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Deportation and Dissent: Protecting the Voices of the Immigrant Rights Movement

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PROTECTING THE VOICES OF THE IMMIGRANT RIGHTS MOVEMENT

In January 2018, federal immigration officials arrested two men in New York City and swiftly transferred them to a prison in Miami, Florida, for immediate deportation. The agency responsible, U.S. Immigration and Customs Enforcement (ICE), claimed that it was merely enforcing old deportation orders against the noncitizens, Jean Montrevil and Ravi Ragbir. Years prior to their arrest, both men had been authorized by ICE to stay and work in the United States through formal orders of supervision, and they had since become prominent immigrant rights activists. In 2007, Montrevil co-founded New Sanctuary Coalition (NSC), a multi-faith non-profit organization dedicated to advancing immigrant rights, and Ragbir faced deportation to Haiti.


4. See Nick Pinto, Trump Banished Immigration Rights Activists for Speaking Out. He’s Suing ICE to Come Back, THE INTERCEPT (Jan. 16, 2020), https://theintercept.com/2020/01/16/jean-montrevil-deportation-first-amendment/?comments=1 [hereinafter Trump Banished Immigration Rights Activist] (reporting that Montrevil had lived under an order of supervision since 2005); see also Press Release, Just. for Ravi Ragbir, supra note 3 (“[Ragbir received] an order of supervision in 2008.”). Pursuant to an order of supervision, ICE may require individuals to “report to a specified officer periodically.” 8 C.F.R. § 241.5(a)(1) (2021). At these supervision appointments, often referred to as “check-ins,” individuals may be required to answer questions about their cases or provide other information. See Tiziana Rinaldi, As Immigration Detention Soars, 2.3 Million People Are Also Regularly Checking In With Immigration Agents, THE WORL D (May 23, 2017), https://www.pri.org/stories/2017-05-23/immigration-detention-soars-23-million-people-are-also-regularly-checking (describing ICE supervision appointments). Orders of supervision are “given to people who are awaiting a court hearing or final deportation order.” 5 Common Questions About Orders of Supervision, LAW OFF. OF GAIL SEERAM, https://myorlandoimmigrationlawyer.com/5-common-questions-about-orders-of-supervision (last visited Apr. 17, 2021). Supervision orders can last months or even years while an individual’s case is pending. Id.

became its executive director. Ten years later, ICE officials planned an operation to deport the two men on the same day in January 2018. Montrevil was subsequently deported, but Ragbir secured release from detention and challenged his deportation on First Amendment grounds.

To many, ICE’s professed “business as usual” rationale for targeting the two men in one operation, and on the same day, rang hollow. When Ragbir’s First Amendment lawsuit reached the U.S. Court of Appeals for the Second Circuit in 2019, the court concluded that “[a] plausible, clear inference is drawn that Ragbir’s public expression of his criticism [of ICE], and its prominence, played a significant role in the recent attempts to remove him.” In what seem like additional measures of retaliation, immigration officials continue seeking Ragbir’s deportation.

Throughout the country, federal immigration officials have targeted immigrant rights activists for arrest, detention, fines, and deportation. In the process, authorities have surveilled organizations, churches, and rallies organized and attended by citizens and noncitizens alike, and have tracked protected political speech. In some instances, they have surveilled and questioned U.S. citizens affiliated with the immigrant rights movement—community organizers, lawyers, clergy, and journalists. In one case,


9. See supra note 2.

10. See, e.g., Bekiempis, supra note 2 (“ICE can spin these numbers all it wants, but the fact is we’re seeing a rash of instances where immigrants who pose zero threat are being targeted and, coincidentally, they happen to be community leaders.”).


13. See infra Part I.


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authorities pursued a federal criminal prosecution against humanitarian aid workers who gave immigrants water and care in the desert.\textsuperscript{16} All told, more than one thousand instances of federal government retaliation against immigrant rights activists have been documented.\textsuperscript{17}

As immigration officials contend, the First Amendment does not constrain their authority to deport because the courts generally lack the power to review or prevent their deportation decisions.\textsuperscript{18} Further, federal immigration officials do not consider themselves accountable to any other administrative or legislative body when allegations of retaliation arise.\textsuperscript{19}

This article asserts that federal government retaliation against immigrant rights activists poses a severe threat to freedom of speech and the democratic values protected by the First Amendment. Part I describes the recent pattern of retaliation against immigrant rights activists in the United States and its threat to the vibrancy of immigration policy debate. Part II explores how immigrants have been particularly vulnerable to retaliation, by discussing legal precedent and identifying protective mechanisms that have eroded over time. Part III outlines measures that can be taken to protect immigrant voices through robust administrative, legislative, and judicial oversight. Part IV concludes this article.

\section{Retaliation Against Immigrant Rights Activists}

The United States is home to forty-four million immigrants, with an estimated 55 percent lacking U.S. citizenship.\textsuperscript{20} More than 16.7 million people live in mixed-status homes, where at least one family member is undocumented.\textsuperscript{21} Since the last

\begin{thebibliography}{99}
\bibitem{Pinto} Nick Pinto, \textit{Across the U.S., Trump Used ICE to Crack Down on Immigration Activists}, The Intercept (Nov. 1, 2020), https://theintercept.com/2020/11/01/ice-immigration-activists-map/.
\bibitem{Vitiello} \textit{See, e.g.}, Brief for Defendants-Appellees \textit{passim}, Ragbir v. Vitiello, 923 F.3d 53 (2d Cir. 2019) (No. 18-1597); Brief for Appellees-Respondents \textit{passim}, Rojas v. Moore, No. 19-12438 (11th Cir. Oct. 25, 2019); Answering Brief for Respondents-Appellees \textit{passim}, Bello-Reyes v. Gaynor, 985 F.3d 696 (9th Cir. 2021) (No. 19-16441). \textit{See generally infra Part II.A.}
\bibitem{Budiman} \textit{See infra Part II.B.}
\end{thebibliography}
major overhaul of immigration law in 1996, deportations have skyrocketed—from almost seventy thousand in fiscal year 1996 to 267,000 in fiscal year 2019.

Immigrants and their communities have opposed increasingly antagonistic policies targeting noncitizens. In 2006, hundreds of thousands of immigrants marched in cities across the country, protesting a bill that would have criminalized undocumented status. Their voices—from the streets and in the halls of Congress—were critical to defeating the bill in the Senate. In 2012, after more than a decade of organizing around legislation to afford undocumented youth a path to citizenship, immigrant activists also successfully urged the Obama administration to create the Deferred Action for Childhood Arrivals program, commonly known as DACA.

The DACA program has protected hundreds of thousands of young people from deportation and provided them access to work authorization.


25. See Gonzalez, supra note 24 (internal quotations omitted) (“The only political avenue that we had available to us was to take to the politics of the street. We had to show our power, our capability manifested by our numbers.”).

26. See, e.g., Julia Preston & Helene Cooper, After Chorus of Protest, New Tone on Deportation, N.Y. T I M E S (June 17, 2012), https://www.nytimes.com/2012/06/18/us/politics/deportation-policy-change-came-after-protests.html (detailing immigrant student sit-ins and hunger strikes throughout the nation prior to DACA’s passage); Gonzalez, supra note 24 (“[T]he [2006] marches were crucial in creating an opening for initiatives such as [DACA].”).

Immigrant activists also made sizable gains at the local level during this same period. For example, they advocated policies to limit local cooperation with federal immigration enforcement and to expand access to state programs like municipal IDs and language assistance. Without the right to vote, immigrant activists have instead relied on their voices to influence political leaders and to organize voting family members and neighbors to defeat anti-immigrant politicians in local elections. This sustained activism has led to the passage of “sanctuary” or “welcoming” legislation in states and municipalities across the country.

The 2016 election of Donald Trump, who ran on an anti-immigration platform, spurred new protest and activism. Citizens and noncitizens alike protested the administration’s so-called “Muslim ban,” family separation policies, the gutting of asylum protections, the expansion of raids in “sanctuary cities,” and other anti-immigrant policies that “got many Latino voters in the polls.” Alice Speri, A County Sheriff’s Election in North Carolina Has Become a Referendum on ICE’s Deportation Machine, The Intercept (Apr. 27, 2018), https://theintercept.com/2018/04/27/ice-287g-mecklenburg-county-sheriff-election/ (reporting that “[t]he Trump era . . . has made resistance to federal immigration enforcement a central issue in some municipal elections”).

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U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca (Feb. 4, 2021). DACA applicants must meet certain requirements under several categories, including age, timing of arrival into the United States, lawful immigration status, education, and criminal history. Id. DACA “protection lasts for two years at a time, and is renewable.” Dickerson, supra. Participants receive “a range of benefits,” including the right to remain in the United States, work permits, “health insurance from employers who offer it,” and drivers’ licenses. Id.


immigration policies. The vulnerability of immigrant activists directly impacted by these policies was exposed in 2017, when the Trump administration “took the shackles off” of ICE. A spike in enforcement actions against them quickly followed, and with it, a chilling effect across the immigrant rights movement.

A. The Targets

On February 8, 2017, shortly after President Trump took office, ICE detained Guadalupe García de Rayos, a mother of two and a member of Arizona-based immigrant rights group Puente, at a routine supervision appointment. Although Puente members attempted to block the van transporting her for deportation, ICE successfully deported García de Rayos to Mexico later that week. Believed to be one of the first people to be deported under the Trump administration, her story made national headlines.


34. Nicholas Kulish et al., Immigration Agents Discover New Freedom to Deport Under Trump, N.Y. Times (Feb. 25, 2017), https://www.nytimes.com/2017/02/25/us/ice-immigrant-deportations-trump.html (“The Trump administration’s far-reaching plan to arrest and deport vast numbers of undocumented immigrants has been introduced in dramatic fashion over the past month. And much of that task has fallen to thousands of ICE officers who are newly emboldened, newly empowered and already getting to work.”).

35. See discussion infra Part I.A.


37. See She Showed Up Yearly, supra note 36 (illustrating one man’s effort to stop García de Rayos’ deportation by tying himself to a wheel on ICE’s van).

At first, immigrant rights organizations feared that ICE was poised to revoke orders of supervision for all individuals who, like García de Rayos, had received deportation orders years ago. Soon, however, a different pattern emerged. A significant number of those targeted for deportation, including García de Rayos, had openly criticized federal immigration authorities. Of the 2.9 million people under ICE supervision, and the millions more who were potentially deportable, officials focused their resources on a chosen few. Those who spoke out for immigrant rights and against deportation policies—often for years without reprisal—suddenly faced federal investigation, surveillance, fines, arrest, detention, and deportation. Even U.S. citizens who had advocated for immigrant rights faced investigation, surveillance, interrogation, travel restrictions, and—in at least one case—criminal prosecution.

i. Immigrants Who Speak Out and Protest

Early in the Trump administration, federal immigration officials began taking abrupt actions against activists who made public statements at rallies or press conferences. One of the first targeted in this manner was Daniela Vargas, a DACA recipient who, in 2017, spoke at a press conference about a home raid in which her


39. See She Showed Up Yearly, supra note 36. García de Rayos received a deportation order in 2013. Id. However, instead of carrying out the order, the government “merely require[d] her to check in periodically” at supervision meetings. Id. Although she “was always a candidate for deportation, . . . as a matter of practicality, the Obama administration had focused its finite resources on removing the most serious criminals.” Id.


43. See, e.g., Ryan Devereaux, Bodies in the Borderlands, The Intercept (May 4, 2019), https://theintercept.com/2019/05/04/no-more-deaths-scott-warren-migrants-border-arizona/ (highlighting the humanitarian aid organization No More Deaths and reporting that its activist Scott Warren was arrested and indicted on “two counts of harboring and one count of conspiracy” and faced “up to 20 years in prison”).
father and brother were detained. Immediately after Vargas addressed the conference, ICE officials arrested and detained her, despite her pending application for DACA renewal. She was released after almost two weeks in detention.

ICE also detained Baltazar “Rosas” Aburto Gutierrez in 2017, after he condemned his partner’s deportation to the press. Gutierrez was later released on bond and is still in removal proceedings.

Federal immigration officials have also targeted protesters. In 2017, DACA applicant Claudia Rueda was arrested by Border Patrol agents outside of her home in Los Angeles, just six days after she led protests demanding the release of her mother from immigration detention. Rueda’s DACA application was denied later that year, despite her eligibility. In 2018, prominent immigrant rights and reproductive health activist Alejandra Pablos was detained at a routine supervision appointment after her arrest in a nonviolent anti-ICE protest earlier that year. In 2020, several noncitizens were also arrested during a series of Black Lives Matter protests and transferred into ICE custody.


45. Id.


50. Id. (“U.S. Atty. Gen. Jeff Sessions announced the [DACA] program would cease accepting new applications in September 2017, kicking off a series of court battles. . . . Rueda first applied for DACA protection in July 2017, prior to Sessions’ announcement, so she would have been eligible at the time.”).


Retaliation against immigrants protesting in detention centers has also been widespread. In 2019, following the suicide of asylum-seeker Roylan Hernandez-Diaz at Richwood Correctional Center in Louisiana, twenty immigrants at the facility wrote “Justice for Roylan” on their shirts and refused to eat at mealtime; guards beat them, which resulted in at least one hospitalization.\(^{53}\) That same year, in Farmville Detention Center in Virginia, immigrant detainees refused to eat to protest poor conditions and restrictions on social visitations.\(^{54}\) The guards pepper-sprayed them and placed some in solitary confinement.\(^{55}\)

### ii. Immigrant Voices in the Arts and Journalism

ICE’s actions demonstrate a particular sensitivity to public perception of the agency. In January 2019, *The Infiltrators* premiered at the Sundance Film Festival in Salt Lake City, Utah.\(^{56}\) The documentary highlights activist Claudio Rojas, whom ICE had detained several years prior and later released under an order of supervision.\(^{57}\) Just before Rojas was to speak at the film’s Miami premiere, ICE revoked his order of supervision and deported him to Argentina, separating him from his wife of thirty-three years, their children, and a grandchild.\(^{58}\) In May 2019, ICE arrested and detained activist José Bello, thirty-six hours after he was recorded at a public reading of *Dear America*, an original poem in which he criticized ICE.\(^{59}\) Bello was detained until August 2019, when members of the National Football League contributed to the $50,000 bond set for his release.\(^{60}\)

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54. *Id.* ("[D]etainees became concerned over an outbreak of the mumps that infected at least 24 people this year.").

55. *Id.*


Noncitizen journalists have also been frequently targeted. In late 2017, ICE revoked parole for Emilio Gutiérrez Soto, an award-winning Mexican journalist who sought asylum from Mexico several years prior, and arrested him and his son at a routine supervision appointment.61 While accepting the John Aubuchon Award for Press Freedom from the National Press Club (NPC) earlier that year, Gutiérrez Soto had criticized U.S. asylum policy and its cruel treatment of asylum seekers.62 His subsequent arrest prompted anti-ICE protests and subjected ICE to negative media attention from fellow journalists.63 When the NPC Executive Director Bill McCarren expressed similar concern to ICE officials, he was told to “tone it down.”64 A federal court later concluded that Soto had “offered enough evidence to create a genuine issue of material fact regarding whether [ICE] violated [his] First Amendment rights.”65

Similarly, in April 2018, ICE detained Manuel Duran Ortega, a well-known member of the regional Memphis press.66 During his Facebook Live broadcast of a protest against the Memphis Police Department’s collaborations with ICE, local police officers arrested Ortega and transferred him into ICE custody.67 Although local criminal charges against him were dismissed two days later, Ortega was detained for fifteen months, pending deportation, before his release.68

iii. Immigrant Organizing

Leaders of prominent immigrant rights organizations have been targeted, too. As recounted earlier in this article, ICE detained NSC Co-Founder Montrevil and Executive Director Ragbir in January 2018.69 Further indicating ICE’s tendency to

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62. Id.

63. Id.


68. See Goodman, supra note 66 (outlining ICE’s actions against Ortega and noting that his April 2018 criminal charges of “disorderly conduct and blocking a passageway or highway” were “pretext to deport him”); see also Adrian Sainz, Spanish-Language Reporter Released From Immigration Custody, AP News (July 11, 2019), https://apnews.com/article/d444c9f25b264e22998031125ce296f (adding that Ortega was arrested in Memphis, Tennessee but detained in Louisiana and Alabama).

69. See Iannelli, supra note 1.
target and silence its critics through deportation, the arresting officer repeatedly referred to Montrevil and Ragbir’s past media statements and emphasized their negative portrayals of the agency, prior to and during their arrests.70

In Washington state, ICE also targeted Maru Mora-Villalpando, executive director of La Resistencia, an anti-deportation organization.71 For years, she had been meeting with federal immigration officials to advocate for changes to detention policies, and spoke regularly in the media to publicize detainee hunger strikes and other local protests.72 In December 2017, Mora-Villalpando received a Notice to Appear for removal proceedings,73 which noted her “extensive involvement with anti-ICE protests and Latino advocacy programs.”

Likewise, Migrant Justice drew the ire of ICE in 2013 when it successfully campaigned for state driver’s licenses for undocumented immigrants.75 ICE subsequently planted a civilian informant within the farmworker organization,76 and proceeded to arrest and detain, and in some cases deport, nearly two dozen Migrant

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70. Ragbir v. Homan, 923 F.3d 53, 60, 70–71 (2d Cir. 2019), vacated sub nom., Pham v. Ragbir, 141 S. Ct. 227 (2020) (mem.). New York City Field Deputy Director Scott Mechkowski expressed resentment over Ragbir and Montrevil’s negative public statements about ICE, and the public disrespect that the agency had received because of these statements. Id. He also expressed frustration over the “prominence” of Ragbir’s case and his desire to get Montrevil to stop making public statements about ICE. Id. As Montrevil was being detained, Mechkowski told him: “[Y]ou don’t want to make matters worse by saying things.” Id. (emphasis omitted) (citation omitted).

71. See Ice Serves Deportation Notice on Undocumented Leader for Organizing Detained Immigrants, Mijente (Jan. 16, 2018), https://mijente.net/2018/01/maruversusice/ (pointing to Mora-Villalpando’s leadership at La Resistencia as the basis for ICE targeting). La Resistencia was formerly known as the Northwest Detention Center Resistance. Alex Garland, Northwest Detention Center Resistance Celebrates Five Years, S. Seattle Emerald (May 8, 2019), https://southseattleemerald.com/2019/05/08/northwest-detention-center-resistance-celebrates-five-years/.

72. Sacchetti & Weigel, supra note 42.


Justice members in 2016 and 2017. In 2019 and 2020, ICE sent targeted letters to prominent members of the National Sanctuary Collective, notifying them of the agency’s intent to levy hundreds of thousands of dollars in civil immigration fines against them for their failure to depart the United States.

iv. Immigrant Witnesses, Complainants, and Plaintiffs

Over the last several years, ICE has also retaliated against immigrant witnesses, complainants, and plaintiffs in cases alleging abuse or other unlawful conduct. In 2019, ICE arrested and deported Delmer Joel Ramirez Palmar, a construction worker and a witness in a federal workplace safety investigation into a fatal construction accident in Louisiana, who became a plaintiff in a lawsuit against the developer.

In 2020, ICE deported Héctor García Mendoza, just two days after he became a plaintiff in a lawsuit against federal immigration officials and a private prison warden for failing to protect immigrant detainees from COVID-19. That same year, when a whistleblower nurse reported forced hysterectomies and other unwanted gynecological procedures against immigrant women held at Irwin Detention Center in Georgia, ICE began deporting those women. But for the intervention of a federal court, ICE would have also deported Gaspar Avendaño Hernandez, a key witness to the shooting of his partner’s son by an ICE officer during a botched raid of his home.

77. See Holpuch, supra note 75 (“At least 20 Migrant Justice members were . . . detained by [ICE].”); see also Colin Flanders, ICE Agrees to Stop Deportations of Three Migrant Justice Activists, SEVEN DAYS (Oct. 28, 2020), https://www.sevendaysvt.com/OffMessage/archives/2020/10/28/ice-agrees-to-stop-deportations-of-three-migrant-justice-activists (reporting that at least two arrests resulted from a civilian informant’s work with ICE).


v. U.S. Citizens Who Advocate for Immigrant Rights

In 2018, the Trump administration imposed new restrictions on asylum seekers at the southern border.\(^83\) News then emerged that federal immigration officials had been compiling a dossier of lawyers, journalists, clergy, and organizers crossing the border to address the dire circumstances facing asylum seekers encamped in Mexico.\(^84\) Many individuals subsequently stopped and interrogated at the border were U.S. citizens.\(^85\) For example, in 2019, federal immigration officials interrogated and revoked expedited border crossing privileges accorded to U.S. citizen Rev. Kaji Douša, a faith leader affiliated with the NSC who ministered to asylum seekers encamped in Tijuana.\(^86\) Federal immigration officials had also reportedly collected data on immigrant rights rallies deemed “anti-Trump” by following affiliated social media accounts and surveilling large public gatherings.\(^87\) A private firm collected similar data on the hundreds of 2018 demonstrations that took place across the country in response to family separations, and later turned that data over to the Department of Homeland Security (DHS).\(^88\)

Perhaps the most aggressive example of the targeting of U.S. citizens is the criminal prosecution of several volunteers with No More Deaths, an organization that provides humanitarian assistance to people crossing the desert near the southern border.\(^89\) For many years, thousands of bodies have been found in the desert; those


\(^{84}\) See, e.g., Ryan Devereaux, Journalists, Lawyers, and Activists Working on the Border Face Coordinated Harassment from U.S. and Mexican Authorities, The Intercept (Feb. 8, 2019), https://theintercept.com/2019/02/08/us-mexico-border-journalists-harassment/ (revealing a pattern of harassment against professionals covering activity at the southern border); Adolfo Flores, A Pastor Who Was Put On a Watch List After Working With Immigrants Is Suing The US, Buzzfeed (July 8, 2019), https://www.buzzfeednews.com/article/adolfoflores/pastor-watchlist-immigrants-lawsuit (discussing a pastor’s First Amendment suit alleging that she was listed in a government dossier and harassed for her ministry at the border); Jones et al., supra note 15 (describing a secret government database of American activists who witnessed and reported on a migrant caravan moving from Central America to the southern U.S. border).


\(^{86}\) See Flores, supra note 84.

\(^{87}\) Tobias, supra note 14. The documented “anti-Trump protests” included immigrant rights protests, protests against the National Rifle Association, and protests against the Trump administration’s immigration policies. Id.

\(^{88}\) See Homeland Security Used a Private Intelligence Firm, supra note 14. The DHS shared the private intelligence with its staff and other officials, as required by policy to ensure “appropriate situational awareness” of matters “affecting the . . . Homeland Security Enterprise.” Id.

surviving the journey often suffer from severe dehydration. To mitigate this, volunteers place jugs of water throughout the desert and provide care to any distressed people they encounter. In 2018, volunteers recorded Border Patrol agents emptying those jugs, and posted that video online with a report documenting the agency’s abuses toward migrants. Within hours, Border Patrol arrested longtime No More Deaths volunteer Dr. Scott Warren, accusing him of “alien smuggling.” The agency then arrested several other volunteers on charges related to littering and trespassing. The case against Warren was eventually dismissed, but only after years of prosecution.

B. The Harm

The First Amendment ensures that people are free to speak their minds, and that those willing are free to listen. The federal government’s ability to silence dissent through deportation, or threats of deportation, stifles freedom of thought and expression, manipulates public debate, and undermines the ability of critics to advocate political change. Speaking at rallies and press conferences, testifying at public hearings, sharing their stories with the world—this is how noncitizens inform the public and effect change.

Elected officials and federal judges alike have recognized ICE’s targeted policies as discouraging and preventing noncitizens from freely expressing their political and

90. See Migrant Deaths in Arizona Desert Have Reached Seven-Year High, Humane Borders (Oct. 27, 2020), https://humaneborders.org/migrant-deaths-in-arizona-desert-have-reached-seven-year-high/ (“Remains of 181 migrants were found in the Arizona desert through the end of September [2020].”).


96. U.S. Const. amend. I, see also Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion) (“[T]he right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom.”) (emphasis omitted).

97. See Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“[T]he greatest menace to freedom is an inert people.”).
pro-immigrant views. As New York Congressman Jerry Nadler observed, “These are well-known activists who’ve been here for decades, and [ICE is] saying to them: Don’t raise your head.” Similarly, Illinois Congressman Luis Gutierrez stated that, beginning in 2017, those who “made the biggest impression” at immigration hearings were later “harshly targeted” and often detained. The Second Circuit also observed that fear of retaliation has a ripple effect that would “broadly chill protected speech, among not only activists subject to final orders of deportation but also those citizens and other residents who would fear retaliation against others.”

Writers, journalists, and filmmakers have also expressed a shared concern about the impact of retaliatory immigration policies on immigrant freedoms in media and art. Numerous media condemned the targeting of noncitizen journalists like Ortega, underscoring the connection between freedom of speech and freedom of the press. Filmmakers similarly expressed concern over Rojas’ deportation following the debut of The Infiltrators. As they wrote, punishing him “for expressing his opinion . . . will have a chilling effect on the work of journalists and their sources . . . . [T]he American public will now lose Mr. Rojas’ voice in the many upcoming national conversations about our immigration policy.”

Retaliation has also undermined immigrant organizing. The more immigrants were targeted after attending rallies, speaking to the press, and marching in protests, the harder it became for immigrant-led groups to participate in public debate. Fewer members of these groups felt comfortable publicly sharing the injustices that they had experienced in the immigration system. Organizations like La Resistencia—whose leaders and members have been targeted—have needed to divert

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99. Sacchetti & Weigel, supra note 42.

100. Id.

101. Ragbir, 923 F.3d at 71.


104. Id.

105. See Motion of 12 Immigrants’ Rights Advocacy Organizations for Leave to File Brief as Amici Curiae in Support of Appellant-Petitioner, Urging Reversal at 8–14, Rojas v. Moore, No. 19-12438 (11th Cir. Feb. 4, 2020) (detailing the decline in the number of immigrants speaking out at rallies and other events).

106. E.g., Brief of 24 Immigrants’ Rights Advocacy Organizations as Amici Curiae in Support of Plaintiffs-Appellants at 9–18, Ragbir v. Homan, 923 F.3d 53 (2d Cir. 2019) (No. 18-1597) (suggesting that the government’s focus on immigrant speech has “chilled and continues to chill speech about the immigration system”).

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resources to their respective legal defense funds while simultaneously addressing widespread fear among membership.\textsuperscript{107} Workplace organizers have also feared retaliation against immigrant workers when workplace raids have followed on the heels of employment disputes.\textsuperscript{108}

II. THE UNIQUE VULNERABILITY OF IMMIGRANTS

Immigrants are particularly vulnerable to retaliation for exercising First Amendment rights. First, as a matter of precedent, courts have not robustly protected the rights of immigrants to engage in political speech without fear of reprisal from immigration officials. Second, immigrants have few avenues by which to challenge retaliatory arrest, detention, or deportation.

A. Immigration Exceptionalism in First Amendment Jurisprudence

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”\textsuperscript{109} As a constraint on government power, it protects all “people,” irrespective of citizenship or immigration status.\textsuperscript{110} By safeguarding the free exchange of ideas, the First Amendment protects virtually all other freedoms that form the foundation of our democracy.\textsuperscript{111} This is particularly true with respect to political speech: “speech concerning public affairs is more than self-expression; it is the essence of self-government.”\textsuperscript{112}

\begin{itemize}
\item \textsuperscript{107} See NWDC Resistance v. ICE, No. C18-5860, 2020 U.S. Dist. LEXIS 187295, at *21 (W.D. Wash. Oct. 8, 2020) (noting that La Resistencia “ha[s] been forced to divert time and money and effort to help defend” immigrants targeted by ICE’s selective enforcement policy); see also supra note 71 and accompanying text.
\item \textsuperscript{109} U.S. Const. amend. I.
\item \textsuperscript{110} See Bridges v. Wixon, 326 U.S. 135, 148 (1945) (citing Bridges v. California, 314 U.S. 252 (1941)) (“Freedom of speech and of press is accorded [noncitizens] residing in this country.”); see also David Cole, Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?, 25 T. Jefferson L. Rev. 367, 370 (2003) (“[B]oth the First Amendment’s protections of political and religious freedoms and the Fourth Amendment’s protection of privacy and liberty apply to ‘the people.’ The fact that the Framers chose to limit to citizens only the rights to vote and to run for federal office is one indication that they did not intend other constitutional rights to be so limited.”); Michael Kagan, Do Immigrants Have Freedom of Speech?, 6 Calif. L. Rev. Cir. 84, 91 (2015) (describing the application of the First Amendment to undocumented immigrants as an open question and arguing that it should apply).
\item \textsuperscript{112} Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964); see also Virginia v. Black, 538 U.S. 343, 365 (2003) (plurality opinion) (“[P]olitical speech [is] at the core of what the First Amendment is designed to protect.”); see also Meyer v. Grant, 486 U.S. 414, 421–22, 425 (1988) (ranking political speech at the top of the First Amendment hierarchy).
\end{itemize}
The First Amendment plays its most significant role in the protection of dissent. It bars the government from punishing an individual for expressing their constitutionally protected viewpoint—even if it offends the status quo. This freedom to challenge law enforcement without “risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”

In theory, these principles guarantee immigrants robust First Amendment rights to voice their criticism of government policy without risking deportation. In practice, however, the Supreme Court has a poor track record of protecting noncitizen dissidents from retaliatory exclusion or deportation and has repeatedly rejected First Amendment challenges to such treatment.

The Supreme Court’s permissive approach can generally be explained through a combination of two factors. First, the cases considered by the Court have relied heavily on the plenary power doctrine, a principle stemming from the overtly racist Chinese exclusion era when the Supreme Court abdicated judicial review of immigration law. Second, these cases arose largely in the national security context, where federal immigration officials sought to exclude or deport noncitizens based on their alleged

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115. See Cole, supra note 110, at 370.
120. See When Immigrants Speak, supra note 116, at 1264–65, 1282–83 (discussing the “plenary power” doctrine and “[the Court’s reluctance to review immigration decisions”); see also supra note 119 and accompanying text.
affiliation with communist, anarchist, or terrorist organizations that advocate for the violent overthrow of the U.S. government.\textsuperscript{121} The Court, therefore, often defers to federal immigration officials instead of ruling on First Amendment matters.

For example, in 1999 in \textit{Reno v. American-Arab Anti-Discrimination Committee (AADC)}, the plaintiffs alleged that federal immigration officials impermissibly commenced removal proceedings against them in retaliation for their membership in an alleged terrorist group.\textsuperscript{122} The Supreme Court rejected their claim, applying a “general rule” that “an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation,” absent facts demonstrating “outrageous” discrimination.\textsuperscript{123} The Court reasoned that “the Government does not offend the Constitution” when it deports those believed to belong to terrorist organizations who are in the “country . . . in violation of the immigration laws.”\textsuperscript{124}

Despite the national security concerns animating the decision, federal immigration officials have relied on \textit{AADC} to seek dismissal of any First Amendment challenge to deportation.\textsuperscript{125} This strategy was rejected in the Second Circuit’s 2019 decision in \textit{Ragbir v. Homan}.\textsuperscript{126} The court observed that “advocacy for reform of immigration policies and practices is at the heart of current political debate among American citizens and other residents,” and therefore is political speech that “implicates the apex of protection under the First Amendment.”\textsuperscript{127} The court held that the government’s alleged targeting of Ragbir for deportation because of “the public attention” that his speech had received was sufficiently outrageous.\textsuperscript{128}

\begin{footnotesize}
\begin{enumerate}
\item See \textit{When Immigrants Speak}, supra note 116, at 1261–69 (observing that many of the cases addressing the First Amendment rights of noncitizens facing deportation involved national security issues).
\item 525 U.S. at 472–73. The \textit{AADC} plaintiffs “belong[ed] to the Popular Front for the Liberation of Palestine (PFLP), a group that the Government characterize[d] as an international terrorist and communist organization.” \textit{Id.} at 473.
\item \textit{Id.} at 488, 491–92. In \textit{Ragbir v. Homan}, the Second Circuit concluded that ICE’s retaliation against the activist for his criticism of ICE constituted “outrageous” First Amendment discrimination. \textit{See} 923 F.3d 53, 69 (2d Cir. 2019) (\textit{AADC} compels courts to evaluate 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."), \textit{vacated sub nom.}, Pham v. Ragbir, 141 S. Ct. 227 (2020) (mem.).
\item \textit{AADC}, 525 U.S. at 491–92.
\item \textit{See supra} note 18.
\item 923 F.3d at 69.
\item \textit{Id.} at 69–70.
\item \textit{Id.} at 70–73. The Second Circuit reasoned, The conclusion that ICE would nonetheless still be free to deport Ragbir on the basis of his advocacy would certainly draw considerable media attention and thus would be a particularly effective deterrent to other aliens who would also challenge the agency and its immigration policies. . . . To allow this retaliatory conduct to proceed would broadly chill protected speech, among not only activists subject to final orders of deportation but also those citizens and other residents who would fear retaliation against others.
\item \textit{Id.} at 71.
\end{enumerate}
\end{footnotesize}
Federal officials sought certiorari, asking the Supreme Court to vacate and remand the case on two issues: first, on a jurisdictional question of whether the federal courts had power to review Ragbir’s First Amendment claim; and second, on a merits issue as to the viability of that claim. In October 2020, the Supreme Court granted certiorari. It declined to remand on the merits, but did remand to the Second Circuit for resolution of the jurisdictional issue in light of the Court’s recent decision regarding the scope of constitutionally-required habeas review.

The remand will require the Second Circuit to reconsider its interpretation of § 1252(g) of the Immigration and Nationality Act (INA)—a jurisdiction-stripping provision designed to protect discretionary decisions by federal immigration officials from judicial review. Specifically, AADC concluded that § 1252(g) stripped courts of jurisdiction to review the plaintiffs’ selective-enforcement claim, and therefore the Court identified no constitutional concern with its application of § 1252(g) to the AADC plaintiffs’ case. The Second Circuit in Ragbir, however, held that § 1252(g) was unconstitutional as applied to Ragbir’s First Amendment claim and that the government’s alleged retaliatory behavior was sufficiently “outrageous” under AADC.

The Second Circuit may well conclude that its initial interpretation was correct, or it may avoid the constitutional concerns altogether by construing § 1252(g) narrowly and inapplicable to Ragbir’s claim. Either way, it will take several months to decide how and if the case proceeds. With this uncertainty and precarious access to judicial review, immigrants will continue to face difficulties in pursuing First Amendment retaliation claims. To protect noncitizens from retaliatory deportation, judicial review must become fully accessible, and other mechanisms to prevent or redress First Amendment abuses must be strengthened.
B. The Erosion of Protections for Immigrant Voices

Immigrants have long been susceptible to abuses when exercising their civil rights and liberties. The safety measures that exist to prevent such abuses are vulnerable and have eroded over time, as exposed by the recent changes in immigration law enforcement. As a result, the few protections available to immigrants—prosecutorial discretion, administrative oversight, federal departure regulations, judicial review, and congressional intervention—now provide little aid against an oppressive federal immigration agency.

i. Prosecutorial Discretion

Immigration agencies have long exercised prosecutorial discretion in deciding whether to enforce immigration laws. Officials have the power to decline an immigration enforcement action, close a pending case, or grant an administrative “stay of deportation” or “deferred action” authorizing an individual to remain in the United States. This discretionary power has proven an important mechanism in protecting immigrant rights activists. Ragbir and Montrevil, for example, both received administrative stays of removal from ICE before the agency reversed course in 2017.

During the Obama administration, broad prosecutorial discretion was encouraged to protect individuals exercising their civil rights and liberties. For instance, on June 17, 2011, then-ICE Director John Morton issued a memorandum (the “Morton Memo”) that called for “ICE officers, special agents, and attorneys . . . to exercise all appropriate discretion on a case-by-case basis when making detention and enforcement decisions in the cases of victims of crime, witnesses to crime, and individuals pursuing legitimate civil rights complaints.” It paid particular attention to “individuals engaging in a protected activity related to civil or other rights . . . who may be in a non-frivolous dispute with an employer, landlord, or contractor.”

136. See supra notes 34 and 41.


138. See Trump Banished Immigration Rights Activist, supra note 4 (discussing Montrevil’s authorization to stay); Press Release, Just. for Ravi Ragbir, supra note 3 (discussing Ragbir’s authorization to stay).


141. Id. (reminding officials to exercise appropriate enforcement discretion over, for example, “individuals engaging in . . . union organizing or complaining to authorities about employment discrimination or housing conditions”).
When President Trump took office, however, one of his first executive orders directed the DHS to expand the list of individuals prioritized for deportation. In February 2017, then-DHS Secretary John Kelly issued a memorandum (the “Kelly Memo”) that rescinded “all existing conflicting directives, memoranda, or field guidance regarding the enforcement of our immigration laws and priorities for removal.” It specified that “the [DHS] no longer will exempt classes or categories of removable aliens from potential enforcement,” and vastly expanded the categories of individuals prioritized for deportation.

The Kelly Memo did not explicitly mention the Morton Memo protecting certain victims, witnesses, and plaintiffs from immigration enforcement, creating uncertainty as to whether those individuals could continue to benefit from prosecutorial discretion. In some instances, like with Migrant Justice, attempts to vindicate immigrant rights appear connected to ICE subsequently targeting those same advocates. Moreover, longstanding beneficiaries of prosecutorial discretion—like Ragbir, who retained a stay of removal for several years—lost that benefit under the Trump administration.

In 2019, Acting Secretary of Homeland Security Kevin McAleenan issued a memorandum (the “McAleenan Memo”), which stated: “DHS does not profile, target, or discriminate against any individual for exercising his or her First Amendment rights.” The McAleenan Memo prohibited DHS personnel from collecting, using, or maintaining information protected under the First Amendment, except when the agency deemed such information relevant to ongoing criminal, civil,

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142. See Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 30, 2017) (“We cannot faithfully execute the immigration laws of the United States if we exempt classes or categories of removable aliens from potential enforcement.”).


144. See id. (prioritizing action against noncitizens who, for example, have committed or been convicted of criminal offenses, abused public benefit programs, or committed fraud or misrepresentation against a government body).

145. See id.

146. See Letter from Maria Cantwell et al., Sen., U.S. Senate, to John Kelly, Sec’y, U.S. Dep’t of Homeland Sec. (July 18, 2017), https://www.cantwell.senate.gov/imo/media/doc/Letter%20to%20Sec.%20Kelly%20on%20eroding%20VAWA%20protections%20071817%20(1).pdf (seeking “[s]pecific clarification” as to whether the Kelly Memo rescinded the Morton Memo).

147. See Migrant Justice 2019 Complaint, supra note 76; see also Holpuch, supra note 75.

148. See supra notes 1–3 and accompanying text.

or administrative proceedings, or to an immigration application. The exception swallowed the rule and the McAleenan Memo offered little actual protection to immigrant activists.

ii. Administrative Oversight

Two administrative agencies within the DHS have the power to address abuses by federal immigration officials: the DHS Office of Inspector General (OIG) and the DHS Office for Civil Rights and Civil Liberties (CRCL). In theory, these agencies could prevent subcomponents of the DHS from unlawfully retaliating against immigrants and violating immigrant rights. In structure and practice, however, this power is extremely limited.

When Congress created the DHS in 2002, it also created the OIG specifically to investigate fiscal waste, fraud, and official misconduct at the DHS and within its subcomponents like ICE. While noncitizens may contact the OIG to lodge complaints, the OIG is not required to investigate or remedy any individual injuries. For example, an investigation revealed that of twelve hundred sexual misconduct complaints against the DHS—including complaints by individuals in ICE custody—only forty-three were inspected by the OIG.

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150. Id. at 1–2.


152. See supra note 151 and accompanying text.

153. See infra pp. 247–49.

154. About OIG, supra note 151.


While noncitizens and nongovernmental organizations can urge the OIG to issue reports exposing systemic agency abuse, it lacks power to require the DHS or DHS subcomponents to right those wrongs. The OIG considers reports “resolved” when it accepts a corrective action plan submitted to it by ICE (or any relevant DHS subcomponent) “that addresses [the OIG’s] findings and recommendations.” Thus, mere submission of a plan—and not necessarily its successful implementation—may suffice to “resolve” the OIG’s recommendations. Relatedly, the public generally cannot verify what recommendations are outstanding, as recommendations in this category (“resolved” but “open”) are not directly available on the OIG’s website. Even the OIG’s semiannual reports to Congress, which indicate the recommendations closed “due to the Department’s actions,” do not detail those allegedly corrective actions.

Individuals who have experienced alleged abuses by immigration officials may also make a formal complaint to the CRCL. Authorized by federal statute to review and assess these allegations, the CRCL investigates “civil rights, civil liberties, or human rights violation[s] related to a [DHS] program or activity[.]” The CRCL has investigated high-profile rights abuses by the DHS, including allegations of employee misconduct during implementation of the Muslim ban in early 2017. Unlike the OIG, the CRCL is not independent and is statutorily required to assist


159. Id. (stating that recommendations are closed when the OIG verifies that the offending department took corrective actions, or when special circumstances warrant closure).


the DHS Secretary in ensuring that civil rights and liberties are protected in DHS programs and activities.\textsuperscript{165}

Under the Trump administration, however, the CRCL became increasingly marginalized. Scott Shuchart resigned from his position as a senior advisor to the CRCL in 2018 due to the agency’s difficulties in playing “a meaningful role in a number of immigration policy decisions being advanced by the [Trump] administration.”\textsuperscript{166} For example, the expanded family separation policy\textsuperscript{167} was implemented over the CRCL’s objections, and the administration continued this disregard even after the CRCL received “hundreds of complaints filed by migrant children, parents, and [their] advocates.”\textsuperscript{168} Without much power, the CRCL offers little protection to immigrants facing retaliation.

\textit{iii. Federal Regulations Barring Departure}

Federal regulations offer a mechanism for government officials to prevent “departure” of a noncitizen when such departure would be “prejudicial to the interests of the United States.”\textsuperscript{169} These regulations were promulgated pursuant to a

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\item \textsuperscript{165} Compare About OIG, supra note 151, with Office for Civil Rights and Civil Liberties, supra note 151. See generally 6 U.S.C. § 345 (establishing the duties of the CRCL Officer and noting that they report to the Secretary of Homeland Security).
\item \textsuperscript{167} The family separation policy allowed Border Patrol officers to immediately prosecute noncitizens entering the country without permission; if a noncitizen arrived with a child, the child was to be taken from that noncitizen and given to the care of the Department of Health and Human Services. See Exec. Order No. 13841, 83 Fed. Reg. 29435 (June 20, 2018); see also Jeff Sessions, U.S. Att’y Gen., Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions (“I have put in place a ‘zero tolerance’ policy for illegal entry on our Southwest border. If you cross this border unlawfully, then we will prosecute you. It’s that simple. . . . If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law.”). See generally \textit{A Timeline of the Trump Administration’s Family-Separation Policy}, Am. Oversight, https://www.americanoversight.org/a-timeline-of-the-trump-administrations-family-separation-policy (last visited Apr. 17, 2021) (chronicling the Trump administration’s family separation practices); \textit{Family Separation Under the Trump Administration – A Timeline}, S. Poverty L. Ctr. (June 17, 2020), https://www.splcenter.org/news/2020/06/17/family-separation-under-trump-administration-timeline (same).
\item \textsuperscript{168} Shuchart, supra note 166.
\item \textsuperscript{169} 8 C.F.R. § 215.2 (2021). Specifically, § 215.2(a) provides:
\begin{quote}
No [noncitizen] shall depart, or attempt to depart, from the United States if his departure would be prejudicial to the interests of the United States under the provisions of § 215.3. Any departure-control officer who knows or has reason to believe that the case of a[ ] [noncitizen] in the United States comes within the provisions of § 215.3
\end{quote}
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PROTECTING THE VOICES OF THE IMMIGRANT RIGHTS MOVEMENT

congressional statute authorizing the Secretary of State to control the departure of noncitizens.170 Specifically, 8 C.F.R § 215.3 contains a non-exhaustive list of noncitizens whose departure would be prejudicial, including noncitizens who are needed as a party or witness in a criminal case or investigation or proceeding "conducted by any official executive, legislative, or judicial agency in the United States or by any governmental committee, board, bureau, commission, or body . . . whether national, state, or local."171 It also includes a "catch all" provision for noncitizens who do not fall under one of the enumerated categories but whose departure would still be prejudicial to U.S. interests.172 If a departure-control officer prevents a noncitizen's departure pursuant to these regulations, that individual has the right to a hearing.173

Federal courts widely agree these regulations may be used to prevent the deportation or departure of noncitizen witnesses or parties to an ongoing investigation or proceeding.174 There is disagreement, however, as to whether such noncitizens shall temporarily prevent the departure of such [noncitizen] from the United States and shall serve him with a written temporary order directing him not to depart, or attempt to depart, from the United States until notified of the revocation of the order.

Id. There are numerous enumerated categories that can be deemed "prejudicial" under this provision. § 215.3. They include noncitizens who are suspected to engage in, likely to engage in, or seeking to engage in activities that could impede the national security of the United States. Id. 170. See 8 U.S.C. § 1104 (specifying the Secretary of State's authority with respect to immigration and nationality laws); see also § 1185(a)(1) ("[I]t shall be unlawful for any [noncitizen] to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.").

171. 8 C.F.R. § 215.3(g)–(h).
172. See 8 C.F.R. § 215.3(k).

173. 8 C.F.R. §§ 215.4(a). A noncitizen must request a departure hearing in writing to the "district director of the Immigration and Naturalization Service (INS) having administrative jurisdiction over the [noncitizen's] place of residence." Id. Certain rights are afforded to the noncitizen at the time of the scheduled hearing. See § 215.4(b). The hearing must occur "in accordance with the procedures outlined in the regulation. See § 215.5. With respect to these regulations, a "departure-control officer means any immigration officer as defined in the regulations of the [INS] who is designated to supervise the departure of [noncitizens]." § 215.1(i).

may themselves invoke these regulations to prevent their deportation. Several courts have held that noncitizens cannot do so. As a result, witnesses and crime victims have had difficulty in relying on these regulations to defend their remaining in the United States.

iv. Judicial Review

Immigrants subjected to unconstitutional and unlawful retaliation may pursue declaratory, injunctive, or habeas relief. Many have sued seeking: release from retaliatory detention; return to the United States; orders preventing retaliatory deportation; orders preventing retaliatory fines; and orders granting or restoring relief or status that was denied due to retaliation.

In cases involving retaliatory deportation, however, the government has successfully argued that § 1252 strips federal courts of jurisdiction. In particular, § 1252(g) states that “no court shall have jurisdiction to hear any cause or claim by or on behalf of any [noncitizen] arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any [noncitizen] under this chapter.” In AADC, the Supreme Court held that the provision applies narrowly to the three enumerated actions. While some

175. See, e.g., United States v. Pacheco-Poo, 952 F.3d 950, 953 (8th Cir. 2020) (“Pacheco-Poo argues that the Executive Branch has violated its regulation . . . , which governs [a noncitizen’s] acts, not an Executive Branch official’s. ICE’s removal of Pacheco-Poo while on pretrial release, therefore, did not violate 8 C.F.R. § 215.2.”) (footnote omitted) (citations omitted); United States v. Hernandez-Olea, 407 F. Supp. 3d 1351, 1356 (M.D. Ga. 2019) (finding that the regulations are “directed at the conduct of [noncitizens], barring them from leaving, not directed at ICE, barring it from deporting [noncitizens].”) (footnote omitted); United States v. Marinez-Patino, No. 11 CR 064, 2011 WL 902466, at *6 (N.D. Ill. Mar. 14, 2011) (crediting the defendant’s departure-control defense). Cf. In re Melvin Rodriguez-Segura, No. AXXX XX4 994 - L.A., Cal., 2011 WL 6026573, at *1 (B.I.A. Nov. 10, 2011) (finding that the regulations prevent neither removal proceedings nor “requiring the respondent to plead to the Notice to Appear,” but failing to address whether ICE would be able to effectuate the deportation).


181. 8 U.S.C. § 1252(g).

182. See Reno v. Am.-Arab Anti-Discrimination Comm. (AADC), 525 U.S. 471, 482 (1999) (stating that § 1252(g) “applies to three discrete actions” taken by an Attorney General: “decision[s] or action[s] to commence proceedings, adjudicate cases, or execute removal orders.”) (emphasis in original) (quoting § 1252(g)).
courts have distinguished *AADC* or construed it narrowly,\(^{183}\) it remains a source of significant litigation in cases seeking a stay of deportation, as noted above.\(^ {184}\)

Immigrants who have experienced retaliation may also pursue claims under the Federal Tort Claims Act (FTCA).\(^ {185}\) The FTCA allows a noncitizen to pursue a tort claim, provided that they follow a complaint procedure within the specified timeframe.\(^ {186}\) While such claims—if successful—typically result only in financial compensation, previous administrations have also permitted prosecutorial discretion to defer adverse immigration action until the claimant had fully exhausted his or her rights.\(^ {187}\) In addition, certain agencies implicated in FTCA claims may certify U nonimmigrant status, also known as a U visa,\(^ {188}\) to permit an individual to temporarily remain in the United States as part of a settlement agreement.\(^ {189}\)

Alternatively, if an immigrant prevails on an FTCA claim, they may move the federal court to sign the U visa certification.\(^ {190}\) However, if the government successfully argues that the challenged action falls within their discretionary functions, it may avoid FTCA

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\(^{189}\) Patel, supra note 187.

liability altogether. The FTCA does not waive sovereign immunity from a suit “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee . . . , whether or not the discretion involved be abused.” Relatedly, courts are split as to whether § 1252(g) strips their jurisdiction over FTCA claims for wrongful deportation.

vi. Congressional Intervention

To date, no legislation explicitly protects immigrants from retaliation by federal immigration officials. Instead, members of Congress have sought to intervene in individual cases through private bills, a form of legislation that can authorize a person to remain in or return to the United States notwithstanding barriers in immigration law that would typically apply.

A private bill, like all other legislation, requires Congress and the president to act before the bill becomes law. This type of legislation provides little protection in cases where the president may be aligned with federal immigration officials’ choice to target a particular person. Until recently, it was general practice for federal immigration officials to issue a stay of removal if, after a private bill was introduced and a formal hearing took place, a congressional committee or subcommittee requested a “departmental report” from the DHS. Such a stay could extend for one-year and was eligible for renewal. This permitted the individual to remain in the United States while the private bill moved through the legislative process.

ICE unilaterally changed this policy in a May 2017 letter to Congress, in which it stated that requests for departmental reports no longer sufficed for a stay of

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191. The doctrine of sovereign immunity refers to the “government’s immunity from being sued . . . without its consent.” Immunity, BLACK’S LAW DICTIONARY (11th ed. 2019).
193. See Matthew Miyamoto, Whether 8 U.S.C. § 1252(g) Precludes the Exercise of Federal Jurisdiction Over Claims Brought by Wrongfully Removed Noncitizens, 86 U. Chi. L. Rev. 1655, 1657 (2019) (discussing the circuit split over the applicability of § 1252(g) in wrongful removal suits). In 2017, the Eighth Circuit held that § 1252(g) strips federal courts of jurisdiction to hear wrongful removal suits. Id. In 2018, the Ninth Circuit held otherwise. Id.
197. Id. at 40. But see id. at 27 (noting that a private bill introduced through the Senate as opposed to the House may result in a stay lasting between two to four years).
198. See id. at 12 (noting that House and Senate subcommittees have “the power to ask DHS to stay the removal” until the private bill is finalized) (footnote omitted).
removal.  

Going forward, ICE would only consider and grant such a stay upon a formal request from the Chair of the Judiciary Committee or Subcommittee, “independent of any request for an investigative report.” The letter also stated that ICE would only grant one six-month stay, with a single ninety-day extension for extenuating circumstances, which could be revoked at any time.

These policy changes have rendered congressional efforts to intervene in cases of retaliation ineffective. For example, in 2018, the House Judiciary Subcommittee on Immigration and Border Security voted to formally request a six-month stay for Amer Othman Adi, an Ohio father, businessman, and prominent community leader who was arrested when he attended a check-in with his Congressman. ICE declined to issue a stay, and instead announced that “alien beneficiaries need not be present in the United States for a private immigration relief bill to be introduced, considered and/or enacted.”

III. STRENGTHENING PROTECTIONS FOR IMMIGRANT VOICES

To prevent and redress First Amendment retaliation, and to strengthen the protections available to immigrant activists, law and policy must change. First, the executive branch should exercise its broad prosecutorial discretion to take immediate corrective action. Through executive order or proclamation, the president should direct federal agencies, and specifically the DHS and its Secretary, to issue guidance recognizing and protecting immigrant rights.


201. Letter from Thomas D. Homan, supra note 199, at 2; see also Pol’y No. 5004.1, supra note 200 (providing that the ICE director has discretion to issue an extension “beyond the six-month stay” and to initiate removal if an individual’s “final order of removal has previously been stayed through the private immigration bill process if ICE obtains any evidence about the alien-beneficiary that, in its judgment, warrants immediate removal”).


204. But see Sarah Libowsky & Krista Oehlke, President Biden’s Immigration Executive Actions: A Recap, LAWFAR (Mar. 3, 2021), https://www.lawfareblog.com/president-bidens-immigration-executive-actions-recap (pointing to recent state challenges to President Biden’s interim immigration policies and concluding that their enforcement is not guaranteed, with ICE’s compliance expected to be an “important test”).
retaliation, to treat immigrant organizing as a positive factor, and to permit immigrants who have been deported as a result of retaliation to return to the United States.\(^\text{205}\) The DHS should amend the McAleenan Memo to explicitly prohibit targeting and retaliating against immigrants based on their First Amendment activities, and should direct ICE to revamp the 2011 Morton Memo to create a process for certain victims, witnesses, and plaintiffs to receive deferred action. The DHS should also ensure that ICE will not act on a deportation order while a private bill is pending in Congress, and should direct ICE to amend detention standards, to prohibit disciplinary measures in response to First Amendment activities and to facilitate greater transparency. Finally, the DHS should also exercise its prosecutorial discretion to review pending and upcoming retaliation cases for possibilities of settlement.\(^\text{206}\)

Second, the DHS should undertake a series of regulatory reforms to provide immigrants facing retaliation for constitutionally protected activities with immediate and effective intervention from federal officials authorized to investigate and stop that retaliation. The departure bar regulations should be amended to automatically trigger a stay of deportation during an investigation of retaliation or similar civil rights violations. This amendment should also provide immigrants with a mechanism to report such violations to a departure bar officer. Further, the power of the OIG and the CRCL should be strengthened to provide each with the authority to order release and prevent deportation of victims and witnesses in OIG or CRCL investigations.\(^\text{207}\) They should also have the power to order—not just recommend—corrective action.\(^\text{208}\)

Third, Congress should draft legislation to prohibit federal immigration officials from surveilling, stopping, arresting, detaining, deporting, or excluding people from the United States based on their political speech. This legislation should also formalize and streamline the processes through which individuals who have faced unjust deportation may return to the United States. Moreover, to eliminate the impediment that § 1252(g) has on immigrant access to judicial review of First Amendment claims, Congress should repeal this provision or—at minimum—clarify that it is inapplicable to claims challenging the constitutionality or legality of any decision or action to commence proceedings, adjudicate cases, or execute removal

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\(^{205}\) Cf. Memorandum from John Morton, supra note 140, at 1 (establishing a policy of prosecutorial discretion under the Obama administration).

\(^{206}\) In \textit{Migrant Justice v. Wolf}, the parties entered into a settlement agreement in 2020 that provided five years of deferred action, awarded $100,000 in damages to the \textit{Migrant Justice} plaintiffs, and required ICE to re-issue the McAleenan Memo to its officials in Vermont. Stipulation for Compromise Settlement and Release and Dismissal with Prejudice of All Claims in this Action at 2–4, Migrant Just. v. Wolf, No. 5:18-cv-192 (D. Vt. Oct. 28, 2020).


\(^{208}\) Id.
orders. Through these administrative and legislative reforms, the voices of immigrant
activists and others in the immigrant rights movement can be elevated without fear
of unconstitutional reprisal.

IV. CONCLUSION

The bedrock of a functioning democracy hinges on the values protected by the
First Amendment. In a nation where millions of residents lack U.S. citizenship, protecting
the rights of all people to participate in public debate over immigration policy is
essential to self-governance.

The spike in retaliation against immigrants and immigrant rights activists over
the last several years has had a chilling effect on speech and organizing efforts by
noncitizens and citizens alike, and has contributed to an expanding immigration
enforcement apparatus. To address these harms, a comprehensive approach is
necessary: one that strengthens administrative, judicial, and legislative protections
for immigrants. So long as federal immigration officials remain free to target
immigrants critical of their policies—using surveillance, stops, fines, arrests,
detention, and deportation to silence dissent—no meaningful debate is possible.

209. See Budiman, supra note 20 (reporting that “[t]he U.S. foreign-born population reached a record 44.8
million in 2018”); see also Elaine Kamarck & Christine Stenglein, How Many Undocumented Immigrants Are
votervital/how-many-undocumented-immigrants-are-in-the-united-states-and-who-are-they/ (explaining
how to ascertain the number of undocumented immigrants and the difficulties in doing so).