18-1597

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Ravidath Lawrence Ragbir et al.

Plaintiffs–Appellants

v.

Thomas D. Homan et al.

Defendants–Appellees

On appeal from the United States District Court for the Southern District of New York — No. 1:18-CV-1159 (Castel, J.)

BRIEF OF *AMICI CURIAE* INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION, KNIGHT FIRST AMENDMENT INSTITUTE, AND RODERICK & SOLANGE MACARTHUR JUSTICE CENTER IN SUPPORT OF PLAINTIFFS–APPELLANTS

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Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel certifies that *amici curiae* the Institute for Constitutional Advocacy and Protection, the Knight First Amendment Institute, and the Roderick & Solange MacArthur Justice Center have no parent corporations and no publicly held corporation owns 10 percent or more of their organization's stock.

/s/ Caroline DeCell
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INTERESTS OF AMICI CURIAE[1]

The mission of the Institute for Constitutional Advocacy and Protection is to use the power of the courts to defend American constitutional rights and values. The Institute seeks to ensure that national security concerns are given the respect they deserve without allowing those concerns to be used as a pretext for unchecked governmental authority. Founded in 2017, the Institute draws on its leadership's extensive background in national security law and policy, including its Executive Director's prior role as the Senior Director for Counterterrorism at the National Security Council. The Institute thus has a strong interest in the constitutional questions presented in this case.

The Knight First Amendment Institute at Columbia University is a non-partisan, not-for-profit organization that works to defend the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. The Institute aims to promote a system of free expression that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity,

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* certify (1) this brief was authored entirely by counsel for *amici curiae* and not counsel for any party, in whole or in part; (2) no party or counsel for any party contributed money to preparing or submitting this brief; and (3) apart from *amici curiae*, their members, and their counsel, no other person contributed money to the preparation or submission of this brief.

All parties have consented to the filing of this brief.

accountability, and effective self-government. The Institute is particularly committed to addressing the First Amendment implications of government surveillance and immigration policies.

The Roderick & Solange MacArthur Justice Center ("MJC") is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. MJC has represented clients facing myriad human rights and civil rights injustices, including issues related to discriminatory and retaliatory enforcement of the law, the First Amendment rights of protesters and activists, and the defense of marginalized groups in the American justice system. MJC has an interest in the rule of law, including preventing government officials from administering the law in a discriminatory or retaliatory manner.

INTRODUCTION

The government has retaliated against plaintiff–appellant Ravi Ragbir and noncitizen activists across the country for peacefully speaking out against the government's immigration enforcement activities. This retaliation, accepted as true by the district court with regard to Mr. Ragbir, has serious negative effects: it suppresses a critical viewpoint in an ongoing national debate, silences a crucial community voice, and chills the speech of long-time residents with substantial ties to this country, like Mr. Ragbir. And it is prohibited by the First Amendment.

The district court's conclusion to the contrary rests, in part, on reasoning that contravenes the Supreme Court's recent decision in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), holding that the existence of probable cause does not bar claims of retaliatory arrest, particularly those based on a widespread policy carried out by non-prosecutor government actors. Plaintiffs–appellants have alleged a pattern and practice of retaliatory deportations that fits squarely within that category of claims, and the district court erred in concluding otherwise.

The district court's decision further rests, in larger part, on a mistaken understanding of the scope of the Supreme Court's decision in *Reno v. American–Arab Anti-Discrimination Committee (AADC)*, 525 U.S. 471 (1999). In that case, the Supreme Court found that the plaintiffs, who alleged that removal proceedings against them were commenced in retaliation for their membership in an alleged

terrorist group, could not bring a collateral action to challenge the claimed retaliation absent proof of "outrageous" government conduct. The district court's reliance on *AADC* is mistaken for two reasons.

First, Mr. Ragbir's case falls well outside the scope of the narrow category of cases *AADC* addressed. The limited rule articulated in *AADC* was animated by concerns for national security and preserving prosecutorial discretion. In *AADC*, the plaintiffs were alleged to have provided material support to a foreign terrorist organization. There is no claim that Mr. Ragbir—or other activists around the country who have been targeted because of their speech—has provided similar support, or even dealt in any way with foreign entities. Likewise, *AADC* arose in a very different posture—at the start of deportation proceedings—and thus implicated the government's interests in prosecutorial discretion. This case, by contrast, arises long after the exercise of any prosecutorial discretion; it involves the decision of non-prosecutor government actors to withdraw an existing administrative stay of removal, revoke—without notice—an order of supervision, and carry out a ten-year-old final order of removal.

Second, even if *AADC* were to apply, the government conduct alleged by plaintiffs–appellants is outrageous, and falls within the exception preserved in that case. The government has engaged in a pattern of retaliation against activists whose targeted activities—peaceful protest against government policies—constitute core

political speech protected by the First Amendment. And Mr. Ragbir (and his fellow petitioners) are entitled to the full protection of the Constitution. He has substantial connections to the United States and to his local community; he has lived in this country for decades; he has a U.S. citizen spouse and child; and he engages in significant advocacy activities in his New York community. The government has no legitimate interest in retaliating against Mr. Ragbir and other similar advocates; the government's enforcement efforts here target speakers because of their opinions and constitute impermissible viewpoint discrimination. The concerns underlying *AADC* are simply absent in cases involving outrageous conduct such as this.

The government's pattern of retaliation against peaceful advocacy on a key political issue silences a crucial voice in our national conversation and reflects a practice that the government has condemned in other countries around the world. Expanding *AADC* to preclude relief in the factual circumstances presented in this case would severely undercut the protections of the First Amendment for some of the most vulnerable members of our communities. In particular, the 900,000 residents of the United States facing final orders of removal who have been released from custody would be denied redress if the government were to violate their constitutional rights.

ARGUMENT

I. Mr. Ragbir's Retaliation Claim Does Not Fall Within the Reasoning Set Forth in *AADC*.

A. The First Amendment Prohibits Retaliation Against Individuals for Their Speech.

A core purpose of the First Amendment is "to protect unpopular individuals from retaliation—and their ideas from suppression." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). The First Amendment therefore restrains the government from taking adverse actions against individuals as retaliation for engaging in constitutionally protected speech, a safeguard that has been extended to nearly all aspects of government action, including the use of prosecutorial authority, *see, e.g.*, *Hartman v. Moore*, 547 U.S. 250, 256 (2006), the terms of public employment, *see, e.g.*, *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), and the provision of benefits, *see generally Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 674 (1996). In short, the prohibition on speech-based retaliation ensures that "[t]he power of the state . . . not be used to 'drive certain ideas or viewpoints from the marketplace.'" *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1327 (11th Cir. 2017) (quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

B. There Is No Across-the-Board Probable Cause Exception to the Rule Against Speech-Based Retaliation.

Despite this wide-ranging prohibition on speech-based retaliation, the district court found an exception for cases in which probable cause for governmental action—which resulted in the removal order against Mr. Ragbir here—exists. Sustaining the district court's decision in this regard would create a dangerously broad carve-out from the First Amendment, and one that is ripe for abuse. For two reasons, this Court should reject the district court's expansion of cases in which the First Amendment does not apply.

First, the Supreme Court recently made clear in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), that probable cause does not defeat *all* claims of retaliatory enforcement and, in particular, does not bar those, like Mr. Ragbir's, that are based on a widespread policy carried out by non-prosecutor government actors. In *Lozman*, the Court separated claims of retaliatory prosecution (which, in the damages context, are defeated by the existence of probable cause) from those of retaliatory arrest. *Id.* at 1953. Although the Court declined to decide whether probable cause may ever bar a retaliatory arrest claim, the Court found it provided no obstacle to a claim against governmental actors who formed an official policy of retaliation and carried it out by directing the plaintiff's arrest. *Id.* at 1954–55. The Court explained that the plaintiff's allegation of an "official policy motivated by retaliation" significantly heightened the severity of the government's misconduct:

official policies, unlike ad hoc instances of retaliation, "can be long term and pervasive," "can be difficult to dislodge," and are not remediable outside of litigation by, for example, seeking internal disciplinary action against the individual wrongdoer. *Id.* at 1954. Here, like the "official policy" alleged in *Lozman*, Mr. Ragbir has claimed that the government has an ongoing "pattern and practice of targeting immigrant-rights activists for immigration enforcement on the basis of their core protected political speech." Joint App.[2] at A-0042. Thus, probable cause poses no obstacle to his claim.

Second, the district court erred by reasoning that Mr. Ragbir has no claim "because the injury to him flows from the final order of removal and not its execution," A-0278, and thus "retaliation for speech cannot serve as a but-for cause of his removal," A-0292. This view of causation would cut a gaping hole in the First Amendment's protections against retaliation, and it runs headlong into this Court's precedents. As the district court recognized, probable cause is not a bar when the government takes a "non-criminal regulatory enforcement action" if, "for improper motive, [it] t[akes] regulatory action that [i]s significantly more serious than other action [it] had discretion to take." A-0278 (citation omitted). That is because the government's animus is a "but-for" cause of the plaintiff's injury. Holding

[2] Hereinafter, citations to the Joint Appendix will follow the format "A-____".

otherwise—as the district court did—would preclude First Amendment retaliation cases in all contexts, criminal or regulatory, so long as the government can show it had a factual basis to act, no matter how far removed the factual basis is from the action. That is not the law. *See generally Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

Mr. Ragbir's case illustrates these principles. It was not the removal order standing alone that caused Mr. Ragbir's injury. That order had existed for a decade, all while Mr. Ragbir lived a fruitful life in the United States. Instead, it was defendants' decision—motivated by animus towards Mr. Ragbir for his protected speech—to carry out the order that threatens injury to Mr. Ragbir. Likewise, the speech for which Mr. Ragbir was targeted lacked any connection to the basis for his removal order. Simply put, the government action challenged here occurred long after the issuance of the removal order and was motivated by Mr. Ragbir's protected speech.

Moreover, as the Court recognized in *Lozman*, an official policy of "retaliation for prior, protected speech bearing little relation to the criminal offense" alleviates any difficulty in determining whether retaliatory intent prompted adverse government action. 138 S. Ct. at 1954. Mr. Ragbir's speech bears no connection to any allegedly wrongful conduct, and has no legitimate role in the government's decision whether to take action on a decade-old removal order. Here, where there is

evidence that the government factored in such speech, there is no difficulty in concluding that retaliatory intent was a motivating, but-for cause. This is particularly concerning where the speech, like Mr. Ragbir's, is "high in the hierarchy of First Amendment Values." *Id.* at 1955; *see infra* Section II.B.2.

C. In *AADC*, the Supreme Court Outlined a Narrow Category of Cases to Which the General Rule Prohibiting Speech-Based Retaliation Does Not Apply.

Against this backdrop of a wide-ranging prohibition on speech-based retaliation, the Supreme Court in *AADC* described a discrete category of retaliation claims for which judicial review is unavailable. 525 U.S. at 491. The plaintiffs in *AADC* filed suit in federal district court, seeking to enjoin deportation proceedings initiated against them by the Immigration and Naturalization Service (INS). *Id.* at 473–74. Although INS formally charged the plaintiffs with "routine status violations," the plaintiffs alleged that INS's true motivation for initiating deportation proceedings was the plaintiffs' membership in the Popular Front for the Liberation of Palestine (PFLP), an asserted "international terrorist and communist organization." *Id.* at 473. The plaintiffs brought a selective enforcement claim (a species of retaliation claim), contending that they were targeted because of their support for the PFLP, in violation of the First Amendment. *Id.* at 474.

The Supreme Court held that Congress had deprived federal courts of jurisdiction to consider the plaintiffs' selective enforcement claims as a defense to

the initiation of deportation proceedings. *Id.* at 492. In doing so, the Court focused on two particular burdens that would be imposed on the government if respondents in similar deportation proceedings were permitted to raise that defense. *See id.* at 490–91. First, the Court observed that allowing these individuals' claims to proceed would enable them to delay their deportation and thereby continue their allegedly unlawful presence in the United States. *Id*. at 490. Second, the Court warned that examining the prosecutor's motivations for initiating a deportation proceeding would risk "the disclosure of foreign-policy objectives and (as in [*AADC*]) foreign-intelligence products and techniques." *Id.* at 490–91. The Court reasoned that the plaintiffs' interest in "avoiding 'selective' treatment" in deportation proceedings was less compelling than it would have been in criminal prosecutions and could not "overcome" these countervailing "considerations." *Id.* at 491.[3]

Although *AADC* ruled against the plaintiffs, the decision was narrow. The Court twice highlighted that its reasoning came "in the context of claims" of selective enforcement (1) in deportation proceedings and (2) for supporting a foreign terrorist group. *Id.* at 488, 492. The Court also made clear that its conclusion might

[3] The Court contrasted these considerations with those that arise in criminal prosecutions—where selective enforcement claims are permitted—finding them weightier in the deportation context because delay carries with it unlawful presence and because, in a criminal prosecution, a selective enforcement claim risks only "disclosure of normal domestic law enforcement priorities and techniques." *Id.* at 490.

not extend to a more "outrageous" case where the individual's interest in free expression outweighed the government's law enforcement interest. *Id.* at 491.

D. *AADC* Does Not Apply to Mr. Ragbir's Case.

Below, we explain why the government's effort to remove Mr. Ragbir from the United States in retaliation for his advocacy regarding immigration policies and practices is "outrageous" within the meaning of *AADC*.[4] *See infra* Part II. But this Court need not reach that issue because the reasoning of *AADC* does not apply to cases like Mr. Ragbir's, where the First Amendment interests bear no connection to foreign terrorist organizations and where the claimed retaliatory conduct is the withdrawal of a stay of removal and the carrying out of a final order of removal.

To the extent *AADC* bars even raising certain First Amendment claims as a defense to certain deportation proceedings, it is an unusual ruling. Any decision limiting the reach of the First Amendment's prohibition against retaliation should be construed narrowly to ensure the government cannot wield a powerful weapon to silence dissent.

[4] *Amici* assume the truth of the facts set forth in Mr. Ragbir's complaint. A-0037.

1. Unlike the Plaintiffs in *AADC*, Mr. Ragbir Has Not Provided Material Support to Alleged Foreign Terrorist Organizations.

The result in *AADC* reflected the Supreme Court's judgment that any First Amendment interest at stake in supporting an alleged foreign terrorist organization was insufficiently compelling to "overcome" the burden on the government of "permit[ting] immediate review of the selective-enforcement claims." *Id.* at 488. But when the expression at stake is unrelated to foreign terrorist activity and is instead issue advocacy at the core of the First Amendment's protection, the scale ultimately tips against the government.

The Supreme Court's regard for any First Amendment interests at stake in *AADC* reflects the fact that, there, the plaintiffs were alleged to have provided material support to a foreign terrorist organization. *See, e.g.*, Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. Rev. 1237, 1281 (2016) (noting that the government's brief in *AADC* explained that the plaintiffs' activities constituted "material support" and were therefore "the subject of civil and criminal prohibitions under other federal laws").[5] Similarly, in *Holder v. Humanitarian Law Project*, the Supreme Court

[5] *See also* Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After* Reno v. AADC, 14 Geo. Immigr. L.J. 313, 335 (2000) ("[T]he suggestion in *Reno v. AADC* that the First Amendment permits selective enforcement . . . against an alien whom the government 'believes . . . to be a member

upheld against First Amendment challenges a criminal statute making it unlawful to provide material support to a foreign terrorist organization, but made clear that the Court's decision should not be read to "suggest that Congress could extend the same prohibition on material support at issue here to *domestic* organizations." 561 U.S. 1, 39 (2010) (emphasis added). The reduced concern for First Amendment interests exhibited in these cases has no application in Mr. Ragbir's case, which involves no allegation that he provided material support to any foreign organization, let alone a terrorist one.

AADC also reflects the Court's view that, while the First Amendment interests presented were relatively weak, the government's interests were at their peak. "The interest in preserving national security is 'an urgent objective of the highest order.'" *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (quoting *Humanitarian Law Project*, 561 U.S. at 28). Thus, as *AADC* explained, allowing the plaintiffs to pursue their claims would require the disclosure of "foreign-intelligence products and techniques," one of the two core concerns discussed above, *see supra* at 11, that animated the Court's decision. *AADC*, 525 U.S. at 490–91.

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of an organization that supports terrorist activity' could be interpreted as referring to a type of non-nominal membership for which the First Amendment would permit even citizens to be penalized." (quoting *AADC*, 525 U.S. at 492) (second alteration in original)).

These dueling concerns are inverted in Mr. Ragbir's case and others like it. First, the speech for which Mr. Ragbir has been targeted concerns domestic policy, and the people with whom he has associated are in the United States. Indeed, as Mr. Ragbir explains, the force of his speech comes in large part from his presence in the United States, *see* Pls.–Appellants' Br. at 50, contrasting sharply with the cross-border support at issue in *AADC*.[6] Second, the government has not argued that national security concerns justify its conduct with respect to Mr. Ragbir or any of the other individuals targeted for enforcement actions in the troubling pattern of retaliation challenged in this case.[7] Simply put, the circumstances that prompted the Supreme Court to foreclose selective enforcement claims in the context presented in *AADC* do not exist here.

2. The Reasoning of *AADC* Does Not Apply When the Government Seeks to Carry out a Removal Order.

AADC does not apply to Mr. Ragbir's case for a second reason: the retaliatory action that Mr. Ragbir challenges is the decision to withdraw an existing

[6] In *AADC,* the Court suggested that the only "consideration on the other side of the ledger" was the avoidance of deportation, further revealing its limited view of the First Amendment interests at stake. *See* 525 U.S. at 491. Here, by contrast, the right Mr. Ragbir seeks to vindicate—issue advocacy related to domestic policy—is at the core of what the First Amendment protects. *See infra* Section II.B.2.

[7] The mere existence of an order of removal does not raise a national security concern, particularly not of the type at issue in *AADC*, where the government raised individualized concerns about personal ties to a terrorist organization.

administrative stay, refuse to issue a new stay, and carry out a years-old final order of removal. *AADC*, by contrast, considered claims raised at the start of deportation proceedings. Those claims thus threatened to delay the proceedings and impinge on the exercise of prosecutorial discretion in initiating the proceedings. Just as the balance of the competing concerns underlying *AADC* shifts because of the different First Amendment interests at stake here, so too does it shift because of the different procedural posture. Because both the government's interest in avoiding delay and the risk of impinging on prosecutorial discretion are weaker here, Mr. Ragbir's claim should be allowed to proceed.[8]

First, with respect to delay, the government cannot establish a vital interest in expedited removal when—as here—it has already approved of the person subjected to retaliatory action remaining in the United States for *years* after the entry of a final order of removal. The potential harm that follows from the "ongoing violation of United States law" when an individual remains in the United States without authorization, *AADC*, 525 U.S. at 491 (emphasis omitted), should be given little

[8] For the avoidance of doubt, as explained above, *amici* do not interpret *AADC*'s reasoning to apply to the retaliatory initiation of deportation proceedings unrelated to support for foreign terrorist organizations. But this Court need not determine whether *AADC* extends to such action because, as explained below, it is clear that the Supreme Court's reasoning is inapplicable when the government retaliates by carrying out a final order of removal.

weight where the government has acquiesced in any purported "harm"—or, more likely, repeatedly determined that no such harm exists.

Second, the imposition on the "prosecutor" is highly attenuated in a case like this one. The charging decision, including the evaluation of factors such as the "strength of the case" and competing enforcement priorities, *AADC*, 525 U.S. at 490 (citation omitted), has already been made, sometimes years earlier, when deportation proceedings were adjudicated. Although the decision to carry out a final order of removal can, in theory, be related to the Executive Branch's foreign policy, the mere possibility of foreign policy implications does not alone suffice to justify a categorical refusal to hear a claim. *Cf.*, *e.g.*, *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 594 (4th Cir.), *vacated and remanded on other grounds*, *Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017) (adjudicating Establishment Clause challenge to limits on entry to the United States for foreign citizens); *United States v. Lindh*, 212 F. Supp. 2d 541, 564 (E.D. Va. 2002) (entertaining selective prosecution claim brought by al-Qaeda suspect).

The post-final-order posture here is also more susceptible to abuse. When the government *begins* deportation proceedings with a retaliatory motivation, it still must prove to the Immigration Court, the Board of Immigration Appeals, and, on petition for review, an Article III Court of Appeals that the respondent committed some independent wrong—such as overstaying a visa or committing a crime—that

renders him removable. By contrast, when the government decides to carry out a removal order for retaliatory reasons, it does so without having to prove any change of circumstances or unlawful act by the target of the retaliation and without any independent check. *See, e.g.*, 8 C.F.R. § 241.6(b) (denial of an administrative stay is not appealable). Thus, what is normally understood as a *presumption* of regularity would become irrebuttable and insulated from all outside review if *AADC* were stretched to apply to post-final-order conduct.

The district court's conclusion that the differing procedural posture here "does not necessarily work in Ragbir's favor" rests on a flawed factual premise. A-0272. The district court found it significant that Mr. Ragbir "has had a full and fair opportunity to have the BIA and the Second Circuit review both his order of removal as well as the immigration judge's refusal to reopen and reconsider the order." *Id.* But that is only partially correct. Mr. Ragbir never had an opportunity to bring this constitutional challenge because the factual predicates did not arise until after the proceedings the district court referenced had come to an end. Indeed, he could not, because the retaliation claim does not pertain to the order itself.

To be sure, *AADC* does allow a risk that some improper retaliation will go undetected. But that danger exists only in an exceedingly narrow range of cases described above in which national security concerns—and thus deference to the Executive—are at their highest. Extending *AADC* beyond those discrete

circumstances threatens to turn legitimate interests into a pretext for government suppression of dissent.

E. Extending *AADC*'s Reasoning Would Silence a Significant Number of Residents.

Extending *AADC* to cases like Mr. Ragbir's would severely undercut the protections that the First Amendment affords and the societal benefits it fosters. The freedom of speech that millions of noncitizens otherwise enjoy, *see infra* Section II.A, would be cast into doubt, and few noncitizens would risk voicing unpopular views with the knowledge that doing so could trigger deportation. "If a foreign national has no First Amendment rights in the deportation setting, he has no First Amendment rights anywhere; the fear of deportation will always and everywhere restrict what he says." David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 T. Jefferson L. Rev. 367, 377 (2003).

This danger is particularly stark for the approximately 900,000 individuals who, like Mr. Ragbir, are under final orders of removal but have been released from custody.[9] If *AADC* is extended to shelter the government from claims of First Amendment retaliation when it withdraws stays and deferrals or carries out removal

[9] Tiziana Rinaldi, *As Immigration Detention Soars, 2.3 Million People Are Also Regularly Checking in With Immigration Agents*, PRI (May 23, 2017), https://www.pri.org/stories/2017-05-23/immigration-detention-soars-23-million-people-are-also-regularly-checking.

orders, individuals threatened with removal for expressing a view with which the government disagrees will have no recourse to an independent forum before they are separated from their families, their homes, and possibly the only country they have ever known. Many of these individuals, like Mr. Ragbir, remain in the United States with the government's knowledge and approval for years—and, in some instances, for the remainder of their lives—after a final order of removal is entered. Extending *AADC* would force these individuals to self-censor indefinitely.

This unbridled power could easily be abused. ICE would be free, for example, to remove deportable noncitizens for supporting a disfavored political party. Or, if an ICE agent abused or harassed a noncitizen, the victim would have to face the risk of retaliatory removal (against which she would have no recourse) should she choose to report the misconduct. The list of potential wrongs is too long to catalog here, but no valid government interest is achieved by allowing such unchecked authority.

II. Mr. Ragbir's Case Falls Within *AADC*'s Carve-Out For Outrageous Government Conduct.

Even if *AADC* did apply to the factual circumstances of Mr. Ragbir's case, the government's retaliation against him and other vocal proponents of immigrants' rights would fall within the exception preserved by that case. As explained above, the *AADC* Court expressly left open "the possibility of a rare case in which the alleged basis of discrimination [against a noncitizen] is so outrageous" that a claim of improper prosecutorial action could be recognized. *AADC*, 525 U.S. at 491. While

the Supreme Court only clarified that it is not outrageous when the government deports a noncitizen because "it believes him to be a member of an organization that supports terrorist activity[,]" *id.* at 492, a review of case law following *AADC* reveals a framework that examines the importance of the right being infringed and whether the government's actions are rationally related to a legitimate purpose. Critically, no court ruling addressing the *AADC* exception prior to this case has evaluated facts coming close to the egregious targeting of Mr. Ragbir and his fellow activists because of their advocacy.

The lion's share of cases that have addressed the *AADC* exception stem from ICE's National Security Entry-Exit Registration System ("NSEERS"), a noncitizen registration program based on national origin. In determining that application of the program was not outrageous, the First Circuit found that it "serves legitimate government objectives of monitoring nationals from certain countries to prevent terrorism and is rationally related to achieving these monitoring objectives." *Kandamar v. Gonzales*, 464 F.3d 65, 74 (1st Cir. 2006) (citation omitted). This Court adopted the same rationale to uphold the program because it had a "rational national security basis." *Rajah v. Mukasey*, 544 F.3d 427, 438 (2d Cir. 2008).[10]

[10] The same program was also upheld by the Third, Fifth, Ninth, and Eleventh Circuits, without substantive discussion of the "outrageous" exception. *See Daud v. Gonzales*, 207 F. App'x 194, 203 (3d Cir. 2006); *Ahmed v. Gonzales*, 447 F.3d 433,

In *Carranza v. INS*, 277 F.3d 65, 72 n.5 (1st Cir. 2002), the First Circuit described the "outrageous" exception in *AADC* as "[i]n much the same vein" as the standard laid out in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). That is, selection would be unconstitutional—and thereby outrageous for the purposes of the *AADC* exception—when, for example, "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Bordenkircher*, 434 U.S. at 364 (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)); *see also id. at* 363 ("[T]o pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional." (internal quotation marks and citations omitted)).

The framework developed by these cases provides that claims of outrageous government conduct can be met depending on (1) the importance of the right being infringed; and (2) whether the government's actions are rationally related to a legitimate purpose, and are not arbitrary or malicious. Under this framework, plaintiffs–appellants have sufficiently pled that the government's retaliation against Mr. Ragbir and other similarly situated activists qualifies as outrageous.

Here, the district court "decline[d] to extend this exception for outrageous discrimination to Ragbir's claim[,]" finding that free speech is a "volitional act" that

439–40 (5th Cir. 2006); *Adenwala v. Holder*, 341 F. App'x 307, 309 (9th Cir. 2009); and *Zafar v. U.S. Att'y Gen.*, 461 F.3d 1357, 1367 (11th Cir. 2006).

is subject to "strategic use." A-0280. But this suggestion—that Mr. Ragbir may have "strategically" engaged in free speech in order to immunize himself from immigration enforcement—is not supported by the facts set forth in the motions. There is no basis to conclude that Mr. Ragbir's advocacy, or that of the other plaintiffs–appellants in this action, consists of anything but genuine acts of peaceful political expression, which are subject to the highest protection. This is especially true because Mr. Ragbir's speech predated the government's new, unlawful policy of retaliation. Whatever else may be said of the potential for manipulation going forward, improper motives could not have infected Mr. Ragbir's speech.

A. By Targeting Mr. Ragbir for Deportation, the Government Is Infringing on His and Others' Constitutionally Protected Rights.

The government's retaliation against First Amendment protected advocacy, as alleged by plaintiffs–appellants, infringes on one of the most closely guarded constitutional freedoms guaranteed to all people within U.S. borders, whether or not they are citizens.

All persons present in the United States are protected from retaliation by the government based on the exercise of their free speech rights. Notably, the First Amendment prohibits Congress from making a "law . . . abridging the freedom of speech," without limitation to U.S. citizens or any other specific group of people. U.S. Const. amend. I. Although some noncitizens may have more limited constitutional rights in certain contexts, these limitations have been applied

primarily to noncitizens who have spent little time in the United States. *See, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (Fourth Amendment does not apply to use of evidence from the search of a dwelling in Mexico against a foreign resident who had been arrested in Mexico and brought involuntarily to the United States). But even in those contexts, noncitizens are "accorded a generous and ascending scale of rights" that increases in step with the noncitizen's "identity with our society." *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). In *Verdugo-Urquidez*, the Supreme Court, in determining the scope of the Fourth Amendment's protections, noted that its textual reference to "the people," while not conclusive, "suggests that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." 494 U.S. at 265.

Mr. Ragbir undeniably possesses substantial ties to his community in New York City and the country as a whole. His spouse and daughter are U.S. citizens who reside in this country, and he has lived here for over two decades. Through his work, worship, and advocacy, Mr. Ragbir has become an integral part of his community in New York, and the community of activists around the country, including citizens and noncitizens alike. He is thus at the zenith of the "ascending scale" of protection of constitutional rights described in *Eisentrager*. The extent of free speech

protections enjoyed by Mr. Ragbir is therefore governed by the same standard that applies to citizens. *See Harisiades v. Shaugnessy*, 342 U.S. 580, 591–92 (1952) (applying same First Amendment standard to noncitizens' claims that then applied to citizens).

Moreover, the First Amendment rights of citizens are also at stake in this case. The Supreme Court has recognized that "the First Amendment interests of those who seek personal communication" with a noncitizen weighs against government actions that would infringe upon those rights. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972); *see also Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 117 (2d Cir. 2009) ("The Supreme Court has recognized a First Amendment right to 'hear, speak, and debate with' a visa applicant." (citation omitted)). The government's retaliation here therefore infringes not only on the fully vested First Amendment rights of Mr. Ragbir, but also on those of his U.S. citizen wife and child, co-workers, supporters, and community members.

B. The Government's Retaliation in This Case is Particularly Outrageous.

The government action challenged here violates the most fundamental guarantees of the First Amendment while serving no legitimate government interest. It is therefore particularly outrageous, and subject to judicial review even under *AADC*. 525 U.S. at 491.

1. The Government Has No Legitimate Interest in Retaliating Against Mr. Ragbir.

The government has no legitimate interest in retaliating against Mr. Ragbir. Unlike in *AADC* and other cases that have followed it, Mr. Ragbir is not a member of any group that advocates for violence and has no associations with terrorism, and the government has not claimed that his national origin presents any foreign policy implications. In *AADC*, as discussed *supra* Section I.D.1, the plaintiffs belonged to a group that the government characterized as "an international terrorist and communist organization." 525 U.S. at 473. Similarly, in the NSEERS cases, the government's actions were found not to be outrageous because the government had a legitimate objective to "prevent terrorism." *Kandamar*, 464 F.3d at 74. No similar interest lies here.

2. The Speech Protected Here—Peaceful Advocacy on Political Issues—Is Afforded the Strongest Protections Under the Law.

A long line of precedent confirms that peaceful speech critical of the government—the type of expression against which the government has retaliated in this case—merits the highest protection under the law. Freedom to speak is at "the core of the First Amendment." *In re Application of Herald Co.*, 734 F.2d 93, 100 (2d Cir. 1984). Accordingly, impairment of the right to free speech "threatens the

most fundamental of constitutional values." *Id.* Its abridgement "not only silences one speaker, it also inhibits others from exercising their rights of expression." *Id.*

Even within that core protected right, dissent against the government receives special attention. "There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991). "The Supreme Court has declared that . . . political demonstrations and protests [are] activities at the heart of what the Bill of Rights was designed to safeguard." *Jones v. Parmley*, 465 F.3d 46, 56 (2d Cir. 2006) (citing *Boos v. Barry*, 485 U.S. 312, 318 (1988)); *see also Butterworth v. Smith*, 494 U.S. 624, 632 (1990) ("[I]nformation relating to alleged governmental misconduct" is speech at the "core of the First Amendment."). Mr. Ragbir's peaceful advocacy efforts and criticism of government immigration policies and practices—including marches, community education programs, and media outreach—are emblematic of the traditional "political demonstrations and protests" that the First Amendment so clearly protects.

The outrageousness of the government's retaliation against Mr. Ragbir for his constitutionally protected speech is highlighted by the fact that Congress has set aside "issue advocacy"—speech that does not expressly advocate for or against a political candidate—as the sole form of participation in the democratic process for noncitizens who are not legal permanent residents. *See Bluman v. FEC*, 800 F. Supp.

2d 281, 284 (D.D.C. 2011), *aff'd* 565 U.S. 1104 (2012) (finding that statute preventing foreign nationals from contributing to campaigns does not bar foreign nationals from issue advocacy). The fact that Congress has permitted this form of political expression by foreign nationals while limiting others demonstrates its intent to protect issue advocacy by noncitizens, who, while not entitled to participate in electoral politics as fully as citizens, nonetheless have an important role to play in informing domestic policy debates. Protecting issue advocacy from retaliation is therefore essential to ensure that these crucial community voices are not silenced. The government's actions against Mr. Ragbir and other activists across the country strike at the very core of these zealously guarded rights.

3. The Government's Actions Constitute Impermissible Viewpoint Discrimination.

Viewpoint discrimination is a particularly "egregious form of content discrimination" in which "the government targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Under the First Amendment, the government must abstain from it. *Id*. In this case, the circumstances surrounding the government's decision to withdraw an existing administrative stay, refuse to issue a new stay, revoke—without notice—an order of supervision, and carry out a years-old final order of removal, as well as similar targeting efforts across the country, suggest that there is good reason to believe that the government's purpose is retaliating against

those who oppose the government's immigration enforcement activity, as shown in the internal document regarding outspoken advocate Maru Mora-Villalpando which describes her as an "anti-ICE" activist.[11] This viewpoint-based retaliation offends core principles of the First Amendment and falls within the "outrageous" exception of *AADC*.

The government's conduct is made even more outrageous because the allegations describe a pattern of suppression of advocacy on a political issue central to the national conversation, and reflect a practice that the government has condemned in other countries around the world. Plaintiffs–appellants' complaint, and the filings of *amici*, detail a pattern of retaliation against government critics on the key issue of immigration. Immigration, including the treatment of noncitizens in the United States, has been a touchstone of political debate in the United States from the beginning of the Republic. The pattern of retaliation alleged here has the outrageous effect of prohibiting foreign nationals present in the United States, including those like Mr. Ragbir with deep and enduring ties to this country, from protesting for better treatment for themselves and others similarly situated. This

[11] Gene Johnson, *Washington Immigrant Targeted for Deportation Came to ICE's Attention After Protests and Newspaper Interview, Document Shows*, Seattle Times (Feb. 26, 2018), https://www.seattletimes.com/seattle-news/immigrant-targeted-for-deportation-came-to-ices-attention-after-protests-and-newspaper-interview-document-shows.

suppression constitutes impermissible viewpoint discrimination on a national scale, silencing critical voices in the ongoing and contentious national debate.

It is outrageous for the government to use deportation as a retaliatory tool against those who nonviolently express positions on domestic policy contrary to the position of the government. The United States has long condemned targeted enforcement of protesters, government critics, and dissidents in other countries. Less than a year ago, the United States Permanent Mission to the United Nations made the point clear when criticizing a verdict against a human rights activist in Bahrain:

> [N]o one anywhere should be prosecuted or imprisoned for exercising their human rights or fundamental freedoms, including the freedoms of expression or peaceful assembly. [The U.S. Government] believe[s] societies are strengthened, not threatened, by expressions of opinion and dissent, and that opposition voices can play a vital role helping societies become more tolerant and inclusive.[12]

[12] *U.S. Disappointed by the Verdict Sentencing Human Rights Activist Nabeel Rajab*, Press Statement by Heather Nauert, Department Spokesperson, Mission of the United States in Geneva, Switzerland (July 10, 2017), *available at* https://geneva.usmission.gov/2017/07/11/u-s-disappointed-by-the-verdict-sentencing-human-rights-activist-nabeel-rajab/; *see also U.S. Slams Vietnam for Jailing Dissidents*, VOA News (Aug. 27, 2014), https://www.voanews.com/a/us-slams-vietnam-for-jailing-dissidents/2429357.html (U.S. criticizes selective enforcement of traffic laws against activists in Vietnam); Jennifer Rubin, *The State Department Speaks Up Against Russia*, Wash. Post (Mar. 21, 2017), https://www.washingtonpost.com/blogs/right-turn/wp/2017/03/27/the-state-department-speaks-up-against-russia/?utm_term=.29ccc4a67b2b (U.S. "strongly condemns" detention of peaceful protesters as "an affront to core democratic values.").

CONCLUSION

Amici respectfully urge the Court to reverse the district court's decision.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Second Circuit Local Rules 29.1(c) and 32.1(a)(4)(A) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), it contain 6,950 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it was prepared using Microsoft Word in 14-point Times New Roman font, a proportionally spaced typeface.

Dated: September 7, 2018

/s/ Caroline DeCell
Caroline DeCell

CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2018, I caused a true and correct copy of the foregoing to be served on all counsel of record through the Court's CM/ECF system.

Dated: September 7, 2018

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