No. 19-1046

In the Supreme Court of the United States

MATTHEW T. ALBENCE, ET AL., PETITIONERS

v.

RAVIDATH LAWRENCE RAGBIR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Ravidath Lawrence Ragbir is an alien who was admitted to the United States as a lawful permanent resident but, after a conviction for an aggravated felony, was ordered removed. U.S. Immigration and Customs Enforcement (ICE) granted him a series of discretionary administrative stays of removal. After one such stay was revoked and a further stay denied, ICE detained Ragbir to effectuate his removal. Respondents filed suit, alleging that the government had selectively enforced the immigration laws against Ragbir in retaliation for his speech, and seeking a preliminary injunction prohibiting the government from executing his order of removal. The district court concluded that it lacked jurisdiction over respondents' challenges under 8 U.S.C. 1252(g). The court of appeals reversed, concluding that Section 1252(g) violated the Suspension Clause, U.S. Const. Art. I, § 9, Cl. 2, as applied to Ragbir. The questions presented are:

1. Whether respondents stated a cognizable constitutional claim regarding the selective enforcement of the immigration laws.

2. Whether the Suspension Clause guarantees a right to file a habeas petition challenging the revocation of an administrative stay of removal.

PARTIES TO THE PROCEEDING

Petitioners were appellees in the court of appeals. They are: Matthew T. Albence, in his official capacity as Deputy Director and Senior Official Performing the Duties of the Director of U.S. Immigration and Customs Enforcement; Thomas Decker, in his official capacity as New York Field Office Director for U.S. Immigration and Customs Enforcement; Jerome White, in his official capacity as Acting Deputy New York Field Office Director for U.S. Immigration and Customs Enforcement; U.S. Immigration and Customs Enforcement; Chad F. Wolf, in his official capacity as Acting Secretary of Homeland Security; the U.S. Department of Homeland Security; William P. Barr, in his official capacity as Attorney General of the United States; and the U.S. Department of Justice.*

Respondents were appellants in the court of appeals. They are: Ravidath Lawrence Ragbir; New Sanctuary Coalition of New York City; CASA de Maryland, Inc.; Detention Watch Network; National Immigration Project of the National Lawyers Guild; and New York Immigration Coalition.

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* Matthew T. Albence, Jerome White, and Chad F. Wolf are substituted for their predecessors Thomas D. Homan, Scott Mechkowski, and Kevin K. McAleenan. See Sup. Ct. R. 35.3.

RELATED PROCEEDINGS

United States District Court (D.N.J.):

United States v. *Ragbir*, No. 00-cr-121 (Sept. 17, 2001)

Ragbir v. *United States*, No. 17-cv-1256 (Jan. 25, 2019)

United States District Court (S.D.N.Y.):

Ragbir v. *Homan*, No. 18-cv-1159 (May 23, 2018)

United States Court of Appeals (2d Cir.):

Ragbir v. *Holder*, No. 07-1187 (Aug. 12, 2010)

Ragbir v. *Homan*, No. 18-1597 (Apr. 25, 2019)

United States Court of Appeals (3d Cir.):

United States v. *Ragbir*, No. 01-3745 (June 7, 2002)

Ragbir v. *United States*, No. 18-2142 (Nov. 15, 2018)

Ragbir v. *United States*, No. 19-1282 (Feb. 10, 2020)

Supreme Court of the United States:

Ragbir v. *United States*, No. 02-708 (Dec. 16, 2002)

Ragbir v. *Holder*, No. 10-1295 (Oct. 3, 2011)

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-55a) is reported at 923 F.3d 53. The opinion of the district court (App., *infra*, 56a-78a) is not reported in the Federal Supplement but is available at 2018 WL 2338792.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2019. A petition for rehearing was denied on September 26, 2019 (App., *infra*, 79a-80a). On December 17, 2019, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including January 24, 2020. On January 14, 2020, Justice Ginsburg further extended the time to and including February 21, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. I, § 9, Cl. 2 provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

8 U.S.C. 1252(g) provides:

> **(g) Exclusive jurisdiction**
>
> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

STATEMENT

Respondent Ravidath Lawrence Ragbir is a native and citizen of Trinidad and Tobago. App., *infra*, 5a. After he was convicted of an aggravated felony and was ordered removed, U.S. Immigration and Customs Enforcement (ICE) granted him a series of administrative stays of removal. *Id.* at 5a-7a. When ICE eventually sought to effectuate his removal order, respondents filed a petition for habeas corpus, alleging that the enforcement of a removal order against Ragbir amounted to unconstitutional retaliation for protected First Amendment activity. *Id.* at 3a-4a, 11a. The district court dismissed the petition for lack of jurisdiction, relying on 8 U.S.C. 1252(g). App., *infra*, 56a-78a. The court of appeals reversed, concluding that Section 1252(g) violated

the Suspension Clause, U.S. Const. Art. I, § 9, Cl. 2, as applied to Ragbir. App., *infra*, 1a-50a.

1. Under the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 163 (8 U.S.C. 1101 *et seq.*), removal proceedings generally provide the exclusive means for determining whether an alien is both removable from the United States and eligible for any relief or protection from removal. See 8 U.S.C. 1229a. When an immigration judge issues a removal order, an alien can challenge that order in an appeal to the Board of Immigration Appeals (BIA). See 8 C.F.R. 1003.1(b), 1003.3(a). If the BIA affirms the immigration judge's order, the removal order becomes administratively final. 8 U.S.C. 1101(a)(47)(B). The alien may then seek judicial review of that final order of removal by filing a petition for review in the court of appeals in the regional circuit in which the immigration judge completed the underlying proceedings. See 8 U.S.C. 1252(a) and (b)(1)-(2).

In 8 U.S.C. 1252, Congress channeled into the statutorily-prescribed administrative procedure described above all legal and factual questions that may arise from the removal of an alien, with judicial review of those decisions vested exclusively in the courts of appeals. See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (*AADC*). Section 1252(a) provides that a petition for review in a court of appeals is the "sole and exclusive means for judicial review of an order of removal." 8 U.S.C. 1252(a)(5). Section 1252(b) further emphasizes that review of "all questions of law and fact * * * arising from any action taken or proceeding brought to remove an alien from the United States * * * shall be available *only* in judicial review of a final order under this section." 8 U.S.C. 1252(b)(9) (emphasis added). Finally, Section 1252(g) provides

that, "notwithstanding any other provision of law (statutory or nonstatutory)," "no court"—except a federal court of appeals in the petition-for-review process described above—"shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the [Secretary of Homeland Security] to commence proceedings, adjudicate cases, or execute removal orders against any alien." 8 U.S.C. 1252(g).[1] That language protects the government's authority to make "discretionary determinations" over whether and when to execute a removal order, "providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed." *AADC*, 525 U.S. at 485.

2. In 1994, Ragbir was admitted to the United States as a lawful permanent resident. App., *infra*, 5a. In 2001, following a jury trial, Ragbir was convicted of wire fraud and conspiracy to commit wire fraud and was sentenced to 30 months of imprisonment. *Ibid.* The Third Circuit affirmed, 38 Fed. Appx. 788, and this Court denied review, 537 U.S. 1089.

Because Ragbir's convictions constituted aggravated felonies under the INA, 8 U.S.C. 1101(a)(43)(M)(i) and (U), they rendered him removable from the United States, 8 U.S.C. 1227(a)(2)(A)(iii). C.A. App. 149. In August 2006, an immigration judge ordered Ragbir removed. App., *infra*, 6a. The BIA denied Ragbir's appeal, *ibid.*, and the Second Circuit denied his petition

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[1] The Attorney General once exercised all of that authority, but much of that authority has been transferred to the Secretary of Homeland Security. See *Clark* v. *Martinez*, 543 U.S. 371, 374 n.1 (2005). Many of the INA's references to the Attorney General are now understood to refer to the Secretary. *Ibid.*

for review, 389 Fed. Appx. 80. This Court denied review. 565 U.S. 816. In 2012, the BIA denied Ragbir's motion to reconsider and reopen, App., *infra*, 6a, and the Second Circuit denied his petition for review of that decision, 640 Fed. Appx. 105.[2]

ICE nevertheless released Ragbir from immigration detention and granted him four discretionary administrative stays of removal, ranging from one to two years in length. App., *infra*, 6a-7a; see 8 U.S.C. 1231(a)(3); 8 C.F.R. 241.4(d). Ragbir's last administrative stay of removal was set to expire on January 19, 2018. C.A. App. 151. In November 2017, Ragbir filed an application for another administrative stay. App., *infra*, 7a. In December 2017, ICE declined to exercise its discretion to grant Ragbir a further stay of removal, C.A. App. 202, although that decision was not communicated to Ragbir at that time, App., *infra*, 10a; see C.A. App. 153.

On January 11, 2018, Ragbir reported to ICE's New York Field Office, where he was informed that ICE had denied his request for a renewed administrative stay of removal, had revoked the remaining period of his current stay, and was detaining him to effectuate removal. C.A. App. 155, 206. That same day, Ragbir filed a habeas petition, raising a novel theory that his abrupt arrest for removal had violated "the freedom to say goodbye." No. 18-cv-236, 2018 WL 623557, at *1, vacated as

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[2] Ragbir also filed a petition for a writ of coram nobis in the United States District Court for the District of New Jersey, seeking to collaterally attack his conviction. See 17-cv-1256 Pet. for Coram Nobis. The district court denied the petition, 17-cv-1256 D. Ct. Doc. 82 (Jan. 25, 2019), and the Third Circuit affirmed, No. 19-1282, 2020 WL 611071. The Third Circuit reasoned that Ragbir had not provided any sound reason for his delay in filing, and it noted that it also did not perceive any fundamental errors in his conviction. *Id.* at *7-*9 & n.37.

moot, No. 18-1595, 2019 WL 6826008; see C.A. App. 156-157. Soon after, the district court granted Ragbir's petition, and ICE released him from custody. 2018 WL 623557, at *3; see C.A. App. 157. The court of appeals vacated the district court's judgment under *United States* v. *Munsingwear*, 340 U.S. 36 (1950). See 2019 WL 6826008, at *1.

3. Respondents thereafter filed a petition for a writ of habeas corpus and for declaratory and injunctive relief in the United States District Court for the Southern District of New York. C.A. App. 37-80. Respondents contended that the federal government had engaged in a nationwide practice of selectively enforcing the immigration laws against immigrant-rights activists, including Ragbir after his release from immigration detention in 2008, in retaliation for their speech and in violation of the First Amendment. *Id.* at 74-76; see App., *infra*, 7a. Respondents moved for a preliminary injunction prohibiting the government from executing Ragbir's order of removal. App., *infra*, 58a.

The district court denied the request for a preliminary injunction insofar as it sought to stay Ragbir's removal and dismissed the petition for lack of jurisdiction under Section 1252(g) to the extent it sought to declare unlawful or enjoin the execution of the final removal order against Ragbir. App., *infra*, 78a; see *id.* at 56a-78a. The court concluded that it lacked jurisdiction over respondents' challenges to the execution of Ragbir's removal order. *Id.* at 63a-77a. It explained that Ragbir is subject to a final order of removal and that his petition plainly "aris[es] from the decision or action by the Attorney General to * * * execute removal orders against any alien," 8 U.S.C. 1252(g). App., *infra*, 63a-72a. The

court further explained that "[t]he limitation on jurisdiction found in section 1252(g) does not depend on the form or theory on which a plaintiff proceeds" and thus includes respondents' challenge to allegedly retaliatory execution, even though it arose after entry of a final order of removal. *Id.* at 64a.

The district court next concluded that the application of Section 1252(g) to Ragbir was constitutional because that provision does not foreclose Ragbir from raising a viable constitutional claim that could provide a defense to removal. App., *infra*, 72a-77a. The court explained that the execution of a final order of removal cannot support a First Amendment retaliation claim, drawing an analogy to courts' reliance on the existence of probable cause to defeat retaliatory-arrest and retaliatory-prosecution claims in the criminal context. *Id.* at 73a-74a. It also noted that its conclusion was "buttressed by *AADC*," in which this Court explained that, "'as a general matter, . . . an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.'" *Id.* at 75a-76a (quoting *AADC*, 525 U.S. at 488) (brackets omitted). Because the district court concluded that Ragbir had no viable constitutional claim, it declined to reach the question whether the Suspension Clause rendered Section 1252(g) unconstitutional as applied here. *Id.* at 75a n.8.

4. A divided panel of the court of appeals vacated and remanded. App., *infra*, 1a-50a.

a. The court of appeals agreed with the district court that Section 1252(g) barred review of Ragbir's selective-enforcement claim, but it held that Section 1252(g) is unconstitutional under the Suspension Clause as applied to Ragbir. App., *infra*, 16a-47a. The court thus

vacated and remanded for adjudication of Ragbir's First Amendment claim. *Id.* at 50a.

First, the court of appeals concluded that Ragbir's complaint stated a viable claim of retaliation in violation of the First Amendment, notwithstanding that ICE had a legal basis to arrest and remove him. App., *infra*, 22a-36a. The court attempted to distinguish this Court's decision in *AADC*, noting that this Court did not "rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous" that a selective-prosecution claim could nevertheless be appropriate. *Id.* at 28a (quoting *AADC*, 525 U.S. at 491). The court of appeals then concluded both that such an exception exists and that ICE's alleged conduct here was "outrageous" and fell within that exception. *Id.* at 29a-36a. The court also distinguished circuit precedent holding that the existence of probable cause defeats a claim of retaliatory enforcement in the criminal context. *Id.* at 23a-25a. The court viewed probable cause as sufficient to defeat a retaliatory-arrest claim only where the plaintiff failed to show any chilling effect, and it concluded that Ragbir had made the "requisite showing" here that "his speech has been or will be suppressed." *Id.* at 25a.

Second, the court of appeals concluded that the Suspension Clause entitled Ragbir to bring his First Amendment claim in federal court, and that Section 1252(g) was therefore unconstitutional as applied to him. App., *infra*, 36a-47a. The court determined that Ragbir's "imminent deportation" "necessarily involves a period of detention," which, in the court's view, meant that Ragbir had a cognizable habeas claim protected by the Suspension Clause. *Id.* at 42a; see *id.* at 42a-43a. The court also believed that, though outside the norm,

a common-law habeas court in 1789 could have adjudicated a habeas claim involving disputed issues of fact like those here. *Id.* at 44a-47a. Finally, the court of appeals determined that prior retaliation "does not necessarily" mean that Ragbir will never be removed, but instead that "at least for the near future, the taint of the unconstitutional conduct could preclude removal." *Id.* at 48a. The court suggested that bar could extend to "the end of a typical two-year stay extension that Ragbir would plausibly have otherwise received through January 2020, or some other period." *Ibid.* But it "le[ft] that determination to the district court on remand." *Ibid.*

b. Judge Walker dissented. App., *infra*, 51a-55a. He would not have remanded the case for further proceedings because, in his view, any "retaliation against Ragbir has ended and its taint has dissipated." *Id.* at 51a. Judge Walker also noted that he had "reservations about the majority's discussion of *AADC*'s 'outrageous' exception," both because he did not view that discussion as necessary to the result and because he was concerned about the "five-factor balancing test" that the majority had "create[d] from whole cloth." *Id.* at 53a-54a. In any event, he doubted that any such exception would apply here, where "there was nothing inherently unlawful in these acts which, absent improper motive, are fully authorized when enforcing an alien's removal." *Id.* at 55a.

REASONS FOR GRANTING THE PETITION

The court of appeals held unconstitutional an important Act of Congress, 8 U.S.C. 1252(g), as applied to respondent Ragbir. Although the court's decision was incorrect, plenary review is not necessary at this time. The court reasoned first that the Suspension Clause was potentially implicated because Section 1252(g)

barred Ragbir from raising a viable constitutional claim, see App., *infra*, 22a-36a, and second that the Suspension Clause guaranteed Ragbir the ability to raise such a claim in a habeas corpus proceeding, *id.* at 36a-47a. Intervening developments may affect both prongs of that analysis. First, this Court's intervening decision in *Nieves* v. *Bartlett*, 139 S. Ct. 1715 (2019), undermines the court of appeals' conclusion that Ragbir raised a viable selective-enforcement claim. Second, this Court's pending decision in *Department of Homeland Security* v. *Thuraissigiam*, No. 19-161 (oral argument scheduled for Mar. 2, 2020), may affect the court of appeals' conclusion that Ragbir is entitled to challenge by habeas corpus a decision to execute a final order of removal. Accordingly, the Court should hold this petition until its decision in *Thuraissigiam* and then should grant a writ of certiorari, vacate the decision below, and remand to the court of appeals for further consideration in light of *Nieves* and, if also appropriate, *Thuraissigiam*.

A. This Court Should Grant, Vacate, And Remand In Light Of Its Intervening Decision In *Nieves*

The court of appeals first concluded that Section 1252(g) implicated the Suspension Clause, as applied here, because it deprived Ragbir of a forum for what it determined to be a viable constitutional claim. App., *infra*, 22a-36a. The court reasoned that, "[t]o state a First Amendment retaliation claim, a plaintiff must show that: (1) he has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by the plaintiff's exercise of that right; and (3) the defendant's actions caused the plaintiff some injury." *Id.* at 23a (brackets, citations, and internal quotation marks omitted). The court then rejected the government's argument that "the existence of probable

cause to arrest an individual defeats a plaintiff's First Amendment retaliation claim." *Ibid.* In the court's view, the existence of probable cause matters only if the arrest did not have "the effect of actually deterring or silencing the individual." *Id.* at 24a (quoting *Mozzochi* v. *Borden*, 959 F.2d 1174, 1179 (2d Cir. 1992)) (emphasis omitted). And the court believed that Ragbir had made such a showing of a chilling effect here. *Id.* at 25a.

A month after the panel decision below, this Court issued its decision in *Nieves*, *supra*. In *Nieves*, the Court held that "[t]he presence of probable cause should generally defeat a First Amendment retaliatory arrest claim." 139 S. Ct. at 1726. The Court explained that "[t]he causal inquiry" between a plaintiff's protected speech and a law enforcement officer's determination to arrest "is complex" and that "probable cause speaks to the objective reasonableness of an arrest." *Id.* at 1723-1724. The Court also explained that, particularly given the workload and competing considerations that officers face, it "generally review[s] their conduct under objective standards of reasonableness" rather than delving into "allegations about an arresting officer's mental state." *Id.* at 1725. And it warned that "a subjective inquiry would threaten to set off broad-ranging discovery in which there often is no clear end to the relevant evidence." *Ibid.* (citation and internal quotation marks omitted). Finally, the Court noted that, "[a]lthough probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so," such as jaywalking. *Id.* at 1727.

The Court in *Nieves* nowhere suggested that—as the court below held—an arrest supported by probable

cause may nonetheless support a viable retaliatory-arrest claim so long as the plaintiff's speech is chilled. And, conversely, the court of appeals did not require Ragbir to show that he satisfied the "narrow" exception described in *Nieves*. 139 S. Ct. at 1727. Instead, it adopted a more general subjective inquiry into whether a "defendant's actions were motivated or substantially caused by the plaintiff's exercise of [a First Amendment] right," App., *infra*, 23a (brackets and citations omitted)—the very sort of subjective inquiry that this Court found problematic and unwarranted in *Nieves*, 139 S. Ct. at 1724-1725.

To be sure, this case involves the asserted selective enforcement of immigration laws rather than, as in *Nieves*, the asserted selective enforcement of criminal laws. The court of appeals suggested in a footnote that the two contexts might be different. See App., *infra*, 23a n.17 ("It is unclear that Fourth Amendment doctrine should be so readily applied to the circumstances here, as it has developed within the context of the particular interests served by criminal investigations."). But if anything, the rule that a sufficient legal basis for an action in the criminal context precludes a selective-enforcement claim should apply *a fortiori* in the immigration context, where "the interest of the target in avoiding 'selective' treatment * * * is less compelling than in criminal prosecutions." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999); see, *e.g.*, *Bello Reyes* v. *McAleenan*, No. 19-cv-3630, 2019 WL 5214051, at *4 (N.D. Cal. July 16, 2019) (applying *Nieves* to alien's habeas petition and rejecting First Amendment retaliation claim where "an objectively reasonable justification" existed for arrest and detention during removal proceedings), appeal pending,

No. 19-16441 (9th Cir. filed July 22, 2019). That is especially so where, as here, the alien is subject to a final order of removal and already has been afforded a series of discretionary stays of removal. And in any event, the court did not have an opportunity to consider whether the rule in *Nieves* should apply similarly in the immigration context here. See App., *infra*, 23a (stating that circuit precedent applied the chilling-effect rule, "[e]ven if we were to accept the Government's analogy of that aspect of Fourth Amendment law to the execution of final orders of removal").

This Court's decision in *Nieves* thus represents an "intervening development[]" that the panel below[3] did not consider and raises "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). As a result, the Court should grant the petition, vacate the decision below, and remand for further consideration in light of *Nieves*.

B. A Hold For *Thuraissigiam* Is Also Warranted

The court of appeals next concluded that the Suspension Clause entitled Ragbir to bring his First Amendment claim in federal court, and that Section 1252(g) was therefore unconstitutional as applied to him. App., *infra*, 36a-47a. The court's determination that the Suspension Clause entitled Ragbir to judicial review of his claim depended on its conclusions both that (1) Ragbir

[3] This Court had issued its decision in *Nieves* by the time the court of appeals denied panel rehearing and rehearing en banc. See App., *infra*, 79a-80a. But the denial of rehearing does not indicate that the court has ever considered the effect of *Nieves* on this case.

had a constitutionally protected habeas right merely because his deportation "necessarily involves a period of detention," and (2) a common-law habeas court in 1789 could have adjudicated a claim comparable to the one raised here. *Id.* at 42a; see *id.* at 42a-47a.

This Court is currently considering in *Thuraissigiam* whether the Suspension Clause guarantees judicial review of an alien's failure to pass a threshold screening of his potential eligibility for certain forms of relief or protection from removal, notwithstanding his inadmissibility. Among other things, the government has contended in that case that the Suspension Clause guarantees only the common-law writ of habeas corpus and that, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001); see Gov't Br. at 27-35, *Thuraissigiam*, *supra* (No. 19-161). If this Court provides guidance in *Thuraissigiam* about whether, or when, or to what extent, the Suspension Clause guarantees a judicial forum for challenges to immigration decisions, that guidance could affect whether Ragbir's habeas petition—which challenges not his removal order itself but the execution of that order under the circumstances here—falls within the scope of the Suspension Clause's protections.

Notably, in *Hamama* v. *Adducci*, 912 F.3d 869 (2018), petition for cert. pending, No. 19-294 (filed Aug. 30, 2019), the Sixth Circuit concluded that Section 1252(g)—the same provision at issue here—did not violate the Suspension Clause because the aliens there, who sought to delay the execution of their final removal orders, were "not seeking habeas relief" in the traditional sense. *Id.* at 875. The Sixth Circuit explained that the aliens'

"removal-based claims did not challenge any detention and did not seek release from custody." *Ibid.* When the habeas petitioners in that case filed a petition for a writ of certiorari, the government opposed a hold for *Thuraissigiam*, explaining that "*Thuraissigiam* concerns a different provision of the INA, 8 U.S.C. 1252(e)(2), which cabins habeas corpus review of expedited-removal orders." Br. in Opp. at 17, *Hamama*, *supra* (No. 19-294).[4] The same is true here. Nevertheless, this Court appears to be holding the petition in *Hamama* pending the Court's disposition of *Thuraissigiam*. The same disposition is therefore appropriate here, as this case and *Hamama* both involve Suspension Clause challenges to the application of Section 1252(g).

* * * * *

This Court could immediately grant the petition, vacate the decision below, and remand for reconsideration in light of *Nieves*, which undermines one of the two central conclusions on which the court of appeals' decision rests. However, because this Court's decision in *Thuraissigiam* may affect the court of appeals' other conclusion, it would conserve judicial resources to allow the court below to reconsider its decision in light of both sets of guidance from this Court.

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[4] The court of appeals in *Hamama* also rejected the Suspension Clause claims "for the independent reason that Congress has provided an adequate alternative" process for judicial review. 912 F.3d at 876. The government explained that *Thuraissigiam* would be unlikely to disturb that alternative, independently sufficient ground for the court's decision. Br. in Opp. at 17-18, *Hamama*, *supra* (No. 19-294). No such alternative ground was raised here.

CONCLUSION

The petition for a writ of certiorari should be held for this Court's decision in *Department of Homeland Security* v. *Thuraissigiam*, No. 19-161 (oral argument scheduled for Mar. 2, 2020), and then the petition should be granted, the judgment below vacated, and the case remanded for further proceedings in light of *Nieves* v. *Bartlett*, 139 S. Ct. 1715 (2019), and, if also appropriate, *Thuraissigiam*.

Respectfully submitted.

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FEBRUARY 2020

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Aug. Term, 2018
No. 18-1597

RAVIDATH LAWRENCE RAGBIR, NEW SANCTUARY COALITION OF NEW YORK CITY, CASA DE MARYLAND, INC., DETENTION WATCH NETWORK, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NEW YORK IMMIGRATION COALITION,
PLAINTIFFS-APPELLANTS

v.

THOMAS D. HOMAN, IN HIS OFFICIAL CAPACITY AS DEPUTY DIRECTOR AND SENIOR OFFICIAL PERFORMING THE DUTIES OF THE DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, THOMAS DECKER, IN HIS OFFICIAL CAPACITY AS NEW YORK FIELD OFFICE DIRECTOR FOR U.S. IMMIGRATION AND CUSTOMES ENFORCEMENT, SCOTT MECHKOWSKI, IN HIS OFFICIAL CAPACITY AS ASSISTANT NEW YORK FIELD OFFICE DIRECTOR FOR U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, KEVIN K. MCALEENAN, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF HOMELAND SECURITY, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, WILLIAM P. BARR, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES DEPARTMENT OF JUSTICE, DEFENDANTS-APPELLEES

Argued: Oct. 29, 2018
Decided: Apr. 25, 2019

Appeal from the United States District Court
for the Southern District of New York.
No. 18-cv-1159—P. Kevin Castel, *Judge*

Before: WALKER, LEVAL, and DRONEY, *Circuit Judges.*

Ravidath Ragbir, an alien subject to a final order of removal, together with several immigration-policy advocacy organizations, appeals from an interlocutory order of the United States District Court for the Southern District of New York (Castel, *J.*) denying their motion for a preliminary injunction and dismissing certain of their claims. Plaintiffs-Appellants sought to enjoin Ragbir's imminent deportation on the basis of evidence that Government officials targeted him for deportation because of his public speech that was critical of Immigration and Customs Enforcement and U.S. immigration policy. The district court held that Ragbir failed to state a cognizable claim to the extent that he sought to enjoin his deportation and that 8 U.S.C. § 1252(g) deprives federal courts of jurisdiction over that claim. We conclude that Ragbir states such a claim, that the Suspension Clause of the Constitution requires the availability of a habeas corpus proceeding in light of § 1252(g), and thus, that the district court had jurisdiction over Ragbir's claim. Accordingly, we **VACATE** the district court's order, and **REMAND** to the district court for further proceedings consistent with this opinion.

Judge WALKER dissents in a separate opinion.

DRONEY, *Circuit Judge*:

The principal question presented in this appeal is whether Ravidath Ragbir, an alien subject to a valid final order of removal, has presented a legally recognizable claim to enjoin the Government from deporting him on the basis of his public speech that was critical of the Government's immigration policies and practices. Related to that question is whether Congress has deprived courts of jurisdiction to hear Ragbir's claim,[1] and if so, whether the Suspension Clause of the Constitution, U.S. Const. art. I, § 9, cl. 2, nonetheless requires that the writ of habeas corpus be available to Ragbir.

Ragbir, together with the New Sanctuary Coalition of New York City, CASA de Maryland, Inc., Detention Watch Network, National Immigration Project of the National Lawyers Guild, and New York Immigration Coalition (collectively, "Ragbir"),[2] appeals from an interlocutory order of the district court denying Plaintiffs-Appellants' motion for a preliminary injunction and dismissing his claim to the extent that he seeks to "declare unlawful or to enjoin the execution of the final order of

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[1] By "jurisdiction," we refer to any grant of jurisdiction, including 28 U.S.C. §§ 1331, 2241, and 1651.

[2] It is uncertain whether the organizational plaintiffs would have standing on their own to pursue the claim at issue in this appeal. However, we need not reach that issue because "the issues are sufficiently and adequately presented by" Ragbir, and "nothing is gained or lost" by the presence or absence of the organizational plaintiffs. *Doe v. Bolton,* 410 U.S. 179, 189 (1973); *see also Duke Power Co. v. Carolina Envtl. Study Group,* 438 U.S. 59, 72 n.16 (1978); *Railway Labor Execs. Ass'n v. U.S.*, 987 F.2d 806, 810 (D.C. Cir. 1993) ("[T]he Supreme Court has repeatedly held that if one party has standing in an action, a court need not reach the issue of the standing of other parties when it makes no difference to the merits of the case.").

removal against him" on the basis of First Amendment retaliation. App'x 281-82. Ragbir claims that certain officials of the Department of Justice and of the Immigration and Customs Enforcement ("ICE") agency of the Department of Homeland Security (collectively, "the Government"), selectively enforced against Ragbir a final order of removal on the basis of his speech that these officials disfavor. The district court concluded that Ragbir failed to state a cognizable claim to the extent that he sought to enjoin his deportation and that 8 U.S.C. § 1252(g) deprives all courts of jurisdiction over that claim.

We conclude that Ragbir states a cognizable constitutional claim, and although Congress intended to strip all courts of jurisdiction over his claim, the Suspension Clause of the Constitution nonetheless requires that Ragbir may bring his challenge through the writ of habeas corpus. Accordingly, we vacate the district court's order and remand the case.

FACTUAL AND PROCEDURAL BACKGROUND

Because the district court dismissed Ragbir's claim (and accordingly denied his motion for a preliminary injunction) for lack of subject matter jurisdiction, we "must accept as true the [plausible] allegations contained in [his] complaint and affidavits for purposes of this appeal."[3] *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980); *see J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir. 2004) ("We may consider

[3] *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that "the tenet that a court must accept as true all of the [plaintiff's] allegations contained in a complaint" applies only to those allegations that are plausible).

affidavits and other materials beyond the pleadings to resolve . . . jurisdictional issue[s], but we may not rely on conclusory or hearsay statements contained in the affidavits."); *see also F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 601 (1966) ("Since the case comes to us from a dismissal on jurisdictional grounds we must take the allegations of the Commission's application for a preliminary injunction as true.").

I. Ragbir's Immigration Status

Ragbir, a native and citizen of Trinidad and Tobago, lives in Brooklyn, New York. He became a lawful permanent resident of the United States in 1994. His wife is an American citizen, as is their daughter. In 2001, Ragbir was convicted of wire fraud and conspiracy to commit wire fraud in the United States District Court for the District of New Jersey, and he was sentenced to 30 months' imprisonment. *See generally United States v. Ragbir*, 38 F. App'x 788 (3d Cir. 2002). His convictions were affirmed by the United States Court of Appeals for the Third Circuit.[4] *Id.*

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[4] After exhausting the direct appeal of his conviction, Ragbir filed a *coram nobis* petition in the District of New Jersey. On March 23, 2018, the New Jersey district court stayed Ragbir's administrative immigration removal pending the outcome of Ragbir's petition, finding a likelihood of success on the merits and that the other relevant factors warranted a stay. *See generally Ragbir v. United States*, No. 2:17-cv-1256-KM, 2018 WL 1446407 (D.N.J. Mar. 23, 2018). The district court denied Ragbir's *coram nobis* petition on January 25, 2019, and the stay of removal in that action expired on February 19, 2019. *Ragbir*, No. 2:17-cv-1256-KM, ECF No. 82. On January 30, 2019, Ragbir filed in the Third Circuit a notice of appeal of the district court's denial of his *coram nobis* petition, *id.*, ECF No. 84, and on February 27, 2019, the Third Circuit denied Ragbir's motion

After Ragbir served his sentence for his wire fraud convictions, ICE detained him in May 2006. In August 2006, an immigration judge entered an order of removal against him on the basis of those convictions. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."). The Bureau of Immigration Affairs ("BIA") denied Ragbir's appeal of his removal order in March 2007. We denied Ragbir's petition for review of the BIA decision in 2010.[5] *Ragbir v. Holder*, 389 F. App'x 80 (2d Cir. 2010). In 2012, the BIA denied Ragbir's motion to reconsider and reopen, and we denied Ragbir's petition for review of that decision in 2016. *Ragbir v. Lynch*, 640 F. App'x 105 (2d Cir. 2016).

ICE released Ragbir from its detention in February 2008, having determined that he was not a flight risk. Ragbir has since continued to live in the United States under orders of supervision that authorized him to remain and work in the United States, provided that he complied with his supervision conditions. He also received four administrative stays of removal[6] from ICE: in 2011, 2013, 2014, and 2016.[7] The shortest of those stays

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to stay his removal pending the resolution of that appeal, *Ragbir v. United* States, No. 19-1282 (3d Cir.).

[5] The Supreme Court denied Ragbir's petition for a writ of *certiorari* as to that appeal.

[6] Deportation is now described as "removal" in the federal immigration statutes. *Evangelista v. Ashcroft*, 359 F.3d 145, 147 n.1 (2d Cir. 2004). We nonetheless occasionally use the term "deportation" in this opinion as a "well-worn colloquialism[] for . . . 'removal.'" *Id.*

[7] Section 241 of the INA grants the Secretary of Homeland Security authority to stay the removal of an alien if he or she "decides . . . immediate removal is not practicable or proper." 8 U.S.C.

was for approximately one year, while the two most recent stays were for approximately two years each. The most recent stay Ragbir received was scheduled to terminate in January 2018. Ahead of that date, Ragbir filed an application for a fourth renewal of his stay in November 2017.

II. Ragbir's Speech

After his release from immigration detention in 2008, Ragbir became an outspoken activist on immigration issues, including publicly criticizing ICE. The New Sanctuary Coalition of New York City, which he founded, sends volunteers to accompany aliens to court dates and ICE check-in appointments. 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,"

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§ 1231(c)(2)(A); *see Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005) (stating that while the INA refers to the Attorney General as the official to whom Congress delegates authority, this authority now belongs with the Secretary of Homeland Security (citing 6 U.S.C. §§ 251(2), 252(a)(3), 271(b)). 8 C.F.R. § 241.6 implements that authority: "Any request of an alien under a final order of deportation or removal for a stay of deportation or removal shall be filed . . . with the district director having jurisdiction over the place where alien is at the time of filing." § 241.6(a). Any one of certain enumerated officials "in his or her discretion and in consideration of factors listed in 8 CFR § 212.5 and section 241(c) of the Act, may grant a stay of removal or deportation for such time and under such conditions as he or she may deem appropriate." *Id.* Under 8 C.F.R. § 212.5, officials "may require reasonable assurances" that the applicant will make any required appearances and "depart the United States when required to do so." § 212.5(d). "The consideration of all relevant factors includes:" assurances from the applicant sponsor or counsel, "community ties," and "[a]greement to reasonable conditions (such as periodic reporting of whereabouts)." § 212.5(d)(1)-(3).

with religious faith leaders. App'x 48. Ragbir has received a number of awards for his "zealous advocacy" for immigrants' rights, including from the Episcopal Diocese of Long Island and the New York State Association of Black and Puerto Rican Legislators. App'x 49.

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 Director Thomas Decker confronted Ragbir and attempted to send away the individuals who had accompanied him. 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.[8]

III. The Government's Alleged Retaliation

Ragbir claims that the events of the March 9, 2017 check-in, including his public statements and the media coverage they garnered, prompted ICE to retaliate against him. Less than one year after that check-in, on January 3, 2018, and days before Ragbir was scheduled to have his next scheduled administrative check-in, ICE

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[8] *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; 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/.

arrested Jean Montrevil, one of the co-founders of Ragbir's New Sanctuary organization, and deported him six days later.

On January 5, 2018, Micah Bucey, a minister in New York City, along with three other faith leaders, had a meeting with ICE's New York Field Office Deputy Director Scott Mechkowski at ICE's office in Manhattan, to discuss Montrevil's case and the clergies' concern that ICE had been surveilling individuals outside a church. According to Ragbir's complaint and a sworn declaration submitted by Bucey, Mechkowski stated at the meeting, "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." Mechkowski then stated, "The other day Jean [Montrevil] made some very harsh statements. . . . I'm like, 'Jean, from me to you . . . *you don't want to make matters worse by saying things*." App'x 55, 252 (emphasis added).

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]?'" App'x 253. 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. . . . " App'x 253. Mechkowski also stated that Ragbir and Montrevil's cases were the two most high-profile cases that ICE had in New York City.

Shortly thereafter, on January 8, 2018—three days before Ragbir was scheduled to appear for his next ICE check-in—Ragbir's counsel Alina Das spoke with Mechkowski, who stated that he felt "resentment" about the

events of the March 9, 2017 check-in, that he had heard Ragbir's statements to the press, and that he continued to see Ragbir at protest vigils outside ICE's New York City office. App'x 55-56, 123.

On January 10, 2018, Ragbir's counsel received an email indicating that his November 2017 application for a renewed administrative stay of removal was still pending and no decision had been reached. Ragbir's then-existing stay was set to expire on January 19, 2018. Ragbir's next check-in occurred on January 11, 2018. At the check-in meeting, Mechkowski told Ragbir that officials had decided that morning to deny Ragbir's application for a renewed stay of removal and that ICE would now enforce the removal order against him. Ragbir later learned that his current stay of removal, which was to last eight more days, had been revoked by ICE.

IV. Events After the Government's Decision to Execute the Order of Removal

That same day, ICE detained Ragbir and transferred him to Florida, in preparation for his removal. He was detained in Florida for two weeks. During that period, Ragbir's counsel filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York, which the district court granted on January 29, 2018. Ragbir was released that day, but ICE ordered him to check in again on February 10, 2018, and to bring luggage for his removal.

A day before the February 10 check-in was to occur, Ragbir filed this action in the United States District Court for the Southern District of New York. Later

that day, the Government stipulated that Ragbir's removal would be stayed pending resolution of his motion for a preliminary injunction, which he filed on February 12, 2018.

Ragbir then brought this action, alleging two First Amendment claims in the district court: one for retaliation against his protected speech and the other for viewpoint discrimination.[9] As relevant to this appeal, Ragbir sought declaratory and injunctive relief to prevent the Government from executing the removal order against him on the basis of his protected speech. He asserted that the district court had federal question jurisdiction under 28 U.S.C. § 1331 and, in the alternative, that it had jurisdiction under the All Writs Act, 28 U.S.C. § 1651, habeas corpus jurisdiction under 28 U.S.C. § 2241, or pursuant to the constitutionally minimum scope of the writ as required by the Suspension Clause of the United States Constitution, U.S. Const. art. I, § 9, cl. 2.

V. District Court Proceedings in this Action

On May 23, 2018, the district court dismissed Ragbir's claim for lack of subject matter jurisdiction insofar as he sought to prevent the Government from executing the final order of removal against him and, accordingly, denied his motion for a preliminary injunction. First, the district court concluded that 8 U.S.C. § 1252 deprives courts of subject matter jurisdiction over all claims challenging the execution of a valid final order of

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[9] We consider these claims to be materially indistinguishable for our purposes and so, we refer to Ragbir's retaliation "claim" in the singular.

removal, including claims based on the United States Constitution. Section 1252(g) provides:

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. § 1252(g) (2012).

The district court determined that Ragbir's claim arose from the Government's decision to "execute [the] removal order[]" against him, *see id.*, and that § 1252(g) deprives courts of jurisdiction over constitutional claims, including those brought under 28 U.S.C. §§ 1331, 2241, or 1651. The district court emphasized that § 1252(g) applies to "*any* cause or claim" and applies "notwithstanding *any* other provision of law (statutory or nonstatutory)," including "any . . . other habeas corpus provision." App'x 269, 275 (quoting § 1252(g)) (emphasis in original decision). Thus, the district court concluded that it lacked subject matter jurisdiction over Ragbir's claim.

The district court further concluded that it could avoid deciding whether § 1252(g)'s withdrawal of jurisdiction posed a Suspension Clause problem as to Ragbir because he did not state a cognizable constitutional claim. First, the district court applied decisions from

this Court which, in its view, foreclosed a First Amendment retaliation claim based on an official's improper motives underlying a criminal arrest or prosecution, provided that the official had probable cause for the arrest or prosecution.

Second, the district court relied on the United States Supreme Court's decision in *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488 (1999) (henceforth, "*AADC*"), which stated that "[a]s a general matter[,] . . . an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." The district court acknowledged the Supreme Court's statement in *AADC* that it would not "rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the . . . considerations" that generally foreclose a selective enforcement claim "can be overcome." App'x 279 (quoting *AADC*, 525 U.S. at 491). The district court declined, however, to "extend this exception" to Ragbir's claim. App'x 280.

The district court dismissed for lack of jurisdiction Ragbir's claim seeking to enjoin the execution of his removal order and, accordingly, denied his motion for a preliminary injunction.

VI. Proceedings in this Court

Ragbir and the organizational plaintiffs filed a notice of appeal of the district court's decision on May 25, 2018. On June 19, 2018, the district court denied Ragbir's motion for a stay of removal pending his appeal to this Court. On July 19, 2018, in response to Ragbir's motion for a stay of removal filed in this Court, we granted a temporary stay of removal pending oral argument on

the motion, which was held on August 14, 2018. We issued an order on August 15, 2018, expediting hearing of this appeal and instructing the parties to notify the Court if the stay issued by the District Court for the District of New Jersey was withdrawn or vacated before we heard the appeal. We heard oral argument on the appeal on October 29, 2018, and on November 1, 2018, we granted Ragbir's motion for a stay of his removal pending the outcome of this appeal.

APPELLATE JURISDICTION

As the parties agree, we have jurisdiction over this appeal from the district court's interlocutory denial of a preliminary injunction, 28 U.S.C. § 1292(a)(1), and our jurisdiction extends to the district court's dismissal of certain claims because that decision was "inextricably intertwined" with the denial of Ragbir's request for a preliminary injunction and "review of the unappealable issue is . . . necessary for review of the issue over which we have appellate jurisdiction," *Lamar Advertising of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 371-72 (2d Cir. 2004).

DISCUSSION

We review *de novo* a district court's dismissal of claims for lack of subject matter jurisdiction. *Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir. 1996). We review for abuse of discretion a district court's denial of a preliminary injunction. *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 36 (2d Cir. 2018). "A district court abuses its discretion when it rests its decision on . . . an error of law." *Id.*

As an initial matter, Ragbir contends, and the Government does not dispute, that he could not have brought

his claim in a BIA proceeding or in a petition for review. That is because Ragbir's claim arose only after his petition process was exhausted and his order of removal became final.[10] Notwithstanding this situation, the Government argues that § 1252(g) withdraws federal court jurisdiction over Ragbir's First Amendment claim. The Government also contends that we need not decide whether the Suspension Clause would nonetheless require the availability of a habeas corpus proceeding because *AADC*, and certain of our decisions, foreclose Ragbir's claim. Ragbir disagrees, contending that he states a claim, that § 1252(g) should be read to allow jurisdiction over his constitutional claim in the district court, and that if § 1252(g) does not so allow, the Suspension Clause requires a review of his claim through a petition for the writ of habeas corpus.

We first consider whether § 1252(g) forecloses all jurisdiction over Ragbir's constitutional claim, which he could not bring in his earlier—and concluded—petition for review. We then consider whether Ragbir states a viable constitutional claim. If we answer that question

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[10] A renewed motion to reopen also is not available to Ragbir. Such a motion allows a petitioner to introduce "new facts" pertinent to the propriety of an order of removal. 8 C.F.R. § 1003.2(c)(1). Subject to certain exceptions that are inapplicable here, *see id.* § 1003.2(c)(3), and the possibility in a rare case of equitable tolling, *see, e.g., Zhao v. INS*, 452 F.3d 154, 157 (2d Cir. 2006) (equitably tolling numeric and time limits because of ineffective assistance of counsel during limitations period), "a party may file only one motion to reopen," *id.* § 1003.2(c)(2). Here, even assuming, *arguendo*, that "new facts" as to the Government's alleged retaliatory execution of Ragbir's order of removal in 2018 could bear on the propriety of that order—entered years before the alleged retaliation—Ragbir already filed an unsuccessful motion to reopen (prior to the alleged retaliation). *See generally Ragbir v. Lynch*, 640 F. App'x 105 (2d Cir. 2016).

in the affirmative, we must then address whether the Suspension Clause requires a hearing of Ragbir's claim in a habeas corpus proceeding. *See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 158 (1984) ("It is a fundamental rule of judicial restraint . . . [that courts] will not reach constitutional questions in advance of the necessity of deciding them.").

I. Whether § 1252(g) Forecloses Jurisdiction Over Ragbir's Claim

The crux of the dispute between Ragbir and the Government is whether § 1252(g) applies: 1) to the Government's alleged conduct here; and 2) to constitutional claims.

A. Section 1252(g) Applies to the Alleged Government Conduct

The Supreme Court has emphasized that § 1252(g) "applies only to three discrete actions:" the Government's "'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'"[11] *AADC*, 525 U.S. at 482 (quoting § 1252(g)) (emphasis in original decision). By contrast, § 1252(g) does not apply to "many other decisions or actions that may be part of the deportation process—such as the decisions to open an investigation." *Id.*

The Government argues that Ragbir's claim falls within the ambit of § 1252(g) because his claim arises

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[11] *AADC* addressed the version of § 1252(g) as it was first enacted in 1996. As is discussed later in this opinion, § 1252(g) has since been amended by the REAL ID Act of 2005, but the statutory text regarding the three discrete Government actions has not changed.

from the Government's execution of Ragbir's final removal order. Ragbir disagrees, contending that his claim instead arises "from immigration officials' unlawful decision to retaliate against [his] protected speech." Appellants' Br. at 31-32.

In support, Ragbir refers to a Ninth Circuit case, *Arce v. United States*, 899 F.3d 796 (9th Cir. 2018). In *Arce*, the Government's violation of a judicial stay of removal resulted in the alien's wrongful removal from the United States. *Id.* at 799. The alien plaintiff brought a Federal Tort Claims Act ("FTCA") claim for damages suffered as result of the removal. The Ninth Circuit held that this claim fell outside the scope of § 1252(g) because "the stay of removal temporarily suspend[ed] the source of the [Government's] authority to act." *Id.* at 800 (internal quotations omitted). In other words, while the stay was in place, the Government "totally lack[ed] the [statutory] discretion to effectuate a removal order." *Id.* at 800-01. Therefore, the Ninth Circuit concluded that the Government's "decision or action to violate a court order staying removal f[ell] outside" of § 1252(g)'s "jurisdiction-stripping reach." *Id.* at 801.

We express no opinion as to the Ninth Circuit's decision in *Arce*, which is distinguishable from this case.[12] Here, the Government unquestionably had statutory authority to execute Ragbir's final order of removal, and that very conduct is the retaliation about which Ragbir

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[12] We note that the Eighth Circuit appears to have come to a different conclusion than the Ninth Circuit. *Silva v. United States*, 866 F.3d 938, 940 (8th Cir. 2017) (holding that a claim challenging the execution of a removal order in violation of a stay still fell within § 1252(g)).

complains.[13] To remove that decision from the scope of section 1252(g) because it was allegedly made based on unlawful considerations would allow plaintiffs to bypass § 1252(g) through mere styling of their claims. And so, we conclude that the Government's challenged conduct falls squarely within the ostensible jurisdictional limitation of § 1252(g).

B. Section 1252(g) Applies to Constitutional Claims

Next, Ragbir argues that Congress would have used the word "constitutional" in § 1252(g) if it intended to foreclose jurisdiction (habeas or otherwise) over those claims. Moreover, he contends that § 1252(g) merely "channels" claims that *could* be brought in a petition for review into that process, but does not eliminate jurisdiction over other claims. The Government argues that § 1252(g) plainly states otherwise.

Before proceeding to the current text of § 1252(g), a brief review of the history of that provision—including court decisions construing it—is instructive. Section 1252(g) was added to the Immigration and Nationality Act ("INA") through adoption of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") in 1996. The initial version of § 1252(g) read as follows:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf

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[13] That discrete action necessarily includes the Government's denial of a further administrative stay of removal in January 2018 and its early termination of Ragbir's then-existing stay. *See AADC*, 525 U.S. at 483 (describing the Executive's discretion to abandon the execution of a removal order as part of the execution "stage" in the deportation process).

> of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

8 U.S.C. § 1252(g) (2000).

In *Jean-Baptiste v. Reno*, 144 F.3d 212, 218-20 (2d Cir. 1998), we held that the 1996 version of § 1252(g) barred federal court jurisdiction under 28 U.S.C. § 1331 over constitutional claims within its scope—there, the plaintiffs' Fifth Amendment due process claim challenging the INS's deportation procedures. We dismissed the plaintiffs' claim for lack of subject matter jurisdiction under § 1331. *Id.* However, we held that "in the absence of language affirmatively and clearly eliminating habeas review," § 1252(g) did not repeal habeas corpus jurisdiction under 28 U.S.C. § 2241. *Id.* at 219-20. Other circuit courts, and, eventually, the Supreme Court, also concluded that neither IIRIRA nor the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") repealed (or limited the prior scope of) district court jurisdiction over aliens' petitions for writs of habeas corpus brought pursuant to 28 U.S.C. § 2241. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 314 (2001).

Congress responded to the Supreme Court's *St. Cyr* decision by enacting the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat 302, which strengthened § 1252(g)'s jurisdictional limitations.[14] Specifically, it amended § 1252(g) by inserting new language, which is italicized:

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[14] *See* Paul Diller, Habeas and (Non-)Delegation, 77 U. Chi. L. Rev. 585, 615 (2010) (stating that Congress passed the REAL ID Act in direct response to *St. Cyr*).

> Except as provided in this section and notwithstanding any other provision of law *(statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title*, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

8 U.S.C. § 1252(g) (2012) (emphasis added).

Thus, the REAL ID Act had two primary functions as to section 1252(g). First, by adding unmistakably clear language, it "eliminat[ed] the availability of habeas corpus relief in the United States District Courts for aliens seeking to challenge orders of removal entered against them." *Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 105 (2d Cir. 2008).

Second, we conclude that by adding the words "statutory or nonstatutory," Congress further clarified what had already been our construction of § 1252(g) in *Jean-Baptiste*: it applies even to constitutional claims. Taken together with § 1252(g)'s clear elimination of habeas corpus jurisdiction, it follows that the statute purports to forbid bringing even constitutional claims in such a proceeding. In reaching the conclusion that the amended version of § 1252(g) should be so construed, we are mindful that "[w]here Congress intends to preclude judicial review of constitutional claims[,] its intent to do so must be clear," *Webster v. Doe*, 486 U.S. 592, 603 (1988), and that "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where

an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems," *St. Cyr*, 533 U.S. at 299-300 (citing *Crowell v. Benson,* 285 U.S. 22, 62 (1932)) (internal citation and quotation marks omitted). However, "[t]he canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means of choosing between them*." *Clark v. Martinez,* 543 U.S. 371, 385 (2005) (emphasis in original); *see Boumediene v. Bush*, 553 U.S. 723, 787 (2008) (stating that "[t]he canon of constitutional avoidance does not supplant traditional modes of statutory interpretation" (citing *Clark*, 543 U.S. at 385)). In other words, "[w]e cannot" use constitutional avoidance to "ignore the text and purpose of a statute in order to save it." *Boumediene*, 553 U.S. at 787.

Here, even putting aside our construction of the *less* obviously restrictive version of 1252(g) in *Jean-Baptiste*, we are aware of no "nonstatutory" claim that a petitioner could bring in relation to a deportation proceeding other than one rooted in the Constitution. Nor does Ragbir offer such an explanation. And even if there were such claims, we see no basis—in light of the text and legislative history—for construing the word

"nonstatutory" in § 1252(g) to *exclude* constitutional claims.[15, 16]

Accordingly, Congress appears to have made "an informed legislative choice" that eliminating even habeas review of constitutional claims would not pose a constitutional (Suspension Clause) problem despite courts' indications to the contrary, and so Congress's legislative "intent must be respected even if a difficult constitutional question is presented." *Boumediene*, 553 U.S. at 738 (recognizing that Congress's passage of the Military Commissions Act of 2006 was a direct response to the Court's narrow reading of the Detainee Treatment Act in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)). It then falls upon "the Judiciary, in light of [Congress's] determination" that such statutory language is constitutional, to "proceed[] to its own independent judgment on the constitutional question when required to do so in a proper case." *Id.*

II. Whether Ragbir States a Constitutional Claim

As discussed above, Ragbir argues that even if § 1252 bars all jurisdiction over his claim, the Suspension Clause nonetheless requires the availability of a petition for writ of habeas corpus. The Government counters

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[15] For the same reasons, we also reject Ragbir's argument that § 1252(g) merely "channels" certain claims into a petition for review but does not intend to eliminate jurisdiction for other claims. That argument lacks textual support and is belied by Congress's plain indication, through the REAL ID Act, that § 1252(g)'s limitation of "any" cause or claim truly means "any."

[16] The Eighth and Sixth Circuits have come to the same conclusion. *Silva*, 866 F.3d at 941; *Elgharib v. Napolitano*, 600 F.3d 597, 602 (6th Cir. 2010).

that we need not reach that serious constitutional question because Ragbir fails to state a cognizable claim under certain of our decisions and because of the application of the Supreme Court's holding in *AADC*. We thus first address whether Ragbir states a claim.

A. Whether Our Prior Decisions Foreclose Ragbir's Claim

To state a First Amendment retaliation claim, a plaintiff must show that: "(1) he has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by [the plaintiff's] exercise of that right; and (3) the defendant's actions caused [the plaintiff] some injury." *Smith v. Campbell*, 782 F.3d 93, 100 (2d Cir. 2015) (quoting *Dorsett v. Cty. of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013)). The Government contends that we have "long held" that the existence of probable cause to arrest an individual defeats a plaintiff's First Amendment retaliation claim. Gov't Br. at 39. And so, the Government argues that, *per force*, Ragbir's undisputedly valid final order of removal bars his claim that Government officials sought to deport him in retaliation for his speech.

Even if we were to accept the Government's analogy of that aspect of Fourth Amendment law to the execution of final orders of removal,[17] it reads our decisions too

[17] It is unclear that Fourth Amendment doctrine should be so readily applied to the circumstances here, as it has developed within the context of the particular interests served by criminal investigations. *See, e.g.*, *Virginia v. Moore*, 553 U.S. 164, 173 (2008) ("[A]n arrest based on probable cause serves interests that have long been seen as sufficient to justify the seizure. Arrest ensures that a suspect

broadly. The Government relies primarily on *Mozzochi v. Borden*, 959 F.2d 1174, 1179-80 (2d Cir. 1992), and *Singer v. Fulton Cty. Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995), which relied on *Mozzochi* for its legal standard. But, in *Mozzochi* the question presented was whether it was "clearly established that an individual's constitutional rights were violated when a criminal prosecution, supported by probable cause, was initiated in an attempt to deter or silence the exercise by the criminal defendant of his right to free speech, *but without the effect of actually deterring or silencing the individual*." *Mozzochi*, 959 F.2d at 1179 (emphasis added). Central to our decision in favor of the defendants was that, at summary judgment, Mozzochi had not adduced "any evidence to support his allegation that he was actually chilled in the exercise of the right to free speech." *Id.* at 1179-80. Thus, *Mozzochi* stands for the proposition that "[a]n individual does not have a right under the First Amendment to be free from a criminal prosecution supported by probable cause that is in reality an unsuccessful attempt to deter or silence criticism of the government." *Id.* at 1180. In *Singer*, we quoted that holding from *Mozzochi* and affirmed the dismissal of

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appears to answer charges and does not continue a crime, and it safeguards evidence and enables officers to conduct an in-custody investigation." (internal citations omitted)).

Singer's First Amendment retaliation claim because, *inter alia*, he had "failed to allege with sufficient particularity any actual 'chilling' of his speech."[18, 19] *Id.* at 120.

The Government does not argue that Ragbir has made an insufficient showing that his speech has been or will be suppressed, and so we deem that argument waived. Nor, at any rate, do we doubt that Ragbir has made the requisite showing. We thus conclude that the precedents cited by the Government do not foreclose Ragbir's claim.

B. Whether *AADC* Forecloses Ragbir's claim

The Government also argues that the Supreme Court's decision in *AADC* forecloses Ragbir's claim. In *AADC*, six temporary resident aliens and two lawful permanent resident aliens brought a First Amendment claim seeking to enjoin the Government's initiation of deportation proceedings against them. *AADC*, 525 U.S. at 474.

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[18] The Government also disputes Ragbir's contention that the Supreme Court's decision in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), has broadened the scope of potential retaliatory arrest claims that are permissible under our precedents. However, we need not reach that issue for the reasons discussed above.

[19] The Government cites in passing to another of our decisions that quoted the same standard from *Mozzochi*, and so, it is unpersuasive for the Government's purposes. *Fabrikant v. French*, 691 F.3d 193, 215 (2d Cir. 2012). Likewise, *Magnotti v. Kuntz*, 918 F.2d 364, 368 (2d Cir. 1990), is unhelpful to the Government. In *Magnotti*, we stated that it was "undisputed that retaliatory prosecution may expose a state official" to damages. *Id.* The plaintiff, Magnotti, claimed that charges were brought against him in retaliation for his complaints of police misconduct. *Id.* We held against Magnotti at summary judgment, however, because, *inter alia*, the only evidence he had adduced of the retaliation was "omissions made in the warrant application." *Id.*

The six temporary residents were charged with technical immigration violations such as overstaying visas, and the two resident-alien plaintiffs were charged with aiding a terrorist organization.[20] *Id.* at 473-74.

The regional counsel of ICE's predecessor agency, the Immigration and Naturalization Service ("INS"), had stated at a press conference that the INS was seeking to deport the plaintiffs because of their affiliation with the Popular Front for the Liberation of Palestine ("PFLP"), a "group that the Government characterize[d] as an international terrorist and communist organization." *Id.* at 473. The Government represented that it had evidence that the PFLP had been responsible for multiple terrorist attacks around the world. Brief for the Petitioners, *AADC*, 525 U.S. 471 (1998) No. 97-1252, 1998 WL 411431 at *2-4.

The plaintiffs brought an action in the district court, claiming that the Government's initiation of deportation proceedings impinged upon their right to associate under the First Amendment. They did not wish to wait to bring their claims until a final order of removal (if any) was entered against them because deportation proceedings could take years, and during that time their association with the PFLP would be deterred. *AADC*, 525 U.S. at 487-88; Brief for Respondents ("Plaintiffs' *AADC* Br."), *AADC*, 525 U.S. 471 (1998) No. 97-1252, 1998 WL 614300 at *30-37. In addition, the plaintiffs argued that their claims required factual development that could not be accomplished in an administrative immigration proceeding. Plaintiffs' *AADC* Br. at *14-15,

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[20] The INS had also brought against all the aliens "advocacy-of-communism charges," which were later dropped. *AADC*, 525 U.S. at 473-74.

20-21. The plaintiffs thus urged the Supreme Court to employ the doctrine of constitutional avoidance to read the pre-REAL ID Act version of § 1252(g) as permitting immediate district court review of their constitutional claims. *AADC*, 525 U.S. at 487-88.

The Supreme Court held that § 1252(g) permissibly deprived courts of jurisdiction over the plaintiffs' claims. *Id.* The Court stated that "[a]s a general matter—and assuredly in the context of claims such as those put forward in the present case—an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." *Id.*

The Court also expressed concern that the plaintiffs' claims "invade[d] a special province of the Executive—its prosecutorial discretion." *Id.* at 489. The Court was particularly concerned about reviewing the Executive's national-security and foreign-affairs decisionmaking:

> What will be involved in deportation cases is not merely the disclosure of normal domestic law enforcement priorities and techniques, but often the disclosure of foreign-policy objectives and (as in this case) foreign-intelligence products and techniques. The Executive should not have to disclose its 'real' reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on that country's nationals—and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.

Id. at 490-91. The Court further stated that "the consideration on the other side of the ledger in deportation

cases—the interest of the target in avoiding 'selective' treatment—is less compelling than in criminal prosecutions." *Id.* at 491. The Court explained:

> While the consequences of deportation may assuredly be grave, they are not imposed as a punishment. In many cases (for six of the eight aliens here) deportation is sought simply because the time of permitted residence in this country has expired, or the activity for which residence was permitted has been completed. Even when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act (criminal charges may be available for that separate purpose) but is merely being held to the terms under which he was admitted.

Id. (internal citation omitted).

The Court continued, "[a]nd in all cases, deportation is necessary in order to bring to an end *an ongoing violation* of United States law. The contention that a violation must be allowed to continue because it has been improperly selected is not powerfully appealing." *Id.* (emphasis in original).

Especially important for the situation that faces us, the Court declined to "rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome. Whether or not there be such exceptions, . . . [w]hen an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a

member of an organization that supports terrorist activity."[21] *Id.* at 491-92.

Ragbir's situation is very different from the one presented in *AADC*. Although the Supreme Court did not clarify what might constitute an "outrageous" basis for discrimination, *AADC* compels courts to evaluate the gravity of the constitutional right affected; the extent to which the plaintiff's conduct or status that forms the basis for the alleged discrimination is actually protected; the egregiousness of the Government's alleged conduct; and the plaintiff's interest in avoiding selective treatment, as balanced against the Government's discretionary prerogative. We address these considerations in turn and conclude that Ragbir's claim involves "outrageous" conduct.

1. Ragbir's Speech Implicates the Highest Position in the Hierarchy of First Amendment Protection

First Amendment speech is preeminent among the liberties that the Constitution protects. Indeed, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics . . . or other matters of opinion." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018) (quoting *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

Ragbir's speech implicates the apex of protection under the First Amendment. His advocacy for reform of

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[21] *See also Rajah v. Mukasey*, 544 F.3d 427, 438 (2d Cir. 2008) (agreeing, in the context of considering a Fifth Amendment equal protection claim, that a selective prosecution based on animus could be "outrageous" under *AADC*).

immigration policies and practices is at the heart of current political debate among American citizens and other residents. Thus, Ragbir's speech on a matter of "public concern"[22] is at "the heart of . . . First Amendment[] protection,"[23] and "occupies the highest rung of the hierarchy of First Amendment values,'" *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (quoting *Connick v. Myers,* 461 U.S. 138, 145 (1983); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985)). Because Ragbir's speech concerns "political change," it is also "core political speech" and thus "trenches upon an area in which the importance of First Amendment protections *is at its zenith*." *Meyer v. Grant*, 486 U.S. 414, 421-22, 425 (1988) (emphasis added and internal quotation marks omitted). Indeed, his "speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991).

2. The Government's Alleged Retaliation Was Egregious

"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

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[22] "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,'" *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (quoting *Connick*, 461 U.S. at 146), "or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public,'" *id.* (quoting *San Diego v. Roe,* 543 U.S. 77, 83-84 (2004)).

[23] *See Snyder*, 562 U.S. at 452 (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964)) ("The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.").

the speech conveys." *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017). "Such discriminat[ion] based on viewpoint is an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.'"[24] *Id.* at 1766 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995)). The Supreme Court has further described viewpoint discrimination as a "blatant" "violation of the First Amendment." *Rosenberger*, 515 U.S. at 829.

Ragbir's plausible allegations and evidence, which we must accept as true at this juncture, support that the Government singled him out for deportation based not only on the viewpoint of his political speech, but on the public attention it received. In a declaration by Micah Bucey, a New York City minister, Bucey asserts that ICE's New York City Field Office Director, Scott Mechkowski, stated that Ragbir and Jean Montrevil were ICE's two most prominent cases in New York City and complained that the activists' protests and comments to the press negatively portrayed ICE to the public and to others in the Government. According to Bucey, Mechkowski 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." App'x 252. Mechkowski then stated that he had heard Ragbir's New Sanctuary cofounder Montrevil (whom ICE had also just detained) "ma[ke] some very harsh statements. I'm like, 'Jean, from me to you . . . *you don't want to make matters worse by*

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[24] "At its most basic, the test for viewpoint discrimination is whether —within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed." *Matal*, 137 S. Ct. at 1766.

saying things." App'x 252 (emphasis added). Mechkowski then turned to Ragbir specifically, stating that it "bother[ed]" him that "there isn't anybody in this entire building that doesn't . . . know about Ravi." App'x 253. "Everybody knows this case," Mechkowski stated, "[n]o matter where you go." App'x 253. Ragbir's counsel Alina Das also submitted a declaration stating that she spoke with Mechkowski, who expressed "resentment" about the events of the March 9, 2017 check-in and disapprovingly mentioned that he had heard Ragbir's statements to the press. App'x 55-56, 123.

A plausible, clear inference is drawn that Ragbir's public expression of his criticism, and its prominence, played a significant role in the recent attempts to remove him. The conclusion that ICE would nonetheless still be free to deport Ragbir on the basis of his advocacy would certainly draw considerable media attention and thus would be a particularly effective deterrent to other aliens who would also challenge the agency and its immigration policies. Ragbir's allegations and evidence support that certain officials were well aware of that consequence.[25] 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. In short, the Government's alleged conduct plausibly fits within the "outrageous[ness]" exception to *AADC*.

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[25] It is unclear whether Ragbir plausibly states a claim against *all* the named Defendants. However, neither party has briefed that issue, and so we decline to address it.

3. The Alien's Interest in Avoiding Selective Deportation

The Supreme Court stated in *AADC* that, "[w]hile the consequences of deportation may assuredly be grave, they are not imposed as a punishment." *AADC*, 525 U.S. at 491. That premise supported the Supreme Court's conclusion that, by comparison to those detained for crimes (who may bring selective-enforcement claims in certain limited circumstances), the *AADC* aliens had a diminished liberty interest in preventing their deportation. *Id.* However, after *AADC*, the Supreme Court reiterated in *Padilla v. Kentucky*, 559 U.S. 356 (2010), its longstanding recognition that deportation is indeed a punishment for lawful permanent residents who, like Ragbir, are rendered removable because of a criminal conviction:

> We have long recognized that deportation is a particularly severe "penalty," *Fong Yue Ting v. United States,* 149 U.S. 698, 740 (1893); but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. *United States v. Russell,* 686 F.2d 35, 38 (C.A.D.C. 1982). Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.

Id. at 365-66 (some internal citations omitted).[26] The premise that deportation of lawful permanent residents convicted of crimes is punitive was important to the Court's holding in *Padilla*: deportation of the petitioner was so "close[ly] connect[ed]" to the criminal process that the analysis that applies to claims of ineffective assistance of counsel applied to his claim. *Id.* at 366. Thus, *Padilla* supports that Ragbir has a substantial interest in avoiding deportation based on his speech.

4. The Government's Discretionary Prerogative

Finally, the Government's interest in having unchallenged discretion to deport Ragbir is also less substantial than in *AADC*. First, as discussed above, national-security and foreign-policy concerns about terrorism were primary in *AADC*, and the Court expressed misgivings that a court proceeding allowing inquiry into the "real reasons" why the Government sought to deport the PFLP supporters would compromise intelligence sources and foreign relations. *AADC*, 525 U.S. at 491. The Government makes no such argument in this case. Here, the plaintiff's plausible allegation is that the Government undertook the deportation to silence criticism of the responsible agency.

We recognize that in *AADC* the Supreme Court observed, "[I]n all cases, deportation is necessary . . . to bring to an end an ongoing violation of United States

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[26] *See also Bridges v. Wixon*, 326 U.S. 135, 147 (1945) ("[I]t must be remembered that although deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling.") (internal citations omitted); *Lok v. INS,* 548 F.2d 37, 39 (2d Cir. 1977) ("Deportation is a sanction which . . . surpasses all but the most Draconian criminal penalties.").

law." *Id.* (emphasis removed). That was certainly correct with respect to aliens who have entered the country illegally or have overstayed their visas. However, the circumstance is different for a former lawful permanent resident, such as Ragbir, who has become "deportable." *See* 8 U.S.C. § 1227(a)(2)(A)(iii). While such a person is subject to removal at any time, his presence in the United States while awaiting deportation violates no law. He is under no legal obligation to depart prior to deportation. And, the law imposes no criminal or civil penalties on that person for failing to leave. *See* Gerard L. Neuman, Terrorism, Selective Deportation and the First Amendment After Reno v. AADC, 14 Geo. Immigr. L.J. 313, 342 (2000) ("Permanent residents who become deportable are *not* engaged in an ongoing violation of United States law. The INA . . . creates no obligations for the aliens to depart without being asked, and imposes no other sanction on permanent residents for becoming deportable. If the [Government] do[es] not . . . seek deportation, then the alien is committing no wrong by continuing residence in the United States."). Indeed, in Ragbir's case, his continued presence after his removal order became final was expressly sanctioned by successive stay orders and work permits. Thus, while it is indisputable that the Government retains an interest in enforcing the immigration laws by removing a deportable person, Ragbir's continued presence until deported has not violated any U.S. law. The Government's interest in deporting him is lower than in the case of an alien whose presence is illegal and in the cases of aliens who, as in *AADC*, pose a threat to safety and security.

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We acknowledge that judicial review of deportation proceedings has produced concern about the Executive's prerogative to execute immigration law. The Government's argument that a holding in Ragbir's favor would open the flood gates of litigation deserves significant consideration. Accordingly, we do not delineate the boundaries of what constitutes an "outrageous" claim within the meaning of *AADC*. It suffices to say that, here, 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 than in *AADC*. In these circumstances, the basis for the alleged discrimination against Ragbir qualifies as "outrageous" under *AADC*.

III. Whether Ragbir is Entitled to the Privilege of the Writ of Habeas Corpus

Because Ragbir states a cognizable claim but, through its adoption of § 1252(g), Congress foreclosed all grants of jurisdiction, we must decide whether the Suspension Clause nonetheless entitles Ragbir to the constitutionally mandated minimum scope of the privilege of the writ of habeas corpus. The Suspension Clause of the Constitution states, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it

is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301. These protections extend fully to aliens subject to an order of removal. *Id.*; *see also* Gerard L. Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 1044 (1998) ("[H]istorical precedents beginning shortly after 1787 and reaching to the present confirm the applicability of the writ of habeas corpus to the detention involved in the physical removal of aliens from the United States. These precedents include opinions . . . denying the power of Congress to eliminate judicial inquiry.").

Thus, except in periods of "formal suspension" of the writ, alien petitioners in "Executive custody," *Boumediene*, 553 U.S. at 745, must either be given access to an "adequate substitute" to the writ (such as a petition for review), *see St. Cyr*, 533 U.S. at 305, or the writ itself, so as "to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty," *Boumediene*, 553 U.S. at 745 (quoting *Hamdi,* 542 U.S. at 536 (plurality opinion)).

The Suspension Clause does not require the availability of the writ as codified under section 2241, or any other statute, *per se*. Rather, the Suspension Clause protects the constitutional "minimum" scope of the writ, upon which Congress may expand through statute. *See Boumediene*, 553 U.S. at 746; *St. Cyr*, 533 U.S. at 301. As to what that "minimum" entails, "[t]he [Supreme] Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ." *Boumediene*, 553 U.S. at

746 (citing *St. Cyr,* 533 U.S. at 300-01). "But the analysis" of the minimum scope of the writ protected by the Suspension Clause "may begin with precedents as of 1789, . . . when the Constitution was drafted and ratified." *Id.*

The Government does not contest these basic premises, nor do the parties dispute that Ragbir has no "adequate substitute" for a habeas petition.[27] Rather, the Government argues that Ragbir is not entitled to the constitutional minimum scope of the writ because, in its view: 1) Ragbir does not seek release from custody since he does not challenge his final order of removal; and 2) Ragbir is not in the Government's custody at all.

In addition, the Government suggests in passing that Ragbir is not entitled to the constitutional minimum scope of habeas review because the merits issues in this case are not purely legal, but rather require factfinding.

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[27] In a Federal Rule of Appellate Procedure 28(j) letter, the Government brings to our attention the Sixth Circuit's recent decision in *Hamama v. Adducci*, 912 F.3d 869 (6th Cir. 2018). In *Hamama*, the Sixth Circuit concluded that § 1252(g) divested the district courts of subject matter jurisdiction over the claims of the plaintiff Iraqi nationals, who sought stays of their removal, but that the plaintiffs had available an "adequate alternative" to habeas relief in the form of a "motion to reopen followed by a petition for review." *Id.* at 876. As discussed above, the Government did not dispute in its response brief (in this appeal) Ragbir's contention that no "adequate substitute" to a habeas proceeding was available to him. By contrast to *Hamama*, and as we discussed earlier in this opinion, *see supra* n.10 and accompanying text, Ragbir's constitutional claims arose only after his removal order became final and after he had taken full advantage of the review process prescribed by statute, including filing a petition for review and the one motion to reopen to which he was entitled. We thus conclude that the "adequate substitute" that the *Hamama* court found present in that case is not available to Ragbir.

Although we might normally deem that issue waived for failure to develop it, we consider the issue because it bears on the district court's authority and means to adjudicate Ragbir's habeas petition.

A. Habeas Relief Would Alter Ragbir's Situation

The Government argues that Ragbir is not entitled to the writ because he does not challenge his final order of removal, and so, it contends, the writ would leave him "in precisely the same position as he is now." Gov't Br. at 44-45. That is incorrect; the Government assumes that a habeas court's only option would be to invalidate Ragbir's final order of removal, but habeas relief would of course prevent the Government from deporting him for its duration. And courts are "invested with the largest power to control and direct the form of judgment to be entered in cases brought up before [them] on habeas corpus.'" *U.S. ex rel. D'Amico v. Bishopp*, 286 F.2d 320, 322 (2d Cir. 1961) (quoting *In re Bonner*, 151 U.S. 242, 261 (1894)); *see Harris v. Nelson*, 394 U.S. 286, 290-92 (1969) ("The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected."). Thus, a habeas court has the authority to grant relief that would alter Ragbir's situation.

B. Ragbir is in Executive Custody

We also disagree with the Government's argument that Ragbir is not in custody. The "custody requirement" of habeas corpus "is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. . . . [I]ts use has been limited to

cases of special urgency" that are "severe" and "immediate."[28] *Hensley v. Mun. Court, San Jose Milpitas Judicial Dist.*, 411 U.S. 345, 351 (1973). In *Hensley*, the Supreme Court held that an individual released on his own recognizance from state detention remained in the state's custody. *Id.* The Court noted that it had "consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements. . . . That same theme has indelibly marked our construction of the . . . custody requirement." *Id.* at 350.

Two primary considerations drove the Court's conclusion in *Hensley*. First, the petitioner was "subject to restraints not shared by the public generally" because "[h]is freedom of movement rest[ed] in the hands of state judicial officers, who may demand his presence at any time and without a moment's notice." *Id.* at 351 (quoting *Jones v. Cunningham*, 371 U.S. 236, 240 (1963)) (internal quotation marks omitted). Second, the petitioner "remain[ed] at large only by the grace of a stay entered first by the state trial court and then extended by two Justices of [the Supreme] Court." *Id.* The Court went on to explain:

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[28] The Supreme Court has stated that 8 U.S.C. § 2241 incorporates the common-law habeas requirement that the petitioner be in "custody" and "does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used." *Jones v. Cunningham*, 371 U.S. 236, 238 (1963). And so, for purposes of determining the constitutional meaning of the custody requirement, we look to the common law and to authority interpreting § 2241.

> The State has emphatically indicated its determination to put him behind bars, and the State has taken every possible step to secure that result. His incarceration is not, in other words, a speculative possibility that depends on a number of contingencies over which he has no control. This is not a case where the unfolding of events may render the entire controversy academic. The petitioner has been forced to fend off the state authorities by means of a stay, and those authorities retain the determination and the power to seize him as soon as the obstacle of the stay is removed. The need to keep the stay in force is itself an unusual and substantial impairment of his liberty.

Id. at 351-52.

The Court rejected the Government's argument that habeas relief would be available only when the Government again physically detained the individual. "[W]e would badly serve the purposes and the history of the writ," the Court stated, "to hold that under these circumstances the petitioner's failure to spend even 10 minutes in jail is enough to deprive the District Court of power to hear his constitutional claim." *Id.* at 353. In the same term it decided *Hensley*, the Court stated even more directly that "the writ is available . . . to attack future confinement and obtain future releases." *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973).

The similarity of Ragbir's situation to that of the petitioner in *Hensley* is clear. If Ragbir were currently in the Government's physical confinement or had already been deported, that Ragbir would be in custody is

obvious.[29] But that he has not been deported is not for a lack of effort on the part of the Government, which detained Ragbir without notice in January 2018 and sent him to Florida, where he was detained for weeks in anticipation of deporting him. Much like in *Hensley*, that process was stopped only because Ragbir was released by a writ of habeas corpus issued by the district court in January 2018 (after which the Government told Ragbir to report again on February 10, 2018). Also like in *Hensley*, Ragbir must continue to report for ICE check-ins, and he remains in this country primarily due to judicial stays of removal, including the one entered by this Court. Moreover, the Government opposed a stay of removal in the district court pending this appeal, and at oral argument, the Government could not represent to this Court that—absent a stay entered by this Court and the stay previously entered in the District of New Jersey—ICE would not deport Ragbir pending resolution of this appeal.

Thus, that Ragbir faces imminent deportation, which necessarily involves a period of detention—and that he

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[29] As to the custodial status of a deported individual, the Supreme Court "has repeatedly held" that the writ of habeas corpus is available to aliens excluded from the United States. *Cunningham*, 371 U.S. at 239-40 (citing *Brownell v. Tom We Shung*, 352 U.S. 180, 183 (1956); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *United States v. Jung Ah Lung*, 124 U.S. 621, 626 (1888)). Although "in those cases each alien was free to go anywhere else in the world," "[h]is movements . . . [we]re restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion." *Id.* (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213 (1953)) (internal quotation marks omitted).

must comply, absent judicial intervention, with the Government's orders "at any time and without a moment's notice," *Hensley*, 411 U.S. at 351—is not in question. That effects a present, substantial curtailment of Ragbir's liberty. *See id.* We also cannot be confident that, if we were to wait for the Government to *again* detain Ragbir, he would have access to judicial oversight prior to being removed from the country. We thus reject employing a "stifling formalism," *id.* at 350, that would deny Ragbir a hearing of his claim in a habeas proceeding on the basis that he is not in Government custody, when the imminent, severe curtailment of his liberty is so obvious, *see Simmonds v. I.N.S.*, 326 F.3d 351, 354 (2d Cir. 2003) (concluding that alien subject to final order of removal was in federal immigration officials' custody and that if he were currently "ordered removed [but] *not* incarcerated," rather than "being held in state prison, th[at] conclusion would [have been] a simple one" (emphasis added)).[30]

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[30] The Government contends that certain of our decisions require that Ragbir must be challenging his final order of removal in order to be in the custody of immigration officials. Not so; the cited decisions merely addressed variations of facts like those presented in *Simmonds*, in which the alien petitioner was currently being held in state detention yet argued he was also in *federal* government custody. In *Duamutef v. I.N.S.*, 386 F.3d 172 (2d Cir. 2004), the petitioner did not challenge the legality of his state detention, but sought a writ of habeas corpus to compel the federal government to hasten his deportation. 386 F.3d at 178. We ultimately did not decide whether the petitioner was in federal immigration custody. *Id.* at 178-79. And, in *Ogunwomoju v. United States*, 512 F.3d 69 (2d Cir. 2008), we decided that a petitioner in immigration detention or under an order of removal as a consequence of a state conviction was not in custody for purposes of challenging his *state* conviction under

C. Common-Law Habeas Courts Had Factfinding Authority

The constitutionally minimum scope of habeas review also includes petitions that require factfinding. In *St. Cyr*, the Supreme Court concluded that the scope includes pure questions of law: "[E]ven assuming that the Suspension Clause protects only the writ as it existed in 1789, there is substantial evidence to support the proposition that pure questions of law like the one raised by the respondent in th[at] case could have been answered in 1789 by a common-law judge with power to issue the writ of habeas corpus." *St. Cyr*, 553 U.S. at 304-05. Ragbir's claims do not involve "pure question[s] of law" but rather require the adjudication of contested facts, and so, we consider whether there is "substantial evidence" to support that a common-law court in 1789 would have had the authority to issue the writ in such a case. *See id.*

The Supreme Court touched on this issue in *St. Cyr*: "At common law, '[w]hile habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention.'" *Id.* at 301 n.14 (citing Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1238 (1970)). And although "the early practice was not consistent," habeas courts sometimes "permitted factual inquiries when," as here, "no other opportunity [existed] for judicial review" of the petitioner's

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28 U.S.C. § 2254. 512 F.3d at 70. Here, Ragbir challenges only federal immigration officials' conduct and is undisputedly not in state custody.

claim. Richard H. Fallon, Jr. & Daniel J. Meltzer, Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror, 120 Harv. L. Rev. 2029, 2102 (2007).[31] That is not surprising because "common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances." *Boumediene*, 553 U.S. at 779-80 (discussing circumstances in which "the black-letter rule that prisoners could not controvert facts in the jailer's return was not followed") (citing, *inter alia*, Fallon & Meltzer, 120 Harv. L. Rev. at 2102; *Cunningham*, 371 U.S. at 243 (stating that habeas is not "a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose")).

Moreover, in 1867, the federal courts were expressly vested with factfinding authority in habeas proceedings by the Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385. Of course, this is not definitive evidence of the scope of the writ in 1789, but it further supports that habeas courts in the early republic exercised factfinding authority. The Act provided that the "petitioner may deny any of the material facts set forth in the [custodian's] return, or may allege any fact to show that the detention is in contravention of the constitution or laws of the United States," and it required the habeas court to "proceed in a summary way to determine the facts of

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[31] Other scholars have also noted that eighteenth-century habeas courts had authority to engage in factual inquiries, although they did so less often than they reviewed pure questions of law. *See, e.g.,* Neuman, 98 Colum. L. Rev. at 986. ("One of the maxims of eighteenth-century habeas corpus practice had been that . . . the facts [the custodian] alleged as justifying the detention were to be taken as true," but this "papered over exceptions [and] . . . was also qualified by a willingness to let the prisoner allege additional facts.").

the case, by hearing testimony and the arguments of the parties interested. . . . " Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385.[32]

In the end, we cannot rely "upon the assumption that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before us." *Boumediene*, 553 U.S. at 752 (citing Paul D. Halliday & G. Edward White, The Suspension Clause: English Text, Imperial Contexts, and American Implications, 94 Va. L. Rev. 575, 588-93 (2008) (noting that most reports of 18th-century habeas proceedings were not printed)); *see* Fallon & Meltzer, 120 Harv. L. Rev. at 2096 ("[E]fforts to reconstruct his-

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[32] Factfinding provisions for federal habeas proceedings are currently set forth in 28 U.S.C. § 2243, which employs substantially similar language to that first codified in 1867; the petitioner "may, under oath, deny any of the facts set forth in the return or allege any other material facts." § 2243. "The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." *Id.* As such, "[p]etitioners in habeas corpus proceedings . . . are [presently] entitled to careful consideration and plenary processing of their claims including full opportunity for presentation of the relevant facts." *Harris*, 394 U.S. at 298-301. *See Wingo v. Wedding*, 418 U.S. 461, 468-70 (1974) ("More often than not, claims of unconstitutional detention turn upon the resolution of contested issues of fact. Accordingly, since the Judiciary Act of February 5, 1867, . . . Congress has expressly vested plenary power in the federal courts 'for taking testimony and trying the facts anew in habeas hearings'") (internal citation omitted); *Sigler v. Parker*, 396 U.S. 482, 487 n.* (1970) (Douglas *J.* dissenting) (stating that § 2243 provides no right to jury trial but permits the use of an advisory jury under certain circumstances); *U.S. ex rel. Mitchell v. Follette*, 358 F.2d 922, 928 (2d Cir. 1966) (stating that a habeas judge "may direct a hearing to determine the facts before handing down a final disposition").

torical practice with respect to most kinds of habeas proceedings founder quickly, for surviving records are fragmentary and practices were not consistent and shifted over time."). In that light, "substantial evidence" supports that a common-law habeas judge "could have" adjudicated a claim involving disputed issues of fact in 1789.[33] *See St. Cyr*, 533 U.S. at 304-305.

* * *

The constitutionally required scope of the privilege of the writ of habeas corpus encompasses Ragbir's claim. Because Congress has provided no "adequate substitute" and because there has been no formal suspension of the writ, *Boumediene*, 553 U.S. at 771-72, Ragbir is entitled to a habeas corpus proceeding as to the basis for the Government's impending action to deport him.

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[33] We take care to emphasize that this not a case in which the Executive or another court has already *adjudicated* any facts regarding Ragbir's present claim, and so the district court here is not called upon to question the Executive's duly obtained factual findings. "[T]he necessary scope of habeas review in part depends upon the rigor of any early proceedings." *Boumediene*, 553 U.S. at 781; *see Heikkila v. Barber*, 345 U.S. 229, 235-36 (1953) (discussing that the constitutional ambit of habeas review has always entailed extensive deference to administrative factfinding, subject to "the enforcement of due process requirements"); Gerard L. Neuman, Jurisdiction and the Rule of Law After the 1996 Immigration Act, 113 Harv. L. Rev. 1963, 1968 (2000) ("[Habeas] [r]eview of [executive] fact-finding can ordinarily be precluded, [although] courts do enforce a due process requirement that factual determinations be supported by 'some evidence.'"). Moreover, in any event, the Government, in opposing the availability of habeas review, does not argue that the declarations of certain officials submitted to the district court must be accepted as true (or even given deference).

IV. Summary and Considerations on Remand

We hold that the district court improperly dismissed Ragbir's claim for lack of subject matter jurisdiction. Because that conclusion was the basis for the district court's order denying Ragbir's motion for a preliminary injunction, we vacate that order and remand to the district court.

We note that, while Ragbir states a claim in his complaint and attachments, it does not necessarily follow that even if he proves that the officials sought to remove him as a result of his First Amendment speech, he may never be removed. But, at least for the near future, the taint of the unconstitutional conduct could preclude removal. That "near future" could be the end of a typical two-year stay extension that Ragbir would plausibly have otherwise received through January 2020, or some other period.[34] We leave that determination to the district court on remand. However, accepting as true the

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[34] Ragbir's plausible allegations support that, in the past, he was never denied a stay application, the shortest stay he received was approximately one year, and several of them, including the two most recent, were for two years. App'x 51. If he had received a two year administrative stay in January 2018, that would have lasted through January 2020. Judge Walker argues in dissent that it is implausible, in light of DHS's 2017 policy statement that "criminal aliens are a priority for removal," that Ragbir would have received another stay absent any retaliatory conduct by the Government. We observe, however, that Ragbir's past stay applications were approved even though the then-operative DHS policies stated, even more emphatically, that aliens convicted of aggravated felonies are categorized as the highest enforcement priority. *Compare* Memorandum from Jeh Charles Johnson, Sec'y of Dep't of Homeland Sec., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014) at 3 (classifying as "Priority 1,"

record currently before us, it is plausible that—absent the Government's alleged retaliation in January 2018—Ragbir would not yet have been deported, and likely not until at least January 2020.

Our order of November 1, 2018, staying Ragbir's removal shall remain in force until our mandate issues. We direct the district court to enter a stay of Ragbir's removal following the issuance of our mandate, to continue at least until such time that the district court has reconsidered, consistently with this opinion, whether a stay should remain in place through adjudication of the motion for a temporary injunction or the merits of the case.

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the "highest priority to which enforcement resources should be directed," "aliens convicted of an offense classified as a felony in the convicting jurisdiction," as well as "aliens convicted of an 'aggravated felony'" as defined in section 101(a)(43) of the INA); Memorandum from John Morton, Director, U.S. Immigrations & Customs Enforcement, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011) at 1-2 (classifying as "Priority 1" "aliens convicted of crimes, with a particular emphasis on violent criminals, felons, and repeat offenders," and further prioritizing as "Level 1 offenders" "aliens convicted of 'aggravated felonies'") *with* Memorandum from John Kelly, Sec'y of Homeland Sec., *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017) at 3 ("criminal aliens are a priority for removal"). Moreover, even in the absence of a stay, Ragbir was allowed to remain in the country under a final order of removal from 2008 until 2011. Thus, it is plausible that—absent the Government's retaliation in January 2018—Ragbir would not have been deported until at least January 2020, and so habeas release delaying his deportation would remedy the ongoing effect of that retaliation.

CONCLUSION

For the foregoing reasons, we **VACATE** the district court's order denying Plaintiffs-Appellants' motion for preliminary injunction and dismissing certain claims, and **REMAND** to the district court for proceedings not inconsistent with this opinion.

JOHN M. WALKER, JR., Circuit Judge, dissenting:

Although I agree with much of the reasoning in the majority opinion, because I would not remand the case for further proceedings or reach the issue of whether Ragbir's claim fits within the "outrageous" exception to § 1252(g)'s withdrawal of jurisdiction that was articulated by the Supreme Court in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 488-92 (1999) [hereinafter "*AADC*"], I respectfully dissent.

In my view, remand is not warranted because the Government's retaliation against Ragbir has ended and its taint has dissipated. Ragbir plausibly alleged that the Government's retaliation occurred on January 11, 2018 and included terminating his third administrative stay early, arresting him on the spot without prior notice, and attempting to immediately deport him by transporting him from New York City to Florida and incarcerating him there. But the taint of any retaliation ended no later than January 29, 2018, more than a year ago, when Ragbir was released from custody following the district court's grant of his habeas corpus petition. Importantly, that grant was ordered not so Ragbir could remain in the United States, but to allow him "an orderly departure" and "the freedom to say goodbye." *Ragbir v. Sessions*, No. 18-CV-236 (KBF), 2018 WL 623557, at *3 (S.D.N.Y. Jan. 29, 2018). Benefiting from litigation-prompted stays, Ragbir has yet to be removed.

Ragbir, in this proceeding, has never taken issue with the fact that he is subject to a valid removal order entered in March 2007 as a result of his felony conviction for wire fraud. Nor does he dispute that no stay prevents his removal other than the one entered by this

court in this appeal. It is the stated policy of the current executive branch to "prioritize for removal . . . removable aliens who [h]ave been convicted of any criminal offense." Exec. Order. No. 13,768, 82 Fed. Reg. 8,799, 8800 (Jan. 25, 2017). *See also* U.S. DEPARTMENT OF HOMELAND SECURITY, ENFORCEMENT OF THE IMMIGRATION LAWS TO SERVE THE NATIONAL INTEREST (2017), at 3 ("criminal aliens are a priority for removal").[1] Although this has also been the stated policy of past administrations, enforcement practices on the ground can differ from administration to administration. One would have to be blind not to notice that the change of administration in January 2017 has brought with it an unremitting focus on deporting convicted felons, such as Ragbir. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT, at 14 (In fiscal year 2018, ICE "conducted 256,085 removals—the highest level since FY2014" and prioritized "public safety threats and immigration violators, as reflected by the fact that, like in FY2017, 9 out of 10 [ICE] administrative arrests had either a criminal conviction(s), pending charge(s), were an ICE fugitive, or illegally reentered the country after previously being removed.").[2]

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[1] We may take judicial notice of written materials "[w]hen there is no dispute as to the authenticity of such materials and judicial notice is limited to law, legislative facts, or factual matters that are incontrovertible, such notice is admissible." *Oneida Indian Nation of New York v. State of N.Y.*, 691 F.2d 1070, 1086 (2d Cir. 1982).

[2] The Government has also represented to this court in a related case that "Ragbir has been issued a so-called 'bag and baggage' letter notifying him that he is to report to ICE for removal. (Dist. Ct. ECF No. 49). Thus, at this point it has been made abundantly clear to him that, once any judicial impediment to his removal has been

For the above reasons, I disagree with the majority's contention that the consequences of the Government's retaliation continue because, but for the retaliation, Ragbir would plausibly have obtained a further extension of his administrative stay from an administration that has steadfastly sought to deport him, much less another two-year extension. Under these circumstances, I see no reason for this case to continue in the district court, further impeding Ragbir's removal.[3]

I also have reservations about the majority's discussion of *AADC*'s "outrageous" exception to the § 1252(g) removal of jurisdiction. As a preliminary matter, I fail to see the necessity of addressing this issue at all given the majority's conclusion that Ragbir is entitled to a habeas corpus proceeding under the Suspension Clause despite § 1252(g)'s withdrawal of jurisdiction. That he is permitted to bring a habeas proceeding would allow us to consider Ragbir's case regardless of whether the Government's conduct falls within the "outrageous" exception contemplated by *AADC*. As I read *AADC*, that exception was predicated on the assumption that habeas relief was not available or would come too late, *AADC*,

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lifted, it is substantially likely that the government will promptly effectuate his removal." Reply Memorandum for Respondents-Appellants at 5, *Ragbir v. Sessions* (2d Cir.) (No. 18-1595).

[3] Any concern by the majority that Ragbir's prompt removal now would somehow revive the previous retaliation of more than a year ago could presumably be addressed by the recusal of the officer who made the decisions in January 2018. This would enable a previously uninvolved officer to independently decide whether to enforce the March 2007 order of removal without regard to the circumstances that are alleged to have prompted the Government's actions in January 2018.

525 U.S. at 487-88, indicating that it is unnecessary to undertake this analysis if timely habeas relief *is* available.

Second, despite the majority's statement that it is not "delineat[ing] the boundaries of what constitutes an 'outrageous' claim within the meaning of *AADC*," it creates from whole cloth a five-factor balancing test to determine whether the Government's conduct was "outrageous." I am concerned that, because this test will be the standard by which future claims are evaluated, it will become an open door for evading the will of Congress in enacting § 1252(g). Considering only the "Government's discretionary prerogative" gives short shrift to the Government's significant enforcement interests and does not provide a framework for adequately considering the Government's actions in context.

Turning to the facts of this case, although the majority opinion acknowledges that Ragbir is a criminal alien subject to a valid removal order, it quickly discounts this fact by arguing that Ragbir has no duty to leave the country on his own, unlike an alien who unlawfully enters and therefore is engaged in a continuing violation of law. To my mind, however, the Government's interest in removing a criminal alien, heightened when the executive branch has a stated policy of prioritizing the removal of criminal aliens, is at least as strong as the Government's interest in "bring[ing] to an end an ongoing violation of United States law" by one who has simply overstayed his visa. *AADC,* 525 U.S. at 491 (emphasis omitted).

Finally, although I agree that the complaint sufficiently alleged that the Government acted improperly when it shortened Ragbir's administrative stay, arrested him, and held him in custody in preparation for

his departure, there was nothing inherently unlawful in these acts which, absent improper motive, are fully authorized when enforcing an alien's removal. I can easily imagine much more "outrageous" acts of government impropriety, such as the deliberate and unjustified use of grossly excessive force or vindictive placement in solitary confinement. Therefore, I am not at all convinced that the Government's actions against Ragbir were "outrageous" under the circumstances.

For these reasons, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

18-cv-1159 (PKC)

RAVIDATH LAWRENCE RAGBIR, ET AL., PLAINTIFFS

v.

THOMAS D. HOMAN, ET AL., DEFENDANTS

Filed: May 23, 2018

MEMORANDUM AND ORDER

CASTEL, U.S.D.J.

Plaintiff Ravidath Lawrence Ragbir, a non-citizen who is a permanent resident of the United States, is subject to a final order of removal. (Verified Complaint ("VC") ¶ 42). Ragbir was convicted in federal court of six counts of wire fraud and one count of conspiracy to commit wire fraud. United States v. Ragbir, 00 Cr. 121 (D.N.J.), aff'd, 38 F. App'x 788, 789-90 (3d Cir. 2002). He served his prison term, and proceedings to remove him from the country ensued. (VC ¶¶ 41-42). Before the Board of Immigration Appeals ("BIA") and the Second Circuit, he unsuccessfully challenged the grounds

for removal, the finding that he had been convicted of an "aggravated felony."[1]

Ragbir is also a "nationally-recognized immigration rights activist . . . who has freely exercised his right to speak out against the injustices and inhumanity of our current immigration system." (VC ¶ 4). In the present action, Ragbir and his co-plaintiffs ask this Court, among other things, to grant an Order "restraining [d]efendants from taking any action to effectuate Mr. Ragbir's removal from the United States unless [d]efendants demonstrate to the Court's satisfaction that such action is untainted by unlawful retaliation or discrimination against protected speech." (VC at 41, Prayer for Relief at c).

Ragbir is joined in this action by New Sanctuary Coalition of New York City, CASA de Maryland, Inc., Detention Watch Network, National Immigration Project of the National Lawyers Guild, and New York Immigration Coalition (the "Organizational Plaintiffs"). Named as defendants are the Department of Justice, the Department of Homeland Security ("DHS"), and Immigration and Customs Enforcement ("ICE"), as well as Thomas D. Homan, Thomas R. Decker, Scott Mechkowski, Kirstjen M. Nielsen, and Jefferson B. Sessions III in their official capacities.[2]

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[1] Subsections M and U of section 101(a)(43) of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101(a)(43)(M), (U), provide the relevant definitions of "aggravated felony."

[2] The attorneys representing the parties and the amici curiae are listed in Appendix A of this Memorandum and Order.

Plaintiffs moved for a preliminary injunction. (Doc. 11). While that motion was pending, plaintiffs requested leave to file a motion for expedited discovery to support their preliminary injunction motion. (Doc. 40). Following the lead of the Supreme Court in a recent immigration case, the Court advised the parties that it would first address defendants' challenge to subject matter jurisdiction before considereing whether leave is warranted. See In re United States, 138 S. Ct. 443, 444 (2017); (Order of Mar. 26, 2018, Doc. 70). The parties have briefed the issue of subject matter jurisdiction in the context of the preliminary injunction motion. For reasons that will be explained, all claims by plaintiffs to declare unlawful and to enjoin the execution of Ragbir's final order of removal are dismissed for want of subject matter jurisdiction.

BACKGROUND

Ragbir became a lawful permanent resident in 1994. (VC ¶ 14). On September 12, 2001, following a 13-day jury trial, which resulted in a guilty verdict on seven counts, and the denial of post-verdict motions, Judge Bassler of the District of New Jersey sentenced Ragbir to 30 months imprisonment, 3 years supervised release, waiver of the fine, and imposition of restitution of $350,001. United States v. Ragbir, 00 Cr. 121 (WGB). The conviction was affirmed on appeal. United States v. Ragbir, 38 F. App'x 788, 789-90 (3d Cir. 2002). He was allowed to remain free on bail pending appeal and did not begin to serve his 30-month sentence until sometime after January 26, 2004. United States v. Ragbir, 00Cr. 121 (WGB) (Doc. 80; Doc. 111).

Following completion of his term of imprisonment, ICE detained him and initiated removal proceedings.

(VC ¶ 41-42). An immigration judge concluded that Ragbir had committed an "aggravated felony," warranting removal under 8 U.S.C. § 1227(a)(2)(A)(iii), and entered an order of removal on August 4, 2006. In re Ragbir, No. A 44-248-862.[3] The order of removal became final upon the BIA dismissing the appeal in 2007. In re Ragbir, No. A 44-248-862, 2007 WL 1180505 (B.I.A. Mar. 14, 2007); (VC ¶ 42). Ragbir filed a petition for review of his final order of removal with the Second Circuit, which denied the petition, Ragbir v. Holder, 389 F. App'x 80, 85 (2d Cir. 2010) (summary order), and, thereafter, for a writ of certiorari to the Supreme Court, which denied that petition, Ragbir v. Holder, 565 U.S. 816 (2011). He subsequently moved for the BIA to reconsider and reopen his removal proceedings, both of which were denied, and filed a petition for review of this decision with the Second Circuit, which dismissed the petition. Ragbir v. Lynch, 640 F. App'x 105, 106-08 (2d Cir. 2016) (summary order). Another motion to reopen and reconsider his order of removal and a coram nobis petition challenging his original conviction are currently pending. (VC ¶ 45).

ICE released Ragbir from detention in 2008, and since then, Ragbir has become a vocal advocate for immigrant rights and "a central figure in the broader community of immigration advocates." (VC ¶¶ 4, 14; Doc. 17 ¶ 8). ICE granted him an administrative stay of removal pursuant to 8 C.F.R. § 241.6 in 2011. (See VC ¶ 48). ICE renewed the administrative stay three times,

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[3] The immigration proceedings of which this Court may take judicial notice are found in the record of Ragbir's coram nobis proceeding. Ragbir v. United States, 17 Civ. 1256 (KM) (D.N.J. Jan. 23, 2018) (Doc. 22-1).

with the last stay set to expire on January 19, 2018. (VC ¶¶ 48, 64). Eight days before Ragbir's administrative stay was to expire, ICE revoked the administrative stay and detained him in anticipation of imminent execution of the final order of removal. (VC ¶¶ 66-67).

Ragbir immediately filed for a writ of habeas corpus in this District, seeking, among other things, that ICE release him. (VC ¶ 70; Amended Petition at 24, Ragbir v. Sessions, 18 Civ. 236 (KBF) (Jan. 17, 2018), 2018 WL 623557). Judge Forrest granted the writ and ordered Ragbir's immediate release from custody to "allow and provide for an orderly departure." Ragbir v. Sessions, 18 Civ. 236 (KBF), 2018 WL 623557, at *3 (S.D.N.Y. Jan. 29, 2018). Following Ragbir's release, he was served with a notice to report for deportation on February 10, 2018 and asked the Court to retain jurisdiction over the matter. (Das Letter, Ragbir v. Sessions, 18 Civ. 236 (KBF) (Jan. 30, 2018), 2018 WL 623557). Judge Forrest declined to do so, writing, in part, that "[t]his Court has no jurisdiction to grant any further relief. The Court provides this direction to the parties now so that if further claims are pursued, they should be pursued in the appropriate forum, or by way of a new action." (Order, Ragbir v. Sessions, 18 Civ. 236 (KBF) (Jan. 31, 2018), 2018 WL 623557).

The day before Ragbir's February 10 report date, this action was filed. The parties stipulated to a stay of removal during the pendency of Ragbir's motion for a preliminary injunction. The stay was entered as an Order. (Stipulated Order, (Jan. 9, 2018), Doc. 4).

Plaintiffs assert that ICE decided to execute the final order of removal because Ragbir is an outspoken ad-

vocate for immigrant rights. (See VC ¶ 4). This decision, plaintiffs argue, is consistent with "a pattern and practice of [ICE] targeting immigrants who exercise[] their fundamental First Amendment rights to criticize immigration policy and immigration enforcement." (VC ¶ 78). Plaintiffs conclude that this conduct is illicit retaliation and content, viewpoint, and speaker discrimination in violation of the First Amendment of the United States Constitution. (VC ¶¶ 124-37). They request (1) a declaration that defendants' actions violate the First Amendment, (2) an "injunction restraining [d]efendants from taking any action to effectuate Mr. Ragbir's removal from the United States unless [d]efendants demonstrate to the Court's satisfaction that such action is untainted by unlawful retaliation or discrimination against protected speech," and (3) an "injunction restraining [d]efendants on a nationwide basis from selectively enforcing the immigration laws against any individual—including, without limitation, through investigation, surveillance, detention, deportation, or any other adverse enforcement action—based on the individual's protected political speech about U.S. immigration law and policy." (VC at 40-41).

DISCUSSION

I. The Court's Subject Matter Jurisdiction

"It is a fundamental precept that federal courts are courts of limited jurisdiction," Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978), bound by the limits placed upon them by Article III of the United States Constitution and by Congress, Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). By virtue of Congress's power, granted in Article III, to create all federal courts inferior to the Supreme Court,

Congress retains the "lesser power to 'limit the jurisdiction of those [c]ourts.'" Patchak v. Zinke, 138 S. Ct. 897, 906 (2018) (plurality) (quoting United States v. Hudson, 11 U.S. 32, 33 (1812)); accord Hudson, 11 U.S. at 33 ("[T]he power which congress possess to create Courts of inferior jurisdiction . . . necessarily implies the power to limit the jurisdiction of those Courts to particular objects."). The "inferior" federal courts possess "only that jurisdiction which Congress confers upon them by statute." Hendrickson v. United States, 791 F.3d 354, 362 (2d Cir. 2015); accord Achtman v. Kirby, McInerney & Squire, LLP, 464 F.3d 328, 333 (2d Cir. 2006) ("The power of the inferior federal courts is 'limited to those subjects encompassed within a statutory grant of jurisdiction.'" (quoting Bechtel v. Competitive Techs., Inc., 448 F.3d 469, 471 (2d Cir. 2006))). In other words, absent statutory authorization, the Court lacks power to resolve the case or controversy. Achtman, 464 F.3d at 333. For a court to act without jurisdiction "is, by very definition, for a court to act ultra vires." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998).

Plaintiffs contend that this Court has jurisdiction over this matter under 28 U.S.C. § 1331, which supplies the federal courts with jurisdiction over federal questions, 28 U.S.C. § 2241, which is the general habeas corpus statute, and the Suspension Clause, U.S. Const. art. I, § 9, cl. 2. (VC ¶ 10).[4]

[4] Although plaintiffs claim that the Court has jurisdiction under section 2241 and the Suspension Clause, they do not request the issuance of a writ of habeas corpus.

II. Section 1252(g) Eliminates Subject Matter Jurisdiction over Ragbir's Challenge to the Execution of an Order of Removal

Defendants urge that Ragbir's claims arise from ICE's decision to execute a removal order against him and, therefore, that the claim is not within this Court's subject matter jurisdiction. The provision on which they rely reads as follows:

> (g) Exclusive jurisdiction
>
> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28 [Writs of Habeas Corpus], or any other habeas corpus provision, and sections 1361 [Writs of Mandamus] and 1651 [All Writs Act] of such title no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. § 1252(g).[5]

Plaintiffs' claims seek to enjoin the execution of Ragbir's removal order and to declare the decision to execute the order unconstitutional and, thus, arise from the decision of the Secretary of Homeland Security to

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[5] Because Congress has transferred the authority to "carry[] out the immigration enforcement functions" formerly performed by INS to the Secretary of Homeland Security, 6 U.S.C. § 202(3), the reference in section 1252(g) to the Attorney General is "deemed to refer to DHS," Ali v. Mukasey, 524 F.3d 145, 150 (2d Cir. 2008).

execute a final order of removal against Ragbir. This is plain from the allegations of the Verified Complaint and plaintiffs' candid briefing to this Court. The Verified Complaint alleges that Ragbir is "subject to a final order of removal." (VC ¶¶ 5, 10). Apart from costs and attorney's fees, plaintiffs seek only declaratory and injunctive relief. (VC at 40-41). Plaintiffs also seek to have this Court "restrain [d]efendants from taking any action to effectuate Mr. Ragbir's removal from the United States unless [d]efendants demonstrate to the Court's satisfaction that such action is untainted by unlawful retaliation or viewpoint discrimination." (VC ¶ 9). Restraining defendants from "effectuat[ing] . . . removal" is, in this context, synonymous with "execut[ing] an order of removal." See Duamutef v. INS, 386 F.3d 172, 181 (2d Cir. 2004) (stating that it had "no difficulty find that the relief sought by [the petitioner] comes within the 'execut[ion]' prohibition of § 1252(g)" when petitioner was "repeatedly challenging the INS's failure to 'effectuate' or 'expedite' his removal"). "Execution" means "[p]utting into force. The completion, fulfillment, or perfecting of anything, or carrying it into operation and effect." United States v. Wiehl, 904 F. Supp. 81, 87 (N.D.N.Y. 1995) (quoting Black's Law Dictionary, 568 (6th ed. 1990)). Plaintiffs' brief to this Court describes this action accurately as a challenge to "[d]efendants' retaliatory execution of the order." (P. Mem. in Support, Doc. 12 at 24).

The limitation on jurisdiction found in section 1252(g) does not depend on the form or theory on which a plaintiff proceeds and includes "any cause or claim by an alien," provided that the claim "aris[es] from" the decision "to commence proceedings, adjudicate cases, or

execute removal orders." 8 U.S.C. § 1252(g). The statute forecloses the exercise of jurisdiction (except as permitted elsewhere in section 1252) under "any . . . provision of law." Id. A 2005 amendment to section 1252(g) added explicit reference to "statutory or non-statutory" law and, specifically, writs of habeas corpus or mandamus and petitions asserted under the All Writs Act. READ ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231. Compare § 1252(g), with Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 306, 110 Stat. 3009.

Before section 1252(g) was amended in 2005 to its current form, the Supreme Court construed section 1252(g) in the context of a First and Fifth Amendment claim by individuals who were asserting that INS, the entity tasked with enforcing the immigration laws before ICE, targeted them for deportation because they were members of a group that advocated terrorism. Reno v. Am.-Arab Anti-Discrimination Comm. ("AADC"), 525 U.S. 471, 474 (1999). The Court concluded that such a claim fell within section 1252(g), but it also narrowed the scope of the provision, concluding that it reaches only "three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" Id. at 482 (emphasis in original).

The Court reasoned that Congress had "good reason" to select these three particular stages of the removal process for "special attention." Id. at 483. When Congress enacted section 1252(g), the INS, in its discretion, "had been engaging in a regular practice (which had come to be known as 'deferred action') of" deferring or declining to commence proceedings, adjudicate cases,

or execute removal orders "for humanitarian reasons or simply for its own convenience." Id. at 483-84. An offshoot of this practice was that removable aliens began asserting selective prosecution claims when this discretion was not exercised. Id. at 483-84.

The effect was that aliens were able to cause "the deconstruction, fragmentation, and hence prolongation of removal proceedings" by bringing these claims outside the streamlined process that was then in place. Id. at 485, 487. The ability to prolong litigation proved useful for removable aliens, as it allotted more time for the removable alien's "status [to] change—by, for example, marriage to an American citizen"—and "simply . . . extend[ed] the alien's unlawful stay," a substantial benefit for those attempting to remain in the United States indefinitely. Id. at 490. Congress, through section 1252(g), south to alleviate these problems by ensuring that if these decisions "are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress ha[d] designed." Id. at 485.

The selective enforcement claims in AADC are similar to the claims asserted by plaintiffs. While labeled First Amendment retaliation and content and viewpoint discrimination, plaintiffs' claims are species of selective enforcement claim, asserting that "[d]efendants have engaged in a nationwide pattern and practice of selectively enforcing the immigration laws against immigration-rights activists on the basis of their protected speech." (VC ¶¶ 127-28 (emphasis added)). Although the claim in AADC was premised on selective enforcement stemming from associational activities rather than, as here, speech activities, there is no principled reason for this

distinction to make a difference in the interpretation of section 1252(g).

A potentially important distinction between this case and AADC is that the selective enforcement in AADC allegedly took place in "commenc[ing]" removal proceedings, thus giving the plaintiffs the potential for raising the issue in the context of judicial review of a final order of removal. See AADC, 525 U.S. at 473. But this distinction does not necessarily work in Ragbir's favor. Ragbir does not challenge in this proceeding the lawfulness of the order of removal or its finality. He has had a full and fair opportunity to have the BIA and the Second Circuit review both his order of removal as well as the immigration judge's refusal to reopen and reconsider the order. His claim is rather that that because ICE, purportedly with retaliatory animus, decided to enforce the final order of removal—instead of to continue staying his removal—they must continue to forebear unless they prove that any future decision to enforce the order is "untainted" by his speech activities. As the AADC Court wrote, "in all cases, deportation is necessary in order to bring to an end *an ongoing violation* of United States law. The contention that a violation must be allowed to continue because it has been improperly selected is not powerfully appealing." AADC, 525 U.S. at 491 (emphasis in the original). That is particularly true when the existence of an ongoing violation has already been determined by clear and convincing evidence by an immigration judge and affirmed on review.

Ragbir argues nonetheless that his claim should be allowed to proceed, contending that section 1252(g) does not apply to his claim. Specifically, he asserts that section 1252(g) is a "channeling provision," functioning to

consolidate all claims within its scope into a petition for review of a final order of removal that must be filed in a federal court of appeals. (Doc. 12 at 25). He maintains that section 1252(g) cannot channel his claims that arose after the order of removal issued and, thus, the Court should not "read [section 1252(g)] to channel claims that cannot be channeled." (Id.; accord Doc. 72 at 11). But section 1252(g) does not read as a channeling provision; it is a jurisdictional bar, precluding review of "any cause or claim" within its structures "[e]xcept as provided in" the remainder of section 1252. See AADC, 525 U.S. at 485 (noting that section 1252(g) is "designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations, providing that *if they are reviewable at all*, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed" (emphasis added)).

Construing section 1252(g) as inapplicable to claims that arise after the final order of removal, as Ragbir urges, is also inconsistent with the apparent purpose of Congress's extension of section 1252(g) to "decisions or actions . . . [to] execute removal orders against any alien." Prior to enacting section 1252(g), Congress had determined that an order of removal "shall become final upon the earlier of . . . (i) a determination by the [BIA] affirming such order . . . or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the [BIA]." Antiterrorism and Effective Death Penalty Act of 1996 § 440(b), 8 U.S.C.

§ 1101(a)(47) (1996).[6] This provision operated in tandem with existing federal regulations, which had provided since at least 1971 that an order of removal "shall not be executed" until the BIA had completed its review of the order, if review was sought. See 8 C.F.R. § 1003.6; 36 Fed. Reg. 316 (1971). Thus, execution of an order of removal could lawfully occur only after the order had become final. Congress was presumably aware of this when it enacted section 1252(g). Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) (observing that it is "assume[d] that Congress is aware of existing law when it passes legislation"). It is not plausible that Congress designed section 1252(g) to cover only the execution of a removal order before the order became final for the simple reason that before the order became final, it could not be executed.

Ragbir's argument is also contrary to Second Circuit precedent. In Daumutef v. INS, 386 F.3d 172 (2d Cir. 2004), the Second Circuit applied section 1252(g)'s jurisdictional bar to a claim that arose after a final order of removal and that stemmed from a decision arising from the "execut[ion] of [the] removal order[]." The petitioner did not contest the propriety of his order of removal and waived his right to appeal it. Id. at 174. Rather, he embraced his removal order and sought to compel his removal through a writ of mandamus in order to take advantage of the state's grant of "Conditional

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[6] The defined term found in section 1101(a)(47) is "order of deportation." In the IIRIRA, which enacted section 1252(g), Congress provided that "any reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of deportation." IIRIRA § 309(d)(2).

Parole for Deportation Only." Id. at 175-76. The Second Circuit concluded that his mandamus claim arose from the decision not to execute a removal order and, thus, fell within the scope of the jurisdictional bar of section 1252(g). Id. at 181.[7] It did not matter that the claim could not be heard in the context of judicial review of a final order of removal.

Simply put, section 1252(g) reaches exactly what it says it reaches—"any cause or claim . . . arising from the decision or action . . . to execute removal orders."

III. Constitutional Claims Are Not Excluded from the Limitation on this Court's Subject Matter Jurisdiction

Ragbir argues that even if section 1252(g) applies to decisions and actions that occur after a final order of removal, it does not apply to his claims because he asserts constitutional violations. He predicates this argument on the doctrine of constitutional doubt, an interpretive tool that counsels courts, when faced with competing plausible interpretations of a statute, to avoid an interpretation that raises serious constitutional questions, such as an interpretation of a statute as "preclud[ing] all judicial review of a constitutional claim." Thunder Basic Coal Co. v. Reich, 510 U.S. 200, 215 n.20 (1994); see Clark v. Martinez, 543 U.S. 371, 381 (2005); Miller v.

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[7] Duamutef declined to reach whether section 1252(g) applied to a habeas petition brought pursuant to 28 U.S.C. § 2241. Daumutef, 386 F.3d at 182 n.8. The later enacted REAL ID Act of 2005 amended section 1252(g) to reference 28 U.S.C. § 2241 expressly in section 1252(g)'s jurisdictional carve out.

French, 530 U.S. 327, 336 (2000). To that end, the Supreme Court has held that "where Congress intends to preclude judicial review of constitutional claims[,] its intent to do so must be clear." Webster v. Doe, 486 U.S. 592, 603 (1988). Ragbir maintains that section 1252(g) lacks the "clear and convincing" evidence necessary to preclude review of constitutional claims. Califano v. Sanders, 430 U.S. 99, 109 (1977) (quoting Weinberger v. Salfi, 422 U.S. 749, 762 (1975)).

To speak clearly, Congress need not "incant magic words"—the plain language of section 1252(g) rebuts Ragbir's argument. Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013); accord Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 20 (2017). The statute does not distinguish between types of claims. Rather, it excludes from a court's jurisdiction the power "to hear any cause or claim," and it applies "notwithstanding any other provision of law (statutory or nonstatutory)." § 1252(g) (emphasis added). The language selected by Congress is broad, and it does not suggest any subject-matter limitation.

Two Circuits have addressed whether section 1252(g)'s limitation on jurisdiction reaches constitutional claims. The Eighth Circuit, in the context of a constitutional challenge to the execution of a removal, concluded that the section 1252(g)'s jurisdictional limitation extended to constitutional claims. Silva v. United States, 866 F.3d 938, 941 (8th Cir. 2017) (concluding that "it was unnecessary for Congress to enumerate every possible cause or claim" and that section 1252(g)'s broad language extends to constitutional claims arising from the execution of a removal order). The Sixth Circuit concluded that a district court did not

have subject matter jurisdiction to hear a due process challenge to an order of removal that had become final, brought on by a writ of prohibition. Elgharib v. Napolitano, 600 F.3d 597, 602 (6th Cir. 2010) ("[A] natural reading of 'any other provision of law (statutory or non-statutory)' includes the U.S. Constitution." (quoting § 1252 (g)); accord Viana v. President of United States, 18 Civ. 222 (LM), 2018 WL 1587474, at *3 (D.N.H. Apr. 2, 2018) (concluding that section 1252(g) does not permit a due process challenge to the execution of a removal order). This Court agrees with the conclusions of the Eighth and Sixth Circuits and, likewise, will not carve constitutional claims from section 1252(g)'s jurisdictional bar.

IV. Ragbir Does Not Have a Constitutional Claim to Assert

Having concluded that section 1252(g), properly construed, does not permit a court to hear a constitutional challenge to the execution of an order of removal, the Court next considers whether the jurisdictional limitation is, itself, constitutional as applied to the allegations of plaintiffs' Verified Complaint. The beginning point of this analysis is consideration of whether Ragbir has a constitutional claim that could be interposed as a defense to removal. If he does, then the Court must address the constitutionality of section 1252(g). If he does not, then the Court may avoid ruling on the constitutionality of the jurisdictional limitation. The court concludes that Ragbir does not.

A. First Amendment Retaliation

"To plead a First Amendment retaliation claim a plaintiff must show: (1) he has a right protected by the

First Amendment; (2) the defendant's actions were motivated or substantially caused by [plaintiff's] exercise of that right; and (3) the defendant's actions caused him some injury." Smith v. Campbell, 782 F.3d 93, 100 (2d Cir. 2015) (alteration in original) (quoting Dorsett v. County of Nassau, 732 F.3d 157, 160 (2d Cir. 2013)). Ragbir claims that before ICE decided to execute the final order of removal, he had engaged in political speech criticizing governmental policies on immigration and that defendants are executing the order of removal to silence him and stifle his advocacy of immigrant rights. Both of these assertions are accepted as true for the purpose of the Court's analysis. The Court concludes, however, that his asserted injury flows from the final order of removal, which he does not allege is defective or legally infirm.

In the context of a criminal prosecution, "[t]he existence of probable cause will defeat . . . a First Amendment claim that is premised on the allegation that defendants prosecuted a plaintiff out of a retaliatory motive, in an attempt to silence her." Fabrikant v. French, 691 F.3d 193, 215 (2d Cir. 2012). This is so because "'[a]n individual does not have a right under the First Amendment to be free from a criminal prosecution supported by probably cause,' even if that prosecution 'is in reality an unsuccessful attempt to deter or silence criticism of the government.'" Id. (quoting Mozzochi v. Borden, 959 F.2d 1174, 1180 (2d Cir. 1992)). Likewise, probable cause to arrest an individual defeats a claim asserting that the arrest was in retaliation for speech protected by the First Amendment. See Curley v. Village of Suffern, 268 F.3d 65, 73 (2d Cir. 2001) (holding that if an officer "had probable cause to arrest plaintiff, an inquiry into the underlying motive for the arrest need

not be undertaken"); Singer v. Fulton Cty. Sherif, 63 F.3d 110, 120 (2d Cir. 1995) ("If the officer . . . had probable cause[,] . . . then [courts] will not examine the officer's underlying motive in arresting and charging the plaintiff."); accord Caravalho v. City of New York, No. 17-1944, 2018 WL 1940938, at *3 (2d Cir. Apr. 25, 2018) (summary order) ("The existence of probable cause defeats a First Amendment claim premised on the allegation that defendants arrested a plaintiff based on a retaliatory motive.").

Although it is true that a First Amendment retaliation claim may be predicated on justified discretionary actions in "a non-criminal regulatory enforcement action" if "the defendant, for improper motive, took regulatory action that was significantly more serious than other action he had discretion to take," Mangino v. Incorporated Village of Patchogue, 808 F.3d 951, 957 (2d Cir. 2015), the context of this case bears little resemblance to a garden variety regulatory enforcement action. The order of removal issued in Ragbir's case was entered after he was heard on the merits and the grounds for removal were found proven by clear and convincing evidence—"[e]vidence indicating that the thing to be proved is highly probable or reasonably certain"—reviewed by the BIA, and then reviewed in a federal judicial forum. Ragbir v. Holder, 389 F. App'x 80, 84-85 (2d Cir. 2010) (quoting Black's Law Dictionary 636 (9th ed. 2009)); 8 U.S.C. § 1229a(c)(3); 8 C.F.R. § 1240.8(a). No court has held, insofar as research discloses, that the execution of a removal order that has become final after agency review may support a claim of First Amendment retaliation or viewpoint or content discrimination. The Court concludes that Ragbir has

no such claim because the injury to him flows from the final order of removal and not its execution.[8]

The Court's conclusion is buttressed by AADC, in which the Supreme Court was faced with a claim of selective enforcement based upon the First Amendment right of association. The Supreme Court observed that "[e]ven in the criminal-law field, a selective prosecution claim is a *rara avis*," in part for the reason that courts are reluctant to intervene because "the decision to prosecute is particularly ill-suited to judicial review," "entails systemic costs of particular concern," "threatens to chill law enforcement," and "may undermine prosecutorial effectiveness." AADC, 525 U.S. at 489-90 (alteration in original) (quoting Wayte v. United States, 470 U.S. 598, 607-08 (1985)). "These concerns," the Supreme Court observed, "are greatly magnified in the deportation context." Id. at 490. "Whereas in criminal proceedings the consequence of delay is merely to postpone the criminal's receipt of his just deserts, in deportation proceedings the consequence is to permit and prolong a continuing violation of United States law." Id. The Supreme Court also recognized that because removal is imposed to hold the alien "to the terms under which he was admitted," rather than "as a punishment," the interest in avoiding selective treatment in removal proceedings is "less compelling than in criminal prosecutions." Id. at 491. The Supreme Court concluded

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[8] Because Ragbir has no viable constitutional claim, the Court need not reach whether the Suspension Clause renders unconstitutional section 1252(g) insofar as it purports to bar all habeas claims. U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

that "[a]s a general matter[,] . . . an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." Id. at 488.

B. The Outrageous Discrimination Exception.

In AADC, the Supreme Court did not "rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome," allowing for the assertion of a selective enforcement claim. AADC, 525 U.S. at 491. In Rajah v. Mukasey, 544 F.3d 427 (2d Cir. 2008), the Second Circuit addressed this possible exception. There, the petitioners asserted in a petition for review of a final order of removal, in part, that "their deportation orders violate[d] their rights under the Equal Protection component of the Fifth Amendment's Due Process Clause because the immigration laws were selectively enforced against them based on their religion, ethnicity, gender, and race." Id. at 438. The Second Circuit noted the dictum in AADC and observed "that a selective prosecution based on an animus of th[e] kind [articulated by the petitioners] would call for some remedy." Id. The Court concluded, however, that there was "no basis for petitioners' claim" and therefore "[n]o circumstance calling for a remedy." Id. at 438-39.

This Court declines to extend this exception for outrageous discrimination to Ragbir's claim. Membership in a targeted and protected group is not usually a volitional act, and, thus, traditionally immutable characteristics are not easily subject to strategic use by the person who is subject to a removal order. Political speech is worthy of the highest protection, and so long as Ragbir remains in the United States, the First Amendment guarantees him

the freedom to speak and associate on any subject of his choosing. But his decision to speak does not confer upon him an immunity from the enforcement of a pre-existing final order of removal. As "[c]ourts 'have long recognized[,] the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" Rajah v. Mukasey, 544 F.3d at 438 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)). Having considered the nature of the claim, the clear Congressional directive contained in section 1252(g), and the purpose of that section, the Court will dismiss Ragbir's claim for want of jurisdiction to the extent it seeks to enjoin the execution of his removal order and to declare the decision to execute the order unconstitutional.

V. The Remaining Claims

The Organizational Plaintiffs joined Ragbir in his challenge to the execution of his removal order. The Court's reasoning above applies without regard to the identity of the party asserting the claim. However, section 1252(g) does not bar all claims pertaining to an order of removal. As previously noted, AADC gives the statute a "narrow reading," construing it to apply "only to three discrete actions"—the commencement of proceedings, the adjudication of cases, and the execution of removal orders. AADC, 525 U.S. at 482, 487.

The Verified Complaint asserts only two claims for relief. Count I is styled "Retaliation in Violation of the First Amendment," (VC ¶¶ 124-29), and Count II "Content, Viewpoint, and Speaker Discrimination in Violation of the First Amendment," (VC ¶¶ 130-37). Broadly read, they allege a "nationwide pattern and practice of selectively enforcing immigration laws against immigration-

rights activists on the basis of their protected speech." (VC ¶ 127; see VC ¶ 132). The claims may reach actions by immigration authorities beyond commencing proceedings, adjudicating cases and executing removal orders.

To understand whether the Organizational Plaintiffs and Ragbir have standing to bring the remaining portions of the claims and whether, with the excision of the challenge to the execution of Ragbir's removal order, they state claims for relief, the Court must understand the contours of the claims. Defendants' time to respond to the Verified Complaint has not run. The Court invites the parties to submit a proposed briefing schedule on these claims within 14 days.

CONCLUSION

Because the Court lacks subject matter jurisdiction over plaintiffs' challenges to the execution of the final order of removal, so much of the Verified Complaint as seeks to declare unlawful or to enjoin the execution of the final order of removal against plaintiff Ragbir is DISMISSED. (Doc. 1). The motion for a preliminary injunction insofar as it seeks to stay removal of plaintiff Ragbir is DENIED. (Doc. 11). The stay set forth in the Stipulated Order filed February 9, 2018 is DISSOLVED. (Doc. 4). The parties shall submit a proposed briefing schedule on the remaining issues within 14 days.

SO ORDERED.

/s/ P. KEVIN CASTEL
P. KEVIN CASTEL
United States District Judge

Dated: New York, New York
May 23, 2018

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 18-1597

RAVIDATH LAWRENCE RAGBIR, NEW SANCTUARY COALITION OF NEW YORK CITY, CASA DE MARYLAND, INC., DETENTION WATCH NETWORK, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NEW YORK IMMIGRATION COALITION,
PLAINTIFFS-APPELLANTS

v.

THOMAS D. HOMAN, IN HIS OFFICIAL CAPACITY AS DEPUTY DIRECTOR AND SENIOR OFFICIAL PERFORMING THE DUTIES OF THE DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, THOMAS DECKER, IN HIS OFFICIAL CAPACITY AS NEW YORK FIELD OFFICE DIRECTOR FOR U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, SCOTT MECHKOWSKI, IN HIS OFFICIAL CAPACITY AS ASSISTANT NEW YORK FIELD OFFICE DIRECTOR FOR U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, KIRSTJEN M. NIELSEN, IN HER OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, MATTHEW G. WHITAKER, IN HIS OFFICIAL CAPACITY AS ACTING ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES DEPARTMENT OF JUSTICE,
DEFENDANTS-APPELLEES

Filed: Sept. 26, 2019

ORDER

Appellees filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk