AMERICAN CIVIL LIBERTIES UNION FOUNDATION

April 17, 2025

Open Letter to College and University General Counsels on: 1) 8 U.S.C. § 1324 Harboring Liability, and 2) ICE Administrative Subpoenas

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The ACLU writes to address significant questions that may arise regarding colleges' and universities' rights and obligations in the face of certain Immigration and Customs Enforcement (ICE) investigations and enforcement actions.

First, amid the growing retaliatory crackdown against noncitizen students for their First Amendment-protected speech and advocacy, the federal government appears to be advancing extreme claims that innocent conduct by colleges and universities may violate 8 U.S.C. § 1324. That statute prohibits, *inter alia*, concealing, harboring, or shielding from detection a noncitizen who is unlawfully present, when done with knowledge or reckless disregard of that person's immigration status.[1] As explained below, under the case law, a college or university's normal conduct in providing housing and services to students does not constitute a violation of Section 1324.

Second, ICE commonly relies on administrative subpoenas to request information, including from colleges and universities. Entities in receipt of these subpoenas often respond reflexively, out of fear of repercussions. However, there are no consequences for an initial failure to respond to an administrative subpoena. For an ICE subpoena to become mandatory, the government must seek enforcement in court, where you can raise a number of possible legal objections. Penalties can only be imposed if a court ultimately orders compliance and you then fail to comply. Additionally, ICE subpoenas often include requests that the recipient not notify anybody of the existence or details of the subpoena. However, any gag order in these subpoenas has no legal effect; the recipient of the subpoena is free to disclose the subpoena, including to the target of ICE's investigation.

As explained in detail below, the following principles should guide colleges' and universities' actions in these areas:

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[1] 8 U.S.C. § 1324(a)(1)(A)(iii). 8 U.S.C. § 1324 prohibits several categories of activity that help people violate immigration law: (1) bringing noncitizens into the country between ports of entry, *id.* § 1324(a)(1)(A)(i); (2) transporting noncitizens within the United States, while "knowing or in reckless disregard" that they entered or remain in the country "in violation of law," and "in furtherance of such violation of law," *id.* § 1324(a)(1)(A)(ii); (3) harboring noncitizens, or concealing them, while "knowing or in reckless disregard" that they entered or remain in the country "in violation of law," *id.* § 1324(a)(1)(A)(iii); and (4) encouraging or inducing people to enter or stay in the country in violation of immigration law, which requires intentional solicitation or aiding and abetting, *id.* § 1324(a)(1)(A)(iv).

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Section 1324:

- Courts of appeals agree that merely providing housing or other services does not violate Section 1324 and cannot be the basis for a warrant.
- Section 1324 liability additionally cannot attach for providing campus housing or other services to a noncitizen who is lawfully present in the country, even if the government has asserted a ground of deportability. This includes lawful permanent residents, because they are not deportable until a judge issues a final order of removal. And it includes students whose student visas have been revoked, because visa revocation does not terminate lawful status as long as the student remains in compliance with the terms of their status (such as maintaining sufficient credit hours).
- Denial of consent for warrantless entry of ICE agents into campus residence halls or other areas closed to the public cannot constitute evidence of harboring, because withholding of consent is a right guaranteed by the Fourth Amendment.

ICE Administrative Subpoenas:

- The recipient of an administrative subpoena does not have to comply with the subpoena unless a court orders it to.
- You should carefully scrutinize each administrative subpoena to assess whether it complies with the relevant subpoena statute, and whether it suffers other defects. Whether or not you believe it is defective, you do not need to respond unless and until a court orders compliance.
- If ICE seeks court enforcement, you can raise a number of possible objections, including related to overbreadth, relevance, burdensomeness, and privacy interests.
- ICE lacks authority to unilaterally gag a subpoena recipient from disclosing the subpoena, including to the target of ICE's investigation.
- Your institution should adopt a clear policy under which you will disclose the subpoena to the parties whose records have been requested unless you are barred from doing so by a court order.

This letter provides background on the scope of the problem, followed by legal analysis of limitations on liability for harboring under 8 U.S.C. § 1324 (**Part I**, pp. 5–9), and the rights and options of an entity after receiving an ICE administrative subpoena (**Part II**, p. 10–14).

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BACKGROUND: Case Study — ICE's Targeting of Columbia University

In March, 2025, ICE issued an administrative immigration arrest warrant for Yunseo Chung, a lawful permanent resident who moved to the United States from South Korea when she was seven years old. In response to Ms. Chung's First Amendment-protected speech and advocacy concerning Palestine and Israel, Secretary of State Rubio had asserted that he had reasonable grounds to believe her continued presence "would have potentially serious adverse foreign policy consequences for the United States"; ICE, in turn, was seeking to arrest and deport Ms. Chung based on Secretary Rubio's designation. *See* 8 U.S.C. § 1227(a)(4)(C)(i). Ms. Chung has now obtained a temporary restraining order barring her detention and deportation on First Amendment grounds.[2]

While attempting to locate Ms. Chung for immigration arrest, ICE took two investigative steps directed at Columbia University that illustrate concerns addressed in this letter. First, on March 12 and 13, 2025, ICE issued two administrative subpoenas to Columbia.[3] The first sought

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[2] *Chung v. Trump*, No. 25-cv-2412 (S.D.N.Y. Mar. 25, 2025) (ECF No. 19) (temporary restraining order); *Id.* (ECF No. 8) (brief in support of proposed order to show cause for TRO and preliminary injunction); Santul Nerkar & Jonah E. Bromwich, *Judge Orders U.S. to Stop Attempts to Deport Columbia Undergraduate*, N.Y. Times (Mar. 25, 2025), https://www.nytimes.com/2025/03/25/nyregion/columbia-university-protester-chung-deportation.html.

ICE has detained other students on similar grounds, including a lawful permanent resident who was recently a graduate student at Columbia, *see* Michael Wilson et al., *How a Columbia Student Activist Landed in Federal Detention*, N.Y. Times (Mar. 16, 2025), https://www.nytimes.com/2025/03/16/nyregion/mahmoud-khalil-columbia-university.html, and a former Fulbright Scholar from Turkey now pursuing her Ph.D. at Tufts University on a student visa, whom ICE arrested in retaliation for publishing an op-ed in her student newspaper addressing the University's response to a student government resolution regarding Gaza. *See* John Hudson, *No Evidence Linking Tufts Student to Antisemitism or Terrorism, State Dept. Office Found*, Wash. Post (Apr. 13, 2025), https://www.washingtonpost.com/national-security/2025/04/13/tufts-student-rumeysa-ozturk-rubio-trump/. In both cases, courts have issued orders barring ICE from deporting the students. *Khalil v. Joyce*, No. 25-cv-1935, 2025 WL 849803, at *2 (S.D.N.Y. Mar. 19, 2025) (continuing prior order barring removal from United States, and transferring case to District of New Jersey); Order, *Khalil v. Joyce*, No. 25-cv-1963 (D.N.J. Mar. 19, 2025) (ECF No. 81) (barring removal); *Öztürk v. Trump*, No. 25-cv-10695, 2025 WL 1009445, at *11 (D. Mass. Apr. 4, 2025) (transferring case to District of Vermont and continuing prior order barring removal from United States "unless and until the transferee court orders otherwise"). *See also* Order, *Mahdawi v. Trump*, No. 2:25-cv-00389 (D. Vt. Apr. 14, 2025) (ECF No. 6) (barring transfer or removal of lawful-permanent-resident Columbia University student). (The ACLU is counsel in *Khalil* and *Öztürk*).

[3] Decl. of Marina Vides ¶¶ 13–14, *Chung v. Trump*, No. 25-cv-2412 (S.D.N.Y. Apr. 11, 2025) (ECF No. 34), *available at* https://perma.cc/866W-3E3V.

"any and all video footage for" Ms. Chung's residence hall over a three-and-a-half day period.[4] The second sought "any and all Student Identification Swipe Card Access Data for Ms. Chung" over an eight-day period.[5]

Second, on March 13, 2025, ICE officials entered and searched Columbia University residence halls pursuant to a search warrant issued by a magistrate judge in the Southern District of New York.[6] The warrant was issued to search for evidence of violations of Section 1324 by Columbia.[7]

Reports indicate, however, that ICE's actual purpose in seeking entry into Columbia dorms was to arrest Ms. Chung for alleged violations of civil immigration law. Although ICE had issued an administrative arrest warrant for Ms. Chung, ICE's administrative warrants, which are signed by an agency official instead of a judge, do not authorize entry into homes or other constitutionally protected spaces, and so ICE cannot enter such spaces to make arrests unless they have valid consent or a Fourth Amendment-compliant search warrant.[8] The search warrant enabled ICE to gain entry into Columbia residence halls not open to the public.

Although the affidavit in support of the March 13 warrant has not yet been made public, the warrant raises serious questions about how the government could have asserted probable cause to believe that Columbia was engaged in violations of Section 1324.

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[4] *Id.* ¶ 13.

[5] *Id.* ¶ 14.

[6] Jonah E. Bromwich & Hamed Aleaziz, *Columbia Student Hunted by ICE Sues to Prevent Deportation*, N.Y. Times (Mar. 24, 2025), https://www.nytimes.com/2025/03/24/nyregion/columbia-student-ice-suit-yunseo-chung.html.

[7] Shawn Musgrave, *ICE Got Warrants Under "False Pretenses," Claims Columbia Student Targeted Over Gaza Protests*, The Intercept (Mar. 28, 2025), https://theintercept.com/2025/03/28/ice-warrants-columbia-students-gaza-protests/ (quoting Deputy Attorney General Todd Blanche explaining that the warrant was pursuant to "an investigation into Columbia University for harboring"). *See also* Search & Seizure Warrant (issued Mar. 13, 2025), attached as Ex. K to Decl. of Sonya Levitova, *Chung v. Trump*, No. 25-cv-2412 (S.D.N.Y.) (ECF No. 9-11), *available at* https://perma.cc/7P58-ZX62 (authorizing search for "residential lease agreements or student occupancy agreements" between the university and noncitizen students).

[8] *See, e.g.*, *Kidd v. Mayorkas*, 734 F. Supp. 3d 967, 979–80 (C.D. Cal. 2024) ("[A]n [ICE] administrative warrant is insufficient to enter the constitutionally protected areas of a home.").

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PART I: Liability Under 8 U.S.C. § 1324

A. Merely providing housing or other services does not violate Section 1324.

Courts have consistently held that merely providing housing to a person does not constitute harboring under Section 1324, regardless of the person's immigration status. In fact, as the Fourth Circuit recently observed, "*every* precedential appellate decision" to address the issue has held that "renting to an undocumented person, without more," is not harboring under Section 1324.[9] To violate Section 1324, a person generally must conceal an undocumented immigrant from authorities, with knowledge or reckless disregard of the person's unlawful status.[10] Thus, a university that merely houses an undocumented student in campus housing on the same terms offered to other students does not satisfy the elements of harboring.[11] This principle applies even

[9] *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 91 F.4th 270, 277–78 (4th Cir. 2024) (emphasis added) (Harboring "only applies to those who intend in some way to aid an undocumented immigrant in hiding from the authorities. It involves an element of deceit that is not present in run-of-the mill leases made in the ordinary course of business."); *see also DelRio-Mocci v. Connolly Props. Inc.*, 672 F.3d 241, 247 (3d Cir. 2012) ("We do not know of any court of appeals that has held that knowingly renting an apartment to an alien lacking lawful immigration status constitutes harboring."); *Cruz v. Abbott*, 849 F.3d 594, 599–600 (5th Cir. 2017) (explaining that harboring "requires some level of covertness well beyond merely renting or providing a place to live"); *United States v. McClellan*, 794 F.3d 743, 751 (7th Cir. 2015) ("[W]hen the basis for the defendant's conviction under § 1324(a)(1)(A)(iii) is providing housing to a known illegal alien, there must be evidence from which a jury could conclude, beyond a reasonable doubt, that the defendant intended to safeguard that alien from the authorities. Such intent can be established by showing that the defendant has taken actions to conceal an alien by moving the alien to a hidden location or providing physical protection to the alien.").

[10] *See, e.g.*, *United States. v. Vargas-Cordon*, 733 F.3d 366, 382 (2d Cir. 2013) ("To 'harbor' under § 1324, a defendant must engage in conduct that is intended both to substantially help an unlawfully present alien remain in the United States—such as by providing him with shelter, money, or other material comfort—and also is intended to help prevent the detection of the alien by the authorities."); *United States v. Silveus*, 542 F.3d 993, 1115 (3d Cir. 2008) ("To sustain a conviction under this section, the government must prove conduct tending substantially to facilitate an alien's remaining in the United States illegally *and* to prevent government authorities from detecting the alien's unlawful presence.") (cleaned up) (emphasis added); *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 530 (5th Cir. 2013) (harboring requires that "something is being hidden from detection"); *Reyes*, 91 F.4th at 277; *McClellan*, 794 F.3d at 751; *see also United States v. Hansen*, 599 U.S. 762, 779 (2023) (reading a specific intent requirement into one provision of § 1324).

[11] By contrast, "[e]xamples of harboring include physical concealment, arranging sham marriage ceremonies, and assisting unlawfully present persons in obtaining employment, with knowledge or reckless disregard of their immigration status." *Kearns v. Cuomo*, 981 F.3d 200, 208 (2d Cir. 2020) (citations omitted).

more strongly in the case of students who reside in campus housing while they have lawful status—such as a student visa—and then lose such status through action by the government.

B. Section 1324 liability cannot attach for "harboring" a lawful permanent resident or other person with lawful status, even if the government has asserted a ground of deportability.

For Section 1324 liability to attach, the noncitizen in question must "remain[] in the United States in violation of law." This means there can be no criminal liability for "harboring" a person whose presence in the U.S. is not in violation of law.

Notably, this includes lawful permanent residents such as Ms. Chung, even if there is a circumstance that allegedly or actually renders them deportable. For example, a person may be deportable because of a criminal conviction, or because of a valid use of the foreign policy bar in U.S.C. § 1227(a)(4)(C)(i), or on other grounds.[12] But even when a lawful permanent resident is deportable on one of these grounds, they cannot be in the country "in violation of law" until after they receive a final order of removal from an immigration court.[13] Until a final order of removal is issued, they remain lawfully present in the country, and so it is definitionally impossible to "harbor" them in violation of Section 1324.

Section 1324 is similarly inapplicable to student visa holders whose visas are merely revoked. Student visa holders present in the United States do not lose their status upon revocation of their visa. A nonimmigrant visa, including an F-1 student visa, controls a noncitizen's *admission* into the United States, not their continued *stay* once admitted. Once admitted on a visa, a student is granted permission to remain in the United States for the duration of status, *i.e.*, as long as they continue to meet the requirements governing their visa classification set out in federal regulations, such as maintaining a full course of study and avoiding unauthorized employment.[14] Revocation of a visa after a student has been admitted to the country does not, on its own, constitute a failure to maintain status, and does not make the

[12] *See* 8 U.S.C. § 1227(a) (grounds of deportability); *id.* § 1227(a)(4)(C)(i) (providing simply that a person subject to the foreign-policy bar "is deportable"). Plaintiffs in the cases mentioned above, *supra* note 2, contend that the government's use of the foreign policy bar is unlawful and unconstitutional.

[13] *See Matter of Gunaydin & Kircali*, 18 I. & N. Dec. 326, 327 (BIA 1982) ("[A]n act which provides the basis for a lawful permanent resident alien's deportability does not itself terminate his status."); *Etuk v. Slattery*, 936 F.2d 1433, 1447 (2d Cir. 1991) ("LPRs who are placed in deportation proceedings do not lose the status of lawful residents and its attendant benefits until a deportation hearing has been conducted . . . and a final deportation order issued."); 8 C.F.R. § 1.2 (status of "permanent residence" only "terminates upon entry of a final administrative order of exclusion, deportation, or removal").

[14] 8 C.F.R. § 214.2(f).

student's presence in the country "in violation of law."[15] DHS can only terminate a student's status in extremely limited circumstances governed by regulation.[16] And while a visa revocation *can* be charged as a ground of deportability in removal proceedings, deportability can be contested in such proceedings.[17] Only when a judge enters a final order of removal would the student lose their status.

Section 1324 also does not apply in the case of a noncitizen who is in the process of seeking immigration benefits or relief—such as asylum, a visa, or adjustment of status—even if they overstayed a visa or entered the United States without inspection. Such noncitizens are permitted by federal law to remain in the country during their proceedings.[18]

Thus, providing such individuals with assistance cannot violate Section 1324 because they are not in the country in violation of law.

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[15] U.S. Dep't of State, Guidance Directive 2016-03, 9 FAM 403.11-3 – Visa Revocation (Sept. 2, 2016), https://j1visa.state.gov/wp-content/uploads/2016/09/2016-03-GD-Visa-Revocation-FINAL-Sept-2016.pdf [https://perma.cc/EX7L-2JG7] ("[T]he revocation of their visa does not override the [student] status granted by Customs and Border Protection ('CBP') at the time of their entry or their ability to stay in the United States (except in extremely rare circumstances)."); ICE Policy Guidance 1004-04 –Visa Revocations (June 7, 2010), https://www.ice.gov/doclib/sevis/pdf/visa_revocations_1004_04.pdf [https://perma.cc/HUN6-ST7X] ("Visa revocation is not, in itself, a cause for termination of the student's SEVIS record [recording student's maintenance of status].").

[16] 8 C.F.R. § 214.1(d). *See Jie Fang v. Dir. U.S. Immigr. & Customs Enf't*, 935 F.3d 172, 185 n.100 (3d Cir. 2019) ("[T]he ability to terminate an F-1 visa is limited by § 214.1(d). That provision states: '(d) Termination of status. Within the period of initial admission or extension of stay, the nonimmigrant status of an alien shall be terminated by the revocation of a waiver authorized on his or her behalf under section 212(d)(3) or (4) of the Act; by the introduction of a private bill to confer permanent resident status on such alien; or, pursuant to notification in the Federal Register, on the basis of national security, diplomatic, or public safety reasons.'").

[17] *See* 8 USC § 1227(a)(1)(B); 8 U.S.C. § 1201(i) (allowing immigration court review of visa revocation). The immigration judge may even dismiss removal proceedings where a visa is revoked, so long as a student is able to remain in valid status. 8 C.F.R. § 1003.18(d)(1)(ii)(B) ("immigration judges may, in the exercise of discretion, terminate the case . . . where . . . [t]he noncitizen is prima facie eligible for . . . lawful status").

[18] *See* 8 U.S.C. § 1231(a)(1)(A) (preventing removal until after "an alien is ordered removed" through immigration proceedings); *id.* § 1229a(b)(5)(A) (requiring noncitizens to attend their immigration hearings in the United States); *id.* § 1225(b)(1)(A)(ii) (preventing removal while an immigration claim is pending); *id.* § 1158(d)(2) (providing permission to work in the United States while a claim is pending); 8 C.F.R. § 208.7 (same).

C. Refusal of consent for warrantless entry by ICE agents cannot constitute evidence of harboring.

The government may claim that withholding consent for ICE to enter a residence hall or other non-public area without a warrant constitutes evidence of harboring, because it frustrates ICE's attempt to locate a person the agency considers removable. However, declining consent for warrantless entry or search cannot be used as evidence of harboring in violation of Section 1324. Courts uniformly agree that "passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing."[19]

This rule holds even if a noncitizen is on the premises and ICE has asserted grounds to detain them. In a closely analogous context, the Ninth Circuit has held that a resident's refusal to consent to a warrantless police entry, when police were trying to arrest a suspect who was hiding in the resident's home, could not be "considered as evidence of the offense charged, i. e., of harboring or concealing" the suspect in violation of the federal accessory-after-the-fact statute.[20] The court explained that the Fourth Amendment gives the occupant of a home "a constitutional right to refuse to consent to entry and search" when officers lack a warrant.[21] "His asserting [that right] cannot be a crime. Nor can it be evidence of a crime."[22] A university's withholding of consent to ICE entry to residence halls is likewise protected by the Fourth Amendment, and cannot create liability for harboring under Section 1324.[23]

D. Other provisions of Section 1324 are similarly narrow.

In addition to harboring, Section 1324 also criminalizes conduct related to transporting people who are present in violation of law, and encouraging or inducing people to enter or stay in the country in violation of immigration law.[24] Both provisions are narrow. The transportation

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[19] *Gasho v. United States*, 39 F.3d 1420, 1431 (9th Cir. 1994) (citation omitted). *See also, e.g.*, Wayne R. LaFave, 1 Search & Seizure § 1.13(b) (6th ed.) ("[C]ertainly the Fourth Amendment bars criminal punishment of a mere failure to surrender rights under that Amendment."); *United States v. Massenburg*, 654 F.3d 480, 482 (4th Cir. 2011) ("[R]efusing to consent to a search cannot itself justify a nonconsensual search."); *United States v. Alexander*, 835 F.2d 1406, 1409 n.3 (11th Cir.1988) ("[R]efusal to consent to a search cannot establish probable cause to search. A contrary rule would vitiate the protections of the Fourth Amendment.").

[20] *United States v. Prescott*, 581 F.2d 1343, 1350 (9th Cir. 1978).

[21] *Id.* at 1351.

[22] *Id*.

[23] Moreover, a university has "no authority to consent to or join in a police search [of a student's dormitory room] for evidence of crime." *Piazzola v. Watkins*, 442 F.2d 284, 290 (5th Cir. 1971).

[24] 8 U.S.C. § 1324(a)(1)(A)(ii), (iv).

provision makes it illegal to transport, within the United States, a person who has entered or remained in the United States in violation of law, while "knowing or in reckless disregard" of and "in furtherance of such violation of law."[25] Violation of this section requires "that the specific intent of the person transporting the illegal aliens was 'to deliberately assist an alien in maintaining his or her illegal presence' in this country."[26] Ordinary interactions with undocumented people, like a shuttle driver taking a student to class or a bus driver taking a student athlete to a tournament, do not violate Section 1324.[27]

Similarly, in *United States v. Hansen*, the Supreme Court interpreted the encourage-or-induce provision to reach "no further than the purposeful solicitation and facilitation of specific acts known to violate federal law."[28] In other words, *Hansen* read in a requirement of specific intent to solicit or aid-and-abet a violation of immigration law.[29] The Court adopted this narrow interpretation in part to avoid the serious First Amendment problems that a broader interpretation would have created. Section 1324 likewise cannot be used to criminalize any speech that is protected by the First Amendment, including abstract advocacy of breaking the law, know-your-rights communications, or expressions of support for individuals who are unlawfully present in the country.

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[25] 8 U.S.C. § 1324(a)(1)(A)(ii).

[26] *United States v. Stonefish*, 402 F.3d 691, 695 (6th Cir. 2005) (citation omitted); *see also United States v. Khalil*, 857 F.3d 137, 140 (2d Cir 2017); *United States v. Moreno*, 561 F.2d 1321, 1323 (9th Cir. 1977); *United States v. Velasquez-Cruz*, 929 F.2d 420, 424 (8th Cir. 1991).

[27] *See Stonefish*, 402 F.3d at 695 ("This court has determined that there is a 'principled distinction between acts performed with the purpose of supporting or promoting an alien's illegal conduct, and acts which are incidental to or merely permit an individual to maintain his existence.'") (quotation marks omitted); *United States v. Parmelee*, 42 F.3d 387, 390–91 (7th Cir. 1994) (avoiding interpretation that "could penalize purely innocent conduct," like "a cab driver who transports in a routine commercial transaction an individual who announces his illegal alien status during the course of the ride"); *United States v. Moreno*, 561 F.2d 1321, 1323 (9th Cir. 1977) (counseling against broad interpretation that "would potentially have tragic consequences for many American citizens who come into daily contact with undocumented aliens and who, with no evil or criminal intent, intermingle with them socially or otherwise").

[28] 599 U.S. 762, 781 (2023) (cleaned up).

[29] *Id.* at 782 (explaining that the statute would not "punish the author of an op-ed criticizing the immigration system, a minister who welcomes undocumented people into the congregation and expresses the community's love and support, [or] a government official who instructs undocumented members of the community to shelter in place during a natural disaster").

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PART II: ICE Administrative Subpoenas

ICE frequently issues administrative subpoenas to obtain information from a wide range of entities, including colleges and universities.[30] The kinds of records sought may implicate serious privacy interests of students or faculty. And although ICE's administrative subpoena power is limited, it often uses the subpoenas to obtain more information or assistance than is legally authorized.[31] There are low-risk ways that an entity can lawfully resist these subpoenas. Every entity should develop procedures in consultation with legal counsel to prepare for being served with immigration administrative subpoenas.

There are two key things to understand about an entity's obligations after receiving an ICE immigration administrative subpoena: First, the recipient does not have to respond to the subpoena at all, unless ICE goes to court—where you can raise a number of possible objections—and the court orders compliance. Second, any gag order in these subpoenas has no legal effect; you are free to publicize the subpoena, including informing the target.

Upon receiving a subpoena from ICE, it is important to first identify and correctly categorize the legal document. ICE subpoenas are generally issued pursuant to 8 U.S.C. 1225(d)(4) or one of several lesser-used statutes.[32] They are signed by an ICE officer, not a judge. Warrants and court orders signed by judges generally require a response. But for ICE administrative subpoenas, there are no consequences for an initial failure to respond. Only if a court orders the recipient to comply and it subsequently fails to do so can penalties be imposed.

[30] *See* Lindsay Nash, *The Immigration Subpoena Power*, 125 Colum. L. Rev. 1, 46–47 (2025).

[31] See *id.* at 53–54. For example, ICE uses subpoenas to compel surrender of objects (such as cell phones) and actions (such as scheduling a pretextual meeting) that the subpoena statutes do not permit.

[32] ICE's legal authority for the issuance of subpoenas, summonses, and Form I-9 notices are 8 U.S.C. § 1225(d)(4)(A) for general immigration enforcement; 8 U.S.C. § 1324a(e)(2)(C) for I-9 audits; 50 U.S.C. App. § 2411(a) for the Export Subpoena; 21 U.S.C. § 967 for the Controlled Substance Enforcement Subpoena; and 19 U.S.C. § 1509 for the Customs Summons. *See* U.S. DHS, *Privacy Impact Assessment for the ICE Subpoena System* 5 (Mar. 29, 2011), https://perma.cc/N4MS-D8EF. If the subpoena or demand is issued under a different authority, such as one of the national security letter statutes, or by a different government entity, such as Congress, there may still be grounds to resist, but you should conduct an independent assessment of that authority.

This is because administrative subpoenas are not self-executing.[33] To enforce the subpoenas, ICE first must file a motion or petition asking a court to compel compliance.[34] At that point, the recipient will have an opportunity to oppose the motion. Whether or not you oppose, you cannot be punished for failure to respond to the subpoena unless and until the court grants the motion to compel *and* you fail to comply with the court order.[35]

Substantive grounds to oppose administrative subpoenas in court can include:

- ***The subpoena asks for records or demands other assistance outside the scope of what the statute permits***. Read the subpoena and the statute it invokes carefully, to ensure that the statute authorizes the specific request the agency is making.[36] A statute that authorizes disclosure of records does not authorize a demand to collect records that do not yet exist, or to create new records not kept in the normal course of business.[37] A statute that authorizes a demand for testimony does not require anyone to actively help locate people or conduct arrests. A statute that authorizes a request for records related to

[33] *See United States v. Sturm, Ruger & Co.*, 84 F.3d 1, 3 (1st Cir. 1996); *United States v. Security State Bank and Trust*, 473 F.2d 638, 642 (5th Cir. 1973) ("The system of judicial enforcement is designed to provide a meaningful day in court for one resisting an administrative subpoena.").

[34] *In re Nat'l Sec. Letter*, 33 F.4th 1058, 1063 (9th Cir. 2022) ("[W]hile an agency may issue a subpoena without prior judicial approval, it must invoke the aid of a federal court to enforce it. The power to punish is not generally available to federal administrative agencies, and so enforcement must be sought by way of a separate judicial proceeding." (citations and internal quotation marks omitted)). *See also, e.g.*, 8 U.S.C. § 1225(d)(4)(B); *U.S. Immigr. & Customs Enf't v. Gomez*, 445 F. Supp. 3d 1213, 1214 (D. Colo. 2020) ("The Sheriff notified ICE . . . that it would not comply with the subpoenas. After attempts between the parties to resolve the matter, ICE filed this proceeding to enforce the subpoenas.").

[35] *See* 8 U.S.C. § 1225(d)(4)(B) (providing authority for district court to issue order requiring compliance with subpoena, and providing that "failure to obey *such order of the court* may be punished by the court as a contempt thereof" (emphasis added)). If a court has already compelled your compliance in one or more cases, you should consider how that might affect the decision to challenge or disregard subsequent administrative subpoenas.

[36] *E.g. United States v. Minker*, 350 U.S. 179, 184 (1956) (section of Immigration and Nationality Act conferring subpoena power on any commissioner of immigration or inspector in charge strictly defines purposes for which officers can subpoena witnesses and thereby does not give them power to issue subpoenas as aids in investigating other offenses).

[37] *erinMedia, LLC v. Nielson Media Research, Inc.*, No. 05-CV-1123-T-24, 2007 WL 1970860, at *4 (M.D. Fla. July 3, 2007) ("A subpoena addresses itself to documents in existence as of the date the subpoena is responded to, not documents created thereafter."); *see also ACLU v. Clapper*, 785 F.3d 787, 813 (2d Cir. 2015) (subpoenas for "records that do not yet exist" are invalid because the relevance of records not yet in existence cannot be known at the time they are requested).

importation of goods does not permit the agency to request records for other kinds of investigations.[38]

- ***The subpoena seeks records that are not "reasonably relevant"*** to a permissible and particular investigation.[39] Bulk requests about a class of individuals rather than targeted demands for records about a particular person may fall within this objection.[40]

- The subpoena is issued for ***an abusive purpose***, i.e. "abus[ive] to such an extent as to be arbitrary and capricious and violative of due process."[41]

- The subpoena is ***"unduly burdensome"*** to comply with.[42]

- The subpoena seeks records in which an individual has a **reasonable expectation of privacy** under the Fourth Amendment, such as granular location history or the contents of electronic communications[43]; and

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[38] *See* John Roth, Dep't of Homeland Sec., Off. of Inspector Gen., *Management Alert - CBP's Use of Examination and Summons Authority Under 19 U.S.C. § 1509*, at 2–3 (2017), https://perma.cc/AWX8-E74V (discussing abuse of customs summons authority).

[39] *See United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

[40] *ACLU v. Clapper*, 785 F.3d 787, 813 (2d Cir. 2015).

[41] *United States v. Samango*, 607 F.2d 877, 881 (9th Cir. 1979) (*quoting United States v. Welch*, 572 F.2d 1359, 1360 (9th Cir. 1978)); *Sec. & Exch. Comm'n v. Howat*, 525 F.2d 226, 229 (1st Cir. 1975) (agency inquiry must be for "a proper purpose"); *United States v. Stuart*, 489 U.S. 353, 360 (1989) (abuse takes place "if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation"). The federal circuit courts express the test for abuse of process in different ways. *Compare United States v. Zadeh*, 820 F.3d 746, 759 (5th Cir. 2016) (setting forth a three-part test).

[42] *See In re Subpoena Duces Tecum to AOL, LLC,* 550 F. Supp. 2d 606, 612 (E.D. Va. 2008) (subpoena imposes an undue burden by being overbroad and requesting records beyond those containing subject matter relevant to the underlying action); *Aristocrat Leisure Ltd. v. Deutsche Bank Tr. Co. Ams.*, 262 F.R.D. 293, 300 (S.D.N.Y. 2009) (court should "balance the interests served by demanding compliance with the subpoena against the interests furthered by quashing it," and "consider whether the information is necessary and whether it is available from any other source."); *cf.* Fed. R. Civ. P. 45(c)(1), 45(c)(3)(A)(iv); Fed. R .Crim. P. 17(c).

[43] *Carpenter v. United States*, 585 U.S. 296, 317–18 (2018) ("[T]his Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy. . . . If the choice to proceed by subpoena provided a categorical limitation on Fourth Amendment protection, no type of record would ever be protected by the warrant requirement.").

- For public universities, there may be an argument that such subpoenas commandeer state government action in ***violation of the Tenth Amendment***, which prevents the federal government from forcing states to help administer federal programs.[44]

  There may be other grounds to challenge specific subpoenas.

Further, ICE subpoenas typically include language purporting to order the recipient not to disclose the existence or details of the subpoena to the target of the investigation or to the public. However, these gag demands are unenforceable, as ICE officials do not have the legal authority to command nondisclosure.[45] This leaves the subpoena recipient free to communicate with the public, or even the person whose information was subpoenaed.[46] As all major internet communications providers do in an analogous context, you can and should develop and make public a policy of disclosure to the person or people whose information ICE has sought.[47]

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[44] Robert A. Mikos, *Can the States Keep Secrets From the Federal Government?*, 161 U. Pa. L. Rev. 103 (2012); *Printz v. United States*, 521 U.S. 898, 935 (1997); *United States v. California*, 921 F.3d 865, 888 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 124 (2020).

[45] See statutes listed in footnote 32, *supra*, which lack any non-disclosure provisions. *See also Doe v. Ashcroft*, 334 F. Supp. 2d 471, 485 (S.D.N.Y. 2004) (observing that "most administrative subpoena laws either contain no provision requiring secrecy, or allow for only limited secrecy in special cases," for example, when a court so orders), *vacated as moot sub nom. Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006).

[46] Even absent a secrecy statute or order, someone who, *corruptly, or with the intent to obstruct an investigation*, alerts the target of an investigation that a subpoena has been issued could theoretically face criminal obstruction of justice charges. 18 U.S.C. § 1505 ("Whoever *corruptly*, *or by threats or force, or by any threatening letter or communication* influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States . . . "commits an offense"). We are unaware of any case in which notifying the target of an immigration administrative subpoena was prosecuted under this statute. Nevertheless, a clear, generally applicable policy of notification developed in consultation with legal counsel will further mitigate the risk of being accused of corruptly obstructing justice in a pending proceeding.

[47] *See e.g.* Google, *How Google handles government requests for user information*, https://policies.google.com/terms/information-requests?sjid=11599126131494237607-NC ("When we receive a request from a government agency, we send an email to the user account before disclosing information.… We won't give notice when legally prohibited under the terms of the request. We'll provide notice after a legal prohibition is lifted, such as when a statutory or court-ordered gag period has expired."); Snap, *Law Enforcement Guide*, https://storage.googleapis.com/snap-inc/privacy/lawenforcement.pdf ("Snap's policy is to notify our users when we receive legal process seeking disclosure of their records" except where legally prohibited or in exceptional discretionary circumstances); Meta, *Safety Center*, https://about.meta.com/actions/safety/audiences/law/guidelines

Having a generally applicable policy places you squarely within the best practices of other entities that commonly receive demands for information and insulates you from claims of obstruction of a pending proceeding or investigation.

Colleges and universities can prepare ahead of time by instituting best practices:

- Create a policy under which you will disclose the subpoena to the parties whose records have been requested unless you are barred from doing so by a court order.[48]
- Announce a policy of disclosure on your webpage, law enforcement contact page, or other publicly accessible place to dissuade casual or frivolous subpoenas.
- Have a policy for responding to ICE subpoenas and connected communications. You can safely decline to respond to administrative subpoenas absent a court order, but you may prefer to provide a written response that explains your grounds for objecting to the subpoena, and that you will notify the person whose records are sought. You may want to provide a short but reasonable time in which the officer can seek a non-disclosure order from a court before disclosing to the affected person.
- Prepare to oppose any court motion to compel compliance. Whether you wait for a court order enforcing the subpoena, or actively contest the motion to compel, this may deter ICE from sending you frivolous subpoenas.
- Train all staff that if immigration agents show up, they should immediately inform a designated, trained contact person and not answer questions or otherwise assist the agents.
- Ensure that an attorney reviews any requests from immigration authorities, including any warrant or subpoena, before complying.
- Limit the information you collect and keep only what is necessary. Data minimization is the best way to protect members of your community. If you don't have it, a subpoena cannot compel disclosure of it.

* * * * *

("Our policy is to notify people who use our service of requests for their information prior to disclosure unless we are prohibited by law from doing so or in exceptional circumstances.").

[48] *See supra* note 47. An entity can always discuss the subpoena with its attorney, even if an agency were to have authority to bar disclosure to others. *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). Note that an entity *does* have to comply with a non-disclosure order if it was issued by a judge.

In a moment when the government is engaged in immigration enforcement practices that raise grave First Amendment, due process, and privacy concerns, clarity on what the law actually requires is critical. We appreciate your careful attention to these issues. If the ACLU can be of assistance in addressing these or related questions, please reach out to Nathan Freed Wessler, nwessler@aclu.org.