



Boston Bar Association

Statement of Principles Concerning Immigration and Related Issues



Boston Bar
ASSOCIATION

Boston Bar Association
Statement of Principles Concerning Immigration and Related Issues

EXECUTIVE SUMMARY

Introduction

The Boston Bar Association (BBA) is a professional association of over 10,000 attorney members drawn from private practice, corporations, government agencies, legal services organizations, the courts, and law schools. Our mission is to facilitate access to justice, advance the highest standards of excellence for the legal profession, foster a diverse and inclusive professional community, and serve the community at large. As an Association, we have a long history of supporting civil rights and access to and the administration of justice. We believe that our profession has a unique responsibility to promote and uphold the rule of law as a fundamental principle of our nation's democracy.

The BBA recognizes the central—indeed, indispensable—role immigrants play in our city and state. It is in significant measure because of Massachusetts' openness to immigrants that our educational, business, and healthcare institutions are recognized as global leaders. As a professional organization, the BBA is enhanced by the valuable contributions of our members and partners who are immigrants, and we affirm our commitment to standing with all immigrant communities in Boston and throughout Massachusetts.

The BBA has long supported measures to uphold due process and equal protections rights and access to counsel for immigrants, and in recent months has spoken out against the "travel ban" that would limit immigration from several Muslim countries; condemned the practice of separation of immigrant families at the border; and opposed proposed changes to "public charge" regulations that would make it more difficult for immigrants to access essential benefits and services. The BBA applauded when the Massachusetts Supreme Judicial Court (SJC) ruled in July 2017 that court officers are not authorized to hold individuals solely on detainer requests from U.S. Immigration and Customs Enforcement (ICE), and in April 2018 urged the full bench of the SJC to review a case petitioning for a ban on civil immigration arrests in and around courthouses. The Boston Bar Foundation also has a strong commitment to ensuring access to justice for immigrants, and has made significant grants to organizations that provide free immigration legal services.

To express its respect for and solidarity with immigrant communities in Massachusetts and to guide its future public policy work, the BBA has adopted the following principles as the foundation for its advocacy on issues pertaining to immigration:

Principle 1: Immigration is a defining feature of the American experience. Immigrants play a critical role in the civic, economic, and cultural life of our city, state, and country.

Boston is largely a city of immigrants, no less now than in the past. Our history, culture, economy, and traditions have been shaped by immigration, and the unique and invaluable contributions of immigrants continue to strengthen our city's civic, economic, and cultural life.

Principle 2: No person's rights or human dignity should be devalued on the basis of immigration or citizenship status.

All human beings are the bearers of fundamental rights and freedoms that are embodied in the United States Constitution and find an even more expansive expression in the Universal Declaration of Human Rights (a declaration adopted by the United Nations General Assembly in 1948 to establish a common standard of fundamental human rights that should be protected for all peoples and nations). National governments must respect human rights when individuals enter their territory, and judicial systems must uphold these rights. The BBA affirms that all human beings have these fundamental rights, regardless of how they entered the United States.

Principle 3: The constitutional right to due process and equal protection, guaranteed to every person regardless of immigration or citizenship status, must be protected and enforced.

The United States Supreme Court has ruled that all people in the United States, including undocumented immigrants, are guaranteed protections under the Constitution's Fifth Amendment (right to due process of law) and Fourteenth Amendment (right to due process and equal protection under the law).

Principle 4: Every person should have the full and meaningful ability to exercise their rights and to access justice through the legal system regardless of immigration or citizenship status, level of income, or economic circumstance.

The BBA asserts that immigrants, like all other residents of the Commonwealth, must be free to access courthouses, law enforcement agencies, and other governmental agencies without fear that doing so will lead to immigration detention or deportation. Furthermore, the BBA believes that defendants should be afforded a lawyer in life-changing immigration removal proceedings. Finally, the BBA believes that immigrants must have access to a fair legal process with independent judges when seeking immigration relief.

Conclusion

As lawyers, and as a Bar Association, it is our special calling, privilege, and obligation to be vigilant guardians of the rule of law, and to ensure that it protects all people to whom it extends—including all immigrants—when their rights are under attack.

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REPORT

Introduction

The Boston Bar Association (BBA) is a professional association of over 10,000 attorney members drawn from private practice, corporations, government agencies, legal services organizations, the courts, and law schools. Our mission is to facilitate access to justice, advance the highest standards of excellence for the legal profession, foster a diverse and inclusive professional community, and serve the community at large. As an Association, we have a long history of supporting civil rights and access to and the administration of justice. We believe that our profession has a unique responsibility to promote and uphold the rule of law as a fundamental principle of our nation's democracy.

America's immigration system has become the subject of intense public debate. Controversies about immigration policies, ranging from the decision to restrict the entry of travelers from certain countries to the separation of children of immigrants from their families at the Mexico/US border, have dominated the news, and occupied the attention of lawyers, judges, and members of the public across the country, including in Massachusetts. Furthermore, in recent months, immigrants have been the targets of both hateful rhetoric¹ and acts of physical violence.²

The BBA recognizes the central—indeed, indispensable—role immigrants play in our city and state. It is in significant measure because of Massachusetts' openness to immigrants that our educational, business, and healthcare institutions are recognized as global leaders. As a professional organization, the BBA is enhanced by the valuable contributions of our members and partners who are immigrants, and we affirm our commitment to standing with all immigrant communities in Boston and throughout Massachusetts.

The BBA has not hesitated to speak out about legal issues related to immigration. We have filed amicus briefs in the Massachusetts Supreme Judicial Court (SJC) seeking to pave the way for vulnerable immigrant children to obtain citizenship,³ issued statements⁴ and filed an affidavit in

¹ See, e.g., <https://www.cnn.com/2018/01/11/politics/immigrants-shithole-countries-trump/index.html> and <https://www.businessinsider.com/trump-mexicans-rapists-remark-reference-2018-4>.

² See, e.g., <https://www.nbcnews.com/news/asian-america/kansas-man-sentenced-life-prison-hate-crime-shooting-n898361>.

³ Amicus Brief of the Boston Bar Association in *Recinos v. Escobar*, 473 Mass 734 (2016), available at <http://www.bostonbar.org/docs/default-document-library/2015-11-4---rivera-recinos-amicus-final.pdf?Status=Temp&sfvrsn=2>.

⁴ See BBA President Carol A. Starkey's January 30, 2017 Statement on Executive Order.

court⁵ opposing the federal administration’s ban on travel from several predominantly Muslim countries, endorsed multiple ABA Resolutions seeking to protect the legal rights of immigrants,⁶ and asked the full SJC to address Immigration and Customs Enforcement (ICE) officials’ practice of targeting immigrants at Massachusetts courthouses for civil immigration arrests.⁷ Our charitable affiliate, the Boston Bar Foundation, has made grants to organizations providing valuable legal services to immigrants.⁸

The BBA’s response to these issues has been to address cases, policies, and practices as they arise. In doing so, we have drawn from the BBA’s core principles—a deep commitment to access to justice, equal protection, civil rights, and the rule of law—but we have not, until today, outlined a set of principles the BBA should apply specifically to issues relating to immigration as they emerge. This document, crafted by the BBA Immigration Working Group, represents our best effort to state those principles.⁹

In the course of our work, we were reminded that the current controversies about immigration are not new. Indeed, today’s public battles contain echoes from our past. Our history is marked by many efforts to restrict immigration, and to treat immigrants differently from others in our communities. Many of these past legislative, executive, and judicial decisions relating to immigration have not fared well in the verdict of history.

For instance, anti-immigrant sentiments in the 1840s, directed at Irish immigrants among others, produced groups such as the nativist American Party, which fought foreign influences and promoted “traditional American ideals.” In its “Questions for Admittance to the American Party” in 1854, inductees committed to “. . . elect to all offices of Honor, Profit, or Trust, no one but native born citizens of America, of this Country to the exclusion of all Foreigners . . . regardless of all party predilections whatever.”¹⁰

⁵ Available at <http://www.bostonbar.org/membership/publications/news-release?ID=349>.

⁶ See, e.g., <http://www.bostonbar.org/docs/default-document-library/aba-resolutions-on-immigration-re-fees-11-14-07.pdf?sfvrsn=2>.

⁷ Available at http://www.bostonbar.org/docs/default-document-library/3-30-2018_letter_sj-2018-0119.pdf?sfvrsn=2http://www.bostonbar.org/docs/default-document-library/3-30-2018_letter_sj-2018-0119.pdf?sfvrsn=2.

⁸ In 2018, for example, the BBF’s grantees included: Irish International Immigrant Center, Kids in Need of Defense, Political Asylum/Immigration Representation Project, and Project Citizenship, as well as many other organizations that include immigration legal services and advocacy as part of their work.

⁹ This effort results from the BBA Council’s vote in May to establish a Working Group on Immigration. BBA President Mark Smith charged the Working Group with developing a set of principles the BBA could draw on when new immigration controversies arise. The Working Group was not asked to develop a detailed set of policies, but rather a broad set of principles.

¹⁰ See Questions for Admittance to the American Party, available at [http://memory.loc.gov/cgi-bin/ampage?collId=mcc&fileName=062/page.db&recNum=0&itemLink=r?ammem/mcc:@field\(DOCID+@lit\(mcc/062\)](http://memory.loc.gov/cgi-bin/ampage?collId=mcc&fileName=062/page.db&recNum=0&itemLink=r?ammem/mcc:@field(DOCID+@lit(mcc/062)).

In 1882, Congress enacted the Chinese Exclusion Act, the country's first statute since the short-lived Alien Act of 1798,¹¹ to provide for deportation of immigrants.¹² In 1889, the Supreme Court upheld the authority of Congress to exclude Chinese residents of the United States returning from overseas visits, despite their possession of government-issued documents allowing them to return.¹³ The Court elaborated that there was “a well-founded apprehension—from the experience of years—that a limitation on the immigration of certain classes from China was essential to the peace of the community on the Pacific Coast, and possibly to the preservation of our civilization there.”¹⁴ In 1894, the Supreme Court held that Chinese residents could be deported from the United States if they failed to register with the Treasury Department, even though immigrants from other nations were not required to register and, indeed, could not be deported for any reason whatsoever.¹⁵

The Immigration Act of 1907 created a commission chaired by Vermont Senator William Dillingham to review U.S. immigration policy. The Dillingham Commission report, issued in 1911, concluded that immigration from southern and eastern Europe posed a serious threat to American society and culture and should therefore be greatly reduced: “Certain kinds of criminality are inherent in the Italian race. In the popular mind, crimes of personal violence, robbery, blackmail and extortion are peculiar to the people of Italy.”¹⁶

Against the backdrop of the Dillingham Report, Congress in 1924 passed the Johnson-Reed Act to revise American immigration laws around an individual’s national origin. The act set quotas that fostered immigration from northern and western Europe and limited immigration of those considered less “racially desirable,” including southern and eastern Europeans, particularly Italians and Jews.¹⁷ Many people born in Asia and Africa were barred from immigration entirely on racial grounds. The Johnson-Reed Act remained in force until 1965.

¹¹ Act of June 25, 1798, 1 Stat. 570 (authorizing President to order deportation of any noncitizen “as he shall judge dangerous to the peace and safety of the United States . . .”).

¹² See Immigration Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 (1882). (“[A]ny Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came”).

¹³ *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

¹⁴ *Id.* at 594.

¹⁵ *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). Racial overtones were prevalent in later decisions, as well. Most notably, Justice Harlan's famous dissent in *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896), reflected his belief that the Chinese were racially unsuited to live in the United States: “There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race.”

¹⁶ Helene Stapinski, “When America Barred Italians.” *New York Times*, June 2, 2017, <https://www.nytimes.com/2017/06/02/opinion/illegal-immigration-italian-americans.html>.

¹⁷ Adam Serwer, “Jeff Sessions’s Unqualified Praise for a 1924 Immigration Law.” *The Atlantic*, January 10, 2017, <https://www.theatlantic.com/politics/archive/2017/01/jeff-sessions-1924-immigration/512591/>.

In 1942, President Franklin D. Roosevelt issued Executive Order 9066, which permitted the military to exclude “any or all persons” from militarily sensitive areas to prevent espionage and sabotage, and to house them in internment camps. The Order affected 117,000 people of Japanese descent, two-thirds of whom were native-born citizens of the United States. In *Korematsu v. United States*, 323 U.S. 214 (1944), the United States Supreme Court held that the Order was constitutional. The *Korematsu* decision has long been viewed as one of the most shameful moments in our country’s history, but was formally overruled only this year.¹⁸

This deeply troubling history of using and interpreting the law to exclude, dehumanize, and impute implicit criminality to successive groups of immigrants remained firmly in mind as the Working Group developed the principles that follow, and should be recalled whenever new immigration controversies arise. Indeed, it serves as a reminder that the BBA’s core mission and values—its organizational DNA—stand in sharp contrast to this history, and in opposition to legislative, executive, and judicial action and rhetoric that seek to scapegoat or single out a particular group of people for harsh treatment. History shows that departing from our core principles—promoting access to justice, equal protection, civil rights, and the rule of law—can have grave consequences.¹⁹

As an Association, we are profoundly concerned by current legislative proposals, executive orders, and policies that serve to deter immigrant members of our community from exercising their rights or that function so as to foreclose access to justice altogether. We are disturbed by discourse that singles out immigrant and minority communities so as to encourage discrimination, intimidation, or violence against them. We are distressed by the ways in which the current climate has enabled the exploitation of immigrants’ fears of deportation to dissuade them from seeking legal assistance, redress of grievances, or the full protection of the law.

We believe that these developments fundamentally impact access to justice and the fabric of our civil society, and have broad implications in Massachusetts and across the country. Both the BBA and the Boston Bar Foundation stand with our legal services and community partners in asserting that the rights and dignity of all members of our state’s immigrant communities must be respected and protected under the law. As such, the BBA has adopted the following Statement of Principles to express our commitment to the foundational doctrines of our profession and our democracy:

¹⁸ *Trump v. Hawaii*, ___ U.S. ___, 138 S. Ct. 2392, 2423 (2018).

¹⁹ Recent Massachusetts history has positive moments that are worth noting. For example, in 1976 Massachusetts voters approved the amendment to Article 1 of the Massachusetts Declaration of Rights to state that “equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.” Art. 106 of the Amendments to the Massachusetts Constitution. And in 1989, the Legislature enacted the Equal Rights Act, guaranteeing equal rights to all persons within the Commonwealth, regardless of sex, race, color, creed or national origin.

Principle 1: Immigration is a defining feature of the American experience. Immigrants play a critical role in the civic, economic, and cultural life of our city, state, and country.

Boston is largely a city of immigrants, no less now than in the past. Our history, culture, economy, and traditions have been shaped by immigration, and the unique and invaluable contributions of immigrants continue to strengthen our city's civic, economic, and cultural life.

More than 177,000 Bostonians—approximately 27% of Boston residents (and more than twice the national average)—are foreign-born.²⁰ Statewide, more than 1.1 million Massachusetts residents—16.1%—are immigrants.²¹ While the patterns of immigration have changed over the years—today's immigrants are more likely to be from China, Haiti, the Dominican Republic, Vietnam, or Latin America than Ireland or Italy—the prevalence of immigrants remains a core characteristic of our city and state.

The contributions that immigrants make to Boston and to Massachusetts as a whole are undeniable. Immigrants have fueled economic growth and spurred innovation, and also form the backbone of our service economy. To give just a few examples:

- Immigrants make up 29% of the adult working age civilian population in the Boston area.²² 41% percent have a college degree or more advanced education.²³
- Many Boston and Massachusetts immigrants are successful entrepreneurs. More than 25% of Massachusetts biotechnology firms have foreign-born founders.²⁴ As of 2015, 68,364 immigrant business owners accounted for 20% of all self-employed Massachusetts residents and generated \$2.1 billion in business income.²⁵

²⁰ See Boston Redevelopment Authority Research Division, *Boston by the Numbers 2015*, <http://www.bostonplans.org/getattachment/1fd5864a-e7d2-4ebc-8d4a-a4b8411bf759>.

²¹ See <https://www.americanimmigrationcouncil.org/research/immigrants-in-massachusetts>. 52% of Massachusetts immigrants have been naturalized. *Id.* Undocumented immigrants made up 19% of the immigrant population and 3.1% of the total state population, based on 2014 data. *Id.*

²² P. Osterman, W. Kimball, C. Riordan, *Boston's Immigrants: An Essential Component of a Strong Economy* (2017), <https://www.jvs-boston.org/wp-content/uploads/2017/11/Osterman-Report-Final.pdf>.

²³ *Id.*

²⁴ Daniel J. Monti, Laurel Smith-Doerr, and James McQuaid, *Immigrant Entrepreneurs in the Massachusetts Biotechnology Industry*, The Immigrant Learning Center, Inc., June, 2007, available at http://www.ilctr.org/wp-content/uploads/2011/08/immigrants_in_biotechnology_updated.pdf.

²⁵ See <https://www.americanimmigrationcouncil.org/research/immigrants-in-massachusetts>.

- Immigrants play a critical role, at all levels, in our state’s healthcare system. Twelve percent of nurses, nearly one in four doctors, and one-third of nursing, psychiatric, and home health aides are foreign-born.²⁶
- Immigrants drive the city’s and state’s service economies, making up more than half of domestic workers and hotel and motel employees, nearly half of the employees who work in restaurants and bars, and 26% of workers providing child care.²⁷
- Immigrants, including undocumented workers, are important contributors to our city and state tax base. Immigrants paid \$3 billion in state and city taxes in 2014.²⁸ More than \$184 million of that amount came from undocumented immigrants.²⁹

Immigrants also help define our city and state’s educational, religious, and cultural landscape.³⁰ They are interwoven in the fabric of our communities. They are our co-workers, colleagues, neighbors, and friends.

²⁶ *The Contributions of New Americans in Massachusetts*, New American Economy, August 2016, available at <http://www.newamericaneconomy.org/wp-content/uploads/2017/02/nae-ma-report.pdf>. (The estimate for doctors is based on the number of doctors attending a foreign medical school.)

²⁷ P. Osterman, W. Kimball, C. Riordan, *Boston’s Immigrants: An Essential Component of a Strong Economy* (2017), available at <https://www.jvs-boston.org/wp-content/uploads/2017/11/Osterman-Report-Final.pdf>.

²⁸ *The Contributions of New Americans in Massachusetts*” New American Economy, August 2016, available at <http://www.newamericaneconomy.org/wp-content/uploads/2017/02/nae-ma-report.pdf>.

²⁹ Institute on Taxation and Economic Policy, *Undocumented Immigrants State & Local Tax Contributions* (2017), <https://itep.org/undocumented-immigrants-state-local-tax-contributions-2/>.

³⁰ See, e.g., <https://www.standswithimmigrants.org/projects/>; <https://www.cnn.com/2017/02/16/us/museum-removes-art-from-immigrants-trnd/index.html>; <https://www.macucc.org/immigration>; <https://www.diomass.org/diocesan-news/churches-mobilize-protect-immigrants-massachusetts>; <https://www.faith-justice.org/events/past-events/32-event-summaries/111-the-immigrant-as-evangelizer>; <https://www.bostonglobe.com/metro/2015/11/16/number-foreign-students-boston-surges/0rrwqyAoHbSjn6f7chxxMI/story.htm>.

Principle 2: No person’s rights or human dignity should be devalued on the basis of immigration or citizenship status.

Our nation’s founders recognized as “self-evident” that “all men are created equal,” and that they were “endowed by their Creator with certain unalienable Rights [including] Life, Liberty, and the pursuit of Happiness.”³¹ Over the centuries that have followed, these ideals have been nurtured in democratic constitutions around the world and in the global system of international human rights. Human rights encompass key rights and freedoms that are embodied in the United States Constitution. They find an even more expansive expression in the Universal Declaration of Human Rights, adopted by the United Nations in 1948, in the aftermath of what the Declaration described as the “disregard and contempt for human rights [that had] resulted in barbarous acts which have outraged the conscience of mankind.”

One of the great accomplishments of the system of international human rights is that it decoupled rights from citizenship and made all human beings bearers of rights. But human rights still require national judicial systems for their enforcement, and states must respect human rights when individuals enter their territory.

The right to live a life that encompasses the basic freedoms Americans hold dear has brought immigrants to our shores from around the world for centuries. This has helped the United States to become one of the greatest democracies the world has ever known. The BBA affirms that respect for human dignity means respect for human rights, and that all human beings have such rights, regardless of how they have gained entrance to the United States.

In doing so, we join the American Bar Association and others in recognizing that even people who enter the country without authorization should be treated fairly and humanely. For that reason, undocumented immigrants should not be detained while their legal claims to remain in the United States are resolved—at least absent extraordinary circumstances, such as if, for example, the individual in question presents a threat to public safety or a serious flight risk.³²

As Americans, we are privileged to have a Constitution that has allowed us to thrive as individuals and as a nation, offering us the opportunities for “Life, Liberty, and the pursuit of Happiness” that are integral to a dignified human existence. It is a legacy we have, in our best moments as a nation, chosen to share with the world, particularly with those who face repression, discrimination, destitution, and violence. The BBA affirms the longstanding commitment of the American legal profession to advocate fiercely on behalf of the human dignity and human rights of all.

³¹ See <https://www.archives.gov/founding-docs/declaration-transcript>.

³² ABA House of Delegates Resolution 2012_AM_, available at https://www.americanbar.org/groups/probono_public_service/policy/hod_resolutions_pro_bono.html.

Principle 3: The constitutional right to due process and equal protection, guaranteed to every person regardless of immigration or citizenship status, must be protected and enforced.

Almost seventy years before the States ratified the Fourteenth Amendment, James Madison wrote that non-citizens owed obedience to the Constitution, and therefore enjoyed the protection and advantage of it.³³ Since the adoption of the Fourteenth Amendment, in decisions spanning more than a century, the U.S. Supreme Court has held that even immigrants “whose presence in this country is unlawful, [are] recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”³⁴ The Supreme Court has held that undocumented persons also enjoy the benefits of the Equal Protection Clause of the Fourteenth Amendment.³⁵

Those well-settled principles—that immigrants, including those who have entered the country without documentation, are entitled to the protections of the Due Process and the Equal Protection Clauses—should serve as the foundation for the BBA’s approach to addressing immigration issues. Those principles apply even outside the context of immigration proceedings. Thus, for example, because the Due Process clause protects immigrants just as it protects citizens, all immigrants, whether or not documented, are entitled to the right to counsel in criminal cases, and the right to trial by jury.³⁶ And, because the Equal Protection Clause applies to immigrants, a state that requires citizen children to attend school cannot forbid the children of undocumented immigrants from doing so.³⁷

The protections of the Equal Protection and Due Process Clauses are likewise vital to immigrants in matters where their ability to remain in the country is in jeopardy. Indeed, the constitutional and common law safeguards may be even more critical to the administration of justice in immigration cases. The Supreme Court has described the immigration process as “complex”³⁸ and ripe with “head scratching”³⁹ administrative interpretations of law. Meanwhile, the outcomes of this process can have life-changing effects on individuals, including with regards to their ability to access the basic necessities of life, remain united with their families, and even to avoid torture, persecution, or death. It is therefore imperative to protect the Constitutional rights of individuals in removal and other immigration proceedings.

³³ “The Report of 1800” at <https://founders.archives.gov/documents/Madison/01-17-02-0202>, last visited July 9, 2018.

³⁴ *Plyler v. Doe*, 457 U.S. 202, 211 (1982) citing *Shaughnessy v. Mezei*, 345 U. S. 206, 212 (1953). See *Wong Wing v. United States*, 163 U. S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (1886). As recently as 2001, the Court wrote, “once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

³⁵ *Plyler*, 457 U.S. at 215.

³⁶ See *Wong Wing v. United States*, 163 U. S. 228, 238 (1896).

³⁷ *Plyler*, 457 U.S. at 215.

³⁸ *Arizona v. United States*, 567 U. S. 387, 395 (2012).

³⁹ *Judulang v. Holder*, 565 U.S. 42, 57 (2011).

Principle 4: Every person should have the full and meaningful ability to exercise their rights and to access justice through the legal system regardless of immigration or citizenship status, level of income, or economic circumstance.

Because all immigrants are entitled to Due Process and Equal Protection, both government and private actions that interfere with immigrants' ability to exercise their rights raise troubling questions. The ability of each person to access justice freely is an essential element of our "concept of ordered liberty."⁴⁰ As Justice Stone (later to become Chief Justice) observed, government action that demonstrates "prejudice against discrete and insular minorities" may "curtail the operation of those political processes ordinarily to be relied upon to protect minorities."⁴¹

Similarly, Article 11 of the Massachusetts Constitution provides that "Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."

When, however, the federal or state government or members of the public target a population and limit or seek to limit that group's access to judicial or administrative forums, it creates a vulnerable subclass, undermining our system of democracy and the Constitution. The BBA recognizes that many policies, practices, and forms of government action have the potential to interfere with immigrants' access to justice. To cite just a few examples:

Access to Courthouses. Immigrants are denied access to the judicial system when immigration officers use courthouses as the location for immigration enforcement.⁴² Fair and equal access to the courts is a core requirement of a well-functioning democracy. The BBA has already publicly addressed ICE's practice of dispatching agents to Massachusetts courthouses to make civil immigration arrests of immigrants attending court proceedings. In a letter to Supreme Judicial Court Associate Justice Cypher, sitting as a single justice, the BBA urged Justice Cypher to report to the full SJC a petition challenging that practice.⁴³ As BBA President Mark Smith wrote, the conduct of

⁴⁰ See *Palko v. State of Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969).

⁴¹ *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938).

⁴² Maria Cramer, "ICE courthouse arrests worry attorneys, prosecutors." *Boston Globe*, June 16, 2017; Lawyers Committee for Civil Rights and Economic Justice, "Immigration Enforcement At Massachusetts Courthouses: A Fact Sheet" (Pub. Nov. 14, 2017); Northeastern University School of Law Immigrant Justice Clinic, "Blocking the Courthouse Doors: ICE Enforcement at Massachusetts Courthouses and Its Effects on the Judicial Process," (Pub. Mar. 2, 2018).

⁴³ Available at http://www.bostonbar.org/docs/default-document-library/3-30-2018_letter_sj-2018-0119.pdf?sfvrsn=2. See Petition for Writ of Protection Pursuant to G.L. c. 211, §3 in the matter of C. Doe, D. Doe, F. Doe, K. Doe, O. Doe, T. Doe, Y. Doe and J. Doe filed with the Massachusetts Supreme Judicial Court on Mar. 15, 2018; see also Massachusetts Bar Association Resolution supporting immigration rights and sanctuary cities adopted on Jan. 26, 2017.

ICE in and around the courthouses of the Commonwealth “impairs the ability of the courts of the Commonwealth to provide protections guaranteed by the laws of the Commonwealth.”

Access to Courts Matters in Both the Civil and the Criminal Contexts. Impediments to noncitizens accessing the court for civil or criminal matters undermine the fair administration of justice and create public safety issues: “The safety of individuals and families, the protection of economic and other rights, and the integrity of the criminal justice system all depend on individuals being willing and able to attend court proceedings: a witness who is subpoenaed to testify in a criminal case; a victim seeking a restraining order against an abusive former spouse; a driver paying a traffic fine; a landlord seeking an eviction or a tenant defending against one; or a small claims court plaintiff in a dispute with a neighbor.”⁴⁴

Access to Law Enforcement Agencies. Immigrants should likewise have equal access to those executive officers charged with enforcing our laws. Victims of crime should not be deterred for any reason—including the fear of civil immigration enforcement—from seeking assistance from criminal law enforcement. This is not only a matter of individual rights, but also of public safety. As Massachusetts Trial Court Chief Justice Paula Carey said in a letter to ICE, if a vulnerable population cannot access criminal law enforcement without fear of reprisal, the “inevitabl[e]” result will be “violence, injustice, and threats to public safety.”⁴⁵ And yet immigrant victims and witnesses of crime fear contacting criminal law enforcement because they justifiably fear that local law enforcement will help ICE enforce civil immigration laws.⁴⁶

Access to Other Government Agencies. Similarly, immigrants are deterred from asserting their civil rights with respect to housing, healthcare, labor and employment, education, and public benefits when they fear that doing so may lead to immigration enforcement against them or their families or may negatively affect their future ability to pursue U.S. citizenship. Such fears arise not only when those violating the law use the threat of immigration enforcement to prevent people from asserting their rights⁴⁷ or when federal immigration authorities affirmatively threaten the workplace through

⁴⁴ Letter from Thomas A. Balmer, Chief Justice of Oregon Supreme Court to U.S. Attorney General John Sessions and Honorable John Kelly (Apr. 6, 2017); *see also* Letter from Mary E. Fairhurst, Chief Justice of Washington Supreme Court to Honorable J. Kelly (Mar. 22, 2017) (“When people are afraid to access our courts, it undermines our fundamental mission. . . the fear now present in our immigrant communities is impeding their access to justice. These developments risk making our communities less safe.”)

⁴⁵ Letter from Hon. Paula M. Carey, Chief Justice of the Mass. Trial Court, to Matthew Etre, ICE Special Agent in Charge (Feb. 23, 2017).

⁴⁶ James Queally, “Fearing deportation, many domestic violence victims are steering clear of police and courts.” *L.A. Times*, Oct. 9, 2017; Katie Johnson, “For low-wage workers, many obstacles to reporting sexual harassment.” *Boston Globe*, Nov. 27, 2017; Paul P. Murphy & Deanna Hackney, “Police answered immigrant’s call for help, then gave him to ICE.” *CNN*, Feb. 13, 2018; Sarah Stillman, “When Deportation is a Death Sentence.” *The New Yorker*, Jan. 15, 2018. Also, *see*, New York State Bar Association Committee on Immigration Representation Resolutions adopted by the House of Delegates on Jan. 1, 28, 2017.

⁴⁷ Johnson, Low-wage workers, *supra*.

raids,⁴⁸ but also when public rhetoric and policy create a climate of uncertainty and mistrust that devastates people’s sense of safety in asserting their rights. When immigration enforcement activities deter immigrants from asserting their civil rights, the safety and health of our communities are put at risk and fundamental principles of due process and equal protection are weakened.

Access to Counsel and Individualized Hearings. It is well documented that immigrants in removal proceedings have significantly improved chances of receiving immigration relief if they are represented by legal counsel. For example, the American Immigration Council reports that among detained immigrants, those with legal representation are twice as likely to receive immigration relief as those without.⁴⁹ As noted above, the results of immigration proceedings usually have life-changing consequences, and for many, life or death can hang in the balance. Yet, as deportation is considered a civil, rather than criminal sanction, immigrants are not guaranteed the right to government-appointed counsel if they cannot afford a lawyer. Thus, many immigrants appear in court without legal assistance; according to a 2016 report, 37% of all immigrants—and only 14% of detained immigrants—secure legal representation for their removal cases.⁵⁰

The BBA has long advocated for the provision of civil legal aid to those who cannot afford a lawyer when they are faced with legal matters that can have life-changing consequences.⁵¹ In keeping with this principle, the BBA endorsed ABA Resolution 115, which “supports the appointment of counsel at federal government expense to represent all indigent persons in removal proceedings before the Executive Office for Immigration Review.”⁵² For our legal system to truly administer justice, it is essential that all people who appear for immigration proceedings, regardless of income or economic circumstance, have the full and meaningful ability to assert their rights and privileges under the law through the advocacy of legal counsel and, where applicable, with the assistance of a qualified interpreter.

Furthermore, when defendants in immigration proceedings seek to assert their rights and privileges, they must be afforded the right to an individualized hearing of the unique facts of their case. As noted by the American Civil Liberties Union in its issue brief on the matter, group hearings and other shortcuts in immigration proceedings have been imposed, particularly along the southwest border, in which “a single attorney can represent dozens of defendants at a time, [and] might not be able to

⁴⁸ Clark Mindock, “US immigration agents double number of workplace raids, spreading fear and tearing families apart.” *Independent*, June 3, 2018.

⁴⁹ Ingrid Eagly and Steven Shafer, *Access to Counsel in Immigration Court*. September 28, 2016, <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

⁵⁰ Eagly and Shafer, *Access to Counsel*, *supra*.

⁵¹ *See, e.g.*, Gideon’s New Trumpet: Expanding the Civil Right to Counsel in Massachusetts. September 2008. https://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf.

⁵² ABA Resolution 115, <https://www.americanbar.org/content/dam/aba/images/abanews/2017%20Annual%20Resolutions/115.pdf>.

speak confidentially with each client or might have a conflict of interest among clients.”⁵³ In such cases, judges may take as little as 25 seconds to hear the case of each defendant.⁵⁴ Such proceedings cannot be viewed as offering meaningful access to counsel, due process, or justice.

Access to a Fair Immigration Process with Independent Judges. For noncitizens, access to justice must include robust and meaningful access to the administrative immigration system put in place by Congress, including access to immigration courts served by independent judges.

For people seeking an immigration remedy, the individual liberty interest at stake is “grave,” and so the accompanying protections—constitutional as well as statutory—must be potent.⁵⁵ Immigrants face barriers to access to the administrative immigration system established by Congress when parents are intentionally separated from their children as a consequence of seeking asylum,⁵⁶ when those facing permanent exile are denied access to counsel because they lack financial resources or are transferred far from their attorneys,⁵⁷ when those seeking legal status are arrested by immigration authorities while attending necessary immigration interviews,⁵⁸ when people are subjected to prolonged detention without a chance to challenge their custody⁵⁹ or are mistreated in custody⁶⁰ while they seek to exercise their rights through removal proceedings, and when applicants for immigration benefits are charged prohibitively high fees.⁶¹ These barriers call into question whether the constitutional rights of Due Process and Equal Protection applicable to all persons, regardless of immigration status, are more illusion than reality.⁶²

⁵³ American Civil Liberties Union, Fact Sheet: Criminal Prosecutions for Unauthorized Border Crossing, <https://www.aclu.org/other/operation-streamline-issue-brief>.

⁵⁴ *Id.*

⁵⁵ See, e.g., *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204, 1213 (2018); *Arevalo v. Ashcroft*, 344 F.3d 1, 14–15 (1st Cir. 2003) (a noncitizen has a vested right to pursue a discretionary immigration benefit made available by statute).

⁵⁶ Letter from Hilarie Bass, President of the ABA, to Attorney General Sessions and DHS Secretary Nielsen (June 12, 2018).

⁵⁷ ABA Resolution 115 (supporting the appointment of counsel at government expense for all indigent persons in removal proceedings); ABA Resolution 301 (urges all levels of government to expand efforts to provide legal information and representation to children in removal proceedings).

⁵⁸ Maria Cramer, “‘I was blindsided’: How a routine immigration interview turned into an arrest.” *Boston Globe*, Mar. 11, 2018; Noah Lanard, “Married Immigrants Seeking Green Cards Are Now Targets for Deportation.” *Mother Jones*, Apr. 20, 2018.

⁵⁹ Adam Liptak, “No Bail Hearings for Detained Immigrants, Supreme Court Rules.” *New York Times*, Feb. 27, 2018.

⁶⁰ Emily Kassie, “Sexual Assault Inside ICE Detention: 2 Survivors Tell Their Stories.” *New York Times*, July 17, 2018.

⁶¹ ABA Recommendation on Fees.

⁶² See the discussion set forth in Principle Three of this Statement.

Immigration Courts and Immigration Judges play a critical role in our nation's immigration system.⁶³ Their jurisdiction includes the most critical issues facing immigrants. Immigration Judges decide whether an immigrant may be removed, deported or excluded from the United States, or whether an immigrant will be granted asylum.⁶⁴ Immigration Judges make decisions that affect the core of an individual's life, such as the ability to be united with one's family, and the ability to live in an environment free of persecution or the ability to pursue dreams of education and career. Immigration Judges, however, lack many of the protections associated with judicial independence. Immigration Judges are career attorneys appointed by the Attorney General as administrative judges under a division of the United States Department of Justice known as the Executive Office of Immigration Review.⁶⁵ They serve indefinite terms—that is, they do not serve for any definite term of years, and do not generally enjoy civil service protections against removal⁶⁶—and are bound to follow the Attorney General's interpretation of the immigration law.⁶⁷

Moreover, Immigration Judges work under extraordinary pressure. Stepped-up enforcement efforts have dramatically increased their caseloads; across the nation, and in Massachusetts, caseloads have more than doubled since 2012.⁶⁸ The Department of Justice has added to these pressures by adopting new measures intended to increase efficiency but which, as a practical matter, pose serious challenges to judges seeking to do justice in individual cases.⁶⁹ It is worth noting that on August 8, 2018, the National Association of Immigration Judges union filed a grievance asking the Justice Department's Executive Office for Immigration Review to acknowledge in writing that it will not interfere with the

⁶³ Approximately 330 Immigration Judges serve in 58 courts located throughout the United States, including eight judges in Massachusetts. See <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge>. Their caseloads are truly staggering; at the end of May 2018, 714,067 cases were pending before these judges, including more than 25,000 in Massachusetts. See http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php.

⁶⁴ See https://www.justice.gov/sites/default/files/pages/attachments/2015/05/20/practice_manual_review.pdf, at 7-8.

⁶⁵ See https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf, at 2-9.

⁶⁶ *Id.*

⁶⁷ *In Matter of A-B-, Respondent*, 27 I&N Dec. 316 (A.G. 2018), for example, the Attorney General declared that fear of domestic violence or gang violence could no longer be considered in making asylum determinations. <https://www.justice.gov/eoir/page/file/1070866/download>.

⁶⁸ See http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php.

⁶⁹ Immigration lawyers and judges, who understand how factually and legally complex immigration cases can be, and the importance of the outcomes to the individuals involved, view these quotas as unrealistic and likely to undermine the quality of judicial decision making. See <https://www.aila.org/infonet/aila-policy-brief-imposing-numeric-quotas-judges>. Los Angeles Immigration Judge A. Ashley Tabbador, the President of the National Association of Immigration Judges, described the new quotas to the ABA Journal as “an egregious example of the conflict of interests of having the immigration court in a law enforcement agency.” A quota system invites the possibility that judges will make decisions out of concern about keeping their jobs . . . rather than making what they think is the legally correct decision. And even if they don't . . . respondents in immigration court may argue that they do.” See Lorelei Laird, “Justice Department imposes quotas on immigration judges, provoking independence concerns.” *ABA Journal*, April 2, 2018. Available at http://www.abajournal.com/news/article/justice_department_imposes_quotas_on_immigration_judges_provoking_independence.

“decisional authority” of judges in the assignment or reassignment of cases.⁷⁰ In connection with that grievance, the president of the National Association of Immigration Judges, Judge A. Ashley Tabaddor, wrote, “The decisional independence of immigration judges is under siege.”⁷¹

The BBA has long been an advocate for the importance of judicial independence. The American Bar Association has proposed that the best approach to ensuring the independence of the Immigration Court is to make the Court an independent Article I Court, like the United States Tax Court, the United States Bankruptcy Court, the United States Court of Federal Claims, and the Court of Appeals for Veterans Claims.⁷² The BBA should not hesitate to extend its historic support for judicial independence to Immigration Judges when their ability to function effectively—and independently—is challenged.

The Path Forward

The BBA and its members possess special expertise across a broad spectrum of legal issues applicable to immigrants. The BBA and its members should draw on that expertise by contributing to informed public discourse about immigration and by working to provide pro bono opportunities to BBA members on immigration issues.

This deep level of legal experience and expertise gives the BBA and its members powerful tools to correct misinformation and combat misinformed rhetoric about immigrants, and to stand with immigrants when proposals are made, based on that misinformation, that would adversely impact their rights. When public officials and others make statements that directly or implicitly target immigrants, seek to pass laws or take administrative measures that impact them adversely, or demean them publicly, the BBA should not hesitate to speak out where its members’ special expertise and experience may contribute meaningfully to the public discussion on an issue.⁷³

In addition, as noted earlier, many of the Boston Bar Foundation’s grantees provide legal services to immigrants. Likewise, BBA members—independently, and through the pro bono programs of their firms—have spent hundreds of pro bono hours providing legal services to immigrants. The BBA is in a unique position in which it has the ability to bring together the expertise of the lawyers in its Immigration Law Section, the lawyers in its grantee organizations, and the pro bono experience of its

⁷⁰ See <https://www.nytimes.com/aponline/2018/08/08/us/ap-us-immigration-judges-complaint-sessions.html>.

⁷¹ *Id.*

⁷² See https://www.americanbar.org/content/dam/aba/migrated/media/nosearch/immigration_reform_executive_summary_012510.authcheckdam.pdf.

⁷³ For example, lawyers and others who work in the criminal justice system recognize that rhetoric equating immigrants and criminals is factually incorrect. Their experience, and their knowledge of academic studies in this area, clearly support the opposite conclusion. Immigrants commit fewer crimes than native-born Americans. See, e.g., <https://www.nytimes.com/interactive/2018/03/30/upshot/crime-immigration-myth.html>.

members to create resources and opportunities for BBA members interested in doing pro bono immigration work.

Leveraging its unique resources, the BBA should seek ways to further the goals set forth in this statement.

Conclusion

We are, in part, a nation of immigrants. Our history should remind us that many of us born here are the descendants of people who were not warmly welcomed by those who came before.⁷⁴ We are also a nation where the rule of law is paramount. As lawyers, and as a Bar Association, it is our special calling, privilege, and obligation to be vigilant guardians of the rule of law, and to ensure that it protects all people to whom it extends—including all immigrants—when their rights are under attack.

⁷⁴ See, e.g., <https://www.bostonglobe.com/opinion/2018/08/16/immigrants-who-change-america-are-its-lifeblood/M6Aam5KzgBwls5aFiTyYhK/story.html>

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