world" harm.[161]

To demonstrate that the defendants caused such injury, or that the injury is fairly traceable to the defendants' allegedly unlawful conduct, Adelante must carefully detail the referral-like practice between ICE and the courthouse for apprehending targets by proxy of their racial markers (e.g., language, last name, or color of skin) or their national origin (e.g., when an individual is not in possession of a driver's license and the only form of identification she can produce is a foreign passport) to avoid a "speculative chain of possibilities."[162] Adelante might also characterize the chilling effect of ICE's enforcement as the deprivation of its membership's opportunity to attend court.[163]

Finally, Adelante would have to demonstrate that its desired redress (i.e., injunctive or declaratory) would be sufficient. For equitable relief, Adelante must show the likelihood of future harm or injury—the same type of harm alleged—to its membership.[164] If Adelante were to secure an injunction against the collaboration

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the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties." (citing Warth v. Seldin, 422 U.S. 490, 511 (1975))).

158. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

159. *See* Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1287 (11th Cir. 1990) (Tjoflat, J., concurring).

160. Heckler v. Mathews, 465 U.S. 728, 729 (1984) ("[D]iscrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore less worthy participants in the political community, can cause serious noneconomic injuries to those persons who are denied equal treatment solely because of their membership in a disfavored group."); Hassan v. City of New York, 804 F.3d 277, 289 (3d Cir. 2015) (citing *Heckler* approvingly and recognizing standing on the basis of stigmatic injury).

161. *Spokeo, Inc.*, 136 S. Ct. at 1549 (injury in fact is not automatically satisfied whenever a statute grants a statutory right and purports to authorize that person to sue to vindicate that right; there must be additional evidence of actual or "real world" harm).

162. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 414 (2013).

163. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 303 (1978) (by characterizing an injury as the deprivation of an opportunity, the court suggests that the injury is not necessarily speculative and is capable of judicial redress).

164. *See* Los Angeles v. Lyons, 461 U.S. 95, 111 (1983). For example, Adelante could collect declarations from Latinx membership expressing fear of attending future court dates and try to do so anonymously. Doe v. Frank, 951 F.2d 320, 323 (11th Cir. 1992) ("The ultimate test for permitting a

of ICE and Gardendale officials, as well as against ICE enforcement in and around the courthouse, this would prevent the future denial of its members' equal protection at the court and reduce the harm resulting from the stigmatic injury that might flow (i.e., fewer Latinx members would be apprehended while trying to enforce the law or comply with the law at court, thus reducing the stigma of "illegality" or "criminality" perpetuated by ICE enforcement).

D. Potential Barriers: Statute of Limitations, Standing, and Scope of Relief

There are several potential barriers to Adelante's Section 1985(2) claim, including the statute of limitations, standing, and the scope of relief.

First, Section 1985(2) claims are subject to the same limitations period as personal injury claims in the forum state. As such, for the citizen plaintiff in Gardendale, the residual, two-year limitations period for personal injury claims set forth in the Code of Alabama applies.[165]

Second, with respect to relief, Section 1985 expressly provides for damages,[166] but injunctive relief is also available because federal courts have "broad powers . . . to fashion remedies under the Civil Rights Act."[167] However, an important issue to flag in fashioning a complaint for injunctive relief would be standing, insofar as the plaintiff would have to demonstrate the likelihood of future harm or injury to herself or others like her.[168] This would be virtually impossible for an individual plaintiff, like CV, to do; as such, the citizen plaintiff would have better odds if an organization, like Adelante, with other similarly situated members, would advance a claim for relief.

Finally, although injunctive relief may be available, a related concern is the scope of relief that a court would have authority to order. Injunctive relief against one federal agent in his official capacity (among other state court personnel) would be unsatisfactory where ICE regularly rotates agents from office to office and could ostensibly continue to conduct civil immigration arrests through different officers

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party to proceed anonymously is whether . . . [he] has a substantial privacy right which outweighs the 'customary and constitutionally embedded presumption of openness in judicial proceedings.'" (citing Doe v. Stegall, 653 F.2d 180, 186 (5th Cir. 1981))). Further, Adelante could collect data demonstrating a continued pattern of ICE and Gardendale's referral-type practice and subsequent arrest of Latinx membership at the Gardendale Municipal Court.

165. *See* Kennedy v. Warren Props., No. 17-00114-KD-N, 2017 U.S. Dist. LEXIS 197908, at *20 (S.D. Ala. Nov. 30, 2017).

166. "[I]n any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the *recovery of damages* occasioned by such injury or deprivation, against any one or more of the conspirators." 42 U.S.C. § 1985(3) (emphasis added).

167. Pennsylvania v. Int'l Union of Operating Eng'rs, 347 F. Supp. 268, 301 (E.D. Pa. 1972) (citing Action v. Gannon, 450 F.2d 1227, 1238 (8th Cir. 1971) (affirming the District Court's issuance of an injunction under 42 U.S.C. § 1985(3)).

168. *See Lyons*, 461 U.S. at 111.

in the municipal court. But an organizational plaintiff like Adelante might be able to secure relief against an entire office, as in the case of *Puente Arizona v. Arpaio*. In *Puente*, an organizational plaintiff sought injunctive relief against an individual policymaker, resulting in an injunction against the policymaker's entire office, where it would not have been possible to protect each of the organization's members at risk of future harm without enjoining the whole office.[169]

CONCLUSION

ICE's aggressive nationwide policy of making arrests and detentions and initiating other immigration enforcement actions at state courthouses is highly problematic because it penalizes many people for exercising, and thus chills them in the exercise of, their fundamental right of access to the courts. In Gardendale specifically, the method used by ICE for selecting people as targets of these enforcement efforts functions as an overinclusive dragnet that is not reasonably calculated to pick up removable noncitizens. Given the background of violence and direct intimidation prevalent at the time of its passage, Section 1985(2) carries important implications today for persons of color who seek to access the courts and are at risk of dragnet immigration enforcement.

The difficulty of Section 1985(2) is that the only people who have standing to raise claims thereunder are *citizens*, who must allege and prove that the defendants conspired to deprive citizens of court access to establish liability.[170] A potential plaintiff might be able to do this by offering direct proof that ICE, in collusion with state officials, interfered with a citizen's access to the court. Alternatively, a potential plaintiff might demonstrate that ICE, aware of its overinclusive approach, proceeded with the knowledge that citizens would be apprehended. To that end, factual proof of ICE's process for selecting people to approach, question, and detain based on their names, skin color, or other physical features which are not specific to noncitizens as opposed to citizens would be particularly useful. Organizations like Adelante, trying to help persons of particular racial, ethnic, or cultural backgrounds, might very well have standing to represent citizens under a Section 1985(2) claim in federal court if they can prove ICE's target selection protocol is so broad as to include citizens with those particular backgrounds.

Given the lack of case law on Section 1985(2), additional research is required to successfully bring a claim. This research should focus on whether noncitizens have standing under Section 1985, clause two, or other subdivisions of the statute where "citizenship" under Section 1985 is not clearly defined. Further, an organizational plaintiff like Adelante should consider whether it would be better to sue as an organization or in a representative capacity, and, in either capacity, what

169. *See* Puente Ariz. v. Arpaio, 76 F. Supp. 3d 833, 861 n.10 (D. Ariz. 2015) (issuing broad injunctive relief on the basis of Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1501–02 (9th Cir. 1996), which "extends benefits to persons other than those before the Court 'if such breadth is necessary to give prevailing parties the relief to which they are entitled'").

170. 42 U.S.C. § 1985(2) (2016).

relief it should seek. Related to this inquiry, the organization must consider the unintended effects of any equitable relief it might secure, including whether an injunction might simply shift ICE enforcement to other unprotected or sensitive spaces.