



Cornell Law School
First Amendment Clinic

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Dear Ms. Culliton-González and Ms. Salvano-Dunn,

The Immigrant Rights Clinic at New York University School of Law (“NYU Immigrant Rights Clinic”) and the First Amendment Clinic at Cornell Law School (“Cornell First Amendment Clinic”) jointly file this complaint seeking an investigation of, and corrective action to address, retaliatory immigration enforcement by officials within the Department of Homeland Security (“DHS”) against individuals who have engaged in First Amendment protected activity. The facts alleged in this complaint are supported by numerous news reports, complaints, judicial decisions, and testimony of the individuals impacted by DHS’ actions.

Over the last several years, federal immigration officials have engaged in acts of retaliation against critics and whistleblowers, including immigrants who have spoken out against unjust immigration policies. Officials within DHS and its subcomponent immigration agencies have surveilled, fined, arrested, detained, deported, and otherwise punished immigrants across the country to silence their voices. As discussed below, federal immigration officials have targeted parents and children who speak out about the cruelty of raids and family separation, workers who advocate for better working conditions, and people in detention who expose hidden abuse and neglect. Such retaliation threatens freedom of speech and assembly—fundamental rights that the First Amendment of the U.S. Constitution guarantees for all persons.

DHS agencies U.S. Citizenship and Immigration Services (“CIS”), U.S. Customs and Border Protection (“CBP”), and U.S. Immigration and Customs Enforcement (“ICE”) have a constitutional obligation to protect the First Amendment. In this complaint, we describe the longstanding obligation of government agencies to comply with the First Amendment, how courts have applied these First Amendment principles to DHS agencies, and why adherence to these principles promotes important values for our nation. Next, we describe the broader pattern of First Amendment violations by DHS agencies CIS, CBP, and ICE in the immigration enforcement context. We also provide detailed information about three public examples of this pattern: the deportation of activists Claudio Rojas and Jean Montrevil, and the ongoing effort to deport activist

Ravi Ragbir. Finally, we describe several corrective actions that DHS and its immigration agencies should undertake to prevent and redress First Amendment retaliation in the immigration enforcement context.

We ask your office to consider this complaint as you investigate individual instances of retaliation and adopt broader policies affecting the rights of immigrant activists, organizers, whistleblowers, complainants, plaintiffs, witnesses, and others who speak out about issues of public concern. And in light of the chilling effect that even the appearance of First Amendment retaliation creates within immigrant communities, we ask that you adopt the strongest possible policies to protect immigrants in this context with a presumption that their voices will be protected and any harms will be redressed.

To that end, we also ask that you make a specific recommendation that DHS exercise prosecutorial discretion to return Claudio Rojas and Jean Montrevil to the United States; cease efforts to deport Ravi Ragbir; grant all three activists deferred action; and ultimately join in motions to reopen their removal proceedings so that they may seek all other appropriate relief. Doing so will send a powerful message of support to the immigrant rights community and uphold the values that the First Amendment was designed to protect.

I. DHS's Obligations To Comply With The First Amendment

Like all government agencies, DHS agencies including CIS, CBP, and ICE must comply with the United States Constitution in carrying out their statutory obligations. This includes the First Amendment to the United States Constitution, which provides in part 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.”¹ Indeed, the First Amendment is worthy of its primary position in the Bill of Rights, because the freedom of speech is necessary to the practice and protection of all other constitutional rights. Simply put, without the freedom to speak and assemble to petition for redress, our government could much more readily violate other constitutional and legal rights without consequence. The freedom of speech is what makes us a free society.

A. The First Amendment Prohibits Government Retaliation Against Public Dissent and Criticism

The Founders believed fervently that the ability to publicly criticize the government without fear of punishment is fundamental to a functioning democracy.² Consistent with this founding principle, the Supreme Court has held that the First Amendment represents “a profound commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”³ As such, speech on public issues “is at the very heart of the First Amendment’s protection,”⁴ and therefore “occupies the highest rung of the hierarchy of First Amendment values,

¹ U.S. CONST. amend. I.

² *See, e.g.*, George Washington, Address to the Officers of the Army (Mar. 15, 1783).

³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

⁴ *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

and is entitled to special protection.”⁵ Reflecting the Founders’ beliefs, “speech concerning public affairs is more than self-expression; it is the essence of self-government.”⁶

As a form of speech concerning public affairs, direct criticism of government policy is at the core of these protections. The Court has held, “[t]here is no question that speech critical of the exercise of the State’s power lies at the very center of the First Amendment,”⁷ because “the freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”⁸ In short, the courts have repeatedly recognized the status of political speech as the speech deserving the most constitutional protection,⁹ suggesting that the exercise of political speech and right to engage in current political debate is where the importance of First Amendment protection is “at its zenith.”¹⁰ Free speech promotes the public discussion necessary for the democratic process to achieve effective governance.¹¹

At the forefront of protecting individuals’ rights to engage in free speech is protecting individuals from being subjected to retaliatory actions for that speech. The right to speak freely about political events and issues must necessarily be bolstered by protections against retaliatory actions by the government to be fully exercised. Retaliatory acts by public officials essentially place restrictions on speech—invading a central constitutional right.¹²

B. Applying these Principles, Courts Have Condemned First Amendment Retaliation by DHS

When individuals practice their freedom of speech by criticizing government actions, “the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out.”¹³ Indeed, viewpoint discrimination is a “blatant” violation of the First Amendment and “presumptively unconstitutional.”¹⁴ Applying these principles, courts have protected people from

⁵ *Connick v. Myers*, 461 U.S. 138, 145 (1983).

⁶ *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

⁷ *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991).

⁸ *City of Houston, Tex. V. Hill*, 482 U.S. 451, 462–63 (1987).

⁹ *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011); *Gentile*, 501 U.S. at 1034; *Sullivan*, 376 U.S. at 270.

¹⁰ *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988).

¹¹ Charles Davis, *Article: Meiklejohn, Alexander. The First Amendment is an Absolute*, 1961 *Sup. Ct. Rev.* 245, 25 COMM. L. & POL’Y 460, 461 (2020) (“In my view, ‘the people need free speech’ because they have decided, in adopting, maintaining and interpreting their Constitution, to govern themselves rather than to be governed by others. And, in order to make that self-government a reality rather than an illusion, in order that it may become as wise and efficient as its responsibilities require, the judgment-making of the people must be self-educated in the ways of freedom.”).

¹² *See Perry v. Sinderman*, 408 U.S. 593 (1972).

¹³ *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

¹⁴ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

government retaliation in a wide variety of contexts, including employment,¹⁵ education,¹⁶ prison,¹⁷ and—as will be discussed in greater detail in this section—immigration.¹⁸

The Supreme Court has held that “[f]reedom of speech and of press is accorded aliens residing in this country,”¹⁹ and that “[n]one of these provisions acknowledges any distinction between citizens and resident aliens.”²⁰ In recent years, noncitizens and their advocates have raised numerous allegations of First Amendment retaliation. Although the Government has challenged this litigation primarily on jurisdictional grounds,²¹ a number of courts found the noncitizens’ claims valid.

Generally, to state a retaliation claim, a plaintiff must show that they have a protected First Amendment right, that the defendant’s actions were substantially motivated by the exercise of that protected right, and finally that the defendant’s actions caused the plaintiff some sort of harm.²² If the plaintiff proves causation, the government can avoid constitutional liability if it can show by a preponderance of the evidence that it would have made the same decision in the absence of the protected conduct.²³

In *Bello-Reyes v. Gaynor*, for example, the petitioner, Jose Bello-Reyes, had his bond revoked by ICE less than thirty-six hours after publicly reading a poem of his own work criticizing ICE practices.²⁴ The Ninth Circuit found that “the district court was correct to remark that the ‘timing of ICE’s decision to re-arrest [Bello] is highly suggestive of retaliatory intent’ and that the burden then shifted to the government to prove not just that they “could have” punished the petitioner in the absence of the protected speech, but that they “would have.”²⁵

In *Gutierrez-Soto v. Sessions*, the court found that “the temporal proximity of Mr. Gutierrez-Soto’s criticism of ICE and the revocation of Petitioner’s parole” created a genuine issue of material fact as to whether a violation of First Amendment rights occurred.²⁶ In light of additional instances cited by the petitioner where other immigrant activists were similarly targeted

¹⁵ *Falco v. Zimmer*, 767 F. App’x 288 (3d Cir. 2019); *Pickering v. Bd. Of Ed. of Twp. High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563 (1968).

¹⁶ *Seamons v. Snow*, 84 F.3d 1225 (10th Cir. 1996); *Cain v. Tigard-Tualatin School Dist. 23J*, 262 F. Supp. 2d 1120 (D. Or. 2003).

¹⁷ *Bridges v. Gilbert*, 557 F.3d 541 (7th Cir. 2009); *Brodheim v. Cry*, 584 F.3d 1262 (9th Cir. 2009).

¹⁸ *Bello-Reyes v. Gaynor*, 985 F.3d 696 (9th Cir. 2021); *Gutierrez-Soto v. Sessions*, 317 F. Supp. 3d 917 (W.D. Tex. 2018); *Rueda Vidal v. Dep’t of Homeland Sec.*, 2021 WL 1731606, at *11 (C.D. Cal. Apr. 30, 2021).

¹⁹ *Bridges v. Wixon*, 326 U.S. 135, 148 (1945).

²⁰ *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953). At times the federal government has challenged the application of the First Amendment to noncitizens who enter the U.S. unlawfully, but this position misreads the First Amendment. *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 (2016); Jason A. Cade, *Judicial Review of Disproportionate or Retaliatory Deportation*, 75 WASH. & LEE L. REV. 1427 (2018).

²¹ *See* Jason A. Cade, *Judicial Review of Disproportionate or Retaliatory Deportation*, 75 WASH. & LEE L. REV. 1427, 1465 n.200 (2018).

²² *See* *Smith v. Campbell*, 782 F.3d 93 (2d Cir. 2015); *Schmidt v. City of Bella Villa*, 557 F.3d 564 (8th Cir. 2009); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005).

²³ *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977).

²⁴ *Bello-Reyes v. Gaynor*, 985 F.3d 696, 699 (9th Cir. 2021)

²⁵ *Id.* at 702.

²⁶ *Gutierrez-Soto v. Sessions*, 317 F. Supp. 3d 917, 933–35 (W.D. Tex. 2018).

after speaking out against immigration practices, the court found support for the inference that parole was revoked in retaliation for Gutierrez-Soto’s protected speech, defeating a motion for summary judgment on those First Amendment claims.²⁷

Similarly, in *Rueda-Vidal*, the district court concluded that temporal proximity, coupled with proof that defendants had knowledge of the First Amendment protected activities, created a genuine issue of material fact as to whether USCIS’s termination of the plaintiff’s DACA application was done as a retaliatory measure and shifted the burden of proof to the defendants to show by a preponderance of the evidence that they would have taken the same actions absent the protected conduct.²⁸

Immigrants seeking to enjoin their imminent deportation on First Amendment grounds face an additional jurisdictional hurdle of establishing that the retaliation amounts to “outrageous” discrimination due to a provision in the Immigration and Nationality Act that purports to limit challenges to the execution of a review order.²⁹ In *Ragbir v. Homan*, the Second Circuit held that the inquiry of whether the government’s actions constitute an outrageous discrimination examines the gravity of the right protected, the egregiousness of the government’s actions, and the plaintiff’s interest in avoiding the sort of treatment they have been subjected to, balanced against the government’s discretionary prerogative.³⁰ Applying that test to the targeting of immigrant rights activist Ravi Ragbir, the Second Circuit concluded that a valid claim of outrageous First Amendment retaliation had been raised. Notably, the Court held that “advocacy for reform of immigration policies and practices is at the heart of current political debate among American citizens and other residents.”³¹ Based on declarations evincing federal immigration officials’ decision to target Mr. Ragbir based on his “high profile”, immigration officers’ statements of resentment towards public criticism of the agency, and similar indicia of retaliatory intent, the Second Circuit easily concluded that the government’s actions were egregious:

Ragbir's speech implicates the highest protection of the First Amendment, he has adduced plausible—indeed, strong—evidence that officials responsible for the decision to deport him did so based on their disfavor of Ragbir's speech (and its prominence), Ragbir has a substantial interest in avoiding deportation under these circumstances, and the Government's interests in avoiding any inquiry into its conduct are less pronounced . . . In these circumstances, the basis for the alleged discrimination against Ragbir qualifies as “outrageous”[.]³²

Mr. Ragbir’s case, discussed in more detail below, remains ongoing.

Finally, at least one court has also permitted organizations to bring First Amendment claims on behalf of their members. In *NWDC Resistance v. ICE*, the court concluded that organizational plaintiffs have standing to bring a First Amendment claim and “have demonstrated

²⁷ *Id.* (“Further bolstering Petitioners’ case is Respondents’ alleged pattern of conduct.”).

²⁸ *Rueda Vidal v. Dep’t of Homeland Sec.*, 2021 WL 1731606, at *11 (C.D. Cal. Apr. 30, 2021).

²⁹ *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) [hereinafter AADC].

³⁰ *Ragbir v. Homan*, 923 F.3d 53, 69–73 (2d Cir. 2019), *vacated sub. nom.*, *Pham v. Ragbir*, 141 S. Ct. 227 (2020).

³¹ *Id.* at 69.

³² *Id.* at 73.

that their members fear retaliation for speaking out, fears supported by ICE's pattern of targeting such individuals for surveillance and removal proceedings.”³³ The court relied in part on evidence of internal ICE documents describing immigrant activists as “instigators”, monitoring their protests, and deciding to target immigrant rights activist Maru Mora Villalpando (and leader of NWDC Resistance, known now as La Resistencia) to “take away her clout”.³⁴ The court therefore denied the government’s motion to dismiss the case, which seeks declaratory and injunctive relief prohibiting selective enforcement of immigration laws based on political speech.³⁵

Thus, there is a growing body of case law recognizing the obligation of federal immigration agencies to respect the First Amendment rights of noncitizens and to refrain from retaliation based on their advocacy for immigrant rights.

C. First Amendment Retaliation Threatens Fundamental Democratic Values and Undermines Racial Justice and Equity

Violations of the First Amendment like the one described herein have severe consequences not only for the specific individuals harmed but for the immigrant rights movement as a whole. The Supreme Court has cautioned that First Amendment violations by government actors threaten the very foundations of democracy:

The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.³⁶

Democracy is therefore threatened if DHS is given free license to target its critics for detention, deportation, and other retaliatory actions. Not only do these actions punish the targeted activists, they undermine public understanding of immigration policy and debate. As the Second Circuit observed in *Ragbir*:

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.³⁷

The public’s participation in and understanding of the immigration debate should not be subject to government control and censorship. Numerous community organizations have attested to the chilling effect DHS’s actions have had on the immigrant rights movement.³⁸

³³ NWDC Resistance v. Immigr. & Customs Enf’t, 493 F. Supp. 3d 1003, 1017 (W.D. Wash. 2020).

³⁴ *Id.* at 1007.

³⁵ *Id.*

³⁶ Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

³⁷ *Ragbir*, 923 F.3d at 71.

³⁸ Numerous elected officials, faith leaders, and community organizations submitted amicus briefing in the *Ragbir* case. See Legal Filings for *Ragbir et al., v. Homan et al.*, available at <https://istandwithravi.org/legal-filings/>.

In addition to threatening democratic values, First Amendment retaliation of this nature also undermines racial justice and equity in America. For example, the slavery abolition movement of the 1800s, the civil rights movement of the 1960s, and the antiwar protests of the 1970s played a central role in shifting American government and policies in their time.³⁹ Those protests “stimulated citizens to play a greater role in formulating government policy in important areas of our public life, and ultimately helped to bring about a more just society.”⁴⁰ Today, the #BlackLivesMatter movement, the immigrant rights movement, and other movements for racial justice and equity equally rely on the First Amendment to protect core political speech and association.⁴¹ These movements depend on the First Amendment to protect political speech and demonstrations, political association, and widespread publicizing through social media and traditional media. These protected forms of speech are why America is engaged in nationwide conversation about policing and the disproportionate killings of Black individuals by law enforcement officials, the cruelty of family separation and immigration detention, and similar injustices affecting people of color. As we know, these protests have, in some instances, been subject to sharp backlash from police and other government officials, including, as explained below, DHS.⁴² This backlash demonstrates the continued necessity of ensuring First Amendment protections for political speech, especially political speech made by people of color pushing for equality and justice.

Free speech rights are particularly valuable to people of color criticizing unjust laws because speech is a primary guarantee of being heard when the majority group in power is not responsive to their needs and desires. When oppressed groups are given the space to exercise their right to free speech and their right to criticize the government, when those groups collectively use their rights to push against the status quo for change, the result is a system that is more equitable and better serving of all people.

II. First Amendment Violations in the Immigration Enforcement Context: Patterns and Examples

A. Patterns of First Amendment Retaliation within DHS and its Subcomponent Agencies

The cases described above represent only a small fraction of reported cases of retaliation, which seldom make it to court. Over the course of the last several years, researchers at New York University Law School have documented over 1,000 reported instances of retaliation against immigrant activists and their advocates.⁴³ Instances of retaliation generally fall into four broad categories: (1) immigrants who speak out and protest; (2) immigrants who criticize immigration policy in art and journalism; (3) leaders of immigrant organizing; (4) immigrant witnesses,

³⁹ Michael Kent Curtis, *The Fraying Fabric of Freedom: Crisis and Criminal Law in Struggles for Democracy and Freedom of Expression*, 44 Tex. Tech L. Rev. 89, 101–06 (2011); Barbara J. Katz, *Civil Disobedience and the First Amendment*, 32 UCLA L. REV. 904, 914 (1985).

⁴⁰ Katz, *supra* note 39, at 918.

⁴¹ BLACK LIVES MATTER, <https://blacklivesmatter.com/herstory/> (last visited July 7, 2021).

⁴² *Id.*

⁴³ These examples have been collected at www.immigrantrightsvoices.org.

complainants, and plaintiffs; and (5) U.S. citizens who defend or amplify the voices of the immigrant rights movement. These examples are described in brief below.⁴⁴

1. Immigrants Who Speak Out and Protest

In several cases, federal immigration officials have taken abrupt actions against activists who made public statements critical of immigration enforcement at rallies or press conferences. One example is the arrest of Daniela Vargas, a Deferred Action for Childhood Arrivals (“DACA”) recipient who, in 2017, spoke at a press conference about a home raid in which her father and brother were detained.⁴⁵ Within five minutes of leaving, ICE officials arrested and detained Ms. Vargas, despite her pending application for DACA renewal.⁴⁶ She was released after almost two weeks in detention.⁴⁷ Another example is Baltazar “Rosas” Aburto Gutierrez, whom ICE detained in 2017 after he condemned ICE’s deportation of his partner to the press.⁴⁸ Mr. Rosas was later released on bond and is reportedly still in removal proceedings.⁴⁹ Similarly, in 2018, prominent immigrant rights and reproductive health activist Alejandra Pablos was detained at a routine supervision appointment after her arrest in a nonviolent immigrant rights protest earlier that year.⁵⁰ In 2020, several noncitizens were also arrested during a series of Black Lives Matter protests and transferred into ICE custody.⁵¹

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 the protestors, which resulted in at least one

⁴⁴ The portions of the descriptions and analysis presented in the following sections were adapted with permission of the author from Alina Das, *Deportation and Dissent: Protecting the Voices of the Immigrant Rights Movement*, 65 N.Y.L. Sch. L. Rev. 225 (2020-2021).

⁴⁵ 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>.

⁴⁶ *Id.*

⁴⁷ 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>.

⁴⁸ 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”).

⁴⁹ 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_f8c5c6ee-7777-11eb-b1bd-83edec8ecef.html.

⁵⁰ 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>.

⁵¹ See, e.g., Fernanda Echavarrri, *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).

hospitalization.⁵² That same year, in Farmville Detention Center in Virginia, immigrant detainees refused to eat to protest poor conditions and restrictions on social visitations.⁵³ The guards pepper-sprayed them and placed some in solitary confinement.⁵⁴ A recent report by the ACLU and Physicians for Human Rights found widespread ICE retaliation against hunger strikers in detention, including the use of punitive transfers, solitary confinement, and force-feeding.⁵⁵

Retaliation against noncitizen protestors is not limited to ICE. As described briefly above, 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.⁵⁶ USCIS subsequently denied Rueda's DACA application that year, despite her eligibility, at the request of a CBP agent.⁵⁷ As a federal district court concluded earlier this year, the combination of the agencies' knowledge of her protected speech, the temporal proximity of the adverse actions taken, and other evidence of irregularities and targeting present a triable issue of fact as to whether immigration officials were motivated by retaliatory animus.⁵⁸

2. *Immigrants Critical of Immigration Policy in Art and Journalism*

Retaliation by DHS subcomponents also demonstrates a particular sensitivity to public perception of the agency. As discussed in further detail below, *see* Part II.B, in January 2019, *The Infiltrators* premiered at the Sundance Film Festival in Salt Lake City, Utah.⁵⁹ The documentary highlights activist Claudio Rojas, whom ICE had detained several years prior and later released under an order of supervision.⁶⁰ Just before Mr. 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 their grandchild.⁶¹ Similarly, as noted briefly above, in

⁵² 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'").

⁵³ *Id.* ("[D]etainees became concerned over an outbreak of the mumps that infected at least 24 people this year.").

⁵⁴ *Id.*

⁵⁵ American Civil Liberties Union and Physicians for Human Rights, *Behind Closed Doors: Abuse and Retaliation Against Hunger Strikers in U.S. Immigration Detention* (2021), <https://www.aclu.org/report/report-behind-closed-doors-abuse-retaliation-against-hunger-strikers-us-immigration-detention>.

⁵⁶ 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>.

⁵⁷ *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.").

⁵⁸ *See* Rueda Vidal v. DHS, No. 2:18-cv-09276-DMG-PLA (C.D.C.A. April 30, 2021).

⁵⁹ 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>.

⁶⁰ 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).

⁶¹ 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*

May 2019, ICE arrested and detained activist Jose Bello, thirty-six hours after he was recorded at a public reading of *Dear America*, an original poem in which he criticized ICE.⁶² Mr. Bello was detained until August 2019, when members of the National Football League contributed to the \$50,000 bond set for his release.⁶³

Noncitizen journalists have also been frequently targeted. As described briefly above, 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.⁶⁴ While accepting the John Aubuchon Award for Press Freedom from the National Press Club (NPC) earlier that year, Mr. Gutiérrez Soto criticized U.S. asylum policy and its cruel treatment of asylum seekers.⁶⁵ His subsequent arrest prompted anti-ICE protests and subjected ICE to negative media attention from fellow journalists.⁶⁶ When the NPC Executive Director Bill McCarren expressed similar concern to ICE officials, he was told to “tone it down.”⁶⁷ A federal court later concluded that, “[t]aking all . . . evidence into account, [Mr. Gutiérrez Soto has] offered enough evidence to create a genuine issue of material fact regarding whether [ICE] violated [his] First Amendment rights.”⁶⁸

Similarly, in April 2018, ICE detained Manuel Duran Ortega, a well-known member of the regional Memphis press.⁶⁹ During his Facebook Live broadcast of a protest against the Memphis Police Department’s collaborations with ICE, local police officers arrested Mr. Duran Ortega and transferred him into ICE custody.⁷⁰ Although local criminal charges against him were dismissed two days later, Mr. Duran Ortega was detained for fifteen months, pending deportation, before his release.⁷¹

Center. Now He’s in Prison, MIAMI HERALD (Mar. 3, 2019),

<https://www.miamiherald.com/news/local/immigration/article227043044.html> (Mar. 5, 2019).

⁶² 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-bello-anti-ice-poem-dear-america/>.

⁶³ 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-money-nfl-players-seemed-like-dream/> (describing the bond set for the farmworker, father, and college student as “unusually large”).

⁶⁴ 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/>.

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ 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>.

⁶⁸ *Gutierrez-Soto v. Sessions*, 317 F. Supp. 3d. 917, 933 (W.D. Tex. 2018).

⁶⁹ 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/>.

⁷⁰ *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.

⁷¹ *See* Goodman, *supra* note 69 (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).

3. *Leaders of Immigrant Organizing*

Leaders of prominent immigrant rights organizations have also been targeted. As discussed in greater detail below, ICE detained NSC Co-Founder Jean Montrevil and Executive Director Ragbir in January 2018.⁷² Further indicating ICE's tendency to 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 ICE, prior to and during their arrests.⁷³

In Washington state, as noted briefly above, ICE also targeted Maru Mora-Villalpando, executive director of La Resistencia, an anti-deportation organization.⁷⁴ 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.⁷⁵ In December 2017, Ms. Mora-Villalpando received Notice to Appear for removal proceedings,⁷⁶ in which ICE noted her "extensive involvement with anti-ICE protests and Latino advocacy programs."⁷⁷

Likewise, Migrant Justice drew the ire of ICE in 2013 when it successfully campaigned for state drivers' licenses for undocumented immigrants.⁷⁸ ICE subsequently planted a civilian informant within the farmworker organization,⁷⁹ and proceeded to arrest and detain, and in some

⁷² See 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>.

⁷³ *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 ICE had received because of it. *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).

⁷⁴ 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, a volunteer group that fights deportations, as the basis for her being targeted by ICE). 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/>.

⁷⁵ See 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.

⁷⁶ 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.*

⁷⁷ 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/>.

⁷⁸ 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>.

⁷⁹ 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 dedicated to defending the fundamental rights of Vermont farmworkers. *About Migrant Justice*, MIGRANT JUST., <https://migrantjustice.net/about> (last visited Apr. 17, 2021).

cases deport, nearly two dozen Migrant Justice members in 2016 and 2017.⁸⁰ ICE entered into a settlement with Migrant Justice in light of its allegations of retaliation in 2020, agreeing to grant three leaders deferred action and to award \$100,000 in damages.⁸¹

In 2019 and 2020, ICE sent targeted letters to several 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 failure to depart the United States.⁸² In 2021, DHS announced it would be withdrawing the "punitive" fines policy.⁸³

4. *Immigrant Witnesses, Complainants, and Plaintiffs*

Over the last several years, federal immigration authorities have also engaged in retaliation against immigrants who serve as witnesses, complainants, and plaintiffs in cases alleging abuse and/or other unlawful conduct. In 2019, ICE arrested and deported Delmer Joel Ramirez Palmar, a construction worker who was a witness in a federal workplace safety investigation into a deadly construction accident at a hotel in Louisiana and a plaintiff in a lawsuit against the hotel developer, two days after he gave an interview about the accident.⁸⁴ In 2020, ICE deported Héctor García Mendoza just two days after he became a named plaintiff in a lawsuit suing federal immigration officials and a private prison warden for failing to protect immigrants in detention from COVID-19.⁸⁵ That same year, when a whistleblower nurse came forward to report forced hysterectomies and other unwanted gynecological procedures against immigrant women held at Irwin Detention Center in Georgia, ICE began deporting the women.⁸⁶ 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.⁸⁷

⁸⁰ See Holpuch, *supra* note 78 ("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 civilian informant's work with ICE).

⁸¹ *Migrant Justice v. U.S. Dep't of Homeland Sec.*, No. 17-cv-197, Stip. (D. Vt.); <https://migrantjustice.net/sites/default/files/MJ-ICE-Settlement.pdf>.

⁸² 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.*

⁸³ U.S. Dep't of Homeland Sec., *DHS Announces Rescission of Civil Penalties for Failure-to-Depart* (Apr. 23, 2021), available at <https://www.dhs.gov/news/2021/04/23/dhs-announces-rescission-civil-penalties-failure-depart>.

⁸⁴ 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>.

⁸⁵ 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-swifty-deported-now-hes-missing>.

⁸⁶ 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>.

⁸⁷ 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>.

5. U.S. Citizens Who Aid, Defend, or Amplify the Voices of Immigrants

DHS and its components have also retaliated against U.S. citizens. For example, federal immigration officials have surveilled and harassed lawyers, journalists, clergy, and organizers crossing the border to address the dire circumstances facing asylum seekers encamped in Mexico.⁸⁸ Many individuals stopped and interrogated at the border were U.S. citizens.⁸⁹ 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 who ministered to asylum seekers encamped in Tijuana.⁹⁰

Federal immigration officials have also surveilled and harassed immigrant rights groups and rallies. The New York ICE Field Office created a spreadsheet of public rallies deemed “anti-Trump” by following affiliated social media accounts and surveilling large public gatherings.⁹¹ A private firm collected similar data on the hundreds of 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).⁹² ICE officials also targeted various immigrants and immigrant rights organizations who led protests at detention centers in Georgia.⁹³

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.⁹⁴ For many years,

⁸⁸ 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/> [hereinafter *Journalists, Lawyers, and Activists*] (highlighting 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., *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/> (describing a secret government database of American activists who witnessed and covered the story of a migrant caravan from Central America to the southern border).

⁸⁹ 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).

⁹⁰ See Flores, *supra* note 88.

⁹¹ 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/>. 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.*

⁹² 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/>. The DHS shared the private intel with its staff and other officials, as required by policy to ensure “appropriate situational awareness” of matters “affecting the . . . Homeland Security Enterprise.” *Id.*

⁹³ Jose Olivares and John Washington, *ICE discussed punishing immigrants for peaceful protest*, The Intercept (June 17, 2021), <https://theintercept.com/2021/06/17/ice-retaliate-immigrant-advocates-surveillance/>.

⁹⁴ 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>.

thousands of bodies have been found in the desert; those surviving the journey often suffer from severe dehydration.⁹⁵ To mitigate this, volunteers place jugs of water throughout the desert and provide care to any people in distress whom they encounter.⁹⁶ In 2018, volunteers recorded Border Patrol agents emptying those jugs, and posted that video online with a report documenting abuses by the agency toward migrants.⁹⁷ Within hours, Border Patrol arrested longtime No More Deaths volunteer Dr. Scott Warren, accusing him of “alien smuggling.”⁹⁸ The agency then arrested several other volunteers on charges related to littering and trespassing.⁹⁹ The case against Dr. Warren was eventually dismissed, but only after years of prosecution.¹⁰⁰

B. Detailed Case Examples

To give a deeper sense of the nature of retaliation that immigrants have faced, this complaint presents the facts and evidence associated with three cases where retaliation has been alleged and redress is being sought. The evidence cited herein is publicly available, and does not necessarily represent the full range of evidence demonstrating retaliation in each case. In fact, in each of these cases, DHS and/or ICE has actively opposed any inquiry into actions, and thus the evidence here is likely the tip of the iceberg demonstrating retaliation.

1. Claudio Rojas

Claudio Rojas is a husband, father, and grandfather who has lived with his family in the U.S. for nearly twenty years before being deported to Argentina in 2019.¹⁰¹ He has no criminal record, was on an order of supervision authorizing him to live and work in the U.S., and was in the process of applying for a T visa based on labor trafficking when he was deported.¹⁰² His wife, two sons, and grandchildren continue to live in Florida and have suffered deeply as a result of his deportation.

⁹⁵ See *Migrant Deaths in Arizona Desert Have Reached Seven-Year High*, HUMANE BORDERS (Oct. 27, 2020), <https://humaneborders.org/migrant-deaths-in-arizona-desert-have-reached-seven-year-high/> (“Remains of 181 migrants were found in the Arizona desert through the end of September [2020]”).

⁹⁶ 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>.

⁹⁷ 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 jugs).

⁹⁸ 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”).

⁹⁹ *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).

¹⁰⁰ 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/>.

¹⁰¹ See Amended Complaint, *Rojas v. Moore*, No. 1:19-cv-20855-JLK (S.D.F.L. Mar. 14, 2019) ECF 15 ¶¶ 3-10.

¹⁰² See *id.*

ICE's deportation of Mr. Rojas in 2019 made national headlines because it came at the heels of the Sundance Film Festival premiere of the documentary *The Infiltrators*, which profiles Mr. Rojas's immigrant rights advocacy.¹⁰³ The Sundance Institute wrote to ICE to request Mr. Rojas's permission to travel out of state to speak at the festival in January 2019.¹⁰⁴ ICE did not respond to the request, but Mr. Rojas was scheduled to speak at the film's Miami debut.¹⁰⁵ In February 2019, at Mr. Rojas's next regularly-scheduled check-in, ICE detained Mr. Rojas despite the fact that Mr. Rojas had a pending T visa application and had dutifully reported to ICE under an order of supervision for seven years without incident.¹⁰⁶ Mr. Rojas's immigration lawyer was not given an explanation for the decision and was only told that the decision came from the district director.¹⁰⁷ ICE then issued a notice of revocation of Mr. Rojas's order of supervision that explained it was taking the action without further review due to recent criminal activity, a fact which the agency counsel later acknowledged was incorrect.¹⁰⁸ Mr. Rojas has no criminal record and followed his supervision instructions.¹⁰⁹ ICE detained Mr. Rojas rather than given him a bag-and-baggage letter or otherwise provide any notice of its intention to revoke his supervision and deport him.¹¹⁰ While Mr. Rojas was in detention, ICE refused to give permission to a journalist to speak with him.¹¹¹ His immigration lawyer applied for an emergency stay of removal, but ICE denied it. His deportation officer told his immigration lawyer that he did not know why the stay was denied, only that the decision was made by "the higher ups."¹¹² Congressman Ted Deutch sponsored a private bill to attempt to prevent Mr. Rojas's deportation, but ICE refused to issue a stay at the time.¹¹³

Mr. Rojas, his family, and community believe that ICE took enforcement action against him in retaliation for his advocacy and the attention it received due to his appearance in *The Infiltrators*.¹¹⁴ Mr. Rojas filed a federal lawsuit seeking to stay his deportation based in part on First Amendment grounds. The district court dismissed the case for lack of jurisdiction without reaching the merits of his First Amendment claim. The case is pending appeal at the U.S. Court of

¹⁰³ See *id.* ¶ 39; see also *id.* ECF 15-9 (Ibarra Decl.); see also *He stars in a new film about infiltrating an ICE detention center. Now ICE has locked him up again.* Washington 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/>; *Getting Detained, On Purpose*, The New Yorker, Mar. 15, 2019, <https://www.newyorker.com/podcast/the-new-yorker-radio-hour/getting-detained-by-ice-on-purpose>.

¹⁰⁴ *Rojas v. Moore*, No. 1:19-cv-20855-JLK, ECF 29-2 (Sundance Institute Letter). ¶¶ 3-10.

¹⁰⁵ *Rojas v. Moore*, No. 1:19-cv-20855-JLK, ECF 15-9 (Ibarra Decl.).

¹⁰⁶ *Rojas v. Moore*, No. 1:19-cv-20855-JLK, ECF 15-4 (First Pineda Decl.).

¹⁰⁷ *Id.*

¹⁰⁸ *Rojas v. Moore*, No. 1:19-cv-20855-JLK, ECF 29-1 (Revocation notice); see also Brief for Appellees-Respondents, *Rojas v. Moore*, No. 19-12438 (11th Cir. Oct. 25, 2019) at 6 ("This Notice also incorrectly stated that "[d]ue to [Rojas's] recent criminal history and [Rojas's] failure to follow the conditions set for in your order, a further review of your case is not necessary." (Id.). Apparently, Rojas had no criminal history nor did he fail to follow conditions.").

¹⁰⁹ *Id.*

¹¹⁰ Amended Complaint, *Rojas v. Moore*, No. 1:19-cv-20855-JLK (S.D.F.L. Mar. 14, 2019) ECF 15.

¹¹¹ *Rojas v. Moore*, No. 1:19-cv-20855-JLK, ECF 15-13 (Second Pineda Decl.).

¹¹² *Id.*

¹¹³ *For the relief of Claudio Marcelo Rojas*, H.R. 1894, 116th Cong. (2019).

¹¹⁴ *ICE deported me for appearing in a film*, The Daily Beast (Apr. 19, 2021), <https://www.thedailybeast.com/ice-deported-me-for-appearing-in-a-film>.

Appeals for the Eleventh Circuit, and has been fully briefed and argued. At oral argument, several judges expressed deep concern about ICE's actions.¹¹⁵

Because Mr. Rojas's First Amendment case was dismissed for lack of jurisdiction, no discovery proceeded in his case. Nonetheless, the evidence he presented in his case more than meets the evidentiary standard to proceed to a trial on the issue of First Amendment retaliation. It is uncontroverted that ICE was aware of Mr. Rojas's advocacy; numerous news articles covered his advocacy in 2012 and the Sundance Institute contacted ICE directly seeking Mr. Rojas's attendance at the January 2019 Sundance Film Festival. As noted above, ICE's actions in February 2019 come in close temporal proximity to the premiere of *The Infiltrators* and occurred just days before the film's Miami premiere. There were numerous indicia of procedural irregularities, including the false, pretextual reason for his detention; the decision to detain rather than to provide a bag-and-baggage letter; lower level officers' statements that the decision came from the district director and "the higher ups"; the denial of access to the press when initially detained; and the expedited manner of deportation despite Congressional intervention. To date, ICE has never explained why it took enforcement action against Mr. Rojas, who was not an enforcement priority even under the prior administration's guidelines. A trier of fact could easily conclude that ICE took these actions because of Mr. Rojas's activism and the widespread attention it was receiving with the premier of *The Infiltrators*.

Moreover, irrespective of ICE's reasons for detaining and deporting Mr. Rojas shortly after the film's premiere, it is clear that its actions were widely received in the press, journalism and film community as retaliatory—having the chilling effect that the First Amendment is designed to guard against.

A decision to bring Mr. Rojas home to his family in the U.S. aligns with the new administration's enforcement priorities, would avoid the expenditure of scarce governmental resources on further litigation in this case, and would help fulfill a commitment to end retaliation against immigrant rights activists.¹¹⁶ He could be returned through humanitarian parole or, under new ICE guidance, through a joint motion to reopen and dismiss his case. He is a priority for favorable discretion under the new ICE guidance both because he is party to a nonfrivolous civil rights claim, and because he had "resided in the United States for many years", has contributed to his community, and has "demonstrated close family and community ties."¹¹⁷ Moreover, returning Mr. Rojas to the U.S. enjoys broad community support. Eighty-six national and local community organizations have called upon the return of Mr. Rojas as part of a broader policy platform for

¹¹⁵ Oral Argument, *Rojas v. Moore*, No. 19-12438 (11th Cir. Sept. 22, 2020),

<https://www.courtlistener.com/audio/71743/claudio-rojas-v-field-office-director-miami-field-office/>.

¹¹⁶ See 2020 Democratic Party National Platform, Creating a 21st Century Immigration System, at 63, <https://democrats.org/where-we-stand/party-platform/creating-a-21st-century-immigration-system/> ("We will also prevent [immigration] enforcement officials from retaliating against individuals for their political speech or activity, or because of their efforts to advocate for individuals' rights.")

¹¹⁷ See Memorandum from John D. Trasviña, Principal Legal Advisor, to All OPLA Attorneys, Re: Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Practices at *6, 11,212-13 & n.6 (May 27, 2021)

redressing retaliation.¹¹⁸ Hundreds of members of the documentary film, journalist, and immigrant rights communities have similarly called upon the new administration to bring Mr. Rojas home, underscoring the importance of First Amendment protections in the context of immigrant voices in film and journalism.¹¹⁹ Bringing Mr. Rojas home to his family would signal the importance of these First Amendment principles and would allow a beloved husband, father, and grandfather to be reunited with his family.

2. *Jean Montrevil*

Jean Montrevil is a father, community member, and immigrants' rights leader.¹²⁰ After his mother died and his father fled political violence in Haiti when Mr. Montrevil was young, he had to support himself.¹²¹ He immigrated to the U.S. in 1985, at the age of 17, as a Lawful Permanent Resident.¹²² In the late 1980s, Mr. Montrevil was arrested several times, resulting several drug-related convictions and a decade of imprisonment.¹²³ While Mr. Montrevil was imprisoned, the government initiated deportation proceedings against him. In 1994, Mr. Montrevil's attorney left him to represent himself before the immigration judge, who did not allow Jean to present his witnesses, denied him relief, and issued an order of deportation.¹²⁴

Mr. Montrevil served a full criminal sentence at a young age and spent the decades that followed dedicated to his church, community, and four U.S. citizen children.¹²⁵ Since his release from prison, he has had no further convictions.¹²⁶ He immersed himself in work. He showed up as a supportive and loving father to his son, who was born shortly after Jean was incarcerated.¹²⁷ After he met and married his wife, had two more children, and became a father to his wife's child from a previous relationship.¹²⁸

In 2005, ICE arrested and detained Mr. Montrevil without warning.¹²⁹ Mr. Montrevil's wife became a member of Families for Freedom, a nonprofit organization organized by and for families facing deportation, and advocated for his release.¹³⁰ Later that year, ICE released Mr. Montrevil and granted him permission to live and work in the U.S. on an Order of Supervision.¹³¹

¹¹⁸ *Five Things the Biden Administration Can Do Immediately to Address DHS Retaliation Against Protestors and Organizers*, <https://justfutureslaw.org/wp-content/uploads/2021/02/FINAL-Top-Biden-Admin-Demands-on-Retaliation-related-to-PD.pdf>.

¹¹⁹ See *Letter to President Biden to End ICE Retribution*, <https://www.documentary.org/advocacy/letter-president-biden-end-ice-retribution>.

¹²⁰ Petition for Writ of Habeas Corpus, *Montrevil v. Decker*, No. 1:20-cv-00264 (E.D.N.Y. 2020), ECF No. 1 [hereinafter *Montrevil Pet'n*], at ¶ 2.

¹²¹ *Id.* at ¶ 25.

¹²² *Id.*

¹²³ *Id.* at ¶ 26.

¹²⁴ *Id.* at ¶ 27.

¹²⁵ *Id.* at ¶ 30.

¹²⁶ *Id.* at ¶ 31.

¹²⁷ *Id.* at ¶ 30.

¹²⁸ *Id.* at ¶ 33.

¹²⁹ *Id.* at ¶ 35.

¹³⁰ *Id.* at ¶ 38.

¹³¹ *Id.* at ¶ 39.

After his release from immigration Mr. Montrevil became a prominent voice in the immigrants' rights movement following his release from immigration detention in 2005. He joined his wife and family as members of Families for Freedom and became a vocal advocate for all immigrants in the U.S., as well as a critic of U.S. immigration policy and its impact on his community.¹³² In 2006 and 2007, faith leaders recruited him to serve as a co-founder and the public face of the New Sanctuary Coalition.¹³³ Following the formation of the New Sanctuary Coalition, Mr. Montrevil's case began to attract significant media and press attention.¹³⁴ His story was featured in numerous outlets, including the *Village Voice*,¹³⁵ *The New York Times*,¹³⁶ and *Democracy Now*.¹³⁷

Federal immigration officials made their disdain for Mr. Montrevil's activism known in the years since. First, ICE officers began to question the presence of New Sanctuary Coalition volunteers who were accompanying Mr. Montrevil to his regular ICE check-ins. They eventually prevented their accompaniment.¹³⁸ Then, in March 2008, ICE transferred Mr. Montrevil's supervision to the Intensive Supervision Appearance Program (ISAP), even though Mr. Montrevil had never missed any of his previous check-ins. He was placed on the highest supervision level—he was required to wear an electronic monitor, remain on house arrest each day from 7:00 PM to 7:00 AM, and check in with ISAP three times per week, among other requirements.¹³⁹ Undeterred, Mr. Montrevil continued to speak out against ICE and U.S. immigration policy. He spoke at a vigil outside of Senator Chuck Schumer's office, and the *Village Voice* profiled him.¹⁴⁰ During an August 2008 ISAP check-in, an ICE officer referenced the newspaper profile, asking Jean whether he would “run to the *Village Voice*” if they refused to remove him from ISAP.¹⁴¹ In 2009, during a routine check-in ICE detained Mr. Montrevil for a second time. Once again, an ICE officer made clear to Mr. Montrevil that the agency was aware of his activism and displeased, saying Mr. Montrevil was the “one complaining to the *Village Voice*,” a clear reference to the profile.¹⁴² No further explanation was provided for why ICE had decided to suddenly detain Mr. Montrevil.¹⁴³ Jean was scheduled for deportation in January 2010, until DHS halted all removals to Haiti following a devastating earthquake there.

¹³² *Id.* at ¶¶ 40-41.

¹³³ *Id.* at ¶¶ 42-43.

¹³⁴ *Id.* at ¶ 44.

¹³⁵ See Maria Luisa Tucker, *The Long Goodbye*, THE VILLAGE VOICE (Apr. 8, 2008), <https://www.villagevoice.com/2008/04/08/the-long-goodbye-2/>.

¹³⁶ See Colin Moynihan, *Close Call for Haitian in an Immigration Web*, THE NEW YORK TIMES (Jan. 24, 2010), <https://www.nytimes.com/2010/01/25/nyregion/25detainee.html>.

¹³⁷ See *National Broadcast Exclusive...Almost Deported Before the Quake, Haitian New Yorker Jean Montrevil Speaks Out*, DEMOCRACY NOW! (January 26, 2010), https://www.democracynow.org/2010/1/26/national_broadcast_exclusivealmost_deported_before_the.

¹³⁸ *Montrevil Pet'n* ¶ 46 (citing Montrevil Decl. Ex. A at ¶ 24; Schaper Decl. Ex. D at ¶ 14).

¹³⁹ *Id.* at ¶ 47 (citing Montrevil Decl., Ex. A at ¶ 31).

¹⁴⁰ *Id.* at ¶ 49.

¹⁴¹ *Id.* at ¶ 50.

¹⁴² *Id.* at ¶ 51.

¹⁴³ *Id.*

Shortly after Mr. Montrevil was released pursuant to a writ of habeas corpus and ICE had reinstated his Order of Supervision, Christopher Shanahan, then-ICE Field Office Director for New York Enforcement and Removal Operations, met with Mr. Montrevil and several of his supporters, including Reverend Donna Schaper. He made clear to Mr. Montrevil and Reverend Schaper that he was frustrated with the community response to Mr. Montrevil's detention.¹⁴⁴ At the meeting, Director Shanahan advised Mr. Montrevil to keep a low profile if he wanted to avoid problems with immigration enforcement.¹⁴⁵ Referencing calls from Mr. Montrevil's supporters that were being made to the ICE Field Office, Director Shanahan said, "If you stop shutting our phone lines down, things would probably get a lot better around here."¹⁴⁶ Mr. Montrevil was shaken by Shanahan's statements and his close brush with deportation. He stepped back from the public spotlight, declining media requests and withdrawing from the public face of New Sanctuary Coalition.¹⁴⁷ In the years that followed, Mr. Montrevil focused on his family, including the needs of his son who was diagnosed with a brain tumor. He continued regularly attending check-ins with ICE every three to six months. In 2016, Director Shanahan granted Jean a one-year stay of removal, which was subject to renewal.¹⁴⁸

In January 2017, Thomas Decker replaced Christopher Shanahan as Field Office Director and was shortly informed by his staff of Jean's case.¹⁴⁹ He stated that Jean's case was "noteworthy because [his] removal potentially could garner media attention."¹⁵⁰ Director Decker later amended this statement, stating that he was informed about Mr. Montrevil's case "pursuant to [Decker's] standing direction to inform [him] of high-profile cases."¹⁵¹ In an email to Decker in April 2017, an official flagged Mr. Montrevil as a "high profile case", "an alien . . . almost certainly guaranteed to be brought up by the NGO community activists" at an upcoming meeting because he "is linked to the whole Judson Memorial Church" and the New Sanctuary Coalition.¹⁵² The same official made snide remarks about the senior minister of Judson Memorial Church and quoted scripture to respond to her religious arguments, suggesting that they deport Mr. Montrevil by saying "third time's a charm."¹⁵³

In the spring of 2017, Mr. Montrevil decided to start speaking out publicly against ICE again. He attended a "Jericho Walk" outside of the ICE Field Office at 26 Federal Plaza. New Sanctuary members had participated in these walks every Thursday, during which they march and pray silently in protest of U.S. immigration policies. Mr. Montrevil spoke in front of a crowd

¹⁴⁴ *Id.* at ¶ 58 (citing Schaper Decl. Ex. D at ¶ 24; Montrevil Decl. Ex. A, at ¶ 36).

¹⁴⁵ *Id.* at ¶ 59 (citing Bardavid Decl. Ex. E at ¶ 8; Montrevil Decl. Ex. A at ¶ 36).

¹⁴⁶ *Id.* (citing Schaper Decl. Ex. D at ¶ 26).

¹⁴⁷ *Id.* at ¶ 61 (citing Montrevil Decl. Ex. A at ¶¶ 37-40).

¹⁴⁸ *Id.* at ¶ 64 (citing Bardavid Decl. Ex. E at ¶ 11).

¹⁴⁹ Declaration of Field Office Director Thomas R. Decker at ¶ 13, *Ragbir et al. v. Homan*, No. 18-CV-1159 (S.D.N.Y. 2018), ECF No. 51.

¹⁵⁰ *Id.*

¹⁵¹ Declaration of Field Office Director Thomas R. Decker at ¶ 12, *Ragbir et al. v. Homan*, No. 18-CV-1159 (S.D.N.Y. 2018), ECF No. 58.

¹⁵² September 17 2020 Discovery Letter, *Montrevil v. Decker*, No. 1:20-cv-00264 (E.D.N.Y. 2020) [hereinafter September 17 2020 Discovery Letter], ECF No. 51, 29.

¹⁵³ *Id.*

following the Jericho Walk, during which he criticized the immigration system.¹⁵⁴ Just weeks later, during a routine check-in on June 22, 2017, ICE officials detained Mr. Montrevil. ICE released Mr. Montrevil that same day, without any explanation for why he was detained or being released. Mr. Montrevil was told only that the decision came from “upstairs.” At his next check-in, on July 20, 2017, Mr. Montrevil was told that ICE had no plans to detain or deport him while his motion before the BIA was pending.¹⁵⁵ He received a new check-in date for January 16, 2018.¹⁵⁶ Director Decker claims that he decided to deport Mr. Montrevil in December 2017.¹⁵⁷ This statement is contradicted by an ICE internal e-mail, dated May 16, 2017, which inquires whether “everything is in place to take [Mr. Montrevil] into custody on [the] next report date 06/22/2017.”¹⁵⁸ The e-mail, in which the author’s name has been redacted, continues, “Th[is] has the potential to be a media/HQ case.”¹⁵⁹

On January 3, 2018, ICE agents arrested Mr. Montrevil outside his home in Queens, New York during his lunch break, weeks before he was scheduled for a check-in later that month.¹⁶⁰ Mr. Montrevil was handcuffed, placed in an unmarked vehicle, and detained at Hudson County Jail in New Jersey and then at Krome Detention Center in Florida. The manner of the arrest indicated that the officers had been surveilling Mr. Montrevil—they knew that Mr. Montrevil took a lunch break from 12 PM to 2 PM each day, as well as where Mr. Montrevil’s car was parked.¹⁶¹ ICE revoked his Order of Supervision without notice or an interview on the reasons for its revocation, and despite Mr. Montrevil’s full compliance for more than a decade. ICE initially denied Mr. Montrevil’s family and community that it had arrested and detained him and denied Mr. Montrevil’s requests to speak with his attorney.¹⁶² Even after ICE confirmed his detention, it prevented Mr. Montrevil’s attorney from meeting with him and misinformed his attorney and community members about the reasons for his detention, as well as his location.¹⁶³ At the time of his arrest, Mr. Montrevil had a motion to reopen pending before the BIA.¹⁶⁴ ICE officials communicated *ex parte* with the BIA to inform it of Mr. Montrevil’s detention in order to expedite a denial of his case and deport him before he could obtain a stay of removal.¹⁶⁵ Mr. Montrevil’s attorney was not notified when the BIA denied his motion late on Friday, January 12, 2018, the Friday of Martin Luther King Jr. weekend. ICE then deported Mr. Montrevil to Haiti at 7:38 AM on the next business day, thwarting his attorney’s ability to seek an emergency hearing on a stay of his removal.¹⁶⁶ An official wrote to various immigration officials, including Director Decker,

¹⁵⁴ Habeas Petition at ¶ 67 (citing Schaper Decl. Ex. D at ¶ 31; Montrevil Decl. Ex. A at ¶ 42).

¹⁵⁵ *Id.* at ¶ 74.

¹⁵⁶ *Id.*

¹⁵⁷ Declaration of Field Office Director Thomas R. Decker at ¶ 29, *Ragbir et al. v. Homan*, No. 18-CV-1159 (S.D.N.Y. 2018), ECF No. 51.

¹⁵⁸ September 17 2020 Discovery Letter, *Montrevil v. Decker*, No. 1:20-cv-00264 (E.D.N.Y. 2020) [hereinafter September 17 2020 Discovery Letter], ECF No. 51, 29.

¹⁵⁹ *Id.*

¹⁶⁰ Habeas petition at ¶ 74.

¹⁶¹ *Id.* at ¶ 76 (citing Montrevil Decl. Ex. A at ¶¶ 44, 46).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at ¶¶ 92-94.

¹⁶⁶ *Id.*

stating: “HAHA EXACTLY AS PLANNED; THAT’S WHY WE DEPORTED HIM THE DAY AFTER THE HOLIDAY.”¹⁶⁷

ICE officials have admitted that Mr. Montrevil’s abrupt, covert detention was intentionally designed to take out a “high profile” leader in a way that would circumvent public backlash.¹⁶⁸ ICE officers admitted that they had engaged in surveillance of New Sanctuary leaders including Mr. Montrevil. Deputy ICE Field Office Director Scott Mechkowski told Mr. Montrevil’s attorney, “We war-gamed this over and over.”¹⁶⁹ Micah Bucey, a New York City minister, recalled that Mechkowski had complained that the Mr. Montrevil’s and other New Sanctuary leaders’ protests and comments to the press negatively portrayed ICE to the public and to others in government. Mechkowski then stated: “Nobody gets beat up in the news more than we do, every single day. It’s all over the place, ... how we’re the Nazi squad, we have no compassion.”¹⁷⁰ Mechkowski then stated that he had heard Mr. Montrevil “ma[ke] some very harsh statements. I’m like, ‘Mr. Montrevil, from me to you... *you don’t want to make matters worse by saying things.*”¹⁷¹ In response to an internal e-mail summarizing media coverage of Mr. Montrevil’s deportation, Deputy Director Mechkowski replied, “Fake news.”¹⁷²

ICE’s abrupt actions—which violated their own regulations, practices, and procedures—led Mr. Montrevil to file a suit in federal court in January 2020 for the violation of his First and Fifth Amendment rights, asking that he be returned home.¹⁷³ Because of ICE’s retaliatory actions, Mr. Montrevil is no longer able to actively speak out about the cruelty of the immigration system, despite his efforts to share his views. More painfully, it has left Mr. Montrevil without a permanent and safe place to live, separated him from his family, and limited his ability to speak with his community in the U.S. The political instability and violence in Haiti, marked by widespread gang attacks, political violence, and the recent assassination of Haitian President Moïse, have endangered Mr. Montrevil. His economic struggles in the midst of the violence and instability have made him reliant on small donations from his community in the U.S. Mr. Montrevil’s children are deeply impacted by his forced absence. His daughter had to take a leave of absence from college after she could no longer rely on her father to pay her college tuition. His son, admitted to one of New York’s top high schools, has struggled in school since his father’s deportation. The success of his children was an immense source of pride for Mr. Montrevil. Despite the thirty years that have passed since Mr. Montrevil was convicted and despite all he has done for thousands of people in New York, ICE abruptly targeted him for deportation and separated him from his family.

¹⁶⁷ September 17 2020 Discovery Letter, *Montrevil v. Decker*, No. 1:20-cv-00264 (E.D.N.Y. 2020) [hereinafter September 17 2020 Discovery Letter], ECF No. 51, 29 (caps in the original).

¹⁶⁸ *Id.* at ¶ 85 (noting that during a meeting with clergy members, Deputy Director Mechkowski told attendees that Jean’s case was one of the “two most high profile” cases in the New York Field office, and that Jean’s detention was orchestrated to avoid protests by New Sanctuary members).

¹⁶⁹ *Id.* at ¶ 76 (citing Bardavid Decl. Ex. E at ¶ 21).

¹⁷⁰ *Ragbir v. Homan*, 923 F.3d 53, 69-70 (2d Cir. 2019).

¹⁷¹ *Id.* (emphasis added).

¹⁷² See September 17 2020 Discovery Letter, *Montrevil v. Decker*, No. 1:20-cv-00264 (E.D.N.Y. 2020), ECF No. 51, 34.

¹⁷³ See *Montrevil v. Decker*, No. 1:20-cv-00264 (E.D.N.Y. 2020)

A decision to bring Mr. Montrevil home to his family in the U.S. aligns with the new administration's enforcement priorities, would avoid the expenditure of scarce governmental resources on further litigation in this case, and would help fulfill a commitment to end retaliation against immigrant rights activists.¹⁷⁴ Moreover, returning Mr. Montrevil to the U.S. enjoys broad community support. Nearly 40,000 people signed a petition by his son to stop his deportation in 2018,¹⁷⁵ and more than 1,800 community organizations and individuals signed on to a letter to then-DHS Secretary Kirstjen Nielsen calling for Mr. Montrevil's return.¹⁷⁶ Mr. Montrevil is one of ten people featured in the National Immigrant Justice Center's new report, the *Chance to Come Home*,¹⁷⁷ and 86 national and local community organizations have called upon the return of Mr. Montrevil as part of a broader policy platform for redressing retaliation.¹⁷⁸ He could be returned through humanitarian parole or, under new ICE guidance, through a joint motion to reopen and dismiss his case. He is a priority for favorable discretion under the new ICE guidance both because he is party to a nonfrivolous civil rights claim, and because he was granted lawful permanent residency and "resided in the United States for many years", has contributed to his community, and has "demonstrated close family and community ties."¹⁷⁹ He has the support of several members of the New York Congressional delegation, along with his family and community.¹⁸⁰ Bringing Mr. Montrevil home to his family would signal the importance of these First Amendment principles and would allow a beloved father and advocate to be reunited with his family, church, and community.

3. *Ravi Ragbir*

Ravidath "Ravi" Lawrence Ragbir ("Mr. Ragbir") is a father, husband, and nationally-recognized immigration rights activist. Mr. Ragbir has lived in the United States for over 25 years, but for the last 10 years he has been subject to a final order of removal. Since his release from immigration detention, Mr. Ragbir has dedicated his professional and personal life to speaking out against immigration policies that he considers unjust.¹⁸¹ Like Mr. Montrevil, he initially volunteered with Families for Freedom, and subsequently became a prominent leader of the New Sanctuary Coalition. Through this work, he has been a vocal critic of ICE and other components

¹⁷⁴ See 2020 Democratic Party National Platform, *Creating a 21st Century Immigration System*, at 63, <https://democrats.org/where-we-stand/party-platform/creating-a-21st-century-immigration-system/> ("We will also prevent [immigration] enforcement officials from retaliating against individuals for their political speech or activity, or because of their efforts to advocate for individuals' rights.").

¹⁷⁵ Jahsiah Montrevil, *Free Jean Montrevil*, <https://www.change.org/p/scott-mechkowski-free-jean-montrevil>.

¹⁷⁶ Letter to Department of Homeland Security Secretary Kirstjen M. Nielsen (Jan. 22, 2018), https://ravidefense.files.wordpress.com/2018/01/ravi-jean-eliseo-maru_sign_on_letter_to_dhs_with_sigs.pdf.

¹⁷⁷ National Immigrant Justice Center, *A Chance to Come Home* (April 28, 2021), <https://immigrantjustice.org/research-items/white-paper-chance-come-home>.

¹⁷⁸ *Five Things the Biden Administration Can Do Immediately to Address DHS Retaliation Against Protestors and Organizers*, <https://justfutureslaw.org/wp-content/uploads/2021/02/FINAL-Top-Biden-Admin-Demands-on-Retaliation-related-to-PD.pdf>.

¹⁷⁹ See Memorandum from John D. Trasviña, Principal Legal Advisor, to All OPLA Attorneys, Re: Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Practices at *6, 11,212-13 & n.6 (May 27, 2021)

¹⁸⁰ See Letter from Members of the New York Congressional Delegation in Support of Mr. Montrevil.

¹⁸¹ Amended Complaint for Declaratory, Injunctive, and Habeas Relief, *Ragbir v. Homan* ("Ragbir Amended Complaint"), No. 18-cv-1159 (PKC), 2018 WL 2338792 (S.D.N.Y. July 19, 2018) ECF 100 ¶ 4.

of the Department of Homeland Security (“DHS”), which has been widely profiled in local and national media.¹⁸²

Because of his special contributions to his community, federal immigration authorities had for years authorized his presence in the United States, granting him an order of supervision and four administrative stays of removal.¹⁸³ Yet, after highly-publicized criticism of ICE and U.S. immigration policy,¹⁸⁴ he has been targeted for surveillance, detention, and removal by federal immigration authorities because of his outspoken advocacy.¹⁸⁵

As an activist, Mr. Ragbir maintained a regular presence outside ICE offices and the immigration courts in New York, including ICE offices at 26 Federal Plaza.¹⁸⁶ Mr. Ragbir has also had extensive contact with ICE’s offices and the immigration courts through the New Sanctuary Coalition’s Accompaniment Program. As part of this program, the New Sanctuary Coalition trained hundreds of volunteers on how to accompany immigrants to immigration court and to check-ins with ICE.¹⁸⁷

In addition to this work, Mr. Ragbir has been a vocal advocate for immigrant rights across the United States and a frequent critic of current immigration policies. For example, Mr. Ragbir testified before the New York City Council on detention and deportation policies, met with President Obama’s (and, more recently, President Biden’s) transition team to discuss his perspective and experiences on immigration policy, and has spoken at countless conferences, media events, and places of worship.¹⁸⁸

Mr. Ragbir also brought attention to the immigration system through his own experience as an immigrant. In one particular high-profile incident, on March 9, 2017, Mr. Ragbir was due to check in with ICE officers at 26 Federal Plaza. Mr. Ragbir was accompanied by his family, lawyers, clergy, and several elected officials.¹⁸⁹ During the check-in, several of the elected officials encountered then-Deputy Director Scott Mechkowski. Deputy Director Mechkowski demanded

¹⁸² Ragbir Amended Complaint, *Ragbir v. Homan*, No. 18-cv-1159 (PKC) (S.D.N.Y. July 19, 2018) ECF 100 ¶ 33.

¹⁸³ *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 17, Declaration of Alina Das, Esq. (hereinafter “Das Decl.”) ¶¶ 7, 10 (S.D.N.Y. May 23, 2018); *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 50, Decl. of Scott Mechkowski (hereinafter “Mechkowski Decl.”) (S.D.N.Y. May 23, 2018) ¶ 10, 13 (noting that ICE granted Mr. Ragbir administrative stays of removal in January 2012, February 2013, January 2014, February 2015, and January 2016, and put him on an Order of Supervision).

¹⁸⁴ *Ragbir v. Homan*, 923 F.3d 53, 59 (2d Cir. 2019), cert. granted, judgment vacated sub nom. *Pham v. Ragbir*, 141 S. Ct. 227, 208 L. Ed. 2d 1 (2020) (“After his release from immigration detention in 2008, Ragbir became an outspoken activist on immigration issues, including publicly criticizing ICE.”).

¹⁸⁵ Ragbir Amended Complaint, *Ragbir v. Homan*, No. 18-cv-1159 (PKC) (S.D.N.Y. July 19, 2018) ECF 100 ¶¶ 32-39, 52-86.

¹⁸⁶ *Ragbir v. Homan*, 923 F.3d at 59 (“Ragbir maintained a ‘regular presence’ outside ICE’s office and Department of Justice immigration courts in Manhattan, including leading weekly prayer vigils, called ‘Jericho Walks,’ with religious faith leaders.”).

¹⁸⁷ *Id.* (“The New Sanctuary Coalition of New York City, which he founded, sends volunteers to accompany [noncitizens] to court dates and ICE check-in appointments.”).

¹⁸⁸ Ragbir Amended Complaint, *Ragbir v. Homan*, No. 18-cv-1159 (PKC) (S.D.N.Y. July 19, 2018) ECF 100 ¶ 33.

¹⁸⁹ *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 17, (Das Decl.), ¶ 13.

that they leave,¹⁹⁰ and there was a tense confrontation between ICE officers and the elected officials who accompanied Mr. Ragbir.¹⁹¹ After the check-in, several media outlets worldwide reported on Mr. Ragbir's struggle to remain in the United States and his confrontational March 9 check-in with ICE.¹⁹²

There is a clear trail of evidence demonstrating that ICE targeted Mr. Ragbir in retaliation for his activism and criticism of ICE. ICE officials' own statements demonstrate the connection between Mr. Ragbir's activism and the adverse immigration decisions made in his case.¹⁹³ A declaration filed by Field Office Director Thomas Decker on March 7, 2018, explained that shortly after becoming Field Office Director for New York Enforcement and Removal Operations, his staff informed him of the "noteworthy" case of Mr. Ragbir and fellow immigrant rights activist Mr. Montrevil (see above). Director Decker conceded on March 7, 2018 that these "cases were noteworthy [at that time] because their removal potentially could garner media attention."¹⁹⁴ Deputy Director Mechkowski expressed resentment over Mr. Ragbir and Mr. Montrevil's negative public statements about ICE,¹⁹⁵ and aired frustration over the "prominence" of Mr. Ragbir's case.¹⁹⁶

In the months that followed the March 9, 2017 check-in, ICE retaliated against Mr. Ragbir in a number of ways, culminating in his arrest and attempted deportation. Soon after the March 9, 2017 check-in, ICE began changing its policies towards the Accompaniment Program, and ICE posted a security guard outside the public check-in waiting room to turn away clergy and other

¹⁹⁰ *Id.* at ¶ 15.

¹⁹¹ *Ragbir v. Homan*, 923 F.3d at 59 ("On March 9, 2017, Ragbir appeared for a scheduled check-in with ICE officials in New York City. He was accompanied by clergy and elected officials, including a New York State Senator, the New York City Council Speaker, and other New York City Council Members. At the check-in, ICE New York Field Office Deputy Director Scott Mechkowski confronted Ragbir and attempted to send away the individuals who had accompanied him."); Nick Pinto, *Behind ICE's Closed Doors, "The Most Un-American Thing I've Seen,"* Village Voice (Mar. 10, 2017), <https://www.villagevoice.com/2017/03/10/behind-ices-closed-doors-the-most-un-american-thing-ive-seen/> ("The conference was cut short when a man ... ordered the group to clear the hallway immediately. City Councilmember Jumaane Williams observed that the group wasn't blocking the hallway and asked the man to identify himself. The man refused, but insisted that Mr. Ragbir, his friends, and the elected officials leave the hallway. For a moment the two men squared off, eye to eye. The unnamed federal official eventually stepped away, and Mr. Ragbir's entourage boarded elevators to descend.").

¹⁹² *Ragbir v. Homan*, 923 F.3d at 59 ("This confrontation garnered negative press coverage for ICE in prominent news outlets, in which Ragbir and several of the politicians who went with him to the check-in expressed criticism of ICE and U.S. immigration policy."); *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 17 (Das Decl.), ¶ 14; *see also, e.g.,* Liz Robbins, *Once Routine, Immigration Check-Ins Are Now High Stakes*, N.Y. Times (Apr. 11, 2017), <https://www.nytimes.com/2017/04/11/nyregion/ice-immigration-check-in-deportation.html>; *Apoyado por cientos, defensor de inmigrantes evade deportación en Nueva York*, La Nación Costa Rica (Mar. 9, 2017), <https://www.nacion.com/el-mundo/politica/apoyado-por-cientos-defensor-de-inmigrantes-evade-deportacion-en-nueva-york/NQTJGKHIWJAYREVGOWMLAWJCE/story/>.

¹⁹³ *Ragbir v. Homan*, 923 F.3d at 60, 70–71.

¹⁹⁴ *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 51, Declaration of Field Office Director Thomas R. Decker (hereinafter "Decker Decl.") ¶ 13 (S.D.N.Y. May 23, 2018); Ragbir Amended Complaint, *Ragbir v. Homan*, No. 18-cv-1159 (PKC) (S.D.N.Y. July 19, 2018) ECF 100 ¶ 50. Defendant Decker later retracted this statement in his amended declaration, filed on March 14, 2018. *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 58, Amended Declaration of Field Office Director Thomas R. Decker (hereinafter "Amended Decker Decl.") ¶ 13 (S.D.N.Y. May 23, 2018). Mr. Decker's amended declaration states that he learned of Mr. Ragbir's case on March 6, 2017.

¹⁹⁵ *Ragbir v. Homan*, 923 F.3d at 70–71.

¹⁹⁶ *Id.* at 60, 70–71.

volunteers.¹⁹⁷ Additionally, ICE began to surveil Mr. Ragbir and Coalition activities, and placed vehicles outside of New Sanctuary Coalition's office in January 2018.¹⁹⁸

On January 5, 2018, faith leaders met with Deputy Director Mechkowski.¹⁹⁹ Without prompting, Deputy Director Mechkowski brought up Mr. Ragbir and his remarks to the media after his last check-in, noted the high profile nature of Mr. Ragbir's case,²⁰⁰ and described his upcoming check-in as "D-Day."²⁰¹ Later, on January 8, 2018, Mr. Ragbir's counsel spoke with Deputy Director Mechkowski who said that things were "different" now than they were in the past, referring to changes in leadership.²⁰² Significantly, Deputy Director Mechkowski stated that he felt "resentment" about the March 9, 2017 check-in.²⁰³ In addition, Deputy Director Mechkowski stated that he heard Mr. Ragbir's statements to the press, and that he continued to see him at vigils at 26 Federal Plaza²⁰⁴ and that he was angry about the presence of the elected officials there.²⁰⁵ At

¹⁹⁷ *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 17 (Das Decl.). ¶ 16.

¹⁹⁸ *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 17 (Das Decl.). ¶ 17; *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 73, Declaration of Reverend Micah Bucey (hereinafter "Rev. Bucey Decl.") ¶ 2 (S.D.N.Y. May 23, 2018) (noting that he believed unmarked vehicles parked outside his church belonged to ICE); Zaira Cortes, *NYC Sanctuary Churches: ICE is Ramping Up Harassment*, Voices of NY, (Jan. 12, 2018) <https://voicesofny.org/2018/01/nyc-sanctuary-churches-ice-is-ramping-up-harassment/>; Nick Pinto, *No Sanctuary*, Intercept (Jan. 19, 2018), <https://theintercept.com/2018/01/19/ice-new-sanctuary-movement-ravi-ragbir-deportation/> (Reporting that on or about April 9, 2017, St. Peter's, a Lutheran church that is part of the Coalition, carried out a procession in support of Mr. Ragbir. An ICE vehicle followed the procession briefly, showed participants an ICE badge, and then left. Mr. Ragbir himself and several Coalition members observed unmarked cars around Judson Memorial Church, which houses the Coalition's office, on January 3, 2018, for several hours. Coalition member Will Coley was leaving the office when a man in a vehicle with tinted windows called out to him and asked where the church's entrance was. The man said he was there to meet "Tom Boland," but there was no such person at the church. Mr. Coley and other Coalition members identified at least three vehicles with tinted windows idling on the same block as the church, all with New York license plates. When Mr. Coley and his partner approached one of the cars, the driver rolled down the window to speak with them, and Mr. Coley saw a white DHS license plate on the floor in the front passenger seat.)

¹⁹⁹ *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 73 (Rev. Bucey Decl.). ¶ 2.

²⁰⁰ *Ragbir v. Homan*, 923 F.3d at 60 ("Unprompted, Mechkowski then brought up Ragbir, stating, 'I read something that Ravi [Ragbir] wrote, [stating] "'do you think it's easy walking around with a target [on you]?"' Mechkowski stated that it 'bother[ed]' him that 'there isn't anybody in this entire building that doesn't ... know about Ravi. Everybody knows this case. No matter where you go' Mechkowski also stated that Ragbir and Montrevil's cases were the two most high-profile cases that ICE had in New York City.") (citations omitted); *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 73 (Rev. Bucey Decl.). ¶¶ 2, 5.

²⁰¹ Additionally, Deputy Director Mechkowski made negative remarks about the elected officials who spoke out about ICE practices after Mr. Ragbir's last check-in. Deputy Director Mechkowski also stated that he would not permit the clergy members to accompany Mr. Ragbir to this check-in, as they had in the past, and he stated that the manner of Mr. Montrevil's detention was intended to avoid the sort of noisy protest that had accompanied Mr. Ragbir's previous check-in. Deputy Director Mechkowski stated that ICE "didn't want the display of wailing kids and wailing clergy." See *Ragbir Amended Complaint*, *Ragbir v. Homan*, No. 18-cv-1159 (PKC) (S.D.N.Y. July 19, 2018) ECF 100 ¶ 67; Clergy members reported that he added: "That can't happen this time around," and, although Deputy Director Mechkowski denied that ICE was surveilling Mr. Ragbir, he stated: "I know where Mr. Ragbir lives, and I have seen him walking around, and I could have taken him myself." See Nick Pinto, *No Sanctuary*, Intercept (Jan. 19, 2018), <https://theintercept.com/2018/01/19/ice-new-sanctuary-movement-ravi-ragbir-deportation/>.

²⁰² *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 17 (Das Decl.). ¶ 18; *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 50 (Mechkowski Decl.). ¶ 21.

²⁰³ *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 17 (Das Decl.). ¶ 18.

²⁰⁴ *Ragbir v. Homan*, 923 F.3d at 60.

²⁰⁵ *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 17, (Das Decl.). ¶ 18.

both meetings, Deputy Director Mechowski falsely stated that no decision had been made concerning Mr. Ragbir's stay of removal.²⁰⁶

On January 11, 2018, with his most recent administrative stay of removal set to expire January 19, 2018,²⁰⁷ ICE officials suddenly detained Mr. Ragbir at what should have been a routine check-in. This check-in was atypical in several respects. First, in advance of the check-in, Deputy Director Mechowski ordered that Mr. Ragbir should report directly to him rather than to a Deportation Officer.²⁰⁸ Second, Deputy Director Mechowski would not allow three of his legal representatives to enter his office for the check-in.²⁰⁹ In the meeting, Mr. Mechowski informed Mr. Ragbir and his attorney that ICE was denying his application for a renewed stay of removal, revoking his current stay of removal²¹⁰—which was supposed to last eight more days—and enforcing the removal order against him.²¹¹ At no time was Mr. Ragbir ever provided an opportunity to be heard on the reasons for the revocation of his supervision order,²¹² as required by federal regulations.²¹³

Further, after taking him into custody, ICE officers quickly moved to deport Mr. Ragbir by transferring him to a Florida detention center, rather than one of the many detention centers typically used by ICE in New York and New Jersey.²¹⁴ ICE later disclosed that they had purchased the tickets to Miami the day before and intended to remove Mr. Ragbir the following morning,²¹⁵ notwithstanding regulations providing that a noncitizen “shall not” be deported within the first 72 hours after being “taken into custody.”²¹⁶ ICE initially refused to return Mr. Ragbir to the New York area despite a January 11 federal court order enjoining the Government from transferring him outside the jurisdiction of the New York field office. Mr. Ragbir was returned only after filing a motion to enforce the order.²¹⁷

²⁰⁶ Compare *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 51 (Decker Decl.) ¶ 21 (“In December 2017, I decided not to exercise discretion to grant Mr. Ragbir a further administrative stay of removal.”), and *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 50 (Mechkowski Decl.) ¶ 20 (“On January 8, 2018, I met with Mr. Ragbir's attorney, Alina Das. I decided that, if Mr. Ragbir knew his request for a renewed administrative stay of removal had been denied, ICE might be unable to accomplish his removal.”), with ¶ *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 17 (Das Decl.) ¶ 18 (on January 8, 2018 Deputy Director Mechowski “stated that no decision had yet been reached with respect to Mr. Ragbir's stay application.”), and *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 73 (Rev. Bucey Decl.) ¶ 6 (“Mr. Mechowski further noted that he had not yet made a decision in Mr. Ragbir's case, and that nothing he told us was a lie and that the agency was not misleading us.”).

²⁰⁷ *Ragbir v. Homan*, 923 F.3d at 60; *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 17 (Das Decl.) ¶ 18.

²⁰⁸ *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 17 (Das Decl.) ¶¶ 20-21.

²⁰⁹ *Id.* at ¶ 18.

²¹⁰ *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 17 (Das Decl.) ¶¶ 22, 28; *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 50 (Mechkowski Decl.) ¶ 23.

²¹¹ *Ragbir v. Homan*, at 60; *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 17 (Das Decl.) ¶ 22.

²¹² *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 17 (Das Decl.) ¶ 26.

²¹³ *Ragbir Amended Complaint, Ragbir v. Homan*, No. 18-cv-1159 (PKC) (S.D.N.Y. July 19, 2018) ECF 100 ¶ 73.c.

²¹⁴ *Ragbir v. Homan*, 923 F.3d at 60; *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 17 (Das Decl.) ¶ 29.

²¹⁵ *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 50 (Mechkowski Decl.) ¶ 26; *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 51 (Decker Decl.) ¶ 41.

²¹⁶ *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 17 (Das Decl.) ¶ 36.

²¹⁷ *Id.* at ¶ 35.

On January 29, 2018, in response to the cruel and unconstitutional actions of federal immigration officials, a district court granted Mr. Ragbir a writ of habeas corpus, requiring ICE to release him from custody. The court wrote that “[i]t ought not to be—and it has never before been—that those who have lived without incident in this country for years are subjected to treatment we associate with regimes we revile as unjust.” *Ragbir v. Sessions*, No. 18-cv-236 (KBF), 2018 WL 623557, at *1 (S.D.N.Y. Jan. 29, 2018), *vacated and remanded sub nom. Ragbir v. Barr*, No. 18-1595, 2019 WL 6826008 (2d Cir. July 30, 2019). The court also noted “with grave concern the argument that petitioner has been targeted as a result of his speech and political advocacy on behalf of immigrants’ rights and social justice.” *Id.* at n.1

Mr. Ragbir was released from detention on January 29, 2018. ICE’s treatment of Mr. Ragbir was unusual even in the final moments of his detention. He was processed for release and personally served a notice to report for deportation on Saturday, February 10, 2018 by Deputy Director Mechkowski at 26 Federal Plaza. Meanwhile, ICE continued to employ extraordinary tactics to remove Mr. Ragbir as quickly as possible and without regard to a district court order holding that Mr. Ragbir was entitled to an orderly departure.²¹⁸ ICE initially ordered Mr. Ragbir to check in again on Saturday, February 10, 2018, which would have offered Mr. Ragbir less than two weeks to prepare himself to leave the country where he has lived for over two decades, even though 60-90 days notice is typical.²¹⁹ In addition, it was scheduled for the day after a hearing on Mr. Ragbir’s motion for a stay of his removal pending adjudication of his coram nobis petition in the District Court of the District of New Jersey. It is highly unusual to require an individual to check in or report to ICE on a Saturday, when ICE offices—and courts—are typically closed.²²⁰

Mr. Ragbir subsequently challenged his deportation on First Amendment Grounds. When this lawsuit reached the U.S. Court of Appeals for the Second Circuit in 2019, the court considered the “strong evidence that officials responsible to deport him did so based on their disfavor of [his] speech”²²¹—including surveillance of Mr. Ragbir, the early termination of his administrative stay, his arrest without notice, and his rushed transfer to Florida for immediate deportation—and 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.”²²² The case is pending before the district court and may take many more years to resolve.

However, ICE remains able to redress these harms without litigation. A decision to join Mr. Ragbir in a motion to reopen his removal proceedings and dismiss the charges against him, or at minimum to grant him five years of deferred action, would redress the retaliation that Mr. Ragbir has suffered over the last several years for his activism.²²³ Mr. Ragbir is not an enforcement priority because he is not a threat to national or border security or to public safety.²²⁴ Rather, under the new

²¹⁸ *Ragbir v. Sessions*, 2018 WL 623557.

²¹⁹ *Ragbir v. Homan*, No. 18-cv-1159 (PKC), ECF 17 (Das Decl.). ¶ 42.

²²⁰ *Id.*

²²¹ *Ragbir v. Homan*, 923 F.3d at 73.

²²² *Id.* at 71.

²²³ See Memorandum from John D. Trasviña, Principal Legal Advisor, to All OPLA Attorneys, Re: Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Practices at *11 (May 27, 2021).

²²⁴ See *id.* at 6, 12-13 & n.6.

guidance, he is a priority for prosecutorial discretion both because he is party to a nonfrivolous civil rights claim, and because he was granted lawful permanent residency and “resided in the United States for many years”, has contributed to his community, and has “demonstrated close family and community ties.”²²⁵ Mr. Ragbir has the support of several members of the New York Congressional delegation, along with his family and community.²²⁶

III. Corrective Actions

In light of the weak protections available to immigrant activists, several changes in policy and law are required to prevent and redress First Amendment retaliation. Many of these actions—including the issuances of executive orders, guidance, and memoranda; regulatory reform; and settlement—can be led by the executive, and the Office of Civil Rights and Civil Liberties should champion these changes.²²⁷ Other actions will require legislation.

A. Case Reviews and Discretion

DHS should engage in a high-level case review of all cases in which retaliation is alleged so that it may exercise appropriate prosecutorial discretion. Prosecutorial discretion should be tailored to each case, and may take the form of granting or joining in motions for immigration relief or status, dismissing or joining in motions to terminate removal proceedings, joining in motions to reopen removal proceedings, granting deferred action or similar protection from deportation, ordering release from detention, returning individuals to the U.S. through humanitarian parole, and/or other mechanisms.

Because even the appearance of retaliation creates a chilling effect on immigrant communities, DHS should ensure that prosecutorial discretion is presumptively exercised where nonfrivolous allegations are raised, without requiring a formal finding of retaliation. At minimum, individuals with nonfrivolous allegations should be restored to their status quo prior to the retaliation while further findings are made. Moreover, separate and apart from findings of retaliation, engagement in immigrant rights organizing and similarly protected First Amendment activity should be viewed as a positive equity for discretion. This aligns with and can build from recent ICE guidance that encourages discretion in cases where an individual is party to a nonfrivolous civil rights claim and/or has contributed to the community.²²⁸

As part of this case review, DHS should coordinate with the Department of Justice, which defends government agencies in First Amendment litigation in federal court, to undertake a review

²²⁵ *See id.* at 9-10.

²²⁶ *See* Letter from the New York Congressional Delegation in Support of Mr. Ragbir.

²²⁷ Many of these suggestions reflect the collective recommendations of various organizations that have discussed issues of retaliation with the Biden transition team, including the National Immigration Project, Migrant Justice, National Immigration Law Center, the Knight Institute (special thank you to Ramya Krishnan), ACLU of Southern California, La Resistencia, Just Futures Law, Mijente, New Sanctuary Coalition, and others. The transition team recommendations may be found here:

https://drive.google.com/file/d/1OI85S6dzw5fcmc_NdDZ1AUKXePzeUZkp/view.

²²⁸ *See* Memorandum from John D. Trasviña, Principal Legal Advisor, to All OPLA Attorneys, Re: Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Practices at *6, 11-13 (May 27, 2021)

of pending cases to assess possibilities for settlement. In *Migrant Justice v. ICE*, the parties entered into a settlement agreement that provided five years of deferred action and awarded \$100,000 in damages to the injured plaintiffs, and required ICE to reissue the 2019 “First Amendment Protected Activities” memorandum to officers in the Vermont office, which had been the defendants in the litigation.²²⁹ Similar settlements should be reached in pending First Amendment retaliation cases to redress activists’ injuries.²³⁰

These recommendations can and should be immediately implemented in the cases of immigrant activists Claudio Rojas, Jean Montrevil, and Ravi Ragbir. DHS should return Mr. Rojas and Mr. Montrevil to the U.S.; cease efforts to deport Mr. Ragbir; grant all three activists deferred action; and join in motions to reopen their removal proceedings so they may seek all available relief. In the cases of Mr. Rojas and Mr. Montrevil, the immediate use of humanitarian parole to ensure their return would send a powerful message that activism and civic engagement will be valued and protected. In the cases of all three individuals, the exercise of prosecutorial discretion would create a “warming” effect to encourage immigrant participation in public debate and civic life, countering the chilling effect that the targeting of these activists has had on immigrant communities.

B. Executive Orders, Guidance, and Memoranda

Through executive order or proclamation, the President should underscore the First Amendment rights of immigrants and direct federal agencies to issue guidance and regulations to protect those rights. Acting on such orders, the DHS Secretary should include First Amendment protections in new guidance and memoranda directed at federal immigration officials.

1. A New First Amendment Protected Activities Memorandum

In 2019, Acting Secretary of DHS Andrew McAleenan issued a memo addressing First Amendment Protected Activities. This policy memo is wholly inadequate and does little to actually protect the First Amendment rights of immigrants. As a result, the DHS Secretary should amend the 2019 “First Amendment Protected Activities”²³¹ memo in several important ways.

First, the DHS Secretary should issue a new Memorandum to explicitly prohibit agency personnel from profiling, surveilling, monitoring, targeting, harassing, revoking or rejecting applications from, fining, arresting, detaining, deporting, or otherwise discriminating against any individual, group, or organization based on their First Amendment protected activities. The language of the current memo states that DHS personnel “should not” pursue information about how an individual exercises their First Amendment rights; that language should be edited to hold that DHS personnel “shall not” engage in those activities. Without that change, DHS employees

²²⁹ *Migrant Justice v. U.S. Dep’t of Homeland Sec.*, No. 17-cv-197, Stip. (D. Vt.); <https://migrantjustice.net/sites/default/files/MJ-ICE-Settlement.pdf>

²³⁰ A list of pending cases is available as a link in the Transition Team memorandum referenced *supra* note 227.

²³¹ Memorandum from Kevin McAleenan, Acting Sec’y, Dep’t of Homeland Sec., to all DHS Employees, Information Regarding First Amendment Protected Activities (May 17, 2019) [hereinafter “McAleenan Memorandum”], https://www.dhs.gov/sites/default/files/publications/info_regarding_first_amendment_protected_activities_as1_signed_05.17.2019.pdf.

appear to retain discretion over whether to engage in practices that burden core First Amendment Protected Activities. By editing the language to direct that personal “shall not” engage in those activities, it makes clear that such practices are expressly prohibited. To be effective in protecting First Amendment activities, any amended policy guidance must make clear that retaliatory behaviors are not just discouraged; they are forbidden.

Second, the 2019 Memorandum focuses on the Privacy Act of 1974 as the guidance for DHS personnel’s activity related to First Amendment protected activity. But it is not just the Privacy Act that governs the protection of this information; the First Amendment itself demands limitations against unauthorized government collection and use of First Amendment protected activity by public officials.²³² Use of individuals’ protected speech and protest activity to target them for deportation proceedings not only violates statutory protections, but also constitutes an invasion of constitutionally protected rights.²³³ The memorandum should explicitly include the First Amendment as a basis for the guidance.

Third, the memo also provides three exceptional situations wherein some collection and use of information that is protected by the First Amendment is authorized: (1) where “an individual has expressly granted his consent,” (2) where “maintaining the record is expressly authorized by a federal statute,” or (3) where “that information is relevant to a criminal, civil, or administrative activity relating to a law DHS enforces or administers.”²³⁴ In their current state, these three exceptions serve to swallow any rule protecting First Amendment activities by noncitizens targeted for enforcement. Accordingly, the wording of these exceptions should be more narrowly tailored to reflect the true scope of these exceptions.

With regards to the first exception, the language should be modified so that it is clear that the exception only applies when this expressly granted consent is affirmative and freely given. Expressly given consent, when only given as a result of coercion or duress, should not be included in this exception. An individual should also be able to withdraw consent to the collection and storage of their First Amendment protected information at any time.

The second exception likewise demands further specification. As an initial matter, this exception should make clear that a federal statute authorizing collection of *some* First Amendment protected information—for example, suspected association with terrorist organizations—does not permit collection of *all* of that individual’s First Amendment protected information. The information collected and used must only be that information relevant to the matter covered in the statute. Likewise, a statute limiting naturalization of individuals opposing rule of law or supporting totalitarian forms of government²³⁵ does not authorize collection of *all* political speech and beliefs held by an individual. So, the second exception should be cabined as such. In addition, some of

²³² Meredith Blake Martin, *Anatomy of a First Amendment Retaliation Claim*, MD. B.J., Nov./Dec. 2008, at 53 (“The First Amendment includes . . . the right to be free from retaliation by a public official for the exercise of [the affirmative right to speak]”).

²³³ *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (“It is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys”).

²³⁴ McAleenan Memorandum, *supra* note 231.

²³⁵ 8 U.S.C. § 1424.

the federal statutes represented in the footnote of the memo will violate the First Amendment if applied to certain individuals,²³⁶ so it is important that this exception recognizes that none of these statutes provides carte blanche authority to collect and use that information in all circumstances against all individuals.

The third exception casts a broad net that should be more narrowly tailored to the true interests of this exception, to avoid unintentionally authorizing an impermissibly broad amount of monitoring of protected First Amendment activities. As it stands, this particular exception is perhaps the most overbroad of them all; the broad-sweeping permission of collecting any information that can be even remotely connected to “law enforcement activity,” including journalistic research and academic inquiry creates a gaping hole in the protection of immigrants’ First Amendment rights. This exception, too, must be cabined to expressly and explicitly lay out what instances collection of First Amendment protected information is acceptable, rather than granting DHS employees a catch-all excuse for said collection and use.²³⁷

As it stands, the “First Amendment Protected Activities” memo provides exceptions that almost entirely swallow the rule. The 2019 Memorandum serves far more to explain how monitoring and use of First Amendment protected activities by immigrants *can* be used, rather than to make it clear that respecting freedom of speech and freedom from fear of retaliation for that speech should be the baseline and the norm. A reissuance of an amended Memorandum, appropriately tailored to highlight the constitutional dimension of this issue and the limited range of exceptions to the general First Amendment protections, will provide the much-needed specific guidance to DHS personnel around how they must act with respect to constitutional limits.

2. First Amendment Considerations for other Executive Orders, Guidance, and Memoranda

Aside from issuing a new policy memorandum on First Amendment Protected Activities, the DHS Secretary should also take additional important steps to protect First Amendment rights.

First, the DHS Secretary should incorporate First Amendment concerns into any prosecutorial discretion guidance DHS or its subcomponents issue. ICE’s prosecutorial discretion guidance, for example, should explicitly consider a person’s public service as an immigrant rights, civil rights, labor rights organizer or activist as a strong positive equity and deserving of a presumption of prosecutorial discretion.

²³⁶ See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 765–69 (1972). The ‘Mandel exception’ provides that while, in general, a nonresident has no constitutional right of entry into the country, there are some situations in which denial of a visa implicates the constitutional rights of a U.S. citizen and therefore can be subjected to further review. The First Amendment protects not only the right to speak, but also the right to receive information and ideas; therefore, preventing U.S. citizens from having access to the speech and ideas of nonresidents, such as the immigrants being targeted for deportation proceedings, may place an “unjustifiable burden” on First Amendment rights. Where such a burden is created, application of the statute may be unconstitutional.

²³⁷ Documenting religious accommodations given by DHS employees may be an acceptable use of this exception; collecting any and all information where an immigrant is discussing immigration policy (the current phrasing authorizing collection of activities related to speech about laws that DHS administers or enforces could allow for such a broad, and unconstitutional, interpretation) is not.

Second, the DHS Secretary should also direct ICE to revamp its 2011 “Victims, Witnesses, and Plaintiffs” prosecutorial discretion memorandum to create an affirmative process to request deferred action for immigrants who report labor violations, civil rights violations, and other abuses; are witnesses in investigations and lawsuits regarding private or public misconduct; and/or engage in immigrant rights organizing and similar forms of protected political speech.²³⁸ This memorandum could also direct federal agencies to exercise favorable prosecutorial discretion in ongoing deportation cases involving these categories.

Third, the DHS Secretary should implement guidance to protect workers’ rights, including workers’ rights to engage in organizing, by prohibiting worksite raids and strengthening the U visa certification and deferred action process for workers involved in organizing and labor disputes. DHS should coordinate with all applicable enforcement agencies, including but not limited to the Department of Labor, Equal Employment Opportunity Commission, National Labor Relations Board, and state agency counterparts, to review, certify, and issue expedited U visas and defer to the prosecutorial discretion requests from these enforcement agencies so that workers are not deported as retaliation for engaging in organizing.

Fourth, the DHS Secretary should direct ICE to amend detention standards to explicitly prohibit disciplinary or other retaliatory measures in response to First Amendment protected activity in detention, and ensure public access and transparency through more robust visitation and communication policies; and more explicitly ensure that these standards are enforceable.²³⁹

Fifth, the DHS Secretary should direct ICE to rescind ICE Policy Memo 5004.1 regarding ICE’s change in policy on private immigration bills and implement a stronger version of prior policy that ensures stays of removal for individuals for whom a private bill is pending consideration.²⁴⁰

Finally, the DHS Secretary should create a formal policy to facilitate the return of individuals who were deported in retaliation for exercising their First Amendment rights, as part of a broader policy to facilitate the return of individuals unjustly deported. This should include a directive to exercise humanitarian parole and deferred action to effectuate the prompt return of individuals who were separated from family and community through their retaliatory deportation pending further review of their claims, and join motions to reopen removal proceedings in such cases in order to grant related forms of relief.

C. Regulatory Reform

The DHS should undertake a series of regulatory reforms to ensure that immigrants facing retaliation for constitutionally protected activity may seek effective and immediate intervention

²³⁸ See Memorandum from John Morton, Dir. of U.S. Immigration and Customs Enforcement, to agency pers., Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, at 2 (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>

²³⁹ Performance Based National Detention Standards 2019, <https://www.ice.gov/detain/detention-management/2019> (classifying group demonstrations, hunger strikes, and protests as disturbances).

²⁴⁰ U.S. IMMIGR. & CUSTOMS ENFORCEMENT, POLICY NUMBER 5004.1: STAYS OF REMOVAL AND PRIVATE IMMIGRATION BILLS (May 5, 2017), https://www.ice.gov/doclib/foia/dro_policy_memos/removalStaysPrivateImmigrationBills_05_05_2017.pdf.

from federal officials with the authority to investigate and stop the retaliatory action. This should take at least three forms. One would be to amend the departure bar regulations to ensure automatic trigger of a stay of deportation during an investigation of retaliation or similar civil rights violations. This amendment would also ensure that immigrants have a mechanism to report such violations to the departure bar officer. Another form would be to strengthen the authority of the Office of Civil Rights and Civil Liberties, as well as the Office of the Inspector General, providing each with the authority to order release and prevent deportation of victims and witnesses in their investigations, and the power to order—not just recommend—corrective action.²⁴¹

An additional set of corrective reforms would involve review of any current or upcoming rulemaking that implicates First Amendment Rights. In some cases, this review might result in problematic rulemaking being withdrawn.

D. Legislative Reform

Congress also has the authority to take corrective action on these issues. It should craft 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 provide a more formal process by which people who have already been deported in retaliation for political speech may return to the United States, as a supplement to the administrative processes that the executive may implement without Congress.

Moreover, in light of the severe impediment that 8 U.S.C. § 1252(g) has posed to immigrant access to judicial review over First Amendment claims, Congress should repeal this provision of the Immigration and Nationality Act, or—at minimum—amend it to clarify that it does not apply to claims challenging the constitutionality or legality of any decision or action to commence proceedings, adjudicate cases, or execute removal orders. This will remove any doubt that federal courts have the authority to exercise robust review over claims of retaliatory deportation.

Through these administrative, regulatory, and legislative reforms, the voices of immigrant activists and others in the movement can be better protected.

Conclusion

In recent months, the nation has recommitted itself to immigration reform. As we engage in a robust public debate about how to align our immigration system with our values, we need to listen to the voices of those directly impacted by the immigration system. But so long as federal immigration officials can target immigrants who speak up—using surveillance, stops, arrests, fines, detention, and deportation to silence dissent—no meaningful debate about immigration policy is possible.

The spike in retaliation against immigrant activists over the last several years is undermining the immigrant rights movements. The targeting of activists has had a chilling effect

²⁴¹ See also Center for American Progress, Building Meaningful Civil Rights and Liberties Oversight in the U.S. Department of Homeland Security (Apr. 2, 2019), <https://www.americanprogress.org/issues/immigration/reports/2019/04/02/467776/building-meaningful-civil-rights-liberties-oversight-u-s-department-homeland-security/>.

on individual speech and collective organizing, affecting citizens and noncitizens alike. It has undermined the bedrock of our democracy.

We therefore urge the Office of Civil Rights and Civil Liberties to ensure a robust and prompt individual case review to redress past and ongoing First Amendment retaliation, and to adopt meaningful changes in policy that will prevent First Amendment retaliation from occurring in the future. To that end, we ask that your office recommend the exercise of prompt prosecutorial discretion in the cases of Claudio Rojas, Jean Montreuil, and Ravi Ragbir. The voices of the immigrant rights movement must be valued and protected.

Sincerely,



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INDEX OF EXHIBITS

- Exhibit A Policy Recommendations
- Transition Team Recommendations (2021)
 - Justice Futures Law, Mijente, et al., *Five Things the Biden Administration Can Do Immediately to Address DHS Retaliation Against Protestors and Organizers* (2021)
 - Alina Das, *Deportation and Dissent: Protecting the Voices of the Immigrant Rights Movement*, 65 N.Y.L. Sch. L. Rev. 225 (2020-2021)
- Exhibit B Allegations of Retaliation – Claudio Rojas
- Amended Complaint
 - Selected Exhibits and Related Documents
- Exhibit C Allegations of Retaliation – Jean Montrevil
- Complaint
 - Selected Exhibits and Related Documents
 - Selected Publicly Filed Discovery
- Exhibit D Allegations of Retaliation – Ravi Ragbir
- Amended Complaint
 - Selected Exhibits and Related Documents
- Exhibit E Miscellaneous Documents Demonstrating Public Condemnation of First Amendment Retaliation Against Immigrant Activists
- Sign-On Letters
 - Selected Amicus Briefs