
Volume 65

Issue 2 *Volume 65, Issue 2, 2020/21: A*
CENTURY OF TARGETING IMMIGRANTS: FROM
THE RED SCARE TO THE TRAVEL BAN

Article 4

January 2020

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

Alina Das

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review



Part of the [Law Commons](#)

Recommended Citation

Alina Das, *Deportation and Dissent: Protecting the Voices of the Immigrant Rights Movement*, 65 N.Y.L. SCH. L. REV. 225 (2020-2021).

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

ALINA DAS

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

65 N.Y.L. SCH. L. REV. 225 (2020–2021)

ABOUT THE AUTHOR: Alina Das is a Professor of Clinical Law and Co-Director of the Immigrant Rights Clinic, New York University School of Law. J.D. New York University School of Law, 2005; M.P.A. New York University Wagner School of Public Service, 2005; B.A. Harvard University, 2001. The author is grateful to the organizers and participants of the *New York Law School Law Review* 2019 symposium, “A Century of Targeting Immigrants: From the Red Scare to the Travel Ban,” the editors of the *New York Law School Law Review*, and Sofia Franco-Lopez, Ryan Mendias, and Julio Castillo for research assistance. Many of the author’s perspectives in this article have come from her involvement in ongoing litigation to defend the First Amendment rights of Ravi Ragbir, Jean Montrevil, Claudio Rojas, and Gaspar Avendaño Hernandez. The author thanks them, along with her co-counsel (particularly Jessica Rofé and Ragbir’s First Amendment team at Arnold & Porter, led by R. Stanton Jones and William Perdue), community partners, defense committee members, law students, and fellow activists, for their wisdom and insights over the years.

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.¹ The agency responsible, U.S. Immigration and Customs Enforcement (ICE), claimed that it was merely enforcing old deportation orders against the noncitizens,² Jean Montrevil and Ravi Ragbir.³ 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,⁴ and they had since become prominent immigrant rights activists.⁵ In 2007, Montrevil co-founded New Sanctuary Coalition (NSC), a multi-faith non-profit organization dedicated to advancing immigrant rights, and Ragbir

-
1. Jerry Iannelli, *New York Immigrant Activist Detained by ICE in Miami Might Be Deported Today*, MIA. NEW TIMES (Jan. 16, 2018), <https://www.miaminewtimes.com/news/new-york-immigrant-activists-ragbir-montrevil-held-in-miamis-krome-processing-center-face-deportation-9996632>. Jean Montrevil faced deportation to Haiti. *Id.* Ravi Ragbir faced deportation to Trinidad and Tobago. *Id.*; see also About, JUST. FOR RAVI RAGBIR, <https://istandwithravi.org/about/> (last visited Apr. 17, 2021).
 2. See Victoria Bekiempis, *N.Y. Congress Members Call for Meeting With ICE Brass Over ‘Targeting’ of Immigration Activists*, N.Y. DAILY NEWS (Jan. 26, 2018), <https://www.nydailynews.com/news/politics/ice-targeting-immigrant-rights-leaders-n-y-congress-members-article-1.3781770> (“ICE insisted the agency ‘focuses its enforcement resources on individuals who pose a threat to national security, public safety and border security’—not their activism.”); see also Michael Herzenberg, *Community Rallies Around Deported Haitian Man Known for Immigration Activism*, SPECTRUM NEWS: NY 1, <https://www.ny1.com/nyc/all-boroughs/news/2020/01/17/community-rallies-around-deported-haitian-man-known-for-immigration-activism> (Jan. 23, 2020) (discussing Montrevil’s January 16, 2018 removal due to a felony conviction in 1990).
 3. Montrevil received his deportation order in 1994 and Ragbir received his in 2007. Herzenberg, *supra* note 2; Press Release, Just. for Ravi Ragbir, Supporters of Immigrant Rights Leader Ravi Ragbir Hold Solidarity Rally On Day of His ICE Check In (Jan. 23, 2020), <https://istandwithravi.org/2020/01/23/press-release-supporters-of-immigrant-rights-leader-ravi-ragbir-hold-solidarity-rally-on-day-of-his-ice-check-in/>.
 4. See Nick Pinto, *Trump Banished Immigration Rights Activist 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 WORLD (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.*
 5. See Nick Pinto, *No Sanctuary: As ICE Targets Immigrant Rights Activists for Deportation, Suspicious Vehicles Outside Churches Stoke Surveillance Fears*, THE INTERCEPT (Jan. 19, 2018), <https://theintercept.com/2018/01/19/ice-new-sanctuary-movement-ravi-ragbir-deportation/> [hereinafter *No Sanctuary*]; see also *Trump Banished Immigration Rights Activist*, *supra* note 4 (indicating that ICE targeted Montrevil in response to his leading role in the immigrant rights movement).

became its executive director.⁶ Ten years later, ICE officials planned an operation to deport the two men on the same day in January 2018.⁷ Montreuil was subsequently deported, but Ragbir secured release from detention and challenged his deportation on First Amendment grounds.⁸

To many, ICE's professed "business as usual" rationale⁹ for targeting the two men in one operation, and on the same day, rang hollow.¹⁰ 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."¹¹ In what seem like additional measures of retaliation, immigration officials continue seeking Ragbir's deportation.¹²

Throughout the country, federal immigration officials have targeted immigrant rights activists for arrest, detention, fines, and deportation.¹³ In the process, authorities have surveilled organizations, churches, and rallies organized and attended by citizens and noncitizens alike, and have tracked protected political speech.¹⁴ In some instances, they have surveilled and questioned U.S. citizens affiliated with the immigrant rights movement—community organizers, lawyers, clergy, and journalists.¹⁵ In one case,

6. See *Who Is NSC*, NEW SANCTUARY COAL., https://www.newsanctuarynyc.org/who_is_nsc (last visited Apr. 17, 2021) (describing NSC as a source of support "for . . . those navigating the immigration system"); see also *Trump Banished Immigration Rights Activist*, *supra* note 4 (recognizing Montreuil as a "founding member" of NSC).
7. Amended Declaration of Field Office Director Thomas R. Decker at 9, *Ragbir v. Homan*, No. 18-CV-1159 (S.D.N.Y. May 23, 2018).
8. Complaint for Declaratory, Injunctive, and Habeas Relief at 18, 22–23, 38–40, *Ragbir*, No. 18-CV-1159.
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.").
11. *Ragbir v. Homan*, 923 F.3d 53, 71 (2d Cir. 2019), *vacated sub nom.* *Pham v. Ragbir*, 141 S. Ct. 227 (2020) (mem.) (remanding "in light of *Department of Homeland Security v. Thuraissigiam*, [140 S. Ct. 1959] (2020)," in which the Court held that habeas review does not extend to an asylum officer's credible-fear determination).
12. Complaint for Declaratory, Injunctive, and Habeas Relief, *supra* note 8, at 23–24.
13. See *infra* Part I.
14. See, e.g., Ryan Devereaux, *Homeland Security Used a Private Intelligence Firm to Monitor Family Separation Protests*, THE INTERCEPT (Apr. 29, 2019), <https://theintercept.com/2019/04/29/family-separation-protests-surveillance/> [hereinafter *Homeland Security Used a Private Intelligence Firm*]; Jimmy Tobias, *Exclusive: ICE Has Kept Tabs on 'Anti-Trump' Protesters in New York City*, THE NATION (Mar. 6, 2019), <https://www.thenation.com/article/archive/ice-immigration-protest-spreadsheet-tracking/>.
15. See, e.g., Tom Jones et al., *Source: Leaked Documents Show the U.S. Government Tracking Journalists and Immigration Advocates Through a Secret Database*, NBC SAN DIEGO (Mar. 5, 2019), <https://www.nbcsandiego.com/news/local/source-leaked-documents-show-the-us-government-tracking-journalists-and-advocates-through-a-secret-database/3438/>; Mari Payton et al., *Documents Reveal Border Agents Targeted U.S. Pastor Over Caravan Marriage Ceremonies*, NBC SAN DIEGO (Jan. 7, 2020), <https://www.nbcsandiego.com/news/investigations/u-s-border-agents-suspected-pastor-performed-sham-marriages-for-migrant-caravan-members/2240500/>.

PROTECTING THE VOICES OF THE IMMIGRANT RIGHTS MOVEMENT

authorities pursued a federal criminal prosecution against humanitarian aid workers who gave immigrants water and care in the desert.¹⁶ All told, more than one thousand instances of federal government retaliation against immigrant rights activists have been documented.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.¹⁸ Further, federal immigration officials do not consider themselves accountable to any other administrative or legislative body when allegations of retaliation arise.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.

I. RETALIATION AGAINST IMMIGRANT RIGHTS ACTIVISTS

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

-
16. Ryan Devereaux, *Nine Humanitarian Activists Face Federal Charges After Leaving Water for Migrants in the Arizona Desert*, THE INTERCEPT (Jan. 23, 2018), <https://theintercept.com/2018/01/23/no-more-deaths-arizona-border-littering-charges-immigration/>.
 17. Nick Pinto, *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/>.
 18. See, e.g., Brief for Defendants-Appellees *passim*, *Ragbir v. Vitiello*, 923 F.3d 53 (2d Cir. 2019) (No. 18-1597); Brief for Appellees-Respondents *passim*, *Rojas v. Moore*, No. 19-12438 (11th Cir. Oct. 25, 2019); Answering Brief for Respondents-Appellees *passim*, *Bello-Reyes v. Gaynor*, 985 F.3d 696 (9th Cir. 2021) (No. 19-16441). See generally *infra* Part II.A.
 19. See *infra* Part II.B.
 20. Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2019/06/17/key-findings-about-u-s-immigrants/> (reporting that, in 2017, the U.S. foreign-born population consisted of 27 percent permanent residents, 5 percent temporary residents, and 23 percent unauthorized immigrants).
 21. Silva Mathema, *Keeping Families Together: Why All Americans Should Care About What Happens to Unauthorized Immigrants*, CTR. FOR AM. PROGRESS (Mar. 16, 2017), <https://www.americanprogress.org/issues/immigration/reports/2017/03/16/428335/keeping-families-together/>.

major overhaul of immigration law in 1996,²² deportations have skyrocketed—from almost seventy thousand in fiscal year 1996 to 267,000 in fiscal year 2019.²³

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.²⁴ Their voices—on the streets and in the halls of Congress—were critical to defeating the bill in the Senate.²⁵ 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.²⁶ The DACA program has protected hundreds of thousands of young people from deportation and provided them access to work authorization.²⁷

-
22. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 restructured federal immigration law in three relevant respects: Title I sought to improve border control through new entry protocols and expansion of federal and state immigration personnel; Title II enhanced immigration enforcement measures and increased criminal penalties for alien smuggling and document fraud; Title III provided for expedited removal by federal immigration officials and the lack of review power by federal courts. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009, 3009–546–48; *see also* *Illegal Immigration Reform and Immigration Responsibility Act*, LEG. INFO. INST., https://www.law.cornell.edu/wex/illegal_immigration_reform_and_immigration_responsibility_act (last visited Apr. 18, 2021) [hereinafter *IIRIRA LII*]. “The Act also allows for the deportation of undocumented immigrants who commit a misdemeanor or a felony.” *IIRIRA LII*, *supra*.
23. *Compare* OFF. OF IMMIGR. STAT., U.S. DEP’T OF HOMELAND SEC., 2017 YEARBOOK OF IMMIGRATION STATISTICS 103 tbl.39 (2019), https://www.dhs.gov/sites/default/files/publications/yearbook_immigration_statistics_2017_0.pdf (annual removals from FY 1892 to FY 2017), *with* ICE Details How Border Crisis Impacted Immigration Enforcement in FY 2019, IMMIGR. AND CUSTOMS ENF’T, <https://www.ice.gov/features/ERO-2019> (last updated Feb. 10, 2021) (removals in FY 2019). From 1990 to 2007, “the unauthorized immigrant population more than tripled in size – from 3.5 million to . . . 12.2 million,” but that number dropped to 1.7 million by 2017. Budiman, *supra* note 20.
24. *See* Mark Engler & Paul Engler, *Op-Ed: The Massive Immigrant-Rights Protests of 2006 Are Still Changing Politics*, L.A. TIMES (Mar. 4, 2016), <https://www.latimes.com/opinion/op-ed/la-oe-0306-engler-immigration-protests-2006-20160306-story.html> (reporting that protests occurred “in more than 140 cities in 39 states”); *see also* Saul Gonzalez, *Hundreds of Thousands Marched for Immigrant Rights a Decade Ago. What’s Happened Since?*, THE WORLD (Mar. 30, 2016), <https://www.pri.org/stories/2016-03-30/hundreds-thousands-marched-immigrant-rights-decade-ago-whats-happened> (discussing the two largest protests against the proposed bill in 2006).
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 Tune on Deportation*, N.Y. TIMES (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].”).
27. Caitlin Dickerson, *What Is DACA? And How Did It End Up in the Supreme Court?*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/article/what-is-daca.html>. Importantly, DACA did not “provide a pathway to citizenship.” *Id.* Rather, DACA deferred removal action against certain individuals who were brought to the United States as children. *Consideration of Deferred Action for Childhood Arrivals (DACA)*,

PROTECTING THE VOICES OF THE IMMIGRANT RIGHTS MOVEMENT

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.²⁸ 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.²⁹ This sustained activism has led to the passage of “sanctuary” or “welcoming” legislation in states and municipalities across the country.³⁰

The 2016 election of Donald Trump, who ran on an anti-immigration platform,³¹ spurred new protest and activism.³² 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-

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.*

28. See EMILY TUCKER, CTR. FOR POPULAR DEMOCRACY, *PROTECTING IMMIGRANT COMMUNITIES: MUNICIPAL POLICY TO CONFRONT MASS DEPORTATION AND CRIMINALIZATION*, 34–35 (2017), https://populardemocracy.org/sites/default/files/Sanctuary-Cities-Toolkit_web.pdf (describing local tactics to advance immigrant rights in the wake of widespread deportations).
29. See, e.g., Alejandra Gomez & Tómas Robles Jr., *How to Turn Anger and Fear Into Political Power*, N.Y. TIMES (Dec. 21, 2019), <https://www.nytimes.com/2019/12/21/opinion/sunday/latinos-arizona-battleground.html> (highlighting strategies used to “bring[] in new voters of color” and make Arizona “a battleground state in 2020”); Jessa O’Connor, *How 287(g) Mobilized the Latino Vote in the Primary. Will The Momentum Continue?*, NPR: WFAE 90.7 (June 18, 2018), <https://www.wfae.org/post/how-287g-mobilized-latino-vote-primary-will-momentum-continue#stream/0> (discussing a local North Carolina immigration policy that “got many Latino voters in the polls”); Fernanda Santos, *Sheriff Joe Arpaio Loses Bid for 7th Term in Arizona*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/11/09/us/joe-arpaio-arizona-sheriff.html> (“Sheriff Arpaio’s bid for re-election . . . was undone by Latino voters who responded to his hard-line position on illegal immigration”); 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”).
30. See, e.g., Michael J. Dax, *A Year Later, Fewer Deportations in Cities That Adopted ‘Welcoming’ Policies*, YES! MAG. (Apr. 11, 2018), <https://www.yesmagazine.org/social-justice/2018/04/11/its-working-fewer-deportations-where-sanctuary-policies-are-in-place/>; Liz Robbins, *New York’s City Council Seeks to Bolster ‘Sanctuary City’ Status*, N.Y. TIMES (Apr. 26, 2017), <https://www.nytimes.com/2017/04/26/nyregion/new-york-city-council-sanctuary-city-bills.html?searchResultPosition=44>.
31. See Nick Corasaniti, *A Look at Trump’s Immigration Plan, Then and Now*, N.Y. TIMES (Aug. 31, 2016), <https://www.nytimes.com/interactive/2016/08/31/us/politics/donald-trump-immigration-changes.html> (quoting then-candidate Trump who promised “to deport many people, many, many people”).
32. See Phil Helsel, *Students Walk Out in Day of Protest Against Trump Immigration Plans*, NBC NEWS (Nov. 16, 2016), <https://www.nbcnews.com/news/us-news/students-walk-out-day-protest-against-trump-immigration-plans-n684981> (mapping student walkouts from New York, New Jersey, and Connecticut to Miami, San Diego, and Portland).

immigration policies.³³ The vulnerability of immigrant activists directly impacted by these policies was exposed in 2017, when the Trump administration “took the shackles off” of ICE.³⁴ A spike in enforcement actions against them quickly followed, and with it, a chilling effect across the immigrant rights movement.³⁵

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.³⁶ Although Puente members attempted to block the van transporting her for deportation, ICE successfully deported García de Rayos to Mexico later that week.³⁷ Believed to be one of the first people to be deported under the Trump administration, her story made national headlines.³⁸

-
33. See, e.g., Jonah Engel Bromwich, *Lawyers Mobilize at Nation's Airports After Trump's Order*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html>; Creede Newton, *Protests Grow as Texas Moves Against 'Sanctuary' Cities*, AL JAZEERA (Feb. 2, 2017), <https://www.aljazeera.com/news/2017/02/protests-grow-texas-moves-sanctuary-cities-170202205015258.html>; Alexandra Yoon-Hendricks & Zoe Greenberg, *Protests Across U.S. Call for End to Migrant Family Separations*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/trump-protests-family-separation.html>. The term “sanctuary city” stems from the 1980s sanctuary movement, “when U.S. churches sheltered Central American migrants who had fled civil strife in the region and feared deportation.” Kristina Cooke & Ted Hesson, *What Are 'Sanctuary' Cities and Why Is Trump Targeting Them?*, REUTERS (Feb. 25, 2020), <https://www.reuters.com/article/us-usa-immigration-crime/what-are-sanctuary-cities-and-why-is-trump-targeting-them-idUSKBN20J25R>. Today, “sanctuary” is “generally applied to states and localities that have laws, policies or regulations that make it harder for [ICE] to track down and arrest immigrants they believe are deportable.” *Id.*
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.
36. Fernanda Santos, *She Showed Up Yearly to Meet Immigration Agents. Now They've Deported Her.*, N.Y. TIMES (Feb. 8, 2017), <https://www.nytimes.com/2017/02/08/us/phoenix-guadalupe-garcia-de-rayos.html> [hereinafter *She Showed Up Yearly*]. Puente Arizona is an advocacy group fighting for migrant justice across Arizona through educational initiatives, political campaigns, and community partnerships. *About Us*, PUENTE HUM. RTS. MOVEMENT, <https://puenteaz.org/about-us/> (last visited Apr. 18, 2021).
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).
38. See, e.g., Daniel Gonzalez & Johana Restrepo, *Protestors Ring ICE in Phoenix: Could Woman in Custody be the First Deported Because of Trump's Orders?*, AZCENTRAL.COM (Feb. 8, 2017), <https://www.azcentral.com/story/news/politics/immigration/2017/02/08/could-woman-first-arizonan-deported-because-trump-orders/97637928/> (reporting that, if deported, García de Rayos would be “among the first casualties under a shift in policy by ICE under President Donald Trump”); Steve Almasy et al., *'I Did it For Love,' Says Mother Deported in Arizona Immigration Case*, CNN (Feb. 10, 2017), <https://www.cnn.com/2017/02/09/us/arizona-guadalupe-garcia-de-rayos-protests/> (“[García de Rayos] might be the first person deported from Arizona under President Trump’s executive order.”); Suzanne Gamboa, *Arizona Woman Deported, Possibly the First Under Trump Immigration Orders*, NBC NEWS (Feb. 9, 2017), <https://www.nbcnews.com/news/immigration/arizona-woman-deported-possibly-first-under-trump-immigration-orders-ncns170209>.

PROTECTING THE VOICES OF THE IMMIGRANT RIGHTS MOVEMENT

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.³⁹ Soon, however, a different pattern emerged. A significant number of those targeted for deportation, including García de Rayos, had openly criticized federal immigration authorities.⁴⁰ 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.⁴¹ 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.⁴² Even U.S. citizens who had advocated for immigrant rights faced investigation, surveillance, interrogation, travel restrictions, and—in at least one case—criminal prosecution.⁴³

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

www.nbcnews.com/news/latino/arizona-woman-deported-possibly-first-under-trump-immigration-orders-n718986 (citing a 2008 conviction for using a forged Social Security number and a 2013 order of removal as the bases for García de Rayos' sudden deportation).

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[ed] 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.*
40. John Burnett, *Immigration Advocates Warn ICE is Retaliating for Activism*, NPR (Mar. 16, 2018), <https://www.npr.org/2018/03/16/593884181/immigration-advocates-warn-ice-is-retaliating-for-activism>.
41. Michael E. Miller, *They Fear Being Deported. But 2.9 Million Immigrants Must Check In With ICE Anyway*, WASH. POST (Apr. 25, 2019), https://www.washingtonpost.com/local/they-fear-being-deported-but-29-million-immigrants-must-check-in-with-ice-anyway/2019/04/25/ac74efce-6309-11e9-9ff2-abc984dc9eec_story.html; 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>.
42. See Gaby Del Valle, *ICE Keeps Arresting Prominent Immigration Activists. They Think They're Being Targeted.*, VICE News (Aug. 24, 2019), <https://www.vice.com/en/article/ywady5/ice-keeps-arresting-prominent-immigration-activists-they-think-theyre-being-targeted> (pointing to recent arrests of immigrant activists to document a post-Obama shift in ICE's enforcement priorities); see also Maria Sacchetti & David Weigel, *ICE Has Detained or Deported Prominent Immigration Activists*, WASH. POST (Jan. 19, 2018), https://www.washingtonpost.com/powerpost/ice-has-detained-or-deported-foreigners-who-are-also-immigration-activists/2018/01/19/377af23a-fc95-11e7-a46b-a3614530bd87_story.html (same).
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.⁴⁴ Immediately after Vargas addressed the conference, ICE officials arrested and detained her, despite her pending application for DACA renewal.⁴⁵ She was released after almost two weeks in detention.⁴⁶ ICE also detained Baltazar “Rosas” Aburto Gutierrez in 2017, after he condemned his partner’s deportation to the press.⁴⁷ Gutierrez was later released on bond and is still in removal proceedings.⁴⁸

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.⁴⁹ Rueda’s DACA application was denied later that year, despite her eligibility.⁵⁰ 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.⁵¹ In 2020, several noncitizens were also arrested during a series of Black Lives Matter protests and transferred into ICE custody.⁵²

44. Phil Helsel et al., *‘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>.

45. *Id.*

46. Ray Sanchez, *DREAMer Daniela Vargas Released, Immigration Group Says*, CNN (Mar. 10, 2017), <https://www.cnn.com/2017/03/10/us/dreamer-daniela-vargas-ordered-released>.

47. Nina Shapiro, *ICE Tracks Down Immigrants Who Spoke to Media in SW Washington: ‘You Are the One From the Newspaper’*, SEATTLE TIMES (Dec. 3, 2017), <https://www.seattletimes.com/seattle-news/ice-tracks-down-immigrant-who-spoke-to-media-in-sw-washington-you-are-the-one-from-the-newspaper/> (reporting that, during the arrest, an ICE officer described Gutierrez, a U.S. resident of nearly twenty years and a father of two U.S. citizens, as “the one from the newspaper”).

48. Nina Shapiro, *Plan to Overhaul Immigration Policy Greeted With Cautious Optimism*, WENATCHEE WORLD (Mar. 6, 2021), https://www.wenatcheeworld.com/news/plan-to-overhaul-immigration-policy-greeted-with-cautious-optimism/article_f8c5c6ec-7777-11eb-b1bd-83edec8ecef.html.

49. James Queally, *L.A. Immigration Activist Files Suit Claiming DACA Application Was Rejected as ‘Political Retaliation’*, L.A. TIMES (Oct. 30, 2018), <https://www.latimes.com/local/lanow/la-me-ln-claudia-rueda-lawsuit-dreamer-20181029-story.html>.

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.”).

51. Ray Stern, *Latina Activist Alejandra Pablos Jailed by ICE; ‘Retaliation’ for Protest, Group Claims*, PHOENIX NEW TIMES (Mar. 7, 2018), <http://www.phoenixnewtimes.com/news/latina-activist-alejandra-pablos-jailed-in-tucson-by-ice-10210545>.

52. *See, e.g.*, Fernanda Echavarrí, *He Went to a Black Lives Matter Protest in Phoenix—and Ended Up in ICE Custody*, MOTHER JONES (June 11, 2020), <https://www.motherjones.com/anti-racism-police-protest/2020/06/undocumented-daca-george-floyd-protest-phoenix-ice/> (counting at least four undocumented individuals who were transferred into ICE custody after being arrested at a George Floyd protest); Jennifer Medina, *After an Arrest at a Black Lives Matter Protest: Deportation Proceedings*, N.Y. TIMES (July 11, 2020), <https://www.nytimes.com/2020/07/11/us/politics/black-lives-matter-phoenix-daca.html> (noting one Arizona-based immigrant activist who had to wear an ankle bracelet after her arrest at a Black Lives Matter protest).

PROTECTING THE VOICES OF THE IMMIGRANT RIGHTS MOVEMENT

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

-
53. Monsy Alvarado et al., *Deaths in custody. Sexual violence. Hunger strikes. What we uncovered inside ICE facilities across the US*, USA TODAY (Dec. 19, 2019, 9:45 PM), <https://www.usatoday.com/in-depth/news/nation/2019/12/19/ice-asylum-under-trump-exclusive-look-us-immigration-detention/4381404002/> (last updated Apr. 23, 2020, 12:25 PM) (adding that Hernandez-Diaz “had spent five months in immigration detention waiting for a judge to hear his asylum claim,” did not eat for four days, and “barely answered questions from security or medical staff, who noted his ‘withdrawn emotional state’”).
 54. *Id.* (“[D]etainees became concerned over an outbreak of the mumps that infected at least 24 people this year.”).
 55. *Id.*
 56. Press Release, Sundance Inst., 2019 Sundance Film Festival: 112 Features Announced (Nov. 28, 2018), <https://www.sundance.org/pdf/press-releases/2019-sundance-film-festival-features.pdf>.
 57. First Amended Verified Complaint for Declaratory & Injunctive Relief & Petition for Writ of Habeas Corpus at 1–3, 12, 39, *Rojas v. Moore (Rojas II)*, No. 1:19-CV-20855, 2019 WL 3340629 (S.D. Fla. Apr. 29, 2019).
 58. Tim Elfrink & 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/>; Monique O. Madan, *He Exposed Abuse at a Florida Immigrant Detention Center. Now He’s in Prison*, MIAMI HERALD (Mar. 3, 2019), <https://www.miamiherald.com/news/local/immigration/article227043044.html> (Mar. 5, 2019).
 59. Yara Simón, *Activist José Bello Performed an Anti-ICE Poem at Public Forum. Two Days Later, ICE Detained Him.*, REMEZCLA (July 15, 2020), <https://remezcla.com/culture/jose-bellow-anti-ice-poem-dear-america/>.
 60. Scott Allen, *Immigration Activist Says Bail Money from NFL Players ‘Seemed Like a Dream’*, WASH. POST (Aug. 15, 2019), <https://www.washingtonpost.com/sports/2019/08/15/immigration-activist-says-bail->

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 Montreuil and Executive Director Ragbir in January 2018.⁶⁹ Further indicating ICE’s tendency to

money-nfl-players-seemed-like-dream/ (describing the bond set for the farmworker, father, and college student as “unusually large”).

61. Carlos Andres López, *Las Cruces Group Calls for Release of Detained Mexican Journalist Emilio Gutierrez Soto*, LAS CRUCES SUN NEWS (Dec. 12, 2017), <https://www.lcsun-news.com/story/news/local/2017/12/12/mexican-journalist-detained-immigration-facility-seeks-asylum-deportation-appeal/944568001/>.

62. *Id.*

63. *Id.*

64. Kathy Kiely, *National Press Club Announces Emilio Gutiérrez’s Release in Victory for Press Freedom*, THE NAT’L PRESS CLUB (July 27, 2018), <https://www.press.org/newsroom/national-press-club-announces-emilio-gutierrezs-release-victory-press-freedom>.

65. *Gutierrez-Soto v. Sessions*, 317 F. Supp. 3d 917, 933 (W.D. Tex. 2018).

66. James Goodman, *The Silencing of Manuel Duran Ortega*, THE PROGRESSIVE (Mar. 22, 2019), <https://progressive.org/dispatches/the-silencing-of-manuel-duran-ortega-goodman-190322/>.

67. *Id.*; see also Zainab Sultan, *‘Just Treat Me With Dignity’*, COLUMBIA JOURNALISM REV. (Feb. 14, 2020), https://www.cjr.org/special_report/manuel-duran-ortega-ice.php.

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/d444c9f25b264e2299f8031125ce296f> (adding that Ortega was arrested in Memphis, Tennessee but detained in Louisiana and Alabama).

69. See Iannelli, *supra* note 1.

PROTECTING THE VOICES OF THE IMMIGRANT RIGHTS MOVEMENT

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."⁷⁴

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

-
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/maruniversice/> (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.
 73. *See Lilly Fowler, ICE Targets Prominent Immigration Activist for Deportation*, CROSSCUT (Jan. 15, 2018), <https://crosscut.com/2018/01/ice-targets-maru-mora-prominent-immigration-activist-for-deportation-trump>. "A Notice to Appear (NTA) is a document given to an alien that instructs them to appear before an immigration judge on a certain date." *USCIS Updates Notice to Appear Policy Guidance to Support DHS Enforcement Priorities*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (July 5, 2018), <https://www.uscis.gov/news/news-releases/uscis-updates-notice-to-appear-policy-guidance-to-support-dhs-enforcement-priorities>. An NTA "commences removal proceedings." *Id.*
 74. Gene Johnson, *Washington Immigrant Targeted for Deportation Came to ICE's Attention After Protests and Newspaper Interview, Document Shows*, SEATTLE TIMES (Feb. 27, 2018), <https://www.seattletimes.com/seattle-news/immigrant-targeted-for-deportation-came-to-ices-attention-after-protests-and-newspaper-interview-document-shows/>.
 75. Amanda Holpuch, *Immigration Activists File Lawsuit Saying They Were Targeted by US Government*, THE GUARDIAN (Nov. 14, 2018), <https://www.theguardian.com/us-news/2018/nov/14/vermont-migrant-justice-immigration-activists-lawsuit-dhs-ice>.
 76. *See First Amended Complaint at 13, Migrant Just. v. Nielsen*, No. 5:18-cv-192 (D. Vt. Feb. 7, 2019) [hereinafter *Migrant Justice 2019 Complaint*] ("ICE enlisted at least one civilian informant to infiltrate Migrant Justice."). Migrant Justice is a non-profit organization dedicated to defending the fundamental rights of Vermont farmworkers. *About Migrant Justice*, MIGRANT JUST., <https://migrantjustice.net/about> (last visited Apr. 17, 2021).

Justice members in 2016 and 2017.⁷⁷ 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.⁷⁸

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.⁷⁹ 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-19.⁸⁰ 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.⁸¹ 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.⁸²

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).

78. Tina Vásquez, *ICE is Targeting Women in Sanctuary with Obscure Laws and Retaliatory Fines*, TRUTHOUT (Dec. 13, 2020), <https://truthout.org/articles/ice-is-targeting-women-in-sanctuary-with-obscure-laws-and-retaliatory-fines/>. The National Sanctuary Collective “is comprised of immigrants in sanctuary, immigrant organizers, attorneys, and allies in faith communities spanning multiple states.” *Welcome – Bienvenidos*, NAT'L SANCTUARY COLLECTIVE, <http://thesanctuarycollective.org/welcome-to-http-thesanctuarycollective-org> (last visited Apr. 17, 2021). Its members “work to build collective strategies for liberation for all people living in sanctuary in the United States.” *Id.*

79. Adeel Hassan, *Witness in Hard Rock Hotel Collapse Is Deported*, N.Y. TIMES (Nov. 29, 2019), <https://www.nytimes.com/2019/11/29/us/hard-rock-hotel-worker-immigration.html>. ICE arrested Ramirez Palmar just two days after he gave an interview about the accident. *Id.*

80. Matt Katz, *ICE detainee who sued his jailers was swiftly deported. Now he's missing*, THE GOTHAMIST (May 28, 2020), <https://gothamist.com/news/ice-detainee-who-sued-his-jailers-was-swiftly-deported-now-hes-missing>.

81. Molly O'Toole, *ICE is deporting women at Irwin amid criminal investigation into Georgia doctor*, L.A. TIMES (Nov. 18, 2020), <https://www.latimes.com/politics/story/2020-11-18/ice-deporting-women-at-irwin-amid-criminal-investigation-into-georgia-doctor>.

82. Claudia Irizarry Aponte, *Man Detained by ICE in Violent Brooklyn Raid Is Free Pending Deportation Hearing*, THE CITY (Apr. 2, 2020), <https://www.thecity.nyc/2020/4/2/21210363/man-detained-by-ice-in-violent-brooklyn-raid-is-free-pending-deportation-hearing>.

PROTECTING THE VOICES OF THE IMMIGRANT RIGHTS MOVEMENT

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

83. Julia Ainsley, *Trump Signs Proclamation Restricting Asylum-Seekers at the Border*, NBC NEWS (Nov. 9, 2018), <https://www.nbcnews.com/politics/immigration/trump-admin-publishes-rule-stop-asylum-seekers-crossing-border-illegally-n934201>.

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).

85. See, e.g., Julia Ainsley, *U.S. Officials Made List of Reporters, Lawyers, Activists to Question at Border*, NBC NEWS (Mar. 6, 2019), <https://www.nbcnews.com/politics/immigration/u-s-officials-made-list-reporters-lawyers-activists-question-border-n980301> (counting roughly fifty-nine American citizens who were targeted by Customs and Border Protection).

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.*

89. Rory Carroll, *Eight Activists Helping Migrants Cross Brutal Desert Charged by US Government*, THE GUARDIAN (Jan. 24, 2018), <https://www.theguardian.com/us-news/2018/jan/24/us-immigration-activists-arizona-no-more-deaths-charged>.

surviving the journey often suffer from severe dehydration.⁹⁰ To mitigate this, volunteers place jugs of water throughout the desert and provide care to any distressed people they encounter.⁹¹ 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.⁹² Within hours, Border Patrol arrested longtime No More Deaths volunteer Dr. Scott Warren, accusing him of "alien smuggling."⁹³ The agency then arrested several other volunteers on charges related to littering and trespassing.⁹⁴ The case against Warren was eventually dismissed, but only after years of prosecution.⁹⁵

B. *The Harm*

The First Amendment ensures that people are free to speak their minds, and that those willing are free to listen.⁹⁶ 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.⁹⁷ 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].").
 91. Joel Rose, *'No More Deaths' Volunteers Face Possible Jail Time for Aiding Migrants*, NPR (Feb. 28, 2019), <https://www.npr.org/2019/02/28/699010462/no-more-deaths-volunteers-face-possible-prison-time-for-aiding-migrants>.
 92. Rory Carroll, *US Border Patrol Routinely Sabotages Water Left for Migrants, Report Says*, THE GUARDIAN (Jan. 17, 2018), <https://www.theguardian.com/us-news/2018/jan/17/us-border-patrol-sabotage-aid-migrants-mexico-arizona>; see also No More Deaths, *Footage of Border Patrol Vandalism of Humanitarian Aid, 2010–2017*, YouTube (Jan. 17, 2018), <https://youtu.be/watch?v=eqaslbj5Th8> (showing Border Patrol agents removing the jugs).
 93. Amy B. Wang, *Border Patrol Agents Were Filmed Dumping Water Left for Migrants. Then Came a 'Suspicious' Arrest.*, WASH. POST (Jan. 24, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/01/23/border-patrol-accused-of-targeting-aid-group-that-filmed-agents-dumping-water-left-for-migrants/> (reporting that Warren was arrested "about eight hours after the No More Deaths report and video were released").
 94. *Id.*; see also *Trials Begin January 15th*, NO MORE DEATHS (Jan. 4, 2019), <https://nomoredeaths.org/trials-begin-january-15th/> (confirming the trial date for Warren and other No More Deaths volunteers).
 95. Rafael Carranza, *Federal Judge Dismisses Lone Conviction Against Arizona Border Aid Volunteer Scott Warren*, AZCENTRAL.COM (Feb. 27, 2020), <https://www.azcentral.com/story/news/politics/border-issues/2020/02/27/judge-tosses-conviction-arizona-border-aid-volunteer-scott-warren/4893132002/>.
 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.").

PROTECTING THE VOICES OF THE IMMIGRANT RIGHTS MOVEMENT

pro-immigrant views.⁹⁸ 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.”⁹⁹ 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.¹⁰⁰ 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.”¹⁰¹

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.¹⁰² Filmmakers similarly expressed concern over Rojas’ deportation following the debut of *The Infiltrators*.¹⁰³ 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.”¹⁰⁴

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.¹⁰⁵ Fewer members of these groups felt comfortable publicly sharing the injustices that they had experienced in the immigration system.¹⁰⁶ Organizations like La Resistencia—whose leaders and members have been targeted—have needed to divert

98. See, e.g., Brief of Amici Curiae New York Elected Officials in Support of Plaintiffs-Appellants and Reversal at 22–23, *Ragbir v. Homan*, 923 F.3d 53 (2d Cir. 2019) (No. 18-1597) (mentioning a congressional letter to the Secretary of Homeland Security, which alleged that ICE’s retaliatory conduct had a chilling effect on immigrant rights).

99. Sacchetti & Weigel, *supra* note 42.

100. *Id.*

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

102. E.g., Brief of Amici Curiae Journalist Organizations in Support of Petitioner, *Duran-Ortega v. U.S. Att’y Gen.*, No. 18-14563 (11th Cir. Jan. 14, 2019).

103. See, e.g., Simon Kilmurry, *Letter in Support of ‘The Infiltrators’ Protagonist Claudio Rojas*, INT’L DOCUMENTARY ASS’N (Mar. 5, 2019), <https://www.documentary.org/advocacy/letter-support-infiltrators-protagonist-claudio-rojas> (asking the documentary community to write to their elected representatives and leverage their personal networks to assist in securing Rojas’ release).

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”).

resources to their respective legal defense funds while simultaneously addressing widespread fear among membership.¹⁰⁷ Workplace organizers have also feared retaliation against immigrant workers when workplace raids have followed on the heels of employment disputes.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.”¹⁰⁹ As a constraint on government power, it protects all “people,” irrespective of citizenship or immigration status.¹¹⁰ By safeguarding the free exchange of ideas, the First Amendment protects virtually all other freedoms that form the foundation of our democracy.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.”¹¹²

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.

108. See Zach Ford, *ICE raids followed a massive sexual harassment settlement at Mississippi plants*, THINKPROGRESS (Aug. 8, 2019), <https://archive.thinkprogress.org/ice-raids-follow-massive-sexual-harassment-settlement-mississippi-plant-koch-foods-d95eb2720f67/>.

109. U.S. CONST. amend. I.

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).

111. *Palko v. Connecticut*, 302 U.S. 319, 326–27 (1937); see also *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010).

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).

PROTECTING THE VOICES OF THE IMMIGRANT RIGHTS MOVEMENT

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.¹¹³ 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.”¹¹⁴

In theory, these principles guarantee immigrants robust First Amendment rights to voice their criticism of government policy without risking deportation.¹¹⁵ In practice, however, the Supreme Court has a poor track record of protecting noncitizen dissidents from retaliatory exclusion or deportation¹¹⁶ and has repeatedly rejected First Amendment challenges to such treatment.¹¹⁷

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,¹¹⁸ a principle stemming from the overtly racist Chinese exclusion era¹¹⁹ when the Supreme Court abdicated judicial review of immigration law.¹²⁰ Second, these cases arose largely in the national security context, where federal immigration officials sought to exclude or deport noncitizens based on their alleged

113. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

114. *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987) (footnote omitted).

115. *See Cole*, *supra* note 110, at 370.

116. Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237, 1261–69 (2016) [hereinafter *When Immigrants Speak*].

117. *See, e.g., Reno v. Am.-Arab Anti-Discrimination Comm. (AADAC)*, 525 U.S. 471, 488 (1999) (footnote omitted) (concluding that unlawfully present noncitizens have “no constitutional right to assert selective enforcement as a defense against [] deportation”); *Kleindienst v. Mandel*, 408 U.S. 753, 756 (1972) (holding that courts generally will not question the executive’s exercise of congressionally-delegated plenary power “to make policies and rules for exclusion of aliens”); *Galvan v. Press*, 347 U.S. 522, 530–32 (1954) (noting that congressional power over who can emigrate is purposely broad); *Harisiades v. Shaughnessy*, 342 U.S. 580, 593–95 (1952) (allowing U.S. residents to be deported for their past affiliation with the Communist Party); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 293–94 (1904) (finding an entry ban against anarchists constitutional).

118. “The plenary power doctrine protects the federal government from claims that it is violating an individual’s constitutional right to equal protection when it imposes discriminatory burdens on non-US citizens.” Nitin Goyal, *The Plenary Power Shield: National Security and the Special Registration Program*, CUNY SCH. L. (2008), [https://www.law.cuny.edu/legal-writing/forum/immigration-law-essays/goyal/#:~:text=Introduction%3A,burdens%20on%20non%2DUS%20citizens](https://www.law.cuny.edu/legal-writing/forum/immigration-law-essays/goyal/#:~:text=Introduction%3A,burdens%20on%20non%2DUS%20citizens; see also Plenary Power, LEGAL INFO. INST., https://www.law.cornell.edu/wex/plenary_power); *see also Plenary Power*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/plenary_power (last visited Apr. 17, 2021) (defining plenary power as “[c]omplete power over a particular area with no limitations”).

119. The Chinese exclusion era involved the passage of the Chinese Exclusion Act of 1882, which restricted immigration of Chinese laborers for ten years. *Chinese Immigration and the Chinese Exclusion Acts*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1866-1898/chinese-immigration> (last visited Apr. 17, 2021). The Supreme Court has abdicated much of its responsibility to review the constitutionality of immigration laws because immigration is assumed to involve foreign policy and national security—areas that the Constitution reserves to the legislative and the executive branches. Goyal, *supra* note 118.

120. *See When Immigrants Speak*, *supra* note 116, at 1264–65, 1282–83 (discussing the “plenary power” doctrine and “[t]he 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.¹²¹ The Court, therefore, often defers to federal immigration officials instead of ruling on First Amendment matters.

For example, in 1999 in *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.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.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.”¹²⁴

Despite the national security concerns animating the decision, federal immigration officials have relied on *AADC* to seek dismissal of any First Amendment challenge to deportation.¹²⁵ This strategy was rejected in the Second Circuit’s 2019 decision in *Ragbir v. Homan*.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.”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.¹²⁸

121. *See 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).

122. 525 U.S. at 472–73. The *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.” *Id.* at 473.

123. *Id.* at 488, 491–92. In *Ragbir v. Homan*, the Second Circuit concluded that ICE’s retaliation against the activist for his criticism of ICE constituted “outrageous” First Amendment discrimination. *See* 923 F.3d 53, 69 (2d Cir. 2019) (“*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.”), *vacated sub nom.*, *Pham v. Ragbir*, 141 S. Ct. 227 (2020) (mem.).

124. *AADC*, 525 U.S. at 491–92.

125. *See supra* note 18.

126. 923 F.3d at 69.

127. *Id.* at 69–70.

128. *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.

Id. at 71.

PROTECTING THE VOICES OF THE IMMIGRANT RIGHTS MOVEMENT

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.¹²⁹ In October 2020, the Supreme Court granted certiorari.¹³⁰ 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.¹³¹

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.¹³² Specifically, *AADC* concluded that § 1252(g) stripped courts of jurisdiction to review the plaintiffs' selective-enforcement claim,¹³³ and therefore the Court identified no constitutional concern with its application of § 1252(g) to the *AADC* plaintiffs' case.¹³⁴ 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*.¹³⁵

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.

129. Petition for Writ of Certiorari at 9–16, *Albence v. Ragbir*, No. 19-1046 (U.S. Feb. 21, 2020).

130. *Pham v. Ragbir*, 141 S. Ct. 227, 227 (2020) (mem.).

131. *Id.* (directing the Second Circuit to consider *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020)). The Solicitor General also sought vacatur and remand in light of *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), which he argued had undermined Ragbir's First Amendment claim on the merits. See Petition for Writ of Certiorari, *supra* note 129, at 10. The Court rejected this argument. See *Pham*, 141 S. Ct. at 227.

132. See 8 U.S.C. § 1252(g) (“[N]o court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision of action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders.”); see also *Reno v. Am.-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 485–86 (1999) (noting that § 1252(g) was designed to give some protection to government discretion in immigration matters).

133. *AADC*, 525 U.S. at 488–92; see also § 1252(g).

134. See *AADC*, 525 U.S. at 478–88 (reasoning that a noncitizen “unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation”).

135. 923 F.3d 53, 66–71 (2d Cir. 2019) (“[W]e see no basis . . . for construing the word ‘nonstatutory’ in § 1252(g) to exclude constitutional claims.”) (emphasis in original).

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.¹³⁶ 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.¹³⁷ 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 2017.¹³⁸

During the Obama administration, broad prosecutorial discretion was encouraged to protect individuals exercising their civil rights and liberties.¹³⁹ 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.”¹⁴⁰ 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.”¹⁴¹

136. *See supra* notes 34 and 41.

137. Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 254–55 (2010) (citation omitted).

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).

139. *See* Michael Kagan, *A Taxonomy of Discretion: Refining the Legality Debate About Obama’s Executive Actions on Immigration*, 92 WASH. U. L. REV. 1083, 1083, 1096 (2015) (examining memoranda by ICE Director John Morton).

140. Memorandum from John Morton, Dir. of U.S. Immigr. and Customs Enf’t, to agency pers., *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs 2* (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

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”).

PROTECTING THE VOICES OF THE IMMIGRANT RIGHTS MOVEMENT

When President Trump took office, however, one of his first executive orders directed the DHS to expand the list of individuals prioritized for deportation.¹⁴² 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.”¹⁴³ 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.¹⁴⁴

The Kelly Memo did not explicitly mention the Morton Memo protecting certain victims, witnesses, and plaintiffs from immigration enforcement,¹⁴⁵ creating uncertainty as to whether those individuals could continue to benefit from prosecutorial discretion.¹⁴⁶ In some instances, like with Migrant Justice, attempts to vindicate immigrant rights appear connected to ICE subsequently targeting those same advocates.¹⁴⁷ Moreover, longstanding beneficiaries of prosecutorial discretion—like Ragbir, who retained a stay of removal for several years—lost that benefit under the Trump administration.¹⁴⁸

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.”¹⁴⁹ 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,

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.”).

143. Memorandum from John Kelly, Sec’y, Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs and Border Prot. et al., Enforcement of the Immigration Laws to Serve the National Interest 2 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

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](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.

149. Memorandum from Kevin K. McAleenan, Acting Sec’y, Dep’t of Homeland Sec., to agency pers., Information Regarding First Amendment Protected Activities 1 (May 17, 2019), https://www.dhs.gov/sites/default/files/publications/info_regarding_first_amendment_protected_activities_as1_signed_05.17.2019.pdf.

or administrative proceedings, or to an immigration application.¹⁵⁰ 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).¹⁵¹ In theory, these agencies could prevent subcomponents of the DHS from unlawfully retaliating against immigrants and violating immigrant rights.¹⁵² In structure and practice, however, this power is extremely limited.¹⁵³

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.¹⁵⁴ While noncitizens may contact the OIG to lodge complaints, the OIG is not required to investigate or remedy any individual injuries.¹⁵⁵ 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.¹⁵⁶

150. *Id.* at 1–2.

151. The OIG was established by Congress in 2002 to oversee DHS and its programs, including DHS's enforcement and administration of immigration laws. *About Us*, OFF. OF INSPECTOR GEN., <https://www.oig.dhs.gov/about> (last visited Apr. 18, 2021) [hereinafter *About OIG*]. The CRCL aids in “preserving individual liberty, fairness, and equality under the law.” *Office for Civil Rights and Civil Liberties*, DHS (Feb. 12, 2021), <https://www.dhs.gov/office-civil-rights-and-civil-liberties>. Each CRCL division handles different subject matter, including immigration. *See id.*

152. *See supra* note 151 and accompanying text.

153. *See infra* pp. 247–49.

154. *About OIG*, *supra* note 151.

155. *See, e.g., Department of Homeland Security OIG*, OVERSIGHT.GOV, <https://www.oversight.gov/taxonomy/term/35> (last visited Apr. 17, 2021) (specifying that any individual may report complaints to the “DHS OIG Hotline”); OFF. OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., *DHS NEEDS TO IMPROVE ITS OVERSIGHT OF MISCONDUCT AND DISCIPLINE 2* (2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-48-Jun19.pdf> (noting that the OIG is responsible for receiving and investigating certain allegations of misconduct or fraud with discretion to initiate an investigation); *Management Directive 0810.1*, U.S. DEP’T OF HOMELAND SEC. OFF. OF INSPECTOR GEN. (June 10, 2004), <https://www.oig.dhs.gov/sites/default/files/0810.1%20The%20Office%20of%20Inspector%20General.pdf> (listing categories of allegations open to OIG investigation but noting that such investigation is discretionary); U.S. DEP’T OF HOMELAND SEC. OFF. OF INSPECTOR GEN., *RECOMMENDED PRACTICES FOR OFFICE OF INSPECTOR GENERAL HOTLINES 11* (2010), <https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/ighotline1010.pdf> (focusing the OIG Hotline’s limited resources on “legitimate complaints . . . that are substantive in subject matter and in detail.”).

156. Alice Speri, *Detained, Then Violated*, THE INTERCEPT (Apr. 11, 2018), <https://theintercept.com/2018/04/11/immigration-detention-sexual-abuse-ice-dhs/>.

PROTECTING THE VOICES OF THE IMMIGRANT RIGHTS MOVEMENT

While noncitizens and nongovernmental organizations can urge the OIG to issue reports exposing systemic agency abuse,¹⁵⁷ 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.”¹⁵⁸ Thus, mere submission of a plan—and not necessarily its successful implementation—may suffice to “resolve” the OIG’s recommendations.¹⁵⁹ 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.¹⁶⁰ 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.¹⁶¹

Individuals who have experienced alleged abuses by immigration officials may also make a formal complaint to the CRCL.¹⁶² 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[.]”¹⁶³ The CRCL has investigated high-profile rights abuses by the DHS, including allegations of employee misconduct during implementation of the Muslim ban in early 2017.¹⁶⁴ Unlike the OIG, the CRCL is not independent and is statutorily required to assist

157. See Press Release, Nat’l Immigrant Just. Ctr., DHS Inspector General Finds Egregious Rights Violations At Immigration Prisons (Dec. 14, 2017), <https://immigrantjustice.org/press-releases/dhs-inspector-general-finds-egregious-rights-violations-immigration-prisons> (publicizing an OIG investigation into human rights and due process violations against immigrant detainees that was prompted by reports from nongovernmental organizations and calls from detained immigrants to the OIG Hotline).

158. See OFF. OF INSPECTOR GEN., DEP’T OF HOMELAND SEC., DHS OPEN UNRESOLVED RECOMMENDATIONS MORE THAN SIX MONTHS OLD, AS OF MARCH 31, 2020, at 2 (May 30, 2020), <https://www.oig.dhs.gov/sites/default/files/DHS-Open-Unresolved-Recommendations-As-Of-033120-053020.pdf>.

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

160. *Id.* But see *Unimplemented Recommendations Archive*, OFF. OF INSPECTOR GEN., U.S. DEP’T OF HEALTH AND HUM. SERVS., <https://oig.hhs.gov/reports-and-publications/compendium/archive.asp> (last visited Apr. 18, 2021) (listing unimplemented recommendations specific to the Department of Health and Human Services).

161. See OFF. OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., SEMIANNUAL REPORT TO THE CONGRESS 9 (2020), <https://www.oig.dhs.gov/sites/default/files/assets/SAR/2020/oig-sar-apr20-sep20.pdf>.

162. See *Make a Civil Rights Complaint*, DEP’T OF HOMELAND SEC. (June 16, 2020), <https://www.dhs.gov/file-civil-rights-complaint>.

163. *Id.* (attributing the CRCL’s authority, in part, to the Homeland Security Act of 2002, 6 U.S.C. § 345).

164. See Ed Pilkington, *Watchdog Investigating DHS for Alleged Misconduct by Immigration Officials at Airports*, THE GUARDIAN (Mar. 22, 2017), <https://www.theguardian.com/us-news/2017/mar/22/us-immigration-investigation-misconduct-airports-travel-ban> (“The [CRCL] had . . . been looking into the impact of the travel ban. That investigation has now been put on hold until the OIG watchdog can complete its work.”). Once the OIG finalized its investigation, the CRCL reopened and completed its travel ban investigation. See Press Release, Dep’t of Homeland Sec. Off. of Inspector Gen., DHS OIG Completes Its Review of Implementation of the Travel Ban; Awaits Decision by DHS Regarding Whether It Will Invoke Privilege (Nov. 21, 2017), <https://www.oig.dhs.gov/sites/default/files/assets/pr/2017/oigpr-112117-dhs-oig-completes-review-implementation-travel-ban.pdf>.

the DHS Secretary in ensuring that civil rights and liberties are protected in DHS programs and activities.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]."¹⁶⁶ For example, the expanded family separation policy¹⁶⁷ 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."¹⁶⁸ Without much power, the CRCL offers little protection to immigrants facing retaliation.

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."¹⁶⁹ These regulations were promulgated pursuant to a

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).

166. Nick Schwellenbach, *A Conversation with Former DHS Official Who Resigned Over Family Separation*, POGO (Dec. 5, 2018), <https://www.pogo.org/analysis/2018/12/conversation-with-former-dhs-official-who-resigned-over-family-separation>; see also Scott Shuchart, *Careless Cruelty: Civil Servants Said Separating Families was Illegal. The Administration Ignored Us.*, WASH. POST (Oct. 25, 2018), <https://www.washingtonpost.com/news/posteverything/wp/2018/10/25/feature/civil-servants-said-separating-families-was-illegal-the-administration-ignored-us/> (telling of families being torn apart without any "reasonable plan to put them back together" despite the CRCL objecting to the administration's knowing rights violations).

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 *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); *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).

168. Shuchart, *supra* note 166.

169. 8 C.F.R. § 215.2 (2021). Specifically, § 215.2(a) provides:

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

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 or attempt 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).

174. *See* *United States v. Stepanyan*, No. 3:15-CR-00234, 2015 WL 4498572, at *4 (N.D. Cal. July 23, 2015) (“The Court will not speculate on the possible results of pending immigration proceedings involving the defendant, and leaves it to the Government to avail itself of the tools at its disposal to manage deportation proceedings in light of the pending criminal prosecution, the Government having made no showing here that it cannot.”). This analysis often arises in bail determinations, where the government argues that an ICE detainer makes an individual a flight risk—but many courts disagree. *See, e.g.*, *United States v. Perez*, No. 08-CR-20114-1, 2008 WL 4950992, at *2 (D. Kan. Nov. 18, 2008) (“The Court finds that Defendant’s alleged unlawful status and . . . ICE detainer are not sufficient grounds to prevent Defendant’s pretrial release.”); *United States v. Holguin-Correa*, No. 2:19-CR-00416, 2020 WL 2085268, at *3 (D. Utah Apr. 29, 2020) (finding no flight risk when “any such risk of nonappearance is within the control of the United States” due to departure control regulations); *United States v. Lozano-Miranda*, No. 09-CR-20005-5, 2009 WL 113407, at *3 n.13 (D. Kan. Jan. 15, 2009) (“[T]he existence of the ICE detainer is not in and of itself sufficient grounds to find that Defendant poses a flight risk.”); *United States v. Garcia-Gallardo*, 2009 WL 113412, No. 09-CF-20005-3, at *2 n.13 (D. Kan. Jan. 15, 2009) (same).

may themselves invoke these regulations to prevent their deportation. Several courts have held that noncitizens cannot do so.¹⁷⁵ 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;¹⁷⁶ return to the United States;¹⁷⁷ orders preventing retaliatory deportation;¹⁷⁸ orders preventing retaliatory fines;¹⁷⁹ and orders granting or restoring relief or status that was denied due to retaliation.¹⁸⁰

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.”¹⁸¹ In *AADC*, the Supreme Court held that the provision applies narrowly to the three enumerated actions.¹⁸² 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).
176. *E.g.*, *Rojas v. Moore (Rojas I)*, No. 19-CV-20855, 2019 WL 3340630, at *1 (S.D. Fla. Mar. 26, 2019); *Bello Reyes v. McAleenan*, No. 19-CV-03630-SK, 2019 WL 5214051, at *4 (N.D. Cal. July 16, 2019), *rev’d sub nom.*, *Bello-Reyes v. Gaynor*, 985 F.3d 698 (9th Cir. 2021) (remanding the case after concluding that the district court applied the wrong standard); *Gutierrez-Soto v. Sessions*, 317 F. Supp. 3d 917, 921, 933–34 (W.D. Tex. 2018).
177. *E.g.*, *Rojas v. Moore (Rojas II)*, No. 19-CV-20855, 2019 WL 3340629, at *2 (S.D. Fla. Apr. 29, 2019).
178. *E.g.*, *Ragbir v. Homan*, No. 18-CV-1159, 2018 WL 2338792, at *1 (S.D.N.Y. May 23, 2018); *Rojas I*, 2019 WL 3340630, at *1.
179. *E.g.*, Amended Complaint at 2–3, *Austin Sanctuary Network v. Mayorkas*, No.1:21-cv-00164 (D.D.C. Mar. 24, 2021).
180. *E.g.*, *Rojas I*, 2019 WL 3340630, at *1; *Vidal v. U.S. Dep’t of Homeland Sec.*, No. CV18-9276, 2019 U.S. Dist. LEXIS 227440, at *2 (C.D. Cal. Aug. 28, 2019), *rev’d sub nom.* *Vidal v. Bolton*, 822 F. App’x 643 (9th Cir. 2020) (mem.).
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)).

PROTECTING THE VOICES OF THE IMMIGRANT RIGHTS MOVEMENT

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

183. *See, e.g.*, *Arce v. United States*, 899 F.3d 796, 799–801 (9th Cir. 2018); *Madu v. U.S. Att’y Gen.*, 470 F.3d 1362, 1367–68 (11th Cir. 2006).

184. *See, e.g.*, *Ibrahim v. Acosta*, No. 17-CV-24574, 2018 WL 582520, at *4–6 (S.D. Fla. Jan. 26, 2018) (upholding federal court jurisdiction to issue a stay of removal); *S.N.C. v. Sessions*, No. 18 CIV. 7680, 2018 WL 6175902, at *4–5 (S.D.N.Y. Nov. 26, 2018) (raising an as-applied challenge to the constitutionality of §1252(g)); *Fatty v. Nielsen*, No. C17-1535, 2018 WL 3491278, at *1–2 (W.D. Wash. July 20, 2018) (retaining jurisdiction over § 1252(g) claim); *You v. Nielsen*, 321 F. Supp. 3d 451, 456–58 (S.D.N.Y. 2018) (holding that the constitutionality of the government’s action is a question for the court beyond the reach of § 1252(g)); *Calderon v. Sessions*, 330 F. Supp. 3d 944, 957–59 (S.D.N.Y. 2018) (same).

185. The FTCA allows individuals to file claims against the United States to recover for injury caused by wrongful or negligent acts by a federal employee. *See Federal Tort Claims Act*, U.S. HOUSE OF REPRESENTATIVES, <https://www.house.gov/doing-business-with-the-house/leases/federal-tort-claims-act> (last visited Apr. 19, 2021); *see also* Tort Claim Procedures Act, 28 U.S.C. §§ 2671–80 (2018). “Every person who . . . causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights [or] privileges, . . . shall be liable to the party injured.” 42 U.S.C. § 1983 (1996).

186. 28 U.S.C. § 2401(b). A claimant must file an administrative claim within two years of the challenged action and exhaust the administrative process before going to federal court. *Id.*; 28 U.S.C. § 2675(a); 28 C.F.R. § 14.2 (2021).

187. *See* PRIYA PATEL, NAT’L IMMGR. PROJECT OF THE NAT’L LAWS. GUILD, FEDERAL TORT CLAIMS ACT: FREQUENTLY ASKED QUESTIONS FOR IMMIGRATION ATTORNEYS 2 (Jan. 24, 2013), https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/fed/2013_24Jan_ftca-faq.pdf.

188. A U visa allows nonimmigrant status “for victims of certain crimes who have suffered mental or physical abuse and are helpful to law enforcement or government officials in the investigation or prosecution of criminal activity.” *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (June 12, 2018), <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-criminal-activity-u-nonimmigrant-status>. *See generally* 8 U.S.C. § 1101(a)(15)(U) (outlining the eligibility requirements for a U visa).

189. PATEL, *supra* note 187.

190. *See, e.g.*, *Villegas v. Metro. Gov’t of Nashville & Davidson Cnty.*, 907 F. Supp. 2d 907, 912, 914 (M.D. Tenn. 2012) (granting plaintiff’s motion for a U visa certification in a damages action under 42 U.S.C. § 1983).

liability altogether. The FTCA does not waive sovereign immunity¹⁹¹ 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.”¹⁹² Relatedly, courts are split as to whether § 1252(g) strips their jurisdiction over FTCA claims for wrongful deportation.¹⁹³

v. 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.¹⁹⁴

A private bill, like all other legislation, requires Congress and the president to act before the bill becomes law.¹⁹⁵ 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.¹⁹⁶ Such a stay could extend for one-year and was eligible for renewal.¹⁹⁷ This permitted the individual to remain in the United States while the private bill moved through the legislative process.¹⁹⁸

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

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).

192. 28 U.S.C. § 2680(a).

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.*

194. See, e.g., For the relief of Claudio Marcelo Rojas, H.R. 1894, 116th Cong. (2019) (seeking to grant permanent resident status to Rojas); For the Relief of Ravidath Lawrence Ragbir, H.R. 4937, 115th Cong. (2018) (seeking same for Ragbir).

195. U.S. CONST. art. I, § 7, cl. 2.

196. See generally NICOLE COMSTOCK, ET. AL., PRIVATE BILLS & DEFERRED ACTION TOOLKIT 7–20 (2010), https://pennstatelaw.psu.edu/_file/PBDA_Toolkit.pdf (providing background about private bills).

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).

PROTECTING THE VOICES OF THE IMMIGRANT RIGHTS MOVEMENT

removal.¹⁹⁹ 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.”²⁰⁰ 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.²⁰¹

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.²⁰² 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.”²⁰³

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.²⁰⁴ This should, in part, direct federal immigration officials to exercise prosecutorial discretion to protect immigrants from

199. Letter from Thomas D. Homan, Acting Dir., U.S. Immigr. & Customs Enf’t, to Charles E. Grassley, Chairman, Comm. on the Judiciary, U.S. Senate 1 (May 5, 2017), <http://myattorneyusa.com/storage/upload/files/matters/ice-private-bill-letter.pdf>.

200. *Id.*; see also U.S. IMMIGR. & CUSTOMS ENF’T, POL’Y NO. 5004.1, STAYS OF REMOVAL AND PRIVATE IMMIGRATION BILLS § 2.2(1) (May 5, 2017) [hereinafter POL’Y No. 5004.1], https://www.ice.gov/doclib/foia/dro_policy_memos/removalStaysPrivateImmigrationBills_05_05_2017.pdf.

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”).

202. Brian Lisi, *ICE Defies Congress, Deports Man Who’s Lived in Country for 39 Years*, N.Y. DAILY NEWS (Jan. 30, 2018), <https://www.nydailynews.com/news/national/ice-defies-congress-deports-man-living-country-39-years-article-1.3788471>; M.L. Schultze, *Amer Adi’s Deportation Leaves Youngstown Mourning ‘A Hell of a Man’*, WOSU PUB. MEDIA (Jan. 29, 2018), <https://radio.wosu.org/post/amer-adis-deportation-leaves-youngstown-mourning-hell-man#stream/0>.

203. M.L. Schultze, *ICE Decides to Deport Youngstown Businessman, Ignoring Congressional Request*, WOSU PUB. MEDIA (Jan. 25, 2018), <https://news.wosu.org/news/2018-01-25/ice-decides-to-deport-youngstown-businessman-ignoring-congressional-request#stream/0>.

204. *But see* Sarah Libowsky & Krista Oehlke, *President Biden’s Immigration Executive Actions: A Recap*, LAWFARE (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.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.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.²⁰⁷ They should also have the power to order—not just recommend—corrective action.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

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

206. In *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 *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 Justice v. Wolf*, No. 5:18-cv-192 (D. Vt. Oct. 28, 2020).

207. Cf. SCOTT SHUCHART, CTR. FOR AM. PROGRESS, BUILDING MEANINGFUL CIVIL RIGHTS AND LIBERTIES OVERSIGHT AT THE U.S. DEPARTMENT OF HOMELAND SECURITY (Apr. 2019), https://cdn.americanprogress.org/content/uploads/2019/03/28064808/DHS-Civil-Rights-Oversight-report1.pdf?_ga=2.75537493.1939097935.1617503499-369173519.1616968504 (recommending changes to law and policy that would enhance the CRCL's role, including the increase of its authority through "clear statutory [language]").

208. *Id.*

PROTECTING THE VOICES OF THE IMMIGRANT RIGHTS MOVEMENT

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,²⁰⁹ 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 in the United States and Who Are They?*, BROOKINGS (Nov. 12, 2019), <https://www.brookings.edu/policy2020/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).