OUTRAGEOUS RETALIATION AS A REMOVAL DEFENSE

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"Dear America,
You and your administration cause fear—fear through separation.
Instead of building trust with our people, do you prefer this racial tension?
Oppressed.
I live my life in frustration: private prisons, political funding, mass incarceration, you make the connection.
I speak for the victims that pay for this scam: Vietnamese, Jamaican, African, Cambodian, Mexican, Salvadoran, on and on, together we stand.
We demand our respect. We want our dignity back.
Our roots run deep in this country, now that's a true fact."
—Jose Omar Bello Reyes, publicly reading from his poem "Dear America," 36 hours before he was arrested by ICE.

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I.
INTRODUCTION

Directly affected individuals and communities have been front and center in speaking out about U.S. immigration policy in recent years. But there has simultaneously been a troubling pattern of retaliation in which Immigrations and Customs Enforcement (ICE) surveils and targets noncitizen activists for deportation.[1] Potential retaliatory enforcement decisions are not only limited to commencing removal proceedings; they can also include revoking benefits like parole, detaining someone pending removal proceedings, and deciding whether to execute a prior removal order. Immigrant Rights Voices, which tracks incidents of retaliation against immigrant activists, has identified over 1,000 discrete incidents of

1. *See infra* Part II (providing examples of selective immigration enforcement against immigrant activists).

retaliation in recent years by various government agencies.[2] This raises the question of whether the government can constitutionally target a noncitizen activist for immigration enforcement based on their political speech, and, if it cannot, whether that constitutional violation can be a defense to removal.

Part II begins by grounding this Article in the human cost of ICE retaliation by providing some recent examples of retaliatory enforcement against noncitizen activists. Part III then provides a brief overview of the legal landscape of noncitizen speech rights and retaliatory enforcement claims. The First Amendment applies to citizens and noncitizens alike,[3] but courts have long given the political branches wide latitude in setting and enforcing immigration policy and have been hesitant to override the enforcement of immigration laws as a remedy even where there is clear evidence of retaliatory conduct. Congress has also narrowly limited judicial review of "any cause or claim . . . arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders" to the petition for review of a final removal order.[4] The Supreme Court in *Reno v. American-Arab Anti-Discrimination Committee* ("*AADC"*) determined that that provision, 8 U.S.C. § 1252(g) or INA § 242(g), deprived the court of jurisdiction to hear a selective enforcement claim, and stated that "[a]s a general matter . . . a[] [noncitizen] unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation."[5] However, the Court left open the possibility of "a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome."[6] In 2019, the Second Circuit identified just such an outrageous case in *Ragbir v. Homan*, determining that Ragbir's prominent and public criticism of ICE plausibly "played a significant role in the recent attempts to remove him,"[7] and that the Suspension Clause required that claim to be cognizable in a habeas petition despite the limitations of § 1252(g).[8] But shortly thereafter, the Supreme Court vacated that decision and directed the Second Circuit to reconsider in light of the *Thuraissigiam* opinion,[9] which had held that another jurisdiction-stripping

2. IMMIGRANT RIGHTS VOICES, https://www.immigrantrightsvoices.org/#/_[https://perma.cc/GHE9-GY4M] (last visited Oct. 22, 2021); *see also* U. OF WASH. L. SCH. IMMIGR. CLINIC, TARGETED BUT NOT SILENCED: A REPORT ON GOVERNMENT SURVEILLANCE AND RETALIATION AGAINST IMMIGRATION ORGANIZERS IN THE UNITED STATES (2021), https://www.flipsnack.com/JustFutures/targeted-but-not-silenced/full-view.html [https://perma.cc/F8UD-JWP7] [hereinafter TARGETED BUT NOT SILENCED].

3. *See* Bridges v. Wixon, 326 U.S. 135, 148 (1945) ("Freedom of speech and of press is accorded [noncitizens] residing in this country.").

4. 8 U.S.C. § 1252(g) (2018).

5. Reno v. American-Arab Anti-Discrimination Comm. ("AADC"), 525 U.S. 471, 488 (1999).

6. *Id.* at 491.

7. Ragbir v. Homan, 923 F.3d 53, 71 (2d Cir. 2019), *vacated and remanded sub nom.* Pham v. Ragbir, 141 S. Ct. 227 (2020) (mem.).

8. *Id.* at 78.

9. *Pham*, 141 S. Ct. at 227.

provision within § 1252 did not violate the Suspension Clause.[10] Overall, raising a First Amendment retaliation defense to immigration enforcement is an uphill battle, and courts have often been hesitant to dismiss removal proceedings even where they do exercise jurisdiction. This tendency to defer to the executive wherever enforcement was otherwise authorized is out-of-step with the reality of immigration policy today, in which potential removability is far broader than could possibly be enforced—leaving entire communities vulnerable by design.[11]

In Part IV, I suggest a new framework for raising the First Amendment as a defense in both federal and immigration courts. I rely on an analogy to the heightened "widespread" or "egregious"[12] Fourth Amendment standard used to suppress evidence in immigration court and propose a similar heightened "outrageous" standard that would require termination of removal proceedings in certain First Amendment retaliation cases. This approach would help avoid the federal court jurisdictional problems presented by § 1252(g) by providing the possibility for meaningful and immediate relief in immigration court, along with a clear path to review in the federal courts if that relief is denied. An analogy to the Fourth Amendment suppression standard provides precedent and guidance for courts that are wary of overriding the executive's broad power over immigration enforcement, and the use of the heightened Fourth Amendment "widespread" or "egregious" standard in immigration and federal court over the last several decades suggests that both adjudicatory bodies would be more willing to offer meaningful relief—such as terminating removal proceedings—if the showing of retaliation was held to a heightened outrageousness standard. Taken together, the Fourth Amendment analogy, the *Ragbir* balancing test for outrageousness, and recent Supreme Court cases involving First Amendment retaliation in the criminal context all shed light on the kinds of conduct that would meet this heightened "outrageousness" standard.

Providing relief from removal in the face of outrageous retaliation is crucial to the goals of the First Amendment. The current immigration laws have resulted in a substantial population of individuals who have extensive ties to the United States and are intimately affected by its policies large and small, but who are excluded from providing input into the democratic process except through speech. Allowing the government to wield the threat of unchecked retaliatory enforcement over them chills an entire community of crucial voices on this issue. Noncitizen

10. U.S. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1969 (2020).

11. *See generally* Lori A. Nessel, *Instilling Fear and Regulating Behavior: Immigration Law as Social Control*, 31 GEO. IMMIGR. L.J. 525, 529 (2017).

12. INS v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984).

activists provide powerful and important additions to the public discourse on immigration,[13] and they should not be silenced.

II.
FIRST AMENDMENT RETALIATION IN THE CURRENT ERA

There is mounting evidence that ICE has surveilled immigrant activists and taken retaliatory enforcement action against individuals who have spoken out against ICE.[14] This Section provides a few recent and high-profile examples.

A. Retaliation Against New Sanctuary Coalition Leaders, Ravi Ragbir and Jean Montrevil

Ravi Ragbir and Jean Montrevil were both legal permanent residents who were placed in removal proceedings and ordered removed following criminal convictions[15] but received administrative stays of removal that allowed them to continue living in the United States while periodically reporting to ICE for several years thereafter.[16] Montrevil had been ordered removed in 1994 while

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13. *See, e.g.*, Press Release, José Muñoz, United We Dream, Our Stories, Our Power: United We Dream Awarded the Clarence B. Jones Impact Award for Transformative Storytelling (Aug. 19, 2021), https://unitedwedream.org/press/our-stories-our-power-united-we-dream-awarded-the-clarence-b-jones-impact-award-for-transformative-storytelling/ [https://perma.cc/4CWX-DU4P] ("[O]ur voices are our power. In the lead-up to the Supreme Court case on DACA, we channeled this power into all of our strategy, including creating a first-of-its-kind video amicus brief, uplifting advocacy efforts with Congressional leaders, amplifying direct action, and emphasizing the ongoing threat of detention and deportation our communities face, in order to create a series of opportunities for large scale earned media."); *Eyes on ICE: Truth and Accountability Forum*, WE ARE HOME COAL., https://www.wearehome.us/eyesonice [https://perma.cc/4E7U-UH53] (last visited Oct. 22, 2021) (describing the campaign to hold public forums that "expose the abuses of DHS and its agencies . . . by sharing our communities' lived experiences.").

14. *See generally* IMMIGRANT RIGHTS VOICES, *supra* note 2; TARGETED BUT NOT SILENCED, *supra* note 2; Letter from NYU Immigrant Rts. Clinic and Cornell First Amend. Clinic, to Katherine Culliton-González and Dana Salvano-Dunn, Office of Civ. Rts. and C.L., U.S. Dep't of Justice (July 19, 2021), https://www.law.nyu.edu/sites/default/files/NYU%20Cornell%20DHS%20OCRCL%20Complaint_First%20Amendment%20Retaliation_Final%20Letter%20and%20Index%207%2019%202021%20web%20version.pdf [https://perma.cc/HM3Y-VN4E] [hereinafter OCRCL Complaint].

15. Ragbir v. Homan, 923 F.3d 53, 58 (2d Cir. 2019) (describing how Ragbir was placed in removal proceedings following a 2001 conviction); Petition for Writ of Habeas Corpus ¶¶ 25–27, Montrevil v. Decker, 1:20-cv-00264 (E.D.N.Y. Jan. 16, 2020), https://theintercept.com/document/2020/01/16/deported-activist-jean-montrevils-first-amendment-lawsuit-against-ice/ [https://perma.cc/SE3M-HFSU] [hereinafter Montrevil Complaint] (describing how a series of drug convictions between the ages of 17 and 21 resulted in Montrevil's incarceration and removal order); Democracy Now!, *NYC Immigration Activist Jean Montrevil Speaks Out After Deportation to Haiti: "My Heart is Broken*," DEMOCRACY NOW!, at 23:20–23:30, (Jan. 17, 2018) https://www.democracynow.org/2018/1/17/nyc_immigration_activist_jean_montrevil_speaks [https://perma.cc/JYG6-T4F3] [hereinafter Montrevil 2018 Interview].

16. *Ragbir*, 923 F.3d at 59; Nick Pinto, *Trump Banished Immigrant Rights Activist for Speaking Out. Now He's Suing ICE to Come Back*, THE INTERCEPT (Jan. 16, 2020), https://theintercept.com/2020/01/16/jean-montrevil-deportation-first-amendment/ [https://perma.cc/8CAU-XR2F].

incarcerated but, following his release, took over the family business, married, and had two children.[17] He was detained by ICE when his period of federal criminal supervision ended in 2005, and released under ICE supervision after filing his own *pro se* habeas petition.[18] That experience sparked his activism, and he began to organize with the group Families for Freedom.[19] Similarly, Ragbir received four administrative stays of removal following his release from detention in 2008 through 2018.[20] During those years, he helped organize regular prayer vigils outside of the ICE office in NYC, spoke out about immigration policy and his own story, and emphasized the importance of community support.[21] Both men became leaders of the New Sanctuary Coalition of NYC and, as the public faces of that movement, spoke extensively in the press about the human cost of immigration enforcement.[22]

Montrevil and Ragbir's leadership and activism on behalf of the New Sanctuary Coalition attracted attention from the media—and also from ICE. The two men continued to attend regular ICE check-ins, now accompanied by clergy, community supporters, and reporters.[23] ICE reacted to the attention generated by Montrevil's case by placing him at the highest level of supervision and detaining him for deportation at a check-in in 2009.[24] The community rallied around Montrevil, holding vigils and flooding the ICE office with phone calls, but his removal was

17. Montrevil Complaint, *supra* note 15, ¶¶ 31–33; Montrevil 2018 Interview, *supra* note 15, at 28:58–29:11 ("All I have done is take care of my kids, go to work and mind my business and try to stay out of trouble. I have been home for 17 years.").

18. Montrevil Complaint, *supra* note 15, ¶¶ 35, 37, 39.

19. *Id.* ¶¶ 40–41; *see also About Us*, FAMILIES FOR FREEDOM, https://familiesforfreedom.org/about [https://perma.cc/A62Q-BLRZ] (describing the history and work of that organization).

20. *Ragbir*, 923 F.3d at 59.

21. *Id.*; *see, e.g.*, Arturo Conde, *Interfaith Leaders Hold Prayer Vigil to Defend Immigrant Rights*, NBC (Nov. 22, 2016), https://www.nbcnews.com/news/latino/interfaith-leaders-hold-prayer-vigil-defend-immigrant-rights-n686726 [https://perma.cc/3H4H-ZQ8B] (describing prayer vigils and quoting Ragbir as executive director of the New Sanctuary Coalition).

22. *Ragbir*, 923 F.3d at 59; Montrevil Complaint, *supra* note 15, ¶ 43; Maria Luisa Tucker, *The Long Goodbye*, VILLAGE VOICE (Apr. 8, 2008), https://www.villagevoice.com/2008/04/08/the-long-goodbye-2/ [https://perma.cc/7FG7-3LKP] (profiling Montrevil as part of a critique of ICE policy).

23. *See, e.g.*, Triziana Rinaldi, *It's Good News and Bad News for an Immigrant Advocate Facing Detention*, PRI: WORLD (Mar. 10, 2017), https://www.pri.org/stories/2017-03-10/its-good-news-and-bad-news-immigrant-advocate-facing-deportation [https://perma.cc/EV62-6BJ5] ("During Ragbir's check-in, supporters circled the building in silent prayer. It's a weekly practice organized by the New Sanctuary Coalition called the Jericho Walk. Like its biblical reference, volunteers hope their motion and invocation can end what they see as injustice. When Ragbir emerged from the federal building . . . he reminded the crowd that there are many others who would benefit from the same outpouring of community support. 'I have you guys, and you are all here for me. But imagine those who do not,' he said. 'We need to protect them, we need to protect each other.'"); Tucker, *supra* note 22 ("New Sanctuary churches, mosques, and synagogues around the city have gathered petitions and letters in support of Montrevil, asking ICE to allow him to stay in the United States. New Sanctuary members have accompanied Montrevil to most of his regular check-ins at the ICE office.").

24. Montrevil Complaint, *supra* note 15, ¶¶ 47, 51; Tucker, *supra* note 22.

only prevented by the 2010 earthquake that devastated his native Haiti and resulted in a temporary hold on all deportations there, and he was released pursuant to a habeas petition.[25] After that release, in a highly unusual move, the ICE Field Office Director for New York met with Montrevil and his lawyer to inform them that ICE was displeased with the media attention, and offered to consider deferred action for Montrevil if he "kept his head down."[26] Concerned for his family, Montrevil did step out of the public spotlight for a time.[27] But in response to the Trump administration's ramped-up immigration tactics, he once again felt compelled to participate in public events in 2017.[28] Ragbir continued to serve as the public face of the New Sanctuary Coalition during this time.[29]

ICE soon executed a plan to surveil, arrest, and deport both men.[30] Montrevil was arrested outside of his home in Queens on January 3, 2018, and transferred to multiple facilities while ICE misled the public and his lawyers about his whereabouts.[31] He was deported in the early morning on January 16, 2018 following the Martin Luther King Jr. Day holiday weekend, frustrating attempts to seek an emergency stay.[32] An internal ICE email gloated, "Haha, exactly as planned."[33] Over the next three years, a chorus of calls to return Montrevil home to New York included an online petition,[34] requests for prosecutorial discretion,[35] and a habeas petition.[36] Happily, Montrevil received a temporary parole that allowed him to

25. Montrevil Complaint, *supra* note 15, ¶¶ 51–57.

26. *Id.* ¶¶ 58–60; Pinto, *supra* note 16.

27. Montrevil Complaint, *supra* note 15, ¶ 61; Pinto, *supra* note 16.

28. *See* Montrevil 2018 Interview, *supra* note 15, at 31:42–32:12 ("[W]hen I was arrested in 2010, I met with the director of ICE, Mr. Shanahan. He did ask me to be quiet, something in that line . . . . I did slow down. But I can't regret the work that we did with the sanctuary movement, because no one knew about what ICE was doing until we started that movement.").

29. *See* Ragbir v. Homan, 923 F.3d 53, 59 (2d Cir. 2019).

30. Montrevil Complaint, *supra* note 15, ¶ 79; Montrevil 2018 Interview, *supra* note 15, at 31:18–31:28 ("I did everything right. Everything they asked me to do, I have done it. So why target me now? . . . It has to be for the New Sanctuary Movement.").

31. Montrevil Complaint, *supra* note 15, ¶¶ 75, 80; Montrevil 2018 Interview, *supra* note 15, at 29:44–30:45 ("On my way to work, I was walking on the street. I heard somebody call my name: 'Jean Montrevil!' I looked. It was four ICE officers . . . . They had no paperwork, nothing. Then they handcuffed me, put me in the back of the car and then took me to 26 Federal Plaza. And that same night, they sent me to New Jersey. And then, the next day, they fly me to Miami. At that moment, I knew that that was something that was planned. Once you go to Miami processing, the next step is to Haiti, even though my case was still in court.").

32. His motion to reopen his removal order, which had been pending before the Board of Immigration Appeals (BIA) at the time of his arrest, was denied by the BIA over the holiday weekend. The flight deporting him left at 7:38 a.m. on the next business day—a half hour before the appellate court that would have had jurisdiction to review the denial opened. Montrevil Complaint, *supra* note 15, ¶¶ 91–93; Pinto, *supra* note 16.

33. OCRCL Complaint, *supra* note 14, at 20–21.

34. *See* BRING JEAN HOME, https://www.bringjeanhome.org/ [https://perma.cc/Z268-583Z] (last visited Oct. 22, 2021) (linking to petition and providing updates on the campaign to return, and keep, Montrevil home).

35. *See* OCRCL Complaint, *supra* note 14, at 21–22.

36. *See generally* Montrevil Complaint, *supra* note 15.

return to New York in October 2021, where he was reunited with his family.[37] At the time of writing, Montrevil continues to seek immigration relief.[38]

Ragbir was arrested on January 8, 2018, and informed that his most recent stay of removal was being revoked eight days early.[39] A district judge granted Ragbir's emergency habeas petition and his removal was stayed pending litigation of his retaliatory arrest claim.[40] Throughout, Ragbir continued to use his voice and story to advocate for change, writing from the detention center that "[a]t the moment, we need to speak about changing the system so that no one has to face this type of harm. Not just for me but for all the families who face being torn apart."[41] Ragbir recently settled his case, but he continues to speak out about his own experience and about immigration policy more broadly.[42]

B. Retaliation Against Other Noncitizen Community Leaders and Activists

Jose Omar Bello Reyes has lived in California since he was three years old and worked as a farmworker while attending Bakersfield College and majoring in political science.[43] He was outspoken about his undocumented status and a passionate advocate for immigration reform.[44] His community rallied around him to help him pay a $10,000 bond when he was first detained and placed in removal

37. Press Release, Deported Activist Jean Montrevil Returns Home to the U.S. (Oct. 18, 2021), https://static1.squarespace.com/static/5e5d44a9d1d6667e4e6905bf/t/616eebaee5a8e559e233172f/1634659248960/Jean+Montrevil+Returns+Home_Press+Release+Final+10.18.pdf [https://perma.cc/7JTF-WSF6]; *see also* Joel Rose, *An Immigrant Activist Says ICE Deported Him in Retaliation. Now He's Back in the U.S.*, NPR (Dec. 15, 2021) https://www.npr.org/2021/12/15/1064224812/immigrant-activist-deported-ice-retaliation-rojas [https://perma.cc/3X42-9W4M].

38. Press Release, Deported Activist Jean Montrevil Returns Home*, supra* note 37.

39. Ragbir v. Homan, 923 F.3d 53, 60 (2d Cir. 2019).

40. *Id.* at 61.

41. Ravi Ragbir, *Ravi's Letter from an Immigration Jail*, JUSTICE FOR RAVI RAGBIR (Jan. 15, 2018), https://istandwithravi.org/2018/01/15/ravis-letter-from-krome-detention-center/ [https://perma.cc/S2JR-JBVW]. Ragbir continues to speak out about his own case and immigration policy more generally.

42. *See* Nick Pinto, *ICE Settles with Immigrant Rights Leader Who Sued Over First Amendment Violations*, INTERCEPT (Feb. 24, 2022), https://theintercept.com/2022/02/24/ice-ravi-ragbir-deportation-first-amendment/ [https://perma.cc/PB4S-BHTJ] (reporting the settlement and quoting Ragbir as saying that he plans to use the coming years as "an opportunity . . . to be not only vocal, but extremely vocal"); Olivia Heffernan, *Ravi Ragbir Continues to Fight ICE and the Trump Administration*, DOCUMENTED (Oct. 30, 2020), https://documentedny.com/2020/10/30/ravi-ragbir-continues-to-fight-ice-and-the-trump-administration/ [https://perma.cc/N4NU-AUEF] (describing Ragbir's advocacy during the litigation).

43. Giulia McDonnell Nieto del Rio, *An Immigrant Activist and Poet Faced Deportation by ICE. Then Two NFL Players Bailed Him Out*, L.A. TIMES (Sept. 16, 2019), https://www.latimes.com/la-me-ln-local-ice-arrest-student-activist-20190705-story.html [https://perma.cc/RTX3-CUFE].

44. *Id.*

proceedings in May 2018.[45] Upon his release he became an even more outspoken critic of ICE, while also applying for immigration relief, attending his court dates, continuing his education, and providing for his one-year old son.[46] Although he was arrested on a DUI charge in January 2019 and sentenced to fines and a DUI course, ICE took no action against him following that arrest.[47] Then, in May 2019, he spoke at a highly publicized hearing of the Kern County Board of Supervisors to share his story and persuade them to support the California TRUTH Act, where he read an impassioned poem about his experience with ICE.[48] He was re-arrested by ICE 36 hours later and had his bond set at $50,000.[49] Bello Reyes said he "could see my whole future going out the window" during the months he was detained.[50]

Maru Mora Villalpando, who has lived in the United States since 1996, has been active in organizing around immigration issues, including founding the group Northwest Detention Center Resistance, now known as La Resistencia,[51] and being a founding member of the national Latinx advocacy group Mijente.[52] She received substantial media attention for her activism, which included organizing roadblocks, rallies, and publicizing detention conditions.[53] She disclosed her undocumented status to the media in 2014 as part of that advocacy but was not placed

45. Bello-Reyes v. Gaynor, 985 F.3d 696, 698 (9th Cir. 2021); *see also Help Jose Bello Fight Deportation*, GOFUNDME, https://www.gofundme.com/f/bc-student-jose-bello-legal-fees?qid=a85f41e732d1e05c12abcea500e1dedd [https://perma.cc/2WDZ-RWNC] (raising money to support Bello Reyes's legal fees after his first arrest by ICE).

46. *Bello-Reyes*, 985 F.3d at 698; *see also Help Jose Bello Fight Deportation*, *supra* note 45 (describing how following his release, "Jose works in the fields from 6:30 am to 3:30 pm while taking a full course load at Bakersfield College in the evenings . . . has continued to advocate for foster/homeless youth and previously incarcerated students through his work as the President of Youth Empowering Success (YES!) at Bakersfield College . . . [and] became a Founding Steering Member of the Kern County chapter of CHIRLA, the Coalition for Humane Immigrant Rights, whose mission is to achieve a just society fully inclusive of immigrants").

47. *Bello-Reyes*, 985 F.3d at 698.

48. *See* ACLU of S. Cal., *"Dear America" by Jose Bello*, YOUTUBE (June 25, 2019), https://www.youtube.com/watch?v=AYIt-euHKuY [https://perma.cc/8V42-STHG] (video of Bello Reyes reading his poem to the Kern County Board of Supervisors).

49. *Bello-Reyes*, 985 F.3d at 699.

50. KERO Staff, *Jose Bello, Immigrant Detained by ICE After Reading Poem, Released with Help from NFL Players*, WMAR2NEWS (Aug. 14, 2019), https://www.wmar2news.com/news/national/jose-bello-immigrant-detained-by-ice-after-reading-poem-released-with-help-from-nfl-players [https://perma.cc/8FML-WXBQ].

51. John Burnett, *See the 20+ Immigration Activists Arrested Under Trump*, NPR (Mar. 16, 2018), https://www.npr.org/2018/03/16/591879718/see-the-20-immigration-activists-arrested-under-trump [https://perma.cc/CYV9-6VTX].

52. *Undocumented Activist Targeted by ICE Asks Immigration Judge to Throw Out Case Based on First Amendment*, MIJENTE (Mar. 13, 2018), https://mijente.net/2018/03/undocumented-activist-targeted-by-ice/ [https://perma.cc/Q6J3-37QH].

53. *See Press*, LA RESISTENCIA, http://laresistencianw.org/press/ [https://perma.cc/P7WA-JDBB] (last visited Mar. 31, 2022).

in removal proceedings by ICE until 2017.[54] On the ICE form detailing the reasons for her arrest, the deportation officer made note of her "extensive involvement with anti-ICE protests and Latino advocacy programs."[55] In another internal email, an ICE official reasoned that "[p]lacing her into proceedings might take away some of her 'clout.'"[56] A working group of the UN Human Rights Council even issued a statement urging the government to not take any retaliatory action against her, and expressing concern that "[g]iving people notice of deportation proceedings appears to be a part of an increasing pattern of intimidation and retaliation against people defending migrants' rights in the US."[57] Despite this, the immigration judge declined to terminate her case on retaliation grounds.[58] Since then, La Resistencia also sued ICE as an organizational plaintiff challenging ICE's practice of targeting its activist members,[59] and has continued to advocate for the closure of the Northwest Detention Center.[60] The government dropped the deportation charges against Mora Villalpando in 2021, but she remains as outspoken as ever; as she shared the good news in her own case, she also announced a protest that same week "to demand the agency exercise prosecutorial discretion in all deportation cases."[61]

Roland Gramajo overstayed a tourist visa in 1994 and was deported in 2004, but reentered the country a few months later to be with his family.[62] He has lived

54. Gene Johnson, *Deportation Document Described Immigrant Activist's Protests*, ASSOCIATED PRESS (Feb. 26, 2018), https://apnews.com/ec59e1c1780146cb9d3b96b669bb0926/Deportation-document-described-immigrant-activist's-protests [https://perma.cc/KVG5-DNS2].

55. Mora-Villalpando v. U.S. Immigr. & Customs Enf't, No. 18-0655-JLR, 2019 U.S. Dist. LEXIS 125913, at *2 (W.D. Wash. July 26, 2019) (quoting the ICE Form I-213 issued in Mora Villalpando's case).

56. E-mails from Marc Moore, Seattle Field Office Dir., Immigr. & Customs Enf't, to redacted recipients (Nov. 20, 2017), https://justfutureslaw.org/wp-content/uploads/2020/04/A-1_ICE-0000618_image-Redact-Highlight_r.pdf [https://perma.cc/EPE7-RR7J].

57. Press Release, U.N. Off. of the High Comm'r for Hum. Rts., US Urged to Protect Rights Defenders as Activist Maru Mora Villalpando Faces Deportation Case (Feb. 14, 2018), https://www.ohchr.org/en/press-releases/2018/02/us-urged-protect-rights-defenders-activist-maru-mora-villalpando-faces [https://perma.cc/66FT-BE62].

58. Lindsey Burton, *"We Will Win": Seattle-Area Immigrant Activist Sees Hope in Her Deportation Case*, SEATTLE PI (June 26, 2018), https://www.seattlepi.com/seattlenews/article/immigrant-maru-mora-villalpando-ICE-Seattle-13027576.php [https://perma.cc/59P2-49KZ].

59. NWDC Resistance v. Immigr. & Customs Enf't, 493 F. Supp. 3d 1003, 1003 (W.D. Wash. 2020).

60. *See, e.g.*, Esmy Jimenez, *A Caravan Protests Outside the Tacoma Immigrant Detention Center*, KOUW (Apr. 1, 2020), https://www.kuow.org/stories/car-caravan-protests-outside-tacoma-immigrant-detention-facility [https://perma.cc/D86G-F244].

61. Nina Shapiro, *Government Drops Deportation Case Against Washington State Immigration Activist*, SEATTLE TIMES (Sept. 21, 2021), https://www.seattletimes.com/seattle-news/government-drops-deportation-case-against-immigration-activist-maru-mora-villalpando/?amp=1 [https://perma.cc/R7WT-8FCX].

62. Mihir Zaveri, *A Houston Activist Invited ICE to a Community Meeting. Now, He Faces Deportation*, N.Y. TIMES (Sept. 10, 2019), https://www.nytimes.com/2019/09/10/us/ice-houston-activist-deportation.html [https://perma.cc/QA54-76EW].

in Houston since then, where he was a small business owner, community leader, and father of five U.S. citizen children.[63] He was honored by the Houston City Council just a few months before his arrest for being "an extremely positive role model who is dedicated to serving and inspiring the community to get involved."[64] Gramajo organized a town hall on immigration issues in August 2019 with local government officials and community activists and even invited ICE to come engage directly with the community at that event.[65] Although ICE declined the invitation, attendees at the town hall noticed three "out of place" men who were taking photos of Gramajo at the event, and he was arrested by ICE three weeks later.[66] ICE claimed that his arrest was based merely on an anonymous tip.[67]

Recipients of the Deferred Action for Childhood Arrivals (DACA) have been some of the most vocal noncitizen activists on issues of immigration.[68] Sergio Salazar, a DACA recipient who organized and participated in an Occupy ICE protest in San Antonio, first came to the attention of federal authorities as a result of their angry tweets expressing disagreement with the government.[69] While many tweets were explicit, the government never had to prove that Salazar was a threat to anyone. Instead, the Department of Homeland Security (DHS) discretionarily denied the renewal of Salazar's DACA application and detained them the day their DACA status expired.[70] FBI officials visited Salazar in the detention center and asked them to share information on their fellow activists, which they refused to do.[71] In a subsequent bond hearing, at which Salazar bore the burden of showing they were not a danger to the community, DHS submitted evidence of their tweets and radical political views as evidence of danger.[72] After 43 days in detention,

63. *Id.*; Amir Vera & Ed Lavandera, *Houston Activist Who Invited ICE to a Community Forum is Facing Deportation. His Family Believes He was Targeted*, CNN (Sept. 17, 2019), https://www.cnn.com/2019/09/17/us/texas-immigrant-activist-target-ice/index.html [https://perma.cc/XCV3-Q2WA].

64. Zaveri, *supra* note 62 (quoting Houston City Council resolution).

65. *Id.*

66. *Id.*

67. *Id.*

68. *See, e.g.*, United We Dream, *Deportation Force Profiled and Targeted United We Dream Leaders*, UNITED WE DREAM (June 28, 2018), https://unitedwedream.org/2018/06/deportation-force-profiled-and-targeted-united-we-dream-leaders/ [https://perma.cc/FTU2-H6ZH] (describing how two DACA-recipient leaders with the immigrant youth organization United We Dream were detained or stopped while traveling and speaking at a protest near the U.S.-Mexico border); *The Faces Behind DACA*, HOME IS HERE, https://homeishere.us/stories/ [https://perma.cc/M942-TNEC] (last visited Oct. 21, 2021) (presenting videos of DACA-recipient activists telling their personal stories).

69. Ryan Devereaux & Cora Currier, *How an Occupy ICE Activist and DACA Recipient was Deported for Tweeting*, INTERCEPT (Nov. 2, 2019), https://theintercept.com/2019/11/02/deportation-occupy-ice-daca/ [https://perma.cc/6BXL-LA8V].

70. *Id.*

71. *Id.*

72. *Id.*

Salazar accepted a removal order and was deported to Mexico, a country they had not seen since they were a child.[73]

Daniela Vargas, a 22-year-old DACA recipient and university student, witnessed the arrest of her father and brother by ICE at their home but was not arrested because she told the officials that she had DACA.[74] In fact, she was in the process of renewing her DACA, which had expired when she couldn't afford the $500 renewal fee.[75] She spoke out about her family's experience and called on President Trump to protect her and other Dreamers at a press conference in Jackson, Mississippi a few weeks later.[76] She was arrested and detained by ICE on her way home from the press conference.[77] A witness to the arrest reported that the ICE agents told her, "[Y]ou know who we are and you know why we're here."[78] Vargas was eventually released under an order of ICE supervision following an outcry from groups across the country.[79]

C. Retaliation Against Noncitizen Journalists

Emilio Gutierrez Soto is a journalist who fled Mexico after being threatened by the military for his journalism exposing military corruption there.[80] He presented himself at the U.S. border with his son and was paroled into the country in 2008.[81] Their asylum case was eventually heard—and denied—in 2017, and they were detained in December 2017 despite the decision by the Board of Immigration Appeals (BIA) to issue a stay of removal and reopen their case.[82] ICE claimed that it detained Gutierrez Soto and his son because their removal order became final, but internal ICE emails months before the removal order identified Gutierrez Soto as a "'candidate for arrest' in an email string entitled 'Non-Detained Target List,'" and one ICE official told the Executive Director of the National Press Club to "tone it down" in regards to the media attention given to Gutierrez Soto.[83] The district court concluded that there was a genuine issue of material fact as to

73. *Id.*

74. Phil Helsel, *'Dreamer' Applicant Arrested After Calling for Immigrant Protection*, NBC NEWS (Mar. 2, 2017), https://www.nbcnews.com/news/us-news/dreamer-applicant-arrested-after-calling-immigrant-protections-n727961 [https://perma.cc/WVR5-SBY3].

75. UnidosUS, *ICE Intimidates Latino Community with Arrest of a DACA Recipient Practicing Free Speech*, HUFFPOST (Mar. 3, 2017), https://www.huffpost.com/entry/ice-intimidates-latino-community-with-arrest-of-daca_b_58b9dd6de4b02b8b584dfb6d [https://perma.cc/EYP8-XSNE].

76. *Id.*

77. *Id.*; Helsel, *supra* note 74.

78. *UnidosUS*, *supra* note 75.

79. Yara Simón, *The Sustained Efforts of Activists Pay Off as Daniela Vargas is Released from ICE Custody*, REMEZCLA (Mar. 10, 2017), https://remezcla.com/culture/daniela-vargas-freed/ [https://perma.cc/8YAP-WYUN].

80. Gutierrez-Soto v. Sessions, 317 F. Supp. 3d 917, 921 (W.D. Tex. 2018).

81. *Id.* at 921–22.

82. *Id.* at 922.

83. *Id.* at 933.

whether ICE had violated Gutierrez Soto's First Amendment rights,[84] but the government opted to release Gutierrez Soto hours before the court deadline instead of producing discovery relating to why he was arrested, and the case was dismissed as moot.[85] Gutierrez Soto's asylum petition was denied in 2019,[86] and he continues to appeal that order.[87]

Claudio Marcelo Rojas made headlines nationwide with his role in the documentary *The Infiltrators*,[88] in which undocumented activists purposefully got themselves arrested and detained by ICE in order to publicize the conditions in a for-profit immigration detention center in Broward, Florida.[89] Rojas, who had already been detained, helped the activists interview and organize detainees who, like himself, qualified as low priorities under ICE's own policies but were being denied an individualized review of their cases.[90] Rojas eventually organized a detainee hunger strike that resulted in a changed ICE policy to review each case individually and his own release.[91] *The Infiltrators* was shown at film festivals across the country to significant acclaim.[92] Despite not having any criminal record and being in the process of pursuing a T visa, Rojas was arrested by ICE shortly before the film's debut at the Miami Film Festival,[93] in his words, because "[i]f [he] would have shown up at the Miami Film Festival, [he] was going to talk a lot. And they wanted to avoid that."[94] The court denied his motion for a temporary restraining order preventing his deportation, determining that it did not have

84. *Id.*

85. Bill Chappell, *U.S. Releases Mexican Journalist After a Second 7-Month Detention*, NPR (July 27, 2018), https://www.npr.org/2018/07/27/632962320/u-s-releases-mexican-journalist-after-a-second-7-month-detention [https://perma.cc/2FKD-SJ7Y].

86. Niraj Warikoo, *Mexican Journalist Who Is a Fellow at University of Michigan Ordered Deported*, DETROIT FREE PRESS (Mar. 14, 2019), https://www.freep.com/story/news/local/michigan/2019/03/14/emilio-gutierrez-soto-ordered-deported-mexico/3155738002/ [https://perma.cc/TP6E-XVNN].

87. *An Update on the Case of Emilio Gutierrez Soto*, NAT'L PRESS CLUB (May 3, 2021), https://www.press.org/newsroom/update-case-emilio-gutierrez-soto [https://perma.cc/7VUD-ZLGB].

88. *See, e.g.*, Tim Elifrink & Isaac Stanley-Becker, *He Stars in a New Film About Infiltrating an ICE Detention Center. Now ICE Has Locked Him Up Again*, WASH. POST (Mar. 4, 2019), https://www.washingtonpost.com/nation/2019/03/04/he-stars-new-film-about-infiltrating-an-ice-detention-center-now-ice-has-locked-him-up-again/ [https://perma.cc/6TU9-QL8H].

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Joel Rose, *ICE Deported Him After His Movie Came Out. Now, He's Testing the Limits of Free Speech*, UTAH PUB. RADIO (Aug. 23, 2021), https://www.upr.org/post/ice-deported-him-after-his-movie-came-out-now-hes-testing-limits-free-speech#stream/0 [https://perma.cc/KC3Y-WV39].

jurisdiction under § 1252(g), and Rojas was deported.[95] On appeal of that decision before the 11th Circuit,[96] the panel at oral argument expressed concern about ICE's actions, with Judge Rosenbaum saying, "The government has discretion to execute the order of removal as long as it was not for an illegal reason. . . . There's possibly an outrageous First Amendment scenario where there could be a problem."[97] Rojas was paroled back into the United States under the Biden administration, and the appeal was dismissed as moot.[98]

Manuel Duran Ortega, a reporter for the Spanish-language paper *Memphis Noticias*, reported on the collaboration between ICE and local police.[99] On April 3, 2018, he was reporting on a protest when he was arrested and charged with disorderly conduct and obstruction of a highway.[100] He was wearing his press credentials and was the only member of the press arrested. The charges against him were quickly dropped—but instead of being released, he was turned over to ICE and transferred over eight hours away to the LaSalle Detention Center in Louisiana.[101] A federal court rejected his retaliatory arrest claim, reasoning that even if his arrest was unconstitutional, it was now moot as the criminal charges had been dropped, and his pre-existing removal order from nearly ten years prior was sufficient probable cause for ICE to "arrest and detain him at any time."[102]

95. *See* Rojas v. Moore, No. 1:19-cv-20855, 2019 WL 3340630 (S.D. Fla. Mar 26, 2019) (Order Denying Plaintiff's Motion for a Stay of Removal and/or Temporary Restraining Order); Rojas v. Moore, No. 1:19-cv-20855, 2019 WL 3340629, at *2 (S.D. Fla. Apr. 29, 2019) (Final Order of Dismissal for Lack of Jurisdiction) (dismissing the case as moot following Rojas's deportation).

96. Rojas v. Moore, No. 19-12438 (11th Cir. June 27, 2019).

97. Alex Pickett, *Deportation of Immigrant Activist Makes Waves at 11th Circuit*, COURTHOUSE NEWS (Sept. 22, 2020), https://www.courthousenews.com/deportation-of-immigrant-activist-makes-waves-at-11th-circuit/ [https://perma.cc/9K5N-T555].

98. Order, Rojas v. Moore, No. 19-12438 (11th Cir. Sept. 21, 2021); *see also* Rose, *supra* note 37.

99. *Manuel Duran Ortega v. U.S. Department of Homeland Security, et al.*, S. POVERTY L. CTR., https://www.splcenter.org/seeking-justice/case-docket/manuel-duran-ortega-v-us-department-homeland-security-et-al [https://perma.cc/ZCR3-N6UX] (last visited Oct. 21, 2021).

100. *Id.*

101. *Id.*

102. Ortega v. U.S. Dep't of Homeland Sec., No. 1:18-cv-00508, 2018 WL 4211864, at *1–*3 (W.D. La. Sept. 4, 2018). Since then, Duran Ortega has successfully reopened his removal proceedings in order to apply for relief. *See* S. POVERTY L. CTR., *supra* note 99.

D. Retaliation Against Noncitizens Who Stand Up for Their Rights

Jose Montelongo Morales was one of the named plaintiffs who sued Coconino County for violating his civil rights when it held him on an ICE detainer.[103] The county lifted the detainer, released Montelongo Morales, and the civil rights case was dismissed as moot.[104] But soon thereafter, ICE conducted a manhunt across two cities in search of Montelongo Morales, targeting his family members and threatening them with arrest if they did not disclose his whereabouts.[105] Montelongo Morales's father was reportedly detained by ICE and told, "The more attention this gets, the worse it will be for your family," before being transferred to Eloy Detention Center when he refused to provide any information.[106] Two of Montelongo Morales's sisters were also arrested during the search for him and pressured for information on his whereabouts.[107] Montelongo Morales was eventually captured and arrested by at least ten armed ICE agents who surrounded his home, without a warrant, for about two hours until he came outside.[108] The agents told Montelongo Morales he had "brought this upon himself" by filing the lawsuit,[109] and he was detained on an abnormally high $20,000 bond pending his removal proceedings.[110]

Daniel Medina Ramirez was detained and placed in removal proceedings after ICE agents came to his house to arrest his father even though Medina Ramirez

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103. Complaint at 2, Montelongo Morales v. Driscoll, Case No. S0300-cv-201900012 (Ariz. Sup. Ct., Coconino County, Mar. 29, 2019), https://www.acluaz.org/sites/default/files/field_documents/montelongo_v_driscoll_amended_superior_court_complaint_final.pdf [https://perma.cc/PA79-A5W3]. Montelongo Morales entered state custody following a stop for speeding and was booked into custody based on a bench warrant for failure to appear as a result of a prior voluntary departure. *Breaking: ICE Detains Immigrant in Retaliation for Lawsuit on Detainer Policies*, MIJENTE, https://action.mijente.net/petitions/breaking-border-patrol-detains-immigrant-in-retaliation-for-lawsuit-on-detainer-policies [https://perma.cc/LHE4-DYAR] (last visited Dec. 13, 2021) [hereinafter Mijente Action Alert: Montelongo].

104. Jake Bacon, *Judge Moran Dismisses County ICE Detainer Lawsuit*, ARIZ. DAILY SUN (June 14, 2019), https://azdailysun.com/news/judge-moran-dismisses-county-ice-detainer-lawsuit/article_20dcba24-5b9f-598a-8b6c-ade76268b6ae.html [https://perma.cc/M39A-DEJC].

105. Sarah Tory, *To Find Jose Montelongo, ICE Agents Targeted His Whole Family*, HIGH COUNTRY NEWS (Nov. 21, 2019), https://www.hcn.org/issues/52.1/immigration-to-find-jose-montelongo-ice-agents-targeted-his-whole-family [https://perma.cc/WJ5T-F6SU].

106. Mijente Action Alert: Montelongo, *supra* note 103.

107. *See* Tory, *supra* note 105 ("My sister told me that . . . the ICE agents . . . had told her that if she revealed where Jose was, nothing bad would happen, but if she did not tell them, they would arrest us all and give the children to the government."); Jacques Billeaud & Astrid Galvan, *Lawyer: Tactic Used by ICE Agents Amounts to Extortion*, ASSOCIATED PRESS (Apr. 29, 2019), https://apnews.com/article/ae2c103e46c5492fb0019f0b24efbf85 [https://perma.cc/4LNE-SVSV].

108. Lauren Gill, *Arizona Man Faces Deportation After Filing Lawsuit Against Coconino County Sheriff*, APPEAL (June 18, 2019), https://theappeal.org/arizona-man-faces-deportation-after-filing-lawsuit-against-coconino-county-sheriff/ [https://perma.cc/GKU5-CKJE]; Tory, *supra* note 105.

109. Mijente Action Alert: Montelongo, *supra* note 103.

110. Gill, *supra* note 108.

informed the agents of his own DACA status.[111] When ICE then doubled down on its efforts by attempting to revoke his DACA status and baselessly accusing him of gang affiliation, Medina Ramirez sued.[112] The case provoked national media attention[113] and sharp criticism from the district court judge, who enjoined ICE from making or relying on any such statement of Medina Ramirez's supposed gang affiliation.[114] Unfortunately, Medina Ramirez's DACA expired that same day.[115] Immediately thereafter, ICE overrode the positive recommendation of the USCIS adjudicator assigned to the case and denied his DACA renewal.[116] But when Medina Ramirez returned to the court to protest that denial, the court held that he had not met his burden of establishing subject matter jurisdiction because the government's decision to renew a DACA application was discretionary.[117] Despite including a biting criticism of ICE's actions in the case,[118] the court concluded that it was "constrained by the law and ha[d] no basis to intervene."[119]

The inherently political and well-publicized act of taking sanctuary has likewise been targeted with retaliation by ICE. For example, Arturo Hernandez Garcia had lived in sanctuary for nearly a year at the First Unitarian Society of Denver before being assured by ICE in 2015 that he was not an enforcement priority and returning to his work and family.[120] However, in 2017 he was arrested and detained without warning, likely as a result of his connection with Jeannette Vizguerra, who had recently taken sanctuary in the same church and received considerable media attention, including being named one of Time Magazine's 100

111. *See* Mark Joseph Stern, *Bad Liars*, SLATE (May 16, 2018), https://slate.com/news-and-politics/2018/05/federal-judge-accused-ice-of-making-up-evidence-to-prove-that-dreamer-was-gang-affiliated.html [https://perma.cc/K5JU-AB2W] (describing ICE's outright falsification of the facts of the case).

112. *See id.*; Mark Joseph Stern, *Is ICE Out of Control?*, SLATE (Feb. 17, 2017), https://slate.com/news-and-politics/2017/02/ices-crackdown-is-beyond-aggressive-its-illegal.html [https://perma.cc/L9TQ-CGVM] (presenting evidence that ICE erased key parts of Medina Ramirez's statements in the detention center to make it look like he was admitting gang affiliation).

113. *See, e.g.*, *id.*

114. Medina v. U.S. Dep't of Homeland Sec., 408 F. Supp. 3d 1224, 1233 (W.D. Wash. 2019).

115. *Id.*

116. *Id.* at 1234–35. In fact, when Medina Ramirez challenged the denial of his renewal within the agency, the adjudicator again raised her concerns that "similar fact patterns should yield similar results" and that such an application would normally be approved. *Id.* at 1235.

117. *Id.* at 1238–39.

118. *See id.* at 1226 ("[T]he Government has pursued a nearly three-year vendetta against Plaintiff Daniel Ramirez Medina."); *id.* at 1227 ("[T]he Government's actions . . . cultivate and nourish suspicion."); *id.* at 1238 ("The Government gave Mr. Ramirez's application an inordinate amount of scrutiny. When the Government's manufactured basis for action dissolved, it searched for a new basis."); *id.* at 1239 ("There are, frankly, many indications that give the Court pause to wonder if the Government had it out for Mr. Ramirez.").

119. *Id.* at 1227.

120. Jesse Paul, *With His Deportation Delayed at Least 30 Days, Arturo Hernandez Garcia Anxiously Gets Back to His Family, Work*, DENVER POST (May 4, 2017), https://www.denverpost.com/2017/05/04/arturo-hernandez-garcia-deportation-delay/ [https://perma.cc/9N57-35H4].

Most Influential People.[121] He was released following a public outcry and the intervention of elected officials who helped negotiate a two-year stay of deportation for both him and Vizguerra.[122] Additionally, individuals taking sanctuary in churches across the country have been targeted by ICE for hundreds of thousands of dollars in civil fines, that were withdrawn and then reinstated over 2019 and 2020.[123]

E. Retaliation Against Citizen Immigration Activists

Nor has the purported retaliation been limited to noncitizen activists. In recent years, the federal government has brought a series of criminal prosecutions against members of the volunteer group No More Deaths for actions such as leaving water in the desert and transporting critically ill migrants to medical care.[124] In a major escalation, the government brought felony harboring charges against one volunteer, Scott Warren, who encountered two migrants at the group's desert outpost and provided them with food, water, beds, and medical attention for three days.[125] The case went to trial twice, with the first trial ending in a hung jury[126] and the

121. *Id.*

122. Kirk Mitchell & Kieran Nicholson, *Arturo Hernandez Garcia, a Leader in Colorado's Sanctuary Movement, Ordered to Leave U.S.*, DENVER POST (Mar. 21, 2019), https://www.denverpost.com/2019/03/21/colorado-sanctuary-leader-deportation/ [https://perma.cc/DZ4F-MQ39].

123. *See generally* Complaint, Austin Sanctuary Network v. Gaynor, 1:21-cv-00164 (D.D.C. Jan. 19, 2021), https://justfutureslaw.org/wp-content/uploads/2021/01/1-complaint.pdf [https://perma.cc/A9RP-34YR]; *Immigrant Rights Groups Sue ICE for Immediate Release of Information Concerning the Continuing Retaliation Against Immigrants in Sanctuary*, CTR. FOR CONST. RTS. (Feb. 26, 2020), https://ccrjustice.org/home/press-center/press-releases/immigrant-rights-groups-sue-ice-immediate-release-information [https://perma.cc/AA89-HYRG]. The Biden administration rescinded the two delegation orders regarding those fines in April 2021, calling them "ineffective and unnecessary punitive measures." Press Release, Dep't of Homeland Sec., DHS Announces Rescission of Civil Penalties for Failure-to-Depart (Apr. 23, 2021), https://www.dhs.gov/news/2021/04/23/dhs-announces-rescission-civil-penalties-failure-depart [https://perma.cc/BNG8-UF3S].

124. *See* United States v. Hoffman, 2020 WL 531943 (D. Ariz. Feb. 3, 2020) (overturning convictions of four volunteers who had left food and water in the desert based on a RFRA defense); United States v. Deighan, 2018 WL 6809429 (D. Ariz. Dec. 27, 2018) (rejecting a necessity defense and convicting four volunteers of entering a national wildlife refuge without a permit); United States v. Warren, 2019 U.S. Dist. LEXIS 202146 (Nov. 20, 2019) (acquitting volunteer Scott Warren of abandoning property in a wildlife refuge based on a RFRA defense); United States v. Millis, 621 F.3d 914 (9th Cir. 2010) (overturning the conviction of a volunteer for leaving water in a wildlife refuge); Defs.' Mot. Dismiss, United States v. Strauss, 4:05-cr-01499-RCC-BPV, ECF No. 40, 2005 WL 6337927 (D. Ariz. Sept. 1, 2006) (describing prosecution of two volunteers for transporting a migrant in need of emergency medical care).

125. United States v. Warren, No. 4:18-cr-00223, 2018 WL 4403753 (D. Ariz. Sept. 17, 2018); *see also* Ryan Devereaux, *Criminalizing Compassion*, INTERCEPT (Aug. 10, 2019), https://theintercept.com/2019/08/10/scott-warren-trial/ [https://perma.cc/BJ3V-HZ9H] (describing Warren's actions in providing aid and the ensuing trial).

126. *Id.*

second resulting in an acquittal.[127] In July 2020, the Border Patrol again conducted a heavily militarized raid of a No More Deaths aid camp where around 30 migrants were receiving medical care in what the group described as "part retaliation, part violent publicity stunt."[128] Undeterred, the group continues to provide direct humanitarian aid in southern Arizona.[129]

Kaji Douša, a reverend and leader in the New Sanctuary Coalition, filed a lawsuit requesting a preliminary injunction to prevent DHS from surveilling or targeting her for protected First Amendment activity.[130] Leaked documents indicated that Douša had been placed on a government watchlist, and that ICE was surveilling her protests and the church where she worked with the New Sanctuary Coalition.[131] As a U.S. citizen, her case did not implicate any of the jurisdictional limitations in § 1252, but the opinion still had the unmistakable theme of giving executive immigration enforcement a wide berth. Among other reasons, the court acknowledged that the presented evidence suggested that ICE's surveillance of her pro-immigration rallies had not occurred "*because of* Douša's protected activities, but because of . . . the fact that Douša's events were attended by undocumented [immigrants],"[132] which, of course, overlooks the fact that the undocumented activists attending those rallies were *also* engaging in protected speech.

That reasoning also foreshadows a legal fiction running throughout many of the decisions discussed in the following Section: that it is possible for courts to constrain ICE's retaliation against protected speech without constraining ICE's authority to deport. This theoretical division risks the result that courts fail to

127. Bobby Allyn, *Jury Acquits Aid Worker Accused of Helping Border-Crossing Migrants in Arizona*, NAT'L PUB. RADIO (Nov. 21, 2019), https://www.npr.org/2019/11/21/781658800/jury-acquits-aid-worker-accused-of-helping-border-crossing-migrants-in-arizona [https://perma.cc/8ZAD-GC7Q]. Worth noting is the tremendous amount of money that the government poured into prosecuting Warren: One of Warren's lawyers told the press after his first trial that "it wouldn't surprise him if Warren's prosecution cost the government upwards of $1 million." Devereaux, *supra* note 126.

128. Ryan Devereaux, *Border Patrol Launches Militarized Raid of Borderlands Humanitarian Aid Camp*, INTERCEPT (Aug. 2, 2020), https://theintercept.com/2020/08/02/border-patrol-raid-arizona-no-more-deaths/ [https://perma.cc/D6G4-P6Z5].

129. *About No More Deaths*, NO MORE DEATHS, https://nomoredeaths.org/about-no-more-deaths/ [https://perma.cc/H5UK-R6C9].

130. Adolfo Flores, *A Pastor Who Was Put on a Watchlist After Working with Immigrants Is Suing the U.S.*, BUZZFEED NEWS (July 9, 2019), https://www.buzzfeednews.com/article/adolfoflores/pastor-watchlist-immigrants-lawsuit [https://perma.cc/7M6A-ZQW8]; Kaji Douša, *I Prayed with Migrants. Now The Government Is Tracking Me*, BUZZFEED NEWS (Mar. 24, 2019), https://www.buzzfeednews.com/article/kajiDouša/opinion-i-prayed-with-migrants-now-the-government-is [https://perma.cc/PAP6-L2L8]. The court found that she had standing because of the chilling effect of the surveillance on her protected First Amendment activity. However, it denied her motion for a preliminary injunction because it found that she was unlikely to succeed on the merits of her First Amendment claims, including her retaliatory enforcement claim. Douša v. U.S. Dep't of Homeland Sec., No. 19-cv-1255, 2020 WL 434314, at *8 (S.D. Cal. Jan. 28, 2020).

131. *Id.* at *14–16.

132. *Id.* at *29.

protect noncitizen activists from the most potent form of retaliation that the government wields over them.

III.
THE LEGAL LANDSCAPE: IMMIGRANTS, THE FIRST AMENDMENT, AND RETALIATORY ENFORCEMENT

Historically, the lofty goals of the First Amendment have coexisted uncomfortably with the broad "plenary power" afforded to the federal government over immigration. Despite a consensus that noncitizens in the United States have First Amendment rights, courts are often hesitant to override the executive's broad power over immigration enforcement by providing remedies such as terminating removal proceedings.[133] Limitations on judicial review added to the Immigration and Nationality Act (INA) have further restricted courts' ability to enforce noncitizens' First Amendment rights.[134] Nor does the executive branch actively apply a constitutional lens to its own decision-making: The agencies responsible for adjudicating immigration cases, primarily immigration judges and the BIA, routinely decline to consider constitutional issues even when they are raised by the parties and largely abdicate their potential role in enforcing constitutional norms to the federal courts.[135]

A. The First Amendment in Removal Proceedings in the Twentieth Century

On one hand, the Supreme Court has squarely held that noncitizen residents possess First Amendment rights. The Court upheld the speech rights of Harry Bridges, a noncitizen resident and union organizer, when it overturned a contempt conviction for his publications in 1941.[136] But the federal government nevertheless attempted to deport him through a "concentrated and relentless crusade"[137] that included extensive investigation and even a congressional amendment to the INA.[138] When his deportation case reached the Court in 1945, the Court relied on its earlier opinion to hold that "[f]reedom of speech and of press is accorded

133. *See infra* Section III.a.

134. *See* Illegal Immigration Reform and Immigrant Responsibility Act § 306 (codified as amended at 8 U.S.C. § 1252 (2018)) (amending section 242 of the INA).

135. *See generally* Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485 (2018).

136. Bridges v. California, 314 U.S. 252, 276–78 (1941).

137. Bridges v. Wixon, 326 U.S. 135, 157 (1945) (Murphy, J., concurring).

138. *See id.* at 157–59 (chronicling the government's efforts to deport Bridges "because he dared to exercise the freedom that belongs to him as a human being and that is guaranteed to him by the Constitution").

[noncitizens] residing in this country,"[139] and has considered the matter "well-settled" since then.[140]

However, the precise scope of "[noncitizens] residing in this country" who can claim the full protection of the First Amendment is less than certain. The federal government's power over whom to admit, and whom to deport, is largely unconstrained as a "plenary power."[141] The plenary power in immigration law can be traced to the Court's sanction of the Chinese Exclusion Act as part of the government's inherent sovereign authority to "exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion."[142] That power evolved over the next century to place a heavy thumb on the scale in favor of the government in any action relating to immigration enforcement.[143] For instance, just a few years after *Bridges*, the Court upheld the deportation of Robert Norbert Galvan, a Mexican citizen who had lived in the United States for 36 years, on the basis of his former membership in the Communist Party.[144] Despite the First Amendment implications of political affiliation being a removable offense, the opinion failed to cite to either of the *Bridges* cases, and instead deferred to Congress's plenary power to determine who was deportable.[145] One—perhaps cynical—way to distinguish *Bridges* and *Galvan* is that the statutory ground of deportability was determined to apply to Galvan, but was determined not to apply to Bridges. In other words, the Court upheld Bridges' First Amendment rights in *Bridges v. California*, but those rights were not dispositive in protecting him from deportation in *Bridges v. Wixon*.[146]

Courts continued to struggle with balancing First Amendment rights and the plenary immigration power in the second half of the twentieth century. In the 1972 case of *Kleindienst v. Mandel*, the Court upheld the government's decision to deny an internationally known socialist a visa that would allow him to attend academic

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139. *Id.* at 148.

140. *See* Reno v. AADC, 525 U.S. 471, 497 (1999) (Ginsburg, J., concurring) (quoting *Bridges v. Wixon* for the proposition that the First Amendment's application to resident [noncitizens] is "well settled"); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) (holding that the Due Process clause applied to a resident [noncitizen] returning from abroad, and observing in a footnote that the First Amendment does as well); Dennis v. United States, 341 U.S. 494, 540 (1951) (Frankfurter, J., concurring) (admitting that the Court had "strained to interpret legislation" in *Wixon* "in order to limit its effect on *interests protected by the First Amendment*") (emphasis added).

141. *See generally* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (describing the origins and development of the plenary power doctrine in immigration law).

142. Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

143. Motomura, *supra* note 141, at 547; Peter Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 3 (1984).

144. Galvan v. Press, 347 U.S. 522, 532–33 (1954) (Black, J., dissenting); *see also In re* Galvan for Writ of Habeas Corpus, 127 F. Supp. 392, 393 (S.D. Cal. 1954).

145. Galvan, 347 U.S. at 531.

146. *See* Bridges v. Wixon, 326 U.S. 135, 156–57 (1945) (The Court found it "unnecessary . . . to consider the larger constitutional questions" challenging the legality of Bridges's detention because he did not meet the statutory requirement of being "affiliated" with the communist party).

conferences as a speaker.[147] Despite recognizing a protected interest of the audience members who wished to hear him, the Court declined to review the discretionary application of Congress's authority to exclude so long as there was a "facially legitimate" reason for the exclusion.[148] When rock star John Lennon challenged his exclusion in the courts as being retaliation for his activism, the Second Circuit overturned the agency's legal determination on statutory grounds and remanded without reaching the First Amendment claim.[149] But it included a word of warning that if the immigration judge discretionarily denied Lennon's application regardless, it would "proceed expeditiously to hear Lennon's claim" because "[t]he courts will not condone selective deportation based upon secret political grounds."[150] *Mandel* and *Lennon* thus supported the inference that executive discretion in immigration enforcement was at least somewhat cabined by the First Amendment, and that while judicial review would be exceptionally deferential to the executive, it was not nonexistent.

B. IIRIRA and AADC: A First Amendment Right without a Remedy?

Then, in 1996, Congress dramatically reshaped immigration law with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[151] Relevant to this Article, IIRIRA aggressively insulated removal decisions from judicial review.[152] It narrowed the avenues for judicial review of immigration decisions, including through the provision in 8 U.S.C. § 1252(g) that foreclosed review for any claim "arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders" except as provided in § 1252—meaning in a petition for review once a removal order was already final.[153]

The first major legal clash between noncitizens' First Amendment rights and § 1252(g) reached the Supreme Court in *Reno v. American-Arab Anti-Discrimination Committee (AADC)*.[154] A group of noncitizens who were affiliated with the Popular Front for the Liberation of Palestine sought to enjoin their deportation proceedings, claiming that the government had unconstitutionally targeted them

147. Kleindienst v. Mandel, 408 U.S. 753, 756–57, 770 (1972).

148. *Id.* at 769–70.

149. Lennon v. INS, 527 F. 2d 187, 195 (2d Cir. 1975).

150. *Id.*

151. *See generally* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C.); *see also AILA Doc. No. 98060458: AILA Press Release on IIRAIRA Reform*, AM. IMMIGR. LAWYERS ASS'N (June 4, 1998) https://www.aila.org/infonet/aila-press-release-on-iiraira-reform [https://perma.cc/9HR9-7N8S] (summarizing and criticizing some of the major changes to immigration law as a result of IIRAIRA).

152. *See* Illegal Immigration Reform and Immigrant Responsibility Act § 306.

153. 8 U.S.C. § 1252(g) (2018).

154. Reno v. AADC, 525 U.S. 471 (1999); *see also* Gerald Neuman, *Terrorism, Selective Deportation, and the First Amendment After* Reno v. AADC, 14 GEO. IMMIGR. L.J. 313, 313–14 (describing the background of AADC).

because of their membership in that group, in violation of their rights of speech and association.[155] While the case was moving through the lower courts, Congress passed IIRIRA, including § 1252(g).[156] The Supreme Court, which granted certiorari on the jurisdictional question only,[157] found that the intervening passage of § 1252(g) applied to the case and stripped its jurisdiction to hear the selective enforcement claim except as provided within § 1252, meaning, when reviewing a final order of removal.[158]

But the Court did not stop there.[159] It then rejected the plaintiffs' argument that waiting to raise the claim on judicial review of a final order, as required by § 1252(g), would not be constitutionally adequate to protect their speech rights and noted that "[a]s a general matter—and assuredly in the context of claims such as those put forward in the present case—a[] [noncitizen] unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation."[160] The majority pointed out that the same reasons that selective prosecution claims are so difficult in the criminal context were "greatly magnified" in the deportation context because of the national security interests of the government.[161] But the Court included an important disclaimer: "we need not rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome."[162]

C. The Evolution of Retaliatory Enforcement in the Criminal Context

Given the parallels to retaliatory arrests in the criminal law context,[163] a brief detour to discuss that area of the law is also in order. Selective, or retaliatory, enforcement occurs when a protected characteristic or action, such as race or protected speech, is a but-for cause of the government's enforcement of the criminal

155. Reno v. AADC, 525 U.S. at 473–74.

156. *See* Illegal Immigration Reform and Immigrant Responsibility Act § 306.

157. Neuman, *supra* note 154, at 319.

158. Reno v. AADC, 525 U.S. at 485–87. The version of § 1252(g) considered by the Court in *AADC* was slightly different from the current version. In 2005, it was amended as part of the REAL ID Act to include language making clear that it applied to all "statutory and nonstatutory" claims, and explicitly precluding habeas review. *See* Ragbir v. Homan, 923 F.3d 53, 65 (2d Cir. 2019) (describing how the REAL ID Act had modified the statute since *AADC*).

159. Arguably, it could have, in which case the broad statements about selective enforcement are mere dicta. *See* Neuman, *supra* note 154, at 321 (noting that the concurrence felt that the majority should not have addressed the selective enforcement claim, which had not been briefed, and that the dissent specifically referred to the majority's holding on selective enforcement as dicta).

160. Reno v. AADC, 525 U.S. at 488 (1999).

161. *Id.* at 489–91.

162. *Id.* at 491.

163. *See, e.g.*, Bello Reyes v. McAleenan, No. 19-cv-03630-SK, 2019 WL 5214051, at *3 (N.D. Cal. July 16, 2019), *rev'd and remanded sub nom.* Bello-Reyes v. Gaynor, 985 F.3d 696 (9th Cir. 2021) (applying incorrectly the *Nieves* retaliatory arrest standard to the revocation of an immigration bond).

law against them.[164] In 2018, the Court determined in *Lozman v. City of Riviera Beach* that probable cause did not necessarily defeat a claim for retaliatory arrest in a situation where the plaintiff alleged that the retaliation was part of a municipal policy to intimidate him.[165] It left open the question of whether probable cause would defeat such a claim for a "typical retaliatory arrest."[166] The next term, in *Nieves v. Bartlett*, the Court held that a plaintiff alleging retaliatory criminal arrest on the part of an individual officer must generally show the absence of probable cause for the underlying charge, as probable cause would defeat the but-for causal connection between the speech and the arrest.[167]

Nevertheless, *Nieves* included an exception "where officers have probable cause to make arrests, but typically exercise their discretion not to do so."[168] The Court provided jaywalking as an example of a crime that rarely results in arrest and would therefore allow a plaintiff to make the necessary showing that "he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."[169] But commentators have noted a flaw in that reasoning: that "framing the question around individuals who are 'similarly situated,' . . . risks some communities being better protected from retaliatory arrests than others"—particularly by exacerbating preexisting "patterns of economically and racially discriminatory policing."[170]

An evenhanded application of this "similarly situated" exception is even more elusive in the immigration context. Just as in the criminal context, immigration enforcement disproportionately impacts male immigrants[171] and Black

164. *See* Nieves v. Bartlett, 139 S. Ct. 1715, 1722 (2019) (in First Amendment context); Hartman v. Moore, 547 U.S. 250, 256 (2006) (same); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285–86 (1977) (same); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (in Equal Protection context).

165. 138 S. Ct. 1945, 1954 (2018).

166. *Id.*

167. 139 S. Ct. at 1723 (extending *Hartman*'s no-probable-cause requirement for selective prosecution claims to retaliatory arrest claims). Similarly, in a claim for retaliatory prosecution in violation of the First Amendment, the plaintiff must allege and prove an absence of probable cause for the underlying criminal charge. *Hartman*, 547 U.S. at 252.

168. *Nieves*, 139 S. Ct. at 1727.

169. *Id.*

170. *First Amendment—Freedom of Speech—Retaliatory Arrest*—Nieves v. Bartlett, 133 HARV. L. REV. 272, 277–78 (2019); *see also id.* at 279 ("This concern is exemplified by the majority's jaywalking example—jaywalking arrests are often made in a racially and economically discriminatory way. For example, in Jacksonville, Florida, black residents were *three times* as likely as white residents to get jaywalking tickets, and residents in poor neighborhoods were *six times* as likely to get tickets as compared to their wealthier counterparts.") (citing Radley Balko, *There's Overwhelming Evidence that the Criminal-Justice System Is Racist. Here's the Proof.*, WASH. POST (Sept. 18, 2018), https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof [https://perma.cc/DC6N-QY8F])).

171. Between 2002 and 2020, just over 5 million people were deported by ICE, and just over 4.5 million of them were men. *Latest Data: Immigration and Customs Enforcement Removals*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/remove/ [https://perma.cc/K92H-XLBY] (last visited Oct. 20, 2021).

immigrants,[172] thereby leaving them particularly vulnerable to retaliatory enforcement under a but-for standard. And just as "criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something,"[173] removability under today's immigration laws sweeps so broadly that the potential to enforce them is nearly always available.[174] Indeed, under the Trump administration, the lack of enforcement priorities and arbitrary enforcement decisions were strategically weaponized to send the message that no one is out of reach.[175] As one of Trump's Acting ICE Directors bluntly put it: "If you're in this country illegally . . . you should be uncomfortable, you should look over your shoulder. . . . No population is off the table."[176] If an administration purposefully eschews having any priorities, showing that an immigration enforcement action is "atypical" for retaliation purposes becomes essentially impossible.

172. A 2016 report found that although Black immigrants made up only 7% of the noncitizen population, they accounted for 10% of individuals in removal proceedings and 20% of individuals in removal proceedings based on criminal grounds, a disparity likely fueled by the over-policing of Black communities and racial disparities in the criminal justice system that creates entry points to immigration enforcement. *See* Jeremy Raff, *The 'Double Punishment' for Black Undocumented Immigrants*, ATLANTIC (Dec. 30, 2017), https://www.theatlantic.com/politics/archive/2017/12/the-double-punishment-for-black-immigrants/549425/ [https://perma.cc/A8EW-4A6R]. And in the initial months of the Biden administration, advocates pointed out that the carve-outs to the ill-fated "deportation moratorium" resulted in particularly severe consequences for Black immigrants. *See* Tina Vásquez, *Biden Spent Black History Month Deporting Black Immigrants. Where's the Outrage?*, TRUTHOUT (Feb. 17, 2021), https://truthout.org/articles/biden-spent-black-history-month-deporting-black-immigrants-wheres-the-outrage/ [https://perma.cc/VFK6-A3DZ].

173. *Nieves*, 139 S. Ct. at 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part).

174. *See* Neuman, *supra* note 154, at 342 (criticizing the *AADC* opinion for conflating "susceptibility to deportation" with a valid reason for deportation).

175. *See* Nessel, *supra* note 11, at 529; *see generally* K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878 (2019).

176. Stephen Dinan, *Thomas Homan, ICE Chief, Says Illegal Immigrants Should Live in Fear*, WASH. TIMES (June 13, 2017), https://www.washingtontimes.com/news/2017/jun/13/thomas-homan-ice-chief-says-illegal-immigrants-sho/ [https://perma.cc/88J7-5FFR] (quoting Homan's testimony to the House Appropriations Committee). Such threats are borne out by the numbers; in March 2015, 61% of detainees had a criminal history, but in April 2019, 64% did not, and the proportion of individuals whose only criminal record was something minor like a traffic violation or misdemeanor illegal entry similarly shot up under the Trump administration. *Growth in ICE Detention Fueled by Immigrants with No Criminal Conviction*, TRAC IMMIGR. (Nov. 26, 2019), https://trac.syr.edu/immigration/reports/583/ [https://perma.cc/343D-P7ND]; *ICE Detains Fewer Immigrants with Serious Criminal Convictions Under Trump Administration*, TRAC IMMIGR. (Dec. 6, 2019), https://trac.syr.edu/immigration/reports/585/ [https://perma.cc/H9KT-4WLL]. Even under the Biden administration, nearly 80% of detainees in ICE custody had no criminal history whatsoever in August 2021, although that increase is likely a reflection of the fact that most current detainees are new arrivals. *ICE Detainees*, TRAC IMMIGR., https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html [https://perma.cc/7NFK-YKAF] (last visited Oct. 20, 2021).

The Biden administration has altered that tone[177] and attempted to reinstate formal enforcement priorities.[178] In addition to providing guidelines for "typical" situations that warrant discretion, its current memo explicitly states that "[a] noncitizen's exercise of their First Amendment rights also should never be a factor in deciding to take enforcement action."[179] While that language is in fact stronger than the "but-for" test of the criminal context, proving whether retaliation was a factor in a given decision remains a practical difficulty for anyone seeking discretion under these guidelines or otherwise challenging an enforcement action. In addition, the administration's attempts to provide guidelines about when to exercise prosecutorial discretion have faced challenges in the courts from the start and may expect further legal hurdles.[180] Meanwhile, immigrant activists continue to risk the possibility of changing attitudes in future administrations and the whims of rank-and-file ICE officers whose individual discretion, while once again theoretically possible, remains variable and unpredictable.[181]

An important open question is whether the kinds of immigration enforcement described in Part II are more like the policy of municipal intimidation alleged in *Lozman*, which survived even the existence of probable cause, or the individual arrest by a single officer in *Nieves*, which could not. The district court in *Bello Reyes* thought the latter, determining that the existence of an otherwise valid reason for immigration enforcement precludes a retaliatory enforcement defense as a matter of law.[182] The Ninth Circuit disagreed, declining to extend *Nieves* to the "completely discretionary" immigration bond revocation context.[183] This narrow

177. For example, in a recent interview, the current DHS Secretary Alejandro Mayorkas condemned retaliatory immigration enforcement as being "unacceptable," but also indicated that he would need to investigate "the basis of the removal" in those cases and "giv[e] the agency the opportunity to communicate the facts that it believes are controlling." *Homeland Security Secretary Alejandro Mayorkas on Immigration*, at 22:32–27:19 CSPAN (Apr. 30, 2021), https://www.c-span.org/video/?511376-1/homeland-security-secretary-alejandro-mayorkas-immigration [https://perma.cc/6N8H-Q3RL].

178. Memorandum from Alejandro N. Mayorkas, Sec'y Homeland Sec., to Tae D. Johnson, Acting Dir. Immigr. & Customs Enf't, Guidelines for Enforcement of Civil Immigration Law (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf [https://perma.cc/88M9-URLP].

179. *Id.* at 5.

180. *See* Texas v. United States, No. 6:21-cv-00016, 2021 WL 3683913, at *63 (S.D. Tex. Aug. 19, 2021) (entering a nationwide injunction of an interim guidance "prioritizing the detention of certain [noncitizens] over others"), *partially stayed on appeal*, Texas v. United States, 14 F.4th 332, 338 (5th Cir. 2021) (staying the injunction so far as it prohibited ICE officers from relying on memos that prioritize "who is subject to investigative and enforcement action in the first place").

181. *Cf. Ten-Fold Difference in Odds of ICE Enforcement Depending Upon Where You Live*, TRAC IMMIGR., (Apr. 11, 2019), https://trac.syr.edu/immigration/reports/555/ [https://perma.cc/JEW6-4DN5] (describing wide variability in the probability that an individual will be detained by ICE between states under the Trump administration).

182. Bello Reyes v. McAleenan, No. 19-cv-03630, slip op. at 4–5 (N.D. Cal. July 16, 2019) (ordering the denial of a petition for writ of habeas corpus).

183. Bello-Reyes v. Gaynor, 985 F.3d 696, 701 (9th Cir. 2021).

holding therefore did not address whether probable cause for other enforcement actions, such as an initial arrest, can insulate an otherwise retaliatory decision.[184]

The deference to the government in both criminal and immigration retaliatory enforcement claims may be partially animated by remedy concerns, where the most meaningful type of relief could conflict with other governmental prerogatives, such as enforcement of criminal or immigration laws.[185] Professor Neuman reached a similar conclusion in his analysis of *AADC*: "This passage of the opinion reads like a remedial analysis; even assuming that the First Amendment constrains the Attorney General's enforcement discretion, dismissal of the deportation proceeding is not the proper remedy."[186] Many of those intermediate forms of relief, such as ordering release from detention or staying a proceeding, are obviously important and provide immediate relief. But they may not be enough to ensure that most noncitizens feel comfortable engaging in protected speech where the potential for deportation hangs over their heads. For most noncitizen activists, deportation—which often means separation from loved ones and banishment from the only home they have ever known—is the harshest form of retaliation that the government could possibly subject them to.[187]

D. "Outrageous Retaliation" and the Ragbir Decision

These issues of speech, judicial review, and executive discretion came to a head in the *Ragbir* case.[188] As described in Part II, Ravi Ragbir had been living in the United States based on ten years' worth of administrative stays of his removal order and had become a public figure based on his leadership in the New Sanctuary Coalition.[189] Because the government had the statutory power to deport Ragbir,[190] the Second Circuit ran headfirst into the language of *AADC* suggesting that Ragbir could not possibly state a claim "assert[ing] selective enforcement as a

184. *See id.* (declining to "define the precise extent of *Nieves*'s applicability in the immigration context").

185. *See, e.g.*, Ragbir v. Homan, 923 F.3d 53, 79 (2d Cir. 2019) (declining to overturn the removal decision altogether); Medina v. U.S. Dep't of Homeland Sec., 408 F. Supp. 3d 1224, 1226–28 (W.D. Wash. 2019) (critiquing ICE's actions but determining that it could not overturn the revocation of his DACA status).

186. Neuman, *supra* note 154, at 337.

187. *See* Padilla v. Kentucky, 559 U.S. 356, 364 (2010) ("[A]s a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."); INS v. St. Cyr, 533 U.S. 289, 322 (2001) ("Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.") (quoting 3 BENDER, CRIMINAL DEFENSE TECHNIQUES §§ 60A.01 (1999)).

188. *See Ragbir*, 923 F.3d at 63 ("The crux of the dispute between Ragbir and the Government is whether § 1252(g) applies: 1) to the Government's alleged conduct here; and 2) to constitutional claims.").

189. *See supra* Part II; *Ragbir*, 923 F.3d at 59.

190. *See Ragbir*, 923 F.3d at 64 ("[T]he Government unquestionably had statutory authority to execute Ragbir's final order of removal.").

defense against his deportation."[191] However, the Second Circuit distilled a balancing test to determine whether the government's conduct nevertheless fit into the "outrageous" exception alluded to in *AADC*: "the gravity of the constitutional right affected; the extent to which the plaintiff's conduct or status that forms the basis for the alleged discrimination is actually protected; the egregiousness of the Government's alleged conduct; and the plaintiff's interest in avoiding selective treatment, as balanced against the Government's discretionary prerogative."[192]

Applying this test, the Second Circuit determined that the government's alleged retaliation against Ragbir's speech had in fact been "outrageous."[193] Particularly important to that outcome was the political nature of Ragbir's speech and the fact that the retaliation came from the very agency he was criticizing.[194] But the court stopped short of authorizing the district court to overturn Ragbir's removal altogether on remand,[195] instead suggesting that "at least for the near future, the taint of the unconstitutional conduct could preclude removal," perhaps by requiring another two-year stay.[196]

Another groundbreaking aspect of the *Ragbir* decision was that it determined that the government's decision to execute Ragbir's removal order was inescapably within the scope of § 1252(g),[197] but that the Suspension Clause required his case to be reviewable on habeas anyway.[198] This part of the decision was soon cast into doubt by the Supreme Court, which vacated the Second Circuit decision and remanded for reconsideration in light of *Thuraissigiam*.[199] *Thuraissigiam* held that § 1252(e)(2)—a similar provision to 1252(g) that largely eliminates judicial review through habeas of removal orders for individuals in expedited removal

191. *Id.* at 68 (quoting Reno v. AADC, 525 U.S. 471, 488 (1999)).

192. *Id.* at 69.

193. *Id.* at 73.

194. *Id.* ("[Ragbir] has adduced plausible—indeed, strong—evidence that officials responsible for the decision to deport him did so based on their disfavor of Ragbir's speech (and its prominence).").

195. *Id.* at 79.

196. *Id.*

197. *Id.* at 64.

198. *Id.* at 78.

199. Pham v. Ragbir, 141 S. Ct. 227, 227 (2020) (mem.). The Second Circuit has since remanded to the district court to determine if the case is moot and to address the jurisdictional issue, if not. Ragbir v. Johnson, No. 18-1597 (June 29, 2021) (ordering that the case be remanded to the district court).

proceedings[200]—did not violate the Suspension Clause or due process.[201] The decision therefore casts doubt on the viability of habeas as an avenue for activists such as Ragbir to enforce their rights in federal court.[202]

Still, when the Supreme Court vacated *Ragbir* it did *not* overturn the Second Circuit decision on the merits of the applicability of the First Amendment to noncitizen activism and its balancing test for "outrageous" retaliation.[203] That balancing test could be applied in a variety of other procedural postures in federal court, including petitions for review,[204] habeas petitions for types of enforcement not listed in § 1252(g),[205] or litigation challenging agency policy generally rather than the outcome of a specific case.[206] But given the increasingly difficult path to

200. 8 U.S.C. § 1252(e)(2) (limiting habeas review for decisions made by immigration officers under § 1255(b), which authorizes expedited removal). Expedited removal is a streamlined version of removal proceedings usually not applicable to individuals such as the ones discussed in this Article, who have usually spent many years in the United States. *See* 8 C.F.R. § 235.3(b)(1)(ii) (2021) (making individuals "who have not established to the satisfaction of the immigration officer that they have been physically present in the United States continuously for the 2-year period immediately prior" subject to expedited removal).

201. U.S. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1964 (2020) ("[N]either the Suspension Clause nor the Due Process Clause of the Fifth Amendment requires any further review of respondent's claims, and IIRIRA's limitations on habeas review are constitutional as applied.").

202. The majority relied on a restrictive understanding of habeas relief as extending only to physical detention. *Id.* at 1970 ("While respondent does not claim an entitlement to release, the Government is happy to release him—provided the release occurs in the cabin of a plane bound for Sri Lanka.").

203. *Pham*, 141 S. Ct. at 227; Alina Das, *Deportation and Dissent: Protecting the Voices of the Immigrant Rights Movement*, 65 N.Y.L. SCH. L. REV. 225, 244 n.131 (pointing out that the government had asked the Supreme Court to overturn that portion of the Second Circuit decision as well).

204. Although the petition for review process may eventually result in federal court guidance for some cases, it has major limitations. To bring a petition for review at all, a removal order must be administratively final. 8 U.S.C. §§ 1252(b)(9), (g); *see, e.g.*, Ortiz-Alfaro v. Holder, 694 F.3d 955, 959 ("As long as administrative proceedings are ongoing . . . [the] removal order is not final. Accordingly, we lack jurisdiction . . . ."); *cf.* Humphries v. Various Federal USINS Emps., 164 F.3d 936, 945 (5th Cir. 1999) (dismissing a freestanding claim for retaliatory exclusion in violation of the First Amendment because it was not brought in a petition for review or a habeas petition). If the noncitizen is granted relief during removal proceedings, they cannot bring a petition for review, despite having suffered the injury of being placed in removal proceedings in violation of their First Amendment rights. Not only does that subject a noncitizen activist to the prolonged and demoralizing removal process, but it also ensures that by the time a federal court hears the claim, the agency will have found that person ineligible for relief, giving the government an interest in enforcing a removal order that is theoretically separate from the retaliation that sparked it. Nor is a petition for review available to individuals like Ragbir, whose activism and subsequent targeting for enforcement did not begin until years after he was ordered removed—and long after the time to petition for review had passed.

205. *See, e.g.*, Bello-Reyes v. Gaynor, 985 F.3d 696, 700 n.4 (9th Cir. 2021) ("The Government's argument that Bello's claim fails under [AADC] is inapposite. AADC forecloses selective prosecution claims only as to the three actions listed in 8 U.S.C. § 1252(g): the commencement of proceedings, adjudication of cases, or execution of removal orders.").

206. *See* NWDC Resistance v. Immigr. & Customs Enf't, 493 F. Supp. 3d 1003, 1010 (W.D. Wash. 2020) (distinguishing from the vacation of *Ragbir* on this ground).

raising a First Amendment retaliatory enforcement claim in the federal courts, developing a role for immigration courts in enforcing First Amendment rights—which has been nonexistent so far—is now more important than ever. The following Section addresses that possibility.

IV.
(OUTRAGEOUS) RETALIATION AS A REMOVAL DEFENSE

While the current treatment of First Amendment claims in immigration court leaves much to be desired, an analogy to the Fourth Amendment "widespread" or "egregious" standard[207] provides a roadmap for potential vindication of First Amendment rights. An immigration judge (IJ) could theoretically address a retaliation claim in a motion to terminate at the initiation of removal proceedings the same way they hear motions to suppress evidence for Fourth Amendment violations.[208] In doing so, IJs and the BIA could apply a heightened "outrageous" standard that requires termination of removal proceedings in the same way that those bodies handle Fourth Amendment suppression claims under a heightened "widespread" or "egregious" standard. I describe how that analogy could be applied and discuss how the *Ragbir* balancing test could help immigration courts define the "outrageous" retaliation standard.

A. The Fourth Amendment Analogy

In the 1984 case of *INS v. Lopez-Mendoza*, the Court ruled that the Fourth Amendment exclusionary rule did not apply in civil deportation proceedings, with reasoning that foreshadowed *AADC* by balancing the minimal deterrence of the rule where the executive "has already taken sensible and reasonable steps to deter Fourth Amendment violations by its officers" against the potential for enabling "ongoing violations of the law."[209] Much like *AADC*'s "outrageous" exception, *Lopez-Mendoza* left open a hypothetical window by noting:

> Our conclusions . . . might change, if there developed good reason

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207. *See infra* Part IV.a.

208. *See* U.S. DEP'T OF JUST., IMMIGRATION JUDGE BENCHBOOK, 2001 WL 34634649 (2021) ("Evidence obtained as the result of an illegal search or as the fruit of an illegal arrest . . . could . . . possibly result in suppression of the evidence if the government conduct was egregious."); *In re* Cervantes-Torres, 21 I. & N. Dec. 351, 353 (B.I.A. 1996) ("Initially, we agree with the respondent that the exclusionary rule would exclude any evidence resulting from his egregious arrest."); Irene Scharf, *The Exclusionary Rule in Immigration Proceedings: Where it Was, Where it Is, Where it May Be Going*, 12 SAN DIEGO INT'L L.J. 53, 54 (2010) (describing dismissal of an immigration case based on suppressed evidence). Similarly, "evidence obtained by coercion or other activity which violates the due process clause of the Fifth Amendment may be excluded." U.S. DEP'T OF JUST., IMMIGRATION JUDGE BENCHBOOK, 2001 WL 34634650 (2021).

209. INS v. Lopez-Mendoza, 468 U.S. 1032, 1139, 1046, 1050 (1984). *See also* Neuman, *supra* note 154, at 337–38 ("The reasoning [in *AADC*] is parallel to the reasoning in *United States v. Lopez-Mendoza*, in which the Court refused to apply the exclusionary rule as a remedy for Fourth Amendment violations in deportation proceedings.").

> to believe that Fourth Amendment violations . . . were widespread. Finally, we do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.[210]

Although suppression was denied to Lopez-Mendoza, the Court's reasoning was grounded in the immigration enforcement of that era. Since then, changes in the scope and severity of immigration enforcement have led to discussion of the Fourth Amendment violations by immigration enforcement both in immigration court and in the circuit courts.[211] The "widespread" or "egregious" exception has now been addressed in numerous decisions, many of which have ordered suppression on the grounds that a violation is either widespread or egregious.[212] For example, courts have found racially motivated police stops to be "egregious," although the standard for egregiousness differs among circuits.[213] The Third Circuit also found a widespread[214] Fourth Amendment violation in *Oliva-Ramos*, where the plaintiff alleged that ICE had a policy of conducting pre-dawn raids and "rounding up everyone in a home, without any particularized suspicion, in order to question all of the occupants about their immigration status" and remanded to the BIA for further proceedings.[215]

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210. *Lopez-Mendoza*, 468 U.S. at 1050.

211. Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, WIS. L. REV. 1109, 1133–34 (2008).

212. *See* Michael O'Brien, *"Widespread" Uncertainty: The Exclusionary Rule in Civil-Removal Proceedings*, 81 U. CHI. L. REV. 1883, 1893–94 (2014) (collecting cases).

213. *See id.* at 1894 ("The First, Second, and Ninth Circuits have developed divergent standards for determining whether a constitutional violation qualifies as egregious, and the remaining circuits have addressed egregiousness claims without articulating a standard."); Jonathan Hafetz, *The Rule of Egregiousness:* INS v. Lopez-Mendoza *Reconsidered*, 19 WHITTIER L. REV. 843, 843–44 (1998) (discussing the Ninth Circuit's treatment of racially discriminatory conduct as egregious); *see also* Oliva-Ramos v. Att'y Gen., 694 F.3d 259, 276–79 (3d Cir. 2012) (collecting cases discussing egregiousness). Whether the same widespread-or-egregious standard applies when the conduct in question was undertaken by a state or local officer, such as through a racially biased traffic stop, has been recently addressed by multiple circuits, with at least two squarely concluding it does. *See* Yoc-Us v. Att'y Gen., 932 F.3d. 98, 112 (3d Cir. 2019) ("[T]he Lopez-Mendoza exceptions also apply to state and local officers . . . ."); Sanchez v. Sessions, 885 F.3d 782, 790 (4th Cir. 2018) ("[I]n addition to federal officers, the 'egregious violation' exclusionary rule also applies in civil deportation proceedings to state and local officers."). *But see* Lopez-Gabriel v. Holder, 653 F.3d 683, 686 (8th Cir. 2011) (stating the court "doubt[ed] that even an egregious violation by a state officer would justify suppression of evidence in a federal immigration proceeding" without reaching the issue because the violation was not egregious).

214. The widespread exception has not been as thoroughly litigated. *See generally* O'Brien, *supra* note 212 (reviewing the literature and jurisprudence on the "widespread" exception and concluding that it should be akin to the "policy and practice" standard for municipal liability in actions under 42 U.S.C. § 1983).

215. *Oliva-Ramos*, 694 F.3d at 280–81; *see also* O'Brien, *supra* note 212, at 1901–02 (discussing treatment of the widespread standard to warrantless raids in immigration courts).

B. Motions to Terminate in Immigration Court

This analogy suggests a potential procedure for vindicating First Amendment rights in removal proceedings: raising a retaliatory enforcement claim in a motion to terminate at the initiation of removal proceedings before the immigration judge (IJ). A decision on suppression does not need to wait until the case arrives in a circuit court; IJs and the BIA can dismiss or remand cases where the only evidence stemmed from a Fourth Amendment violation that was widespread or egregious.[216] Likewise, an IJ could terminate proceedings at the outset if they constituted an outrageous violation of First Amendment rights.[217]

The activist Mora Villalpando tried this exact strategy, arguing in a motion to terminate[218] that ICE violated not only the First Amendment, but also an Executive Order issued by President Trump requiring all executive agencies to "respect and promote the freedom of persons . . . to engage in religious and political speech" to "the greatest extent practical."[219] The IJ denied the motion.[220] The decision recognized that the immigration court can terminate proceedings when ICE has violated a binding regulation that "serves a purpose of benefit to the [noncitizen]" and the violation might potentially prejudice the noncitizen in the outcome of removal proceedings—a standard itself borrowed from Fourth Amendment suppression cases[221]—and recognized the executive order as such a binding regulation.[222] However, it reasoned that ICE *had* "fully respected" Mora Villalpando's speech rights, but that her disclosure to the media of her undocumented status was not protected speech.[223]

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216. *See supra* note 208.

217. *See* 8 C.F.R. § 1240.1(a)(1)(iv) (2021) (giving IJs the authority "[t]o take any other action consistent with applicable law and regulations as may be appropriate."). Although Mora Villalpando's motion pointed to the Executive Order on the First Amendment as a binding regulation giving that would satisfy this broad standard, perhaps to sidestep the language of *AADC*, the First Amendment is arguably itself an "applicable law."

218. Resp't's Mot. to Terminate, *In re* Mora Villalpando, at 11 (EOIR Seattle Immigration Ct., Mar. 15, 2018), https://www.nationalimmigrationproject.org/PDFs/practitioners/our_lit/impact_litigation/2018_12Mar_mtt-mora-villalpando.pdf [https://perma.cc/4PX5-WHWV].

219. Exec. Order 13,798, 82 Fed. Reg. 21,675 (May 4, 2017).

220. Mora-Villalpando, Exec. Off. for Immigr. Rev., Seattle Immigration Court, at *5 (May 11, 2018) https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2018_19Jun_appB-ij-decision-redacted.pdf [https://perma.cc/Q47Z-AE2Q] [hereinafter Mora-Villalpando IJ Decision].

221. *Id.* at 2 (citing a suppression case, Sanchez v. Sessions, 870 F.3d 901, 912 (9th Cir. 2017)). Although the *Sanchez* opinion was later withdrawn, the BIA case it relied on for that standard, *Garcia-Flores*, also arose in the suppression context and the test it articulated remains good law. Garcia-Flores, 17 I. & N. Dec. 325, 329 (B.I.A. 1980). In fact, the BIA in *Garcia-Flores* went a step further, adding that "[w]here compliance with the regulation is mandated by the Constitution, prejudice may be presumed." *Id.*

222. Mora-Villalpando IJ Decision, *supra* note 220, at *4.

223. *Id.*

The holding that sharing one's immigration status publicly is an "apolitical admission," particularly in the context of discussing the injustice of that status,[224] is debatable. The IJ was remarkably forthright about the pragmatic concerns underlying that conclusion:

> [T]he Court finds an [undocumented immigrant] cannot insulate himself or herself from being placed in removal proceedings by publicly announcing his or her [undocumented] status, criticizing the government's immigration policy, and then claiming that any subsequent enforcement action against the [undocumented immigrant] constitutes retaliation . . . . If that was the case, everyone in the country without lawful immigration status could do the same thing and no one who had done so could be put in removal proceedings.[225]

That reasoning misunderstands the First Amendment violation. Mora Villalpando had not argued that she was immune from removal proceedings because she had criticized the government, she had argued that her criticism was a central and even explicit motivation for those removal proceedings.[226] ICE does not have to "turn a blind eye to a person currently violating the law" any time that person is a critic,[227] but it cannot institute removal proceedings in retaliation for that criticism. It also ignores that placing Mora Villalpando in removal proceedings had a symbolic function; in ICE's own words, it would "take away some of her clout."[228]

Of course, IJs specialize in determining removability and relief under immigration law,[229] not applying the nuances of the First Amendment or questioning the policies and practices that brought a particular respondent into their courtroom. They also lack the time to thoroughly consider constitutional issues in most cases,

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224. *Id.* at *5.

225. *Id.*

226. *See* Mora-Villalpando Mot. to Terminate, *supra* note 218, at 15 (describing the "causal connection" between Mora Villalpando's speech and ICE's decision to place her in removal proceedings).

227. Mora-Villalpando IJ Decision, *supra* note 220, at *5.

228. E-mails from Marc Moore, *supra* note 56.

229. This is, at least, what their day-to-day job requires. But commentators have pointed out that prior experience with immigration law is not currently a job requirement for new IJs, with serious implications for justice. *See* Nolan Rappaport, *No Experience Required: US Hiring Immigration Judges Who Don't Have Any Immigration Law Experience*, THE HILL (Feb. 3, 2020, 11:30 AM), https://thehill.com/opinion/immigration/481152-us-hiring-immigration-judges-who-dont-have-any-immigration-law-experience [https://perma.cc/XZ9Y-W9NG] (pointing out the lack of immigration experience of several newly appointed IJs). And record turnover, combined with increased hiring, has further limited on-the-job training and mentoring for new immigration judges who lack that experience. *See More Immigration Judges Leaving the Bench*, TRAC IMMIGR. (July 13, 2020), https://trac.syr.edu/immigration/reports/617/ [https://perma.cc/SDD6-T9XD] ("[R]ecord judge turnover means the Court is losing its most experienced judges, judges whose services would be of particular value in helping mentor the large number of new immigration judges now joining the Court's ranks.").

as immigration courts across the country continue to struggle with a massive backlog of removal proceedings.[230] As a result, many front-line IJs are unlikely to terminate proceedings based on the First Amendment without explicit guidance—or mandate—from the BIA or the circuits where they sit. Although it is well within the BIA's role as an arbiter of substantive immigration law to address constitutional issues raised in removal proceedings, it has long refused to do so and has repeatedly invoked its lack of competence to consider constitutional claims with little justification.[231] The Attorney General also has the power to issue precedential immigration decisions, a power that was aggressively utilized throughout the Trump administration.[232] If the current administration is indeed serious about reassuring noncitizen activists that they will not be deported for their speech, a precedential Attorney General decision terminating proceedings on the basis of outrageous First Amendment retaliation would be an effective first step. If federal courts, the BIA, or the Attorney General begin weighing in on what makes First Amendment retaliation outrageous, IJs will hopefully follow suit, much as they have in the context of suppression hearings that meet the heightened *Lopez-Mendoza* standard.[233]

In addition to being consistent with *AADC*, applying a heightened "outrageous" standard analogous to the "widespread" or "egregious" standard may also assuage some of the practical concerns articulated in the IJ's denial of Mora Villalpando's motion. If respondents had to meet a higher threshold of showing that the removal proceedings were *outrageous* retaliation for protected speech, IJs may be less nervous about intruding on ICE's wide prosecutorial discretion to commence and execute removal proceedings. It would also make clear that a retaliation defense to removal does not obligate ICE to "turn a blind eye"[234] to anyone

230. *See, e.g.*, *Immigration Court Cases Jump in June 2021; Delays Double this Year*, TRAC IMMIGR. (July 28, 2021), https://trac.syr.edu/immigration/reports/654/ [https://perma.cc/5Q7Q-U2EB] ("The number of new cases continues to severely outpace the rate at which judges can keep up, resulting in a growing backlog that is approaching 1.4 million."); *Immigration Court Struggling to Manage its Expanding Dedicated Docket of Asylum-Seeking Families*, TRAC IMMIGR. (Sept. 13, 2021), https://trac.syr.edu/immigration/reports/660/ [https://perma.cc/3KHY-65WP] (providing an example of how one IJ would only be able to spend 10 minutes per family at their initial hearings over an entire 8-hour day in order to keep up with the number of cases that had been assigned); *see also* Tal Kopan, *Outgoing SF Immigration Judge Blasts Courts as 'Soul Crushing,' Too Close to ICE*, S.F. CHRON. (May 18, 2021, 4:42 PM) https://www.sfchronicle.com/politics/article/Exclusive-Outgoing-SF-immigration-judge-blasts-16183235.php [https://perma.cc/MLG8-R8LG] (interviewing an outgoing IJ about his frustration over bureaucracy and lack of partiality in EOIR); *id.* ("'I just thought I was going to actually be a judge. . . . They're not real courts.'").

231. *See* Das, *supra* note 135, at 491 ("[T]he DOJ has utilized the BIA as its primary vehicle for developing substantive immigration law for more than sixty years."); *id.* at 511 ("[T]he BIA has never explained why it believes it lacks the authority to consider constitutional challenges . . . .").

232. *See* SARAH PIERCE, OBSCURE BUT POWERFUL: SHAPING U.S. IMMIGRATION POLICY THROUGH ATTORNEY GENERAL REFERRAL AND REVIEW 2 (2021), https://www.migrationpolicy.org/research/obscure-powerful-immigration-attorney-general-referral-review [https://perma.cc/63H2-HX27] (describing the referral power and the potential downsides of its use).

233. *See supra* Part IV.a.

234. Mora-Villalpando IJ Decision, *supra* note 220, at *5.

speaking out against it, only that ICE is constrained from using outrageous conduct to punish and chill First Amendment speech.

C. Defining "Outrageous"

Since immigration and federal courts alike are more likely to provide relief for First Amendment claims that meet a heightened "outrageous" standard, I next address what that standard could look like. The *AADC* court left open the possibility of "outrageous" retaliation with almost no detail on what would make retaliation rise to that level.[235] But the Second Circuit used *AADC*'s reasoning to create a balancing test for outrageousness in *Ragbir* between "the gravity of the constitutional right affected; the extent to which the plaintiff's conduct or status that forms the basis for the alleged discrimination is actually protected; the egregiousness of the Government's alleged conduct; and the plaintiff's interest in avoiding selective treatment, as balanced against the Government's discretionary prerogative."[236] This test provides a helpful framework that can serve as the basis for defining the heightened outrageousness standard. Caselaw applying the widespread and egregious exceptions likewise provides clues about what might make a retaliatory enforcement action outrageous.

1. The Government's Discretionary Prerogative

Beginning first with "the government's discretionary prerogative": as commentators and the *Ragbir* opinion pointed out, *AADC* is a case that should be read in light of the national security concerns present in that case.[237] One of the grounds for deportation in *AADC* was "terrorist activity,"[238] giving the case atypical national security overtones.[239] In contrast, the historic argument for broad executive power based on a connection between immigration and foreign policy is weaker in the context of noncitizens whose legal status as citizens of a foreign country does not reflect a lived relationship with that country.[240] A typical removal proceeding, especially for a noncitizen activist who has lived in this country for many

235. Reno v. AADC, 525 U.S. 471, 491 (1999).

236. Ragbir v. Homan, 923 F.3d 53, 69 (2d Cir. 2019).

237. *See id.* at 72 ("[N]ational-security and foreign-policy concerns about terrorism were primary in *AADC*, and the Court expressed misgivings that a court proceeding allowing inquiry into the 'real reasons' why the Government sought to deport the PFLP supporters would compromise intelligence sources and foreign relations.").

238. *See* Reno v. AADC, 525 U.S. at 474 (pointing out that some of the respondents were charged with removability on the basis of "terrorist activity" under 8 U.S.C. § 1227(a)(4)(B)).

239. Neuman, *supra* note 154, at 346 ("*AADC* was, unfortunately, an atypical case, in which deportation policy was closely related to foreign policy . . . .").

240. *See* Ramos v. Nielsen, 321 F. Supp. 3d 1083, 1129–30 (N.D. Cal. 2018) (distinguishing the executive decision to terminate Temporary Protected Status for individuals already within the United States from the exclusion of individuals abroad seeking relief from the Muslim ban in part because "[t]he government's decision to terminate TPS was not intended to induce the cooperation or action of a foreign government.").

years, has little or nothing to do with the foreign relations between the U.S. and their countries of birth.

Nor should the government's broad interest in "enforcing immigration laws" be treated as a *per se* justification, especially when an administration purposefully eschews any enforcement priorities.[241] The government does not have the capacity to fully enforce deportation laws.[242] Nevertheless, the lack of clear enforcement priorities "serves an immediate function by instilling fear in the undocumented population" that then declines to exercise its rights, whether in the form of applying for benefits, bringing civil rights actions, or publicly criticizing the government.[243] As Professor Nessel puts it, immigration enforcement has historically served to use fear to "creat[e] an obedient workforce and community."[244] Indeed, the current administration acknowledged in its prosecutorial discretion guidelines that:

> It is an unfortunate reality that unscrupulous employers exploit their employees' immigration status and vulnerability to removal by, for example, suppressing wages, maintaining unsafe working conditions, and quashing workplace rights and activities. Similarly, unscrupulous landlords exploit their tenants' immigration status and vulnerability to removal by, for example, charging inflated rental costs and failing to comply with housing ordinances and other relevant housing standards.[245]

Treating a noncitizen's removability as a *per se* justification for enforcement risks making enforcement "an instrument of these and other unscrupulous practices."[246]

Evaluating the government's prerogative also requires a precise and technical approach to evaluating *AADC*'s concern that providing relief would enable "an

241. *See* TRAC IMMIGR., *supra* note 181 ("The current Administration has not faced the practical reality that it does not have the capacity to suddenly find, detain, and deport some 11 million undocumented immigrants. By failing to face up to its own limitations and prioritize what it can accomplish, it has created a system where a myriad of hidden decisions actually determines who is targeted for immigration enforcement actions.").

242. *See* Memorandum from Alejandro Mayorkas, *supra* note 178, at 2 ("It is estimated that there are more than 11 million undocumented or otherwise removable noncitizens in the United States. We do not have the resources to apprehend and seek the removal of every one of these noncitizens."); Hiroshi Motomura, AM. IMMIGR. COUNCIL, *The President's Discretion, Immigration Enforcement, & The Rule of Law* 3 (Aug. 2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_presidents_discretion_immigration_enforcement_and_the_rule_of_law_final_1.pdf [https://perma.cc/JCJ3-ZEWG] (noting that in 2011 the director of ICE estimated that the agency had capacity to deport about 400,000 individuals per year, out of an undocumented population of around 11 million).

243. Nessel, *supra* note 11, at 529.

244. *Id.* at 530.

245. Memorandum from Alejandro Mayorkas, *supra* note 178, at 5.

246. *Id.*

ongoing violation" of law.[247] Unlawful presence is not, in itself, a crime.[248] Instead, a person considered "unlawfully present" may be subject to deportation as a civil penalty.[249] But the general public is often unfamiliar with the panoply of potential immigration statuses,[250] making precision all the more important when the extent of an "ongoing violation" (if any) is considered. For example, because Ragbir was a lawful permanent resident who had received a stay of removal, his continuing presence was not in violation of *any* law, civil or criminal.[251] Likewise, enforcement actions like detaining someone who is already in removal proceedings or revoking a bond do not change the legality of that person's underlying status.[252]

But regardless, the "ongoing violation" concern also contradicts the basic reasoning behind the defense of selective or retaliatory enforcement: that there are some reasons the government cannot rely on when enforcing the law, even if it

247. Reno v. AADC, 525 U.S. 471, 491 (1999) (emphasis omitted).

248. *See* Arizona v. United States, 567 U.S. 387, 407 (2012) ("As a general rule, it is not a crime for a removable [noncitizen] to remain present in the United States.").

249. *See* 8 U.S.C. § 1227(a)(1) (making individuals who were inadmissible at the time of entry or are otherwise present in violation of the immigration laws deportable); 8 U.S.C. § 1182(a)(9)(B)(ii) (2018) (defining unlawful presence as "if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled."). But even that definition is deceptively straightforward, as the statute goes on to exclude multiple situations, including the time when asylum applications are pending, from "unlawful presence." *See, e.g.*, *id.* at (a)(9)(B)(iii)(II).

250. *See Fact Sheet: Why Don't Immigrants Apply for Citizenship? There is No Line for Many Undocumented Immigrants*, AM. IMMIGR. COUNCIL (Oct. 7, 2021) https://www.americanimmigrationcouncil.org/research/why-don%E2%80%99t-they-just-get-line [https://perma.cc/TAG8-MQEM]; Jose Antonio Vargas, *Immigration Debate: The Problem with the Word Illegal*, TIME MAGAZINE (Sept. 21, 2012), https://ideas.time.com/2012/09/21/immigration-debate-the-problem-with-the-word-illegal/ [https://perma.cc/BT3Y-EA3G] ("For many undocumented people—there are 11 million in the U.S. and most have immediate family members who are American citizens, either by birth or naturalization—their immigration status is fluid and, depending on individual circumstances, can be adjusted."); *Shifting Public Views on Legal Immigration Into the U.S.*, PEW RSCH. CTR. (June 28, 2018), https://www.pewresearch.org/politics/2018/06/28/shifting-public-views-on-legal-immigration-into-the-u-s/ [https://perma.cc/7GL2-J2AG] (discussing a poll in which 35% of respondents in the general public thought—incorrectly—that "most" immigrants were not legally present).

251. Ragbir v. Homan, 923 F.3d 53, 72 (2d Cir. 2019).

252. *Cf.* Bello-Reyes v. Gaynor, 985 F.3d 696, 701 (9th Cir. 2021) ("While a probable cause requirement exists for initial immigration arrests, no equivalent benchmark exists where ICE is revoking bond rather than arresting in the first instance.") (citations omitted).

otherwise has the legal authority.[253] Even when vacating a removal order or dismissing ongoing proceedings might enable an ongoing *civil* violation, not doing so in a case of retaliation enables an ongoing *constitutional* violation, not just against the target of enforcement but also against other activists and the immigrant community who are directly and purposefully chilled as a result. The government's interest in enforcing immigration laws must still be subject to constitutional limits.[254]

2. The Plaintiff's Interest in Avoiding Selective Treatment

While the mere existence of valid immigration laws that could be enforced is on its own a weak contribution to the government's side of the scale in these cases, the interests of noncitizen activists "in avoiding selective deportation" are tremendously weighty.[255] Even the *AADC* court recognized that deportation, while nominally "not imposed as a punishment,"[256] is disproportionately harsh. In fact, *AADC* even reasoned that § 1252(g) was intended to protect and encourage the exercise of prosecutorial discretion precisely where deportation would be unreasonably severe.[257] The legal fiction that deportation is purely a nonpunitive sanction has only further eroded in the years since, with the Court acknowledging that it is "most difficult" to separate the penalty of deportation from the penalty of a given criminal conviction.[258] A growing body of literature has even suggested that a Fifth Amendment proportionality review should apply to deportation decisions

253. *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."); *see also* Nieves v. Bartlett, 139 S. Ct. 1715, 1731–32 (2019) (Gorsuch, J., concurring in part and dissenting in part) ("Everyone accepts that a detention based on race, *even one otherwise authorized by law*, violates the Fourteenth Amendment's Equal Protection Clause. . . . Like a Fourteenth Amendment selective arrest claim, a First Amendment retaliatory arrest claim serves a different purpose than a Fourth Amendment unreasonable arrest claim . . . .").

254. *Cf. Perry*, 408 U.S. at 597 ("For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which it could not command directly.' Such interference with constitutional rights is impermissible." (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958) (citation omitted)).

255. *See* Ragbir, 923 F.3d at 71–72.

256. Reno v. AADC, 525 U.S. 471, 491 (1999) ("While the consequences of deportation may assuredly be grave, they are not imposed as a punishment.").

257. *Id.* at 484 ("'To ameliorate a harsh and unjust outcome, the INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation.' . . . Since no generous act goes unpunished, however, the INS's exercise of this discretion opened the door to litigation in instances where the INS chose not to exercise it.") (quoting C. GORDON, S. MAILMAN, & S. YALE-LOEHR, 6 IMMIGR. L. PROC. § 72.03[2][h] (1998)) (emphasis omitted).

258. Padilla v. Kentucky, 559 U.S. 356, 366 (2015).

because deportation is sufficiently punitive.[259] In short, just because deportation is theoretically a civil penalty does not lessen an individual's interest in avoiding it. Indeed, the noncitizen activists in this Article have spoken out powerfully and personally about just how weighty their interest in remaining in the United States is.

3. The Gravity of the Constitutional Right and the Extent to Which the Plaintiff's Conduct is Actually Protected

The gravity of the First Amendment speech is also a heavy consideration in the types of cases addressed in this Article. Not only were the national security interests of the government atypically strong in *AADC*, the First Amendment rights asserted by the *AADC* plaintiffs—association with an organization labeled as a terrorist organization by the administration—occupied a lower position in the First Amendment hierarchy.[260] In contrast, the *Ragbir* court recognized that "Ragbir's speech implicates the apex of protection under the First Amendment" because it directly advocated political change on a matter of tremendous public concern.[261] It is particularly troubling to allow ICE unfettered discretion over the detention and deportation of noncitizen activists when ICE's enforcement policies are the exact matters of public policy and interest that Ragbir and the other activists described in this Article are speaking out against.[262]

The speech interest of noncitizen activists is not only at the core of the First Amendment—it is essential in the face of a democratic process that otherwise excludes them. The current immigration laws have resulted in a substantial population of individuals who have extensive ties to the United States, and are intimately affected by its policies large and small, but are generally excluded from providing

259. *See, e.g.*, Jason Cade, *Judicial Review of Disproportionate (or Retaliatory) Deportation*, 75 WASH. & LEE L. REV. 1427, 1451–56 (2018) (collecting examples in legislative history where Congress linked deportation grounds with punishment); Michael Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 424 (2012) (arguing that "removal orders are subject to judicial review on constitutional proportionality grounds").

260. Neuman, *supra* note 154, at 335–36. Further influencing that outcome, the associational rights chilled in that case were at least conceivably connected to the security concerns raised. *Id.* at 346.

261. Ragbir v. Homan, 923 F.3d 53, 69–70 (2d Cir. 2019).

262. *See* Texas v. Johnson, 491 U.S. 397, 411 (1989) ("Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values."); Neuman, *supra* note 154, at 346 ("Immigration officials should not be permitted to target [noncitizens] even undocumented [noncitizens] for removal because they participated in demonstrations against Proposition 187, or because they complained of mistreatment in a detention facility."). Where ICE retaliation responds only to criticism of ICE, it is akin to viewpoint discrimination, "an egregious form of content discrimination" that is presumptively forbidden even where speech may otherwise be constitutionally restricted. *See* Rosenberger v. Rector, 515 U.S. 819, 829 (1995).

input into the democratic process except through speech.[263] Noncitizens cannot vote or otherwise participate in the democratic process.[264] Meanwhile, the government has made citizenship an ever more difficult benefit to attain, even for people with deep roots and family members in this country.[265] Just a few such barriers include the public charge rule, which can prevent poor immigrants from adjusting status or sponsoring family members,[266] increased restrictions on

263. *See* Foley v. Connelie, 435 U.S. 291, 296–97 (1978) ("[I]t is clear that a State may deny [noncitizens] the right to vote, or to run for elective office. . . . [or] exclude [noncitizens] from jury service. . . . [T]he right to govern is reserved to citizens."). A potential exception occurs when noncitizens are allowed by local law to vote in local elections, such as for school boards, but such examples are few and far between in the United States. *See* Cindy Carcamo, *San Francisco Will Allow Noncitizens to Vote in a Local Election, Creating a New Immigration Flashpoint*, L.A. TIMES (Oct. 26, 2018), https://www.latimes.com/local/california/la-me-san-francisco-election-immigration-20181026-story.html [https://perma.cc/J2R7-3EDD] (describing a local measure to allow noncitizens to vote in school board elections and collecting examples of similar initiatives across the country); *see also* Kimia Pakdaman, *Noncitizen Voting Rights in the United States*, BERKELEY PUB. POL'Y. J., Mar. 2017, at 34, 36 (noting that ten Maryland cities allow noncitizen voting in local or school board elections and that Chicago allows green card and visa holders to vote in Local School Council elections); *see also* Jeffery C. Mays & Annie Correal, *New York Moves to Allow 800,000 Noncitizens to Vote in Local Elections*, N.Y. TIMES (Nov. 23, 2021), https://www.nytimes.com/2021/11/23/nyregion/noncitizen-voting-rights-nyc.html?smid=em-share [https://perma.cc/G3MC-5NMW] (discussing New York City's recent passage of the "Our City, Our Vote" measure allowing certain noncitizens to vote in local elections).

264. *See* Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 287–88 (D.D.C. 2011) (collecting cases that uphold laws excluding noncitizens from participation in the core processes of democratic self-governance).

265. *See, e.g.*, JEANNE BATALOVA, MARY HANNA, & CHRISTOPHER LEVESQUE, FREQUENTLY REQUESTED STATISTICS ON IMMIGRANTS AND IMMIGRATION IN THE UNITED STATES (2021), https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-2020 [https://perma.cc/XT8X-LQRE] (citing trends in naturalization applications from FY 2018 to FY 2019 and noting that "the number of denied petitions increased by 6 percent" and "average processing time increase[ed] from 5.6 months in FY 2016 to 9.9 months"); Martin Macias, Jr., *Feds Sued Over Citizenship Processing Backlog*, COURTHOUSE NEWS (Sept. 17, 2018), https://www.courthousenews.com/feds-sued-over-citizenship-processing-backlog/ [https://perma.cc/CT6X-877R] (describing FOIA litigation related to increased denials and delays in naturalization applications); *Increased Litigation for Denials and Delays on Naturalization Applications*, TRAC IMMIGR. (Jan. 22, 2019), https://trac.syr.edu/tracreports/civil/544/ [https://perma.cc/2BK5-4LEH] (reporting an accelerating increase in mandamus actions and appeals of denials of naturalization applications).

266. The government's interpretation of the "public charge" ground of inadmissibility has been the subject of significant change and litigation in recent years. *See Changes to Public Charge: Analysis and Frequently Asked Questions*, NAT'L IMMIGR. L. CTR. (Mar. 9, 2021), https://www.nilc.org/issues/economic-support/pubcharge/changes-to-public-charge-analysis-and-faq/ [https://perma.cc/J8HH-C44F]. However, being a "public charge" remains a statutory ground of inadmissibility. 8 U.S.C. § 1182(a)(4)(A) ("Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.").

humanitarian benefits like asylum,[267] denaturalization efforts,[268] and the ten-year bar on return for individuals who did not enter lawfully even if they are eligible to adjust status.[269]

Moreover, retaliatory immigration enforcement that also implicates Equal Protection and Due Process rights could weigh in favor of a making a claim of outrageousness. In *Plyler v. Doe*,[270] the Court struck down a law that excluded undocumented children from public schools on Equal Protection grounds, citing concerns about "the specter of a permanent caste of undocumented resident [immigrants], encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents."[271] Systematically chilling noncitizen speech through the threat of deportation impacts a discrete part of the U.S. population who are vulnerable to that enforcement: noncitizens and their immediate families.[272] That disparate impact adds an Equal Protection element that could weigh in favor of making ICE's retaliation-by-removal tactics even more outrageous.[273]

A potential counterargument that was raised by the IJ in Mora Villalpando's case is that noncitizens may engage in gamesmanship by speaking out just to avoid deportation.[274] Such an argument fails for a few reasons. First, there is no

267. DORIS MIESSNER, FAYE HIPSMAN, & T. ALEXANDER ALEINIKOFF, THE U.S. ASYLUM SYSTEM IN CRISIS: CHARTING A WAY FORWARD (2018), https://www.migrationpolicy.org/research/us-asylum-system-crisis-charting-way-forward [https://perma.cc/FMB3-LAQW].

268. *See Denaturalization Efforts by USCIS*, AM. IMMIGR. L. ASS'N (Apr. 29, 2020), https://www.aila.org/advo-media/issues/all/featured-issue-denaturalization-efforts-by-uscis [https://perma.cc/F6HM-QNSA] (describing the authority of USCIS to initiate denaturalization proceedings and noting that denaturalization referrals increased 600% under the Trump administration).

269. *Fact Sheet: The Three-Year and Ten-Year Bars*, AM. IMMIGR. COUNCIL (Oct. 28, 2016), https://www.americanimmigrationcouncil.org/research/three-and-ten-year-bars [https://perma.cc/84BH-AB4N].

270. Plyler v. Doe, 457 U.S. 202, 215 (1982).

271. *Id.* at 218–19.

272. Plyler held that undocumented individuals were not a "suspect class" for the purpose of Equal Protection analysis. *Id.* at 219 n.19. Nevertheless, it applied an arguably heightened scrutiny to the law in question, which regulated the children of undocumented parents. *Id.* at 220.

273. While Plyler's analysis was shaped by the interaction between Due Process and Equal Protection concerns, it is not the only case where multiple implicated constitutional rights tipped the scales in favor of a certain outcome. *See* Cade, *supra* note 259, at 1469.

274. Mora-Villalpando IJ Decision, *supra* note 220, at 5.

evidence any gamesmanship occurs.[275] Amorphous fears about what the immigrant community at large might be motivated to do should have no bearing on an as-applied constitutional defense. Next, retaliatory enforcement is a defense, not an immunity. The government remains free to litigate as an issue of fact whether it would have taken the same enforcement action in the absence of the protected speech.[276] But most importantly, because the First Amendment aims to encourage a robust marketplace of ideas,[277] such speech is not any less inherently valuable based on what motivates it. Rather, creating a sense of security for noncitizen activists to speak out and share their essential perspectives on a topic of national importance without fear of reprisal is *exactly* the goal of the First Amendment.[278]

4. The Egregiousness of the Government Conduct

Finally, the inclusion of "egregiousness of the government's conduct" as part of the *Ragbir* balancing test for outrageousness[279] suggests that conduct that is widespread or egregious in the Fourth Amendment context may also be outrageous in the First Amendment context. Some common themes that courts have found make a Fourth Amendment violation egregious include arrests based on

275. To the contrary, many noncitizens acknowledge a great deal of fear and apprehension about the decision to publicly disclose their undocumented status and engage in activism. *See, e.g.*, Juan Prieto, *Undocumented and Unafraid?*, CTR. FOR LATIN AM. STUD. U.C. BERKELEY (Feb. 15, 2017), https://clasberkeley.wpcomstaging.com/2017/02/15/undocumented-and-unafraid/ [https://perma.cc/FAZ5-TF5W] (describing incidents when fear of being targeted prevented him from speaking out or even attending classes, and saying, "I fear that being too critical of immigration policies might mark me as a threat to the nation. Or that perhaps I need to tone down my thoughts on certain issues."); Albert Sabaté, *The Rise of Being 'Undocumented and Unafraid'*, ABC NEWS (Dec. 4, 2012) https://abcnews.go.com/ABC_Univision/News/rise-undocumented-unafraid/story?id=17872813 [https://perma.cc/B5ST-WKDX] (quoting an undocumented activist about his decision to come out: "First, I thought only of my individual risk. I felt strongly that I was risking all of myself for the cause."); Angy Rivera, *DREAMer: Coming Out as Undocumented*, PROGRESSIVE MAG. (Nov. 14, 2014), https://progressive.org/magazine/dreamer-coming-undocumented/ [https://perma.cc/L5HJ-VAY8] (describing her own fear of coming out as undocumented and her mother's initial reaction: "My mom blankly stared at me, and then she accused me of wanting to put myself and our family at risk. I was going against all the warnings she had given me. . . . I saw that she believed the entire stigma attached to our undocumented status.").

276. This is akin to the but-for causation requirement in retaliatory arrest cases. *See* Nieves v. Bartlett, 139 S. Ct. 1715, 1722 (2019) ("It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must *cause* the injury.").

277. *See, e.g.*, Cohen v. California, 403 U.S. 15, 24 (1971) ("The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity . . . ."); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

278. *See* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 691 (1978) ("Free speech is an affirmative value—we are concerned with encouraging speech almost as much as with preventing its restriction by the government.").

279. Ragbir v. Homan, 923 F.3d 53, 70–71 (2d Cir. 2019).

unconstitutional racial profiling and the use of force, threats, or coercion.[280] Retaliatory enforcement that is used to deter protected speech would seem to meet these criteria because it is based on an unconstitutional motive. Several examples in this Article also include quid-pro-quo style threats and coercion, such as the ICE officials offering deferred action to Montrevil if he "kept his head down,"[281] warning Soto-Gutierrez's press colleagues to "tone down" their coverage of him, and pressuring Salazar for information about their fellow Occupy ICE organizers.[282] Others, such as the two-day manhunt for Montelongo that ended in ten armed ICE officers surrounding his home, include a disproportionate use of force, as well.[283]

In contrast, the concern about Fourth Amendment violations being widespread is rooted in the deterrent effect of the exclusionary rule, which is much more essential if the violations are widespread.[284] Concerns about deterrence of First Amendment violations are not generally part of the retaliatory enforcement balancing test, but perhaps they should be.[285] The First Amendment corollary to deterrence is the chilling effect because it brings into the analysis not only the removal proceeding at hand, but also the effect on third persons who are not parties to the case. Sending a message that ICE cannot retaliate against protected speech with impunity would not only deter future ICE retaliation, it would prevent the ongoing harm of First Amendment chill by giving noncitizen activists the security to participate in the marketplace of ideas. [286]

Additionally, if courts import some version of the "widespread" requirement into the outrageousness analysis for retaliatory immigration enforcement claims, it would make many of the arrests described in this Article more like the municipal policy of intimidation alleged in *Lozman*—which survived even the existence of probable cause—and less like the routine arrest described in *Nieves*, where

280. Scharf, *supra* note 208, at 62–66.

281. Montrevil Complaint, *supra* note 15, ¶¶ 58–59.

282. *Supra* notes 18–19, 55, 68, and accompanying text.

283. *Supra* notes 103–110 and accompanying text.

284. *See* Hudson v. Michigan, 547 U.S. 586, 604 (2006) (Kennedy, J., concurring) (agreeing that the violation of a knock-and-announce policy did not justify suppression in that case, but cautioning that "[i]f a widespread pattern of violations were shown, and particularly if those violations were committed against persons who lacked the means or voice to mount an effective protest, there would be reason for grave concern.").

285. At least one case drew this connection, albeit unsuccessfully, by arguing that evidence should be suppressed in an immigration hearing because it was obtained in a labor dispute, which the respondent argued was in violation of her First Amendment rights. Montero v. INS, 124 F.3d 381, 386 (2d Cir. 1997). The court rejected that particular suppression argument because "the exclusionary rule is applicable, if at all, only to deprivations that affect the fairness or reliability of the deportation proceeding." *Id.*

286. *See* NWDC Resistance v. Immigr. & Customs Enf't, 493 F. Supp. 3d 1003, 1017 (W.D. Wash. 2020) (finding organizational standing to challenge ICE's policy of selective enforcement where the organization's membership feared retaliation for speaking out or participating in the organization's activities).

probable cause defeats a retaliatory criminal arrest claim.[287] As the *Lozman* opinion described, the fact that the plaintiff necessarily had to show the existence of an official municipal policy or practice made all the difference as to whether a retaliatory arrest claim could survive the existence of probable cause, because unlike a single officer acting in retaliation, policies are "a particularly troubling and potent form of retaliation."[288] By extension, where ICE's pattern of retaliation aimed at noncitizen activism "is elevated to the level of official policy, there is a compelling need for adequate avenues of redress."[289] The government argued in *Ragbir* that treating any egregious retaliation as "outrageous" could open the floodgates to substantial litigation, and for that reason the Second Circuit declined to define the exact parameters of the exception.[290] But the outrageousness of retaliation isn't measured by its rarity; that would mean that an agency like ICE can escape review for its misconduct by scaling it up. An analogy to the *Lopez-Mendoza* line of cases and *Lozman* instead supports the idea that widespread violations of the constitution are more egregious, not less.

V.
CONCLUSION

Core political speech by noncitizen activists on the topic of immigration has undeniable First Amendment value. But when courts give an unnecessarily wide berth to the executive's immigration enforcement decisions, those rights remain unprotected. The "outrageous" exception contemplated in *AADC* and developed in *Ragbir* is one potential way to overcome the historic tendency of courts to defer to executive discretion in the realm of immigration and ensure meaningful protection of noncitizens' First Amendment rights. The balancing test established in *Ragbir* provides a starting point for practitioners to proactively develop the outrageous exception, which would in turn require termination of removal proceedings. Doing so would deter ICE retaliation against noncitizen activists, and would allow noncitizen activists to share their essential viewpoints without fear.

287. *Supra* notes 165–166 and accompanying text.
288. Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1954 (2018).
289. *Id.*
290. Ragbir v. Homan, 923 F.3d 53, 73 (2d Cir. 2019).