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Immigration, Retaliation, and Jurisdiction

Daniel Simon[†]

I. INTRODUCTION

When federal officials told Ravidath Ragbir that they were deporting him because of his immigration activism, no one could stop them.¹ This unreviewability was by design—a feature, rather than a bug, of our immigration laws. Federal law curtails the ability of aliens facing removal from the United States to seek relief through habeas corpus: No federal court may exercise habeas jurisdiction over a claim by an alien challenging her removal, regardless of whether that claim is statutory or constitutional in nature.² While this limitation presents broader problems for immigrants in detention, its impact is particularly pronounced in the context of selective or retaliatory enforcement.

Ragbir’s case demonstrates the dangers of this general rule. Ragbir—an alien deportable as a result of a federal wire fraud conviction—has spent years organizing for more lenient immigration policies. That advocacy led a senior official from Immigration and Customs Enforcement to admit that he was deporting Ragbir *because* of his advocacy. Ragbir remains in the United States thanks to the intervention of federal courts. But in Ragbir’s case, discretion layered with unreviewability allowed the Executive to come perilously close to deporting Ragbir to his native Trinidad because of his criticisms of a government policy—the undisputed nucleus of the First Amendment’s Free Speech Clause. Whether he should be here or there is quite beyond the point: motive matters in the law as in life, and identifying motives as impermissible serves valuable expressive and dignitary purposes.

This Comment explains why certain claims of selective enforcement in retaliation for First Amendment activity are—thanks to the

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¹ Ragbir v. Homan, 923 F.3d 53 (2d Cir. 2019), *vac’d sub nom.* Pham v. Ragbir, No. 19-1046, 2020 WL 5882107 (U.S. Oct. 5, 2020); *see also* Ragbir v. Holder, 389 F. App’x 80 (2d Cir. 2010); Ragbir v. Lynch, 640 F. App’x 105 (2d Cir. 2016); Ragbir v. Barr, No. 18-1595, 2019 U.S. App. LEXIS 37203 (2d Cir. July 30, 2019); Ragbir v. United States, No. 17-1256, 2019 U.S. Dist. LEXIS 13236, (D.N.J. Jan. 25, 2019), *aff’d*, 950 F.3d 54 (3d Cir. 2020) (denying writ of coram nobis).

² 8 U.S.C. § 1252(g) (2020).

Suspension Clause³—exempt from the general rule of unreviewability set forth above. Although courts have previously addressed related questions, none has done so squarely, and none has done so in light of the Supreme Court’s decision in *Nieves v. Bartlett*.⁴ In *Nieves*, the Court held that the existence of probable cause generally bars retaliatory arrest claims except in those circumstances where an officer’s discretion would typically counsel against arresting a similarly situated individual.⁵ Given that aliens in removal proceedings have no general “constitutional right to assert selective enforcement,”⁶ however, *Nieves* may portend the doom of all retaliatory removal claims irrespective of the Suspension Clause.

But it shouldn’t. The vast discretion afforded the executive in immigration enforcement authorizes it to knowingly tolerate the unlawful presence of aliens within the United States. When, after obtaining an order of final removal against an alien, the government grants the alien a stay of removal, the government should not be allowed use that order to chill that alien’s First Amendment rights. Such a proposition is not new. The Constitution and statutes such as the Speedy Trial Act⁷ ensure that prosecutors cannot use the specter of criminal prosecution to coerce criminal suspects. Immigration authorities shouldn’t be able to do so either. Moreover, *Nieves* arose in the criminal context, whereas immigration proceedings are civil. Thus, arguments that *Nieves* somehow changed the game are wide of the mark.

This Comment proceeds in three principal parts. The first traces the histories of habeas corpus, immigration, and retaliation. The second explains Ragbir’s dilemma. And the third brings the two together.

Ultimately, the Comment concludes that for a narrow class of aliens—those who entered the United States lawfully, remain in the United States pursuant to a stay of removal, and have exhausted all statutory avenues for review—the Suspension Clause bars the application of jurisdiction-stripping statutes to claims arising from the government’s retaliatory decision to remove the alien from the country. Because these aliens are in detention within—and have substantial ties to—the United States, the writ of habeas corpus as understood at the Framing guarantees that the Suspension Clause applies to them. When an alien has exhausted her lone statutorily authorized motion to reopen her case with Immigration and Customs Enforcement, no adequate

³ U.S. CONST. art. I, § 9, cl. 2.

⁴ 139 S. Ct. 1715 (2019).

⁵ *Id.* at 1727.

⁶ *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488 (1999).

⁷ Speedy Trial Act of 1974, 88 Stat. 2080, as amended August 2, 1979, 93 Stat. 328, codified at 18 U.S.C. §§ 3161–3174.

judicial forum exists in which she can challenge subsequent constitutional violations. Any statutes, then, which operate to preclude judicial review of the government's allegedly retaliatory decisionmaking must be deemed inapplicable absent a Congressional suspension of the writ of habeas corpus.

II. APPLICABLE LAW

A. Habeas Corpus in America

Any effort to examine the power of the executive to detain might sensibly start with an examination of the laws authorizing such detentions. For reasons which will hopefully become apparent, this examination instead starts with the most ancient and storied remedy for such detentions, the writ of habeas corpus.

"Indisputably hold[ing] an honored position in our jurisprudence,"⁸ the "Great Writ" of habeas corpus protects "liberty and republicanism" against "arbitrary imprisonments," "the favorite and most formidable instruments of tyranny."⁹ So essential is the protection against arbitrary arrest or detention that it has become a feature of customary international law¹⁰—an unsurprising development given the writ's availability across both common and civil law systems.¹¹ The Framers regarded the availability of habeas as vital: early drafts of the Suspension Clause envisioned the writ as being "enjoyed in this Government in the most expeditious and ample manner."¹² "Suffering the denial of habeas corpus became a marker of liberty and independence, a point of honor by which Americans would sustain rebellion."¹³ The decision in 1774 to suspend the writ within Quebec even prompted an overture from the Continental Congress for that province to join the fledgling union.¹⁴ It is no wonder, then, that the Framers took care when drafting

⁸ *Engle v. Isaac*, 456 U.S. 107, 126 (1982).

⁹ THE FEDERALIST No. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961); WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 137–38 (9th ed. 1783) ("And by the *habeas corpus* act, 31 Cha. II. c. 2. (that second *magna carta*, and the stable bulwark of our liberties) it is enacted, that no subject of this realm . . . shall be sent prisoner into . . . places beyond the seas (where they cannot have the benefit and protection of the common law).").

¹⁰ Int'l Covenant on Civil & Political Rights, art. 9, *adopted* Dec. 19, 1966, 999 U.N.T.S. 14668.

¹¹ *See, e.g.*, "amparo de libertad" and "Verfassungsbeschwerde." *Cf.* CRIMINAL PROCEDURE: A WORLDWIDE STUDY (Craig M. Bradley ed., 2d ed. 2007) (surveying international criminal procedure); Wilhelm Karl Geck, *Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices*, 51 CORNELL L. REV. 250, 300–301 (1966).

¹² 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 249 (Jonathan Elliot ed., 1837); *see also* 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 460–64 (Jonathan Elliot ed., 1837).

¹³ PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 253 (2010).

¹⁴ 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–89, 105–13 (1904); *see* Zechariah

the Constitution to limit the circumstances in which the writ could be suspended.

To do so the Framers drew from the experience of the Confederation. Before the Ratification, just four state constitutions contained provisions protecting the writ.¹⁵ Confederation-era legislation in Pennsylvania,¹⁶ New York,¹⁷ and Virginia¹⁸ protected the writ, while Georgia and Massachusetts adopted a belt-and-suspenders strategy.¹⁹ These statutory enactments largely tracked the language of Britain's seminal Act of 1679,²⁰ with two states going so far as to copy the text verbatim—including now-superfluous language regarding “his majesty’s justices.”²¹ South Carolina’s 1712 enactment of the 1679 Act remained in force,²² thus bringing the total number of states with positive protection for the writ to eight.²³ At the nascent federal level, the Northwest Ordinance enacted by the Confederation Congress in 1787 specifically provided that “inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus.”²⁴

At Philadelphia, however, little was said about what would become the Suspension Clause. Notables at the Convention questioned the need for an explicit protection of the writ in the new Union, fearing it would

Chafee Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143, 145 (1952).

¹⁵ Dallin H. Oaks, *Habeas Corpus in the States—1776–1865*, 32 U. CHI. L. REV. 243, 247 (1965). Georgia incorporated the Act of 1679 into its constitution; North Carolina conferred a personal right to habeas corpus (though it did not use those words); and Massachusetts and New Hampshire provided both an affirmative right to the writ and legislative power to suspend it for a period of time. See N.C. CONST. art. XIII (1776); GA. CONST. art. LX (1777); MASS. CONST. ch. 6, art. VII (1780); N.H. CONST. pt. 2, art. 91 (1784).

¹⁶ Act of Feb. 18, 1785, § 12, reprinted in DIGEST OF THE LAWS OF PENNSYLVANIA 573 (7th ed., Philadelphia, Davis 1847) (imposing a £200 fine on anyone who transfers a prisoner without legal authority).

¹⁷ Act of Feb. 21, 1787, N.Y. LAWS 1785–88, 424 (Official Reprint 1886).

¹⁸ Act of 1779, 11 VA. STAT. 410 (Richmond, Cochran 1823) (prohibiting transfers of prisoners out of the state except “where the prisoner shall be charged by affidavit with treason or felony, alleged to be done in any of the other United States of America, in which . . . case he shall be sent thither in custody” by order of a Virginia court).

¹⁹ See, e.g., GA. CONST. art. LX (1777) (“The principles of the habeas-corpus act shall be a part of this constitution.”); Act of Mar. 16, 1785, 1 MASS. GEN. LAWS ch. 72, § 10 (1823) (prohibiting “any person [from] transport[ing] . . . any subject of this Commonwealth . . . to any part or place without the limits of the same . . . except [if] such person be sent by due course of law, to answer for some criminal offense committed in some other of the United States of America”).

²⁰ Regarded by Blackstone as the “second *magna carta*,” the Act represented a decades-long struggle to codify the power of courts to question the basis for an individual’s detention. 31 Cha. 2, c. 2 § 8 (1679); see *supra* note 9; Halladay, *supra* note 13, at 80–81.

²¹ See GA CONST. art. LX (1777); Act of Oct. 16, 1692, 2 S.C. STAT. 74 (Cooper 1837).

²² Act of Dec. 12, 1712, 2 S.C. STAT. 399–401 (Columbia, Johnston 1837) (adopting the Habeas Corpus Act of 1679).

²³ Delaware, New Jersey, Connecticut, Rhode Island, and Maryland round out the Thirteen. Rhode Island had no written constitution before the Ratification. See Oaks, *supra* note 15, at 247.

²⁴ The Northwest Ordinance, art. II, codified at 1 Stat. 50 (1787).

provide a roadmap for abuse.²⁵ Initial proposals placed in Article III an outright prohibition on suspending the writ, presumably to empower federal judges in their own right.²⁶ When the rough outlines of what would become the Suspension Clause were approved, the Clause was moved to Article I to reflect its constraint on Congress's powers. The resulting text—that “[t]he 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”²⁷—tracked that of Massachusetts’ constitution and was approved seven to three. The three dissenters believed the writ should be inviolable.²⁸

Of course, all thirteen states would ratify the Constitution. While the Constitution provided an implied right of habeas corpus, it would take legislative action to provide a path for accessing the writ. Congress did not delay. Section 14 of the Judiciary Act of 1789²⁹ provided that federal district judges and justices of the Supreme Court could issue writs of habeas corpus to those incarcerated by the federal government.³⁰ Although unsettled at Ratification,³¹ the question of whether the Suspension Clause was intended to vest the federal courts with jurisdiction of their own was answered in *Ex parte Bollman*.³² The First Congress had, in the First Judiciary Act, supplied federal courts with jurisdiction to preserve the privilege gestured towards in the Suspension Clause.³³ In *Bollman*, Chief Justice Marshall suggested that the failure to do so would have violated the Suspension Clause itself.³⁴

Since that time, little has changed in the writ’s purposes. Much has changed in the way of process and limitations, however. Modern federal

²⁵ Letter from Thomas Jefferson to James Madison (July 31, 1788), in 13 THE PAPERS OF THOMAS JEFFERSON 440, 442 (Julian P. Boyd ed., 1956); see also, Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF. L. REV. 451, 463–65 (1996) (describing Anti-Federalist opposition to the Suspension Clause).

²⁶ See Neil Douglas McFeeley, *The Historical Development of Habeas Corpus*, 30 SW. L. J. 585, 595 (1976) (noting that Charles Pinckney’s plan provided for the habeas right in what was then Article VI, the section on judicial power).

²⁷ U.S. CONST. art. I, § 9, cl. 2.

²⁸ Oaks, *supra* note 15, at 248; see also Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON 438, 440 (Julian P. Boyd ed., 1955) (objecting that the Constitution lacked “the eternal and unremitting force of the habeas corpus laws”).

²⁹ Ch. 20, 1 Stat. 73, 81–82 (1789).

³⁰ *Id.* § 14. The current habeas corpus statute authorizing review of federal detention, 28 U.S.C. § 2241 (2020), flows directly from this first authorization.

³¹ Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 973–74 (1998); accord WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 113–15 (Phillip H. Nicklin ed., Portage Pub., Inc. 2011) (1825); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425, 1509–10 (1987).

³² 8 U.S. (4 Cranch) 75, 94 (1807).

³³ *Id.* at 95.

³⁴ *Id.* (“[F]or if the means [of exercising review] be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted.”).

habeas corpus petitions are brought in federal district court.³⁵ But as recently as 2009, the Court has reaffirmed that habeas must remain available so as to protect against arbitrary detentions.³⁶ The Suspension Clause ensures that, absent an “adequate and effective” alternative to habeas, the writ itself will be available.³⁷ And nowhere is “the need for collateral review is mo[re] pressing” than “[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court.”³⁸

Modern habeas corpus has, for all intents and purposes, always acted as a check on the authority of the executive to detain the individual.³⁹ “The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers.”⁴⁰ But while legislative, jurisprudential, and academic discussion of habeas corpus has largely centered on review of criminal convictions or punishments, habeas has never been so limited. Aliens have long used the Great Writ as a manner of seeking review of their detention or exclusion from the United States.

B. Immigration Proceedings & Their Limits

The power to exclude noncitizens is a hallmark of sovereignty.⁴¹ But for the first eighty years of the Republic, Congress passed just one

³⁵ 28 U.S.C. § 2241. Though statutes authorize the Supreme Court to grant habeas corpus as a matter of the Court’s original jurisdiction, the Court has not done so since 1925. *See Ex parte Grossman*, 267 U.S. 87 (1925); *cf. Felker v. Turpin*, 518 U.S. 651 (1996) (denying petitioner’s habeas claim on the merits).

³⁶ *Boumediene v. Bush*, 553 U.S. 723, 797 (2008).

³⁷ *Swain v. Pressley*, 430 U.S. 372, 381 (1977).

³⁸ *Boumediene*, 553 U.S. at 783.

³⁹ *INS v. St. Cyr*, 533 U.S. 289, 301–03 (2001), *superseded by statute*, 8 U.S.C. § 1252. (“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.”). *See, e.g., Swain*, 430 U.S. at 380 n.13 (1977); *Id.* at 386 (Burger, C.J., concurring) (“[T]he traditional Great Writ was largely a remedy against executive detention.”); *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result) (“The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.”).

⁴⁰ *Harris v. Nelson*, 394 U.S. 286, 291 (1969); *see also Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting) (“[H]abeas corpus cuts through all forms and goes to the very issue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.”).

⁴¹ *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (“As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. The power to . . . expel undesirable aliens . . . [is not] expressly affirmed by the Constitution, nevertheless exist[s] as inherently inseparable from the conception of nationality.”) (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893)); *see also Stephen H. Legomsky, Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV.

bill related to the admission or removal of aliens from the United States: The Alien Friends Act⁴² authorized the removal or exclusion of individuals “dangerous to the peace and safety of the United States.”⁴³ Since then, immigration policy and the structures used to effectuate that policy have evolved to meet new economic and political realities. Modern immigration law is “akin to a corn maze,”⁴⁴ governed by a complex web of statutes, regulations, and discretion. Much has been written on these subjects; a primer is in order nonetheless.⁴⁵

1. Historical proceedings

The Court in the *Passenger Cases*⁴⁶ confirmed that regulation of immigration was an exclusively federal subject.⁴⁷ Despite this confirmation of federal supremacy, Congress did not act in the realm of immigration until 1875.⁴⁸ In the 1880s, Congress began to exercise what would become known as its Plenary Power.⁴⁹ Starting in the *Chinese Exclusion Case*,⁵⁰ Congress’s unenumerated power to regulate the exclusion and removal of immigrants was rooted in the sovereign right of the nation to defend itself.⁵¹ While the Plenary Power has been the subject of much debate by scholars, its place in constitutional law is secure.

Removal of aliens ultimately came to be viewed as an administrative process rather than a true “legal” (in the common law sense)

255, 274 (1984).

⁴² Ch. 58, 1 Stat. 557 (1798).

⁴³ *Id.* § 1. Congress had passed the Naturalization Act of 1790, ch. 3, 1 Stat. 103. That law, however, regulated naturalization rather than immigration—a distinction of significance.

⁴⁴ *Ragbir v. Sessions*, No 18-cv-236, 2018 U.S. Dist. LEXIS 13939, at *3 (S.D.N.Y. Jan. 29, 2018), *vacated as moot*, No. 18-1595, 2019 U.S. App. LEXIS 37203 (2d Cir. July 30, 2019).

⁴⁵ The realm of exclusion, or the denial of entry into the United States, is largely beyond the scope of this Comment. The Executive enjoys even broader discretion in the area of exclusion than it does in removal, and the First Amendment has never been applied extraterritorially. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2416–23 (2018); *see also* *Kleindienst v. Mandel*, 408 U.S. 753, 769–70 (1972) (holding that plenary power authorized the Attorney General to exclude foreign nationals on the basis of their speech); *Kerry v. Din*, 576 U.S. 86, 103 (2015) (Kennedy, J., concurring in the judgment) (applying *Mandel’s* reasoning and holding). Claims regarding the exclusion of aliens on First Amendment grounds are thus unlikely to succeed.

⁴⁶ 48 U.S. 283 (1849).

⁴⁷ *Id.*

⁴⁸ *See* Act of Mar. 3, 1875, ch. 141, 5, 18 Stat. 477, 477–78; *accord* *INS v. St. Cyr*, 533 U.S. 289, 305 (2001).

⁴⁹ *See generally* Legomsky, *supra* note 41.

⁵⁰ *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889).

⁵¹ *See, e.g.*, Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1 (2010); *see also* *Curtiss-Wright*, 299 U.S. at 318. *But see also* *Arizona v. United States*, 567 U.S. 387, 416 (2012) (“The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here.”).

proceeding requiring a hearing before a court.⁵² But a constant feature of whatever process was due to an alien was the availability of habeas to challenge her removal. One judge in the Northern District of California is reported to have heard over seven thousand habeas petitions challenging the removals of mostly Asian immigrants between 1882–1890.⁵³

Frustrated with the delays such proceedings could entail, Congress elected to provide alternative forms of review. In the 1917 Immigration Act Congress strove to curb judicial review to the maximum extent possible.⁵⁴ Even so, courts continued to exercise review of exclusion and deportation orders for compliance with “fundamental principles of justice embraced within the conception of due process of law.”⁵⁵ With the passage of the Immigration and Nationality Act of 1952 (INA)⁵⁶—the backbone of modern immigration law—the government ushered in a system of administrative and judicial review based on factors such as an alien’s residence within or without the nation, the grounds for removing the alien, and principles of finality. Following the enactment of the Administrative Procedure Act (APA),⁵⁷ immigrants facing removal could seek “substantial evidence” review pursuant to the Hobbs Act of the government’s decision in a court of appeals.⁵⁸ But prior to the APA’s enactment, habeas was the exclusive avenue for an alien to challenge removal or exclusion. In 1961, Congress amended the INA to modify various substantive aspects of immigration law such as country quotas, but nothing in these amendments was intended to foreclose habeas review.⁵⁹ For the next three decades, little would change in American immigration proceedings.

⁵² See *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893).

⁵³ Christian G. Fritz, *A Nineteenth Century “Habeas Corpus Mill”: The Chinese Before the Federal Courts in California*, 32 AM. J. LEGAL HIST. 347, 348 (1988).

⁵⁴ S. Rep. No. 352, 64th Cong., 1st Sess., Vol. 2, 16 (remarking of § 17 of the Act that “[t]he last [finality] provision, while new in this particular location, is not new in the law, the courts having repeatedly held that in the cases of aliens arrested for deportation, as well as in the cases of those excluded at our ports, the decision of the administrative officers is final, and the Supreme Court having in several decisions regarded the case of the alien arrested for deportation as practically a deferred exclusion (*The Japanese Immigrant Case*, 189 U.S. 86 [(1903)]; *Pearson v. Williams*, 202 U.S. 281 [(1906)]; etc.).”).

⁵⁵ *Kwok Jan Fat v. White*, 253 U.S. 454, 458 (1920) (quoting *Tang Tun v. Edsell*, 223 U.S. 673, 681–82 (1912)).

⁵⁶ Pub. L. No. 82-414, ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

⁵⁷ Pub.L. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

⁵⁸ *Shaughnessy v. Pedreiro*, 349 U.S. 48, 50–51 (1955); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 52–53 (1950) (holding that deportation proceedings must comply with the APA to be enforceable).

⁵⁹ “[T]here is always available to an alien in custody under a deportation order the right to apply for a writ of habeas corpus for the purpose of questioning the validity of the order.” H. Rep. No. 1086, 87th Cong., 1st Sess., (1961), *reprinted in* 1961 U.S.C.C.A.N. 2950, 2974.

2. Modern immigration proceedings

Congress dramatically reformed immigration proceedings in 1996. The Antiterrorism and Effective Death Penalty Act (AEDPA)⁶⁰ and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)⁶¹ ushered in the modern system for adjudicating deportability and removal. Today, aliens who arrive or remain in the United States without authorization are subject to removal from the country,⁶² as are lawful permanent residents who become “deportable.”⁶³ A lawful permanent resident can be rendered deportable by committing any crime that: may result in a sentence of more than one year in prison; involves the transportation or possession of any controlled substance except less than thirty grams of marijuana; is defined as an “aggravated felony”; is a domestic violence offense; or is the alien’s second crime of “moral turpitude.”⁶⁴ A deportable alien is, by contrast, only made removable if the Department of Homeland Security (DHS) chooses to seek that alien’s removal and proves that the alien is in fact deportable.

To render an alien removable, the DHS serves an alien it believes to be subject to removal with a “notice to appear” for a hearing before an immigration judge employed by the Department of Justice.⁶⁵ At that proceeding, the alien may be detained pending removal, have their residency status modified, or may be released.⁶⁶ Ultimately, the immigration judge determines, based on applicable statutes and regulations, whether to issue an order of final removal against the alien. Only once such an order has been entered may DHS remove an alien.

Both the government and the alien may appeal adverse aspects of the immigration judge’s ruling to the Board of Immigration Appeals (BIA), an appellate body within the Department of Justice.⁶⁷ Further review may be sought by filing a petition for review in a court of appeals, which has discretion to grant the petition and order reconsideration of certain aspects of the decision or alternative relief.⁶⁸ Although similar to the original petition for review process first established in the 1950s,

⁶⁰ Pub. L. 104-132, 110 Stat. 1214 (April 24, 1996).

⁶¹ Div. C, Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009–546 (1996).

⁶² 8 U.S.C. § 1227(a)(1) (2020).

⁶³ *Id.* § 1227(a)(2).

⁶⁴ *Id.*

⁶⁵ *Id.* § 1229(a) (initiation of removal proceedings); 8 C.F.R. § 1240.1(a) (2020) (describing authority of Immigration Judges); *see also* 8 C.F.R. § 1003.10(a) (2020) (authorizing appointment of immigration judges).

⁶⁶ 8 C.F.R. § 1240.1(a)(1)(i)–(iv).

⁶⁷ *Id.* §§ 1003.1–1003.3 (2020).

⁶⁸ 8 U.S.C. § 1252(b); *see also* 28 U.S.C. §§ 2341–2353 (2020) (specifying procedures for exercise of jurisdiction by courts of appeals over petitions for review).

the modern process consolidates judicial review of removal into a single Article III proceeding with only a narrow set of claims subject to review therein.⁶⁹ Questions of law and constitutional questions are reviewed *de novo*, while factual determinations by an immigration judge or the BIA are reviewed for substantial evidence.⁷⁰

Because immigration hearings are not criminal in nature,⁷¹ aliens have a right to counsel, but not appointed counsel, during these proceedings.⁷² Likewise, other protections which accompany the criminal justice system are absent from the immigration context.⁷³ Although immigration proceedings are civil, recent cases have recognized the serious impact that removal can have on an alien and her family. Most notably, in *Padilla v. Kentucky*⁷⁴ the Court held that an attorney's failure to advise her client that his conviction for transporting marijuana would render him deportable could form the basis for an ineffective assistance of counsel claim.⁷⁵

Resource constraints make removing all deportable aliens impossible. Congress has authorized the executive to selectively pursue both an order of removal and the order's ultimate effectuation.⁷⁶ An alien

⁶⁹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009–546 (codified as amended in scattered sections of 8, 18, and 28 U.S.C.).

⁷⁰ 8 U.S.C. § 1252(a)(2)(D) (specifying courts of appeal may review constitutional questions and questions of law in a petition for review proceeding); 8 U.S.C. § 1252(b)(4)(B) (“[T]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.”).

⁷¹ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

⁷² 8 U.S.C. § 1362 (2020); 8 C.F.R. § 1240.3 (2020) (implementing regulation). Nearly all agree that this right is constitutional in nature. *See Reno v. Flores*, 507 U.S. 292, 306 (1993) (“[T]he Fifth Amendment entitles aliens to due process of law in deportation proceedings.”); *see also Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005) (“The right to counsel in immigration proceedings is rooted in the Due Process Clause.”); *Dakane v. U.S. Attorney General*, 399 F.3d 1269, 1273 (11th Cir. 2005) (“It is well established in this Circuit that an alien in civil deportation proceedings . . . has the constitutional right under the Fifth Amendment Due Process Clause . . . to a fundamentally fair hearing.”); *Borges v. Gonzales*, 402 F.3d 398, 408 (3d Cir. 2005) (“[T]he Fifth Amendment entitles aliens to due process of law in deportation proceedings.”) (citing *Reno*, 507 U.S. at 306); *Rosales v. Bureau of Immigr. & Customs Enforcement*, 426 F.3d 733, 736 (5th Cir. 2005) (“[D]ue process requires that [deportation hearings] be fundamentally fair”); *Brown v. Ashcroft*, 360 F.3d 346, 350 (2d Cir. 2004) (“The right . . . under the Fifth Amendment to due process of law in deportation proceedings is well established.”). The Attorney General has agreed with this consensus. *Matter of Compean*, 25 I. & N. Dec. 1 (A.G. 2009).

⁷³ For example, the *Ex Post Facto* Clause, U.S. CONST. art. I, § 9, cl. 3, does not apply to immigration proceedings: Congress may pass laws that retroactively render aliens deportable for offenses that, at the time of conviction, could not have led to deportation. *See Galvan v. Press*, 347 U.S. 522, 531 (1954) (“And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation.”).

⁷⁴ 559 U.S. 356 (2010).

⁷⁵ *Id.* at 374; *see* 8 U.S.C. § 1227(a)(2)(B)(i) (classifying aliens convicted “of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance” as deportable).

⁷⁶ *See* INA § 241 (codified at 8 U.S.C. § 1231(c)(2)(A)(i)) (authorizing the Attorney General to

against whom an order of final removal has been entered may request a stay of removal.⁷⁷ A 2017 article suggests that nearly one million individuals are present in the United States despite the fact that ICE has obtained a final order of removal against them.⁷⁸ Regardless of whether these aliens' removals have been formally stayed through the processes set forth in law, their continued presence is the result of ICE's discretion⁷⁹: No statute provides for judicial review of the decision to grant, deny, or terminate a stay of removal.⁸⁰ Because a stay of removal is entered only after the issuance of an order of final removal, there is frequently nothing left for a court to review. The result is that current federal law operates—contrary to reality—as if the entry of an order of final removal is tantamount to execution of that order.⁸¹

3. Collateral review of immigration proceedings

The broad power of Congress to define the substantive bases for excluding or removing immigrants did nothing “which in any manner affect[ed] the jurisdiction of the courts of the United States to issue a writ of *habeas corpus*.”⁸² “We know that at common law a petitioner’s status as an alien was not a categorical bar to habeas corpus relief.”⁸³ In 1892, the Court affirmed that “[a]n alien immigrant, prevented from landing . . . is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful.”⁸⁴

stay the removal of an alien if removal “is not practicable or proper”); *see also* Clark v. Suarez Martinez, 543 U.S. 371, 374 n.1 (2005) (stating that, pursuant to 6 U.S.C. §§ 251(2), 252(a)(3), 271(b), the Secretary of Homeland Security now has the authority to stay removals originally delegated by Congress in § 241 of the INA to the Attorney General).

⁷⁷ 8 C.F.R. § 241.6 (2020) (“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 [of ICE] having jurisdiction over the place where alien is at the time of filing.”); *see also* *Id.* § 212.5 (2020) (listing factors ICE should consider in whether to grant a stay); *accord* 8 U.S.C. § 1231(c)(2)(A).

⁷⁸ Vivian Yee, *Migrants Confront Judgment Day over Old Deportation Orders*, N.Y. TIMES (Mar. 4, 2017), <https://www.nytimes.com/2017/03/04/us/migrants-facing-old-deportation-orders.html> [<https://perma.cc/65XW-REXF>].

⁷⁹ *Id.*

⁸⁰ 8 U.S.C. § 1252(g); *see also* *infra* Part III.

⁸¹ 8 U.S.C. § 1231(a)(1)(A) (“Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the ‘removal period’).”).

⁸² *United States v. Jung Ah Lung*, 124 U.S. 621, 628–29 (1888).

⁸³ *Boumediene v. Bush*, 553 U.S. 723, 747 (2008); *see, e.g.,* *Sommersett v. Stewart* (*Sommersett’s Case*), 20 How. St. Tr. 1, 80–82 (1772) (ordering an African slave freed upon finding the custodian’s return insufficient). *See generally* *Khera v. Sec’y of State for the Home Dept.*, [1984] A.C. 74, 111 (H.L.) (“Habeas corpus protection is often expressed as limited to ‘British subjects.’ Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic ‘no’ to the question.”).

⁸⁴ *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892); *see also* *United States v. Jung Ah Lung*, 124 U.S. 621 (1888) (affirming district court’s use of habeas corpus to review an immigrant’s long-term detention aboard a ship of voyage in San Francisco harbor).

This remained the case for over a century. In two landmark cases involving the power of the federal judiciary to review the exclusion of aliens from the United States, the Court declined to provide the aliens with relief. In *United States ex rel. Knauff v. Shaughnessy*,⁸⁵ the Court declined to require the Attorney General to admit Knauff, a war bride.⁸⁶ Knauff filed a habeas petition challenging her exclusion on the grounds that “her admission would be prejudicial to the interests of the United States.”⁸⁷ The Attorney General declined to provide any basis for that conclusion, and the Court said he was not required to do so.⁸⁸ Three years later in *Shaughnessy v. United States ex rel. Mezei*,⁸⁹ the Court held that a noncitizen indefinitely detained because no other country would accept him could not compel his admission to the United States.⁹⁰ Despite Mezei’s functional imprisonment on Ellis Island, the Court held that the refusal of other countries did not affect the unfettered discretion afforded to the Attorney General to make determinations regarding the admissibility of noncitizens.⁹¹

But in both cases the Court reached the merits. Nowhere in either opinion did the Court consider that the Plenary Power precluded judicial consideration of the immigrants’ habeas petitions. The *substantive discretion* enjoyed by the executive did not minimize the *procedural protections* afforded by habeas corpus. Whether the immigrants could win relief on the merits was discrete from the method of challenging their predicaments. And even where Congress curtailed the extent of judicial review over immigration decisions, habeas remained available. In *Heikila v. Barber*,⁹² the Court concluded that, stripped of all jurisdiction other than that “required by the Constitution,” habeas remained because some possibility of “judicial intervention in deportation cases” is necessary.⁹³ In fact, until 1952 “the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court.”⁹⁴

Seeking to streamline the process for removing aliens, Congress enacted the Immigration and Nationality Act.⁹⁵ But the 1961

⁸⁵ 338 U.S. 537 (1950).

⁸⁶ *Id.* This uncomfortable phraseology comes from statute. See War Brides Act of 1945, Pub. L. No. 79-271, 59 Stat. 659.

⁸⁷ *Knauff*, 338 U.S. at 539.

⁸⁸ *Id.* at 544–45.

⁸⁹ 345 U.S. 206 (1953).

⁹⁰ *Id.* at 213.

⁹¹ *Id.* at 213–15.

⁹² 345 U.S. 229 (1953).

⁹³ *Id.* at 235.

⁹⁴ *INS v. St. Cyr*, 533 U.S. 289, 306 (2001).

⁹⁵ Pub. L. No. 82-414, ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections

amendments to the Immigration and Nationality Act ensured that the right of aliens to access habeas corpus was provided for by statute.⁹⁶ This status quo remained for the better part of four decades.

First enacted by IIRIRA, 8 U.S.C. § 1252(g) originally provided that:

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 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.⁹⁷

That text was ambiguous as to whether it precluded jurisdiction over constitutional as well as statutory claims. Courts of appeals were nearly unanimous that the efforts in AEDPA and IIRIRA to strip courts of jurisdiction did not extend to habeas corpus.⁹⁸ And in 2001 the Supreme Court agreed: nothing in IIRIRA or AEDPA did anything to limit the jurisdiction of district courts over aliens' petitions for habeas corpus if existing avenues, such as a petition for review, were foreclosed.⁹⁹

Congress responded. Section 106 of the REAL ID Act of 2005¹⁰⁰ aimed to eliminate habeas review of the government's "'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'"¹⁰¹ The modern, post-REAL ID Act text of § 1252(g) reads:

Except as provided in this section and notwithstanding any other provision of law (*statutory or nonstatutory*), *including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title*, no court

of 8 U.S.C.).

⁹⁶ 75 Stat. 651, 652 (1961), codified at 8 U.S.C. § 1105a(10) (repealed 1996).

⁹⁷ Pub. L. 104-208, 110 Stat. 3009, 3612.

⁹⁸ See *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998); *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999); *Bowrin v. INS*, 194 F.3d 483 (4th Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299 (5th Cir. 1999); *Pak v. Reno*, 196 F.3d 666 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719 (8th Cir. 1999); *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135 (10th Cir. 1999) (as amended upon denial of rehearing en banc); *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999). The lone dissenting circuit was the Seventh. *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998).

⁹⁹ *INS v. St. Cyr*, 533 U.S. 289, 314 (2001). Although *St. Cyr* did not address § 1252(g) directly, it did address other subsections of § 1252 with identical language.

¹⁰⁰ Pub. L. No. 109-13, 119 Stat. 302 (2005).

¹⁰¹ Real ID Act § 106 adds a new subsection, (a)(5) to 8 U.S.C. § 1252: "Notwithstanding any other provision of law (statutory or non-statutory), including [habeas, mandamus, and All Writs Act] . . . a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter."

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.¹⁰² (2005 additions italicized).

The legislative history of § 106 makes clear that Congress’s intent was to provide the clear statement the Court said was lacking from the earlier language in *St. Cyr*.¹⁰³ Courts construing § 106 recognized that the continued ability of an immigrant to seek review of certain aspects of an immigration judge’s decision—questions of law and constitutional claims¹⁰⁴—in the Courts of Appeals ensured that an adequate substitute to habeas corpus remained.¹⁰⁵

To take stock: habeas corpus in the United States has traditionally been understood to protect against unlawful executive detentions,¹⁰⁶ regardless of citizenship.¹⁰⁷ Aliens frequently—and, for nearly a century, exclusively—used habeas corpus to challenge their removal from the United States.¹⁰⁸ Frustrations with the delays such review brought led Congress to consolidate review in administrative agencies and, in meritorious cases, the courts of appeals. Simultaneously, Congress dramatically expanded the number of otherwise lawfully present aliens subject

¹⁰² The meaning of “nonstatutory” is unclear. The Second Circuit concludes that “nonstatutory” means “constitutional.” *Ragbir v. Homan*, 923 F.3d 53, 66 (2d Cir. 2019). (“[W]e are aware of no ‘nonstatutory’ claim that a petitioner could bring in relation to a deportation proceeding other than one rooted in the Constitution.”). The Ninth Circuit disagrees: in *Arce v. United States*, that court concluded that § 1252(g) did not preclude jurisdiction over a habeas claim brought by an alien who had been removed in violation of a judicial order staying his removal, suggesting that the inherent power of a court exceeds statutory and nonstatutory grants. 899 F.3d 796, 799–801 (9th Cir. 2018).

¹⁰³ 151 CONG. REC. 8393 (2005); see also *Strengthening Interior Enforcement: Deportation and Related Issues: Joint Hearing Before the Subcomms. on Immigr., Border Sec. & Citizenship and Terrorism, Tech. & Homeland Sec. of the S. Comm. Of the Judiciary*, 109th Cong. 1 (2005); Paul Diller, *Habeas and (Non-) Delegation*, 77 U. CHI. L. REV. 585, 615 (2010) (confirming that the REAL ID Act had been passed in direct response to *St. Cyr*); H.R. REP. NO. 109-72, at 175 (2005), reprinted in 2005 U.S.C.C.A.N. 240, 300 (Conference Report on the REAL ID Act seeking to avoid the constitutional concerns presented in *St. Cyr* regarding the complete suspension of habeas corpus for immigrants).

¹⁰⁴ 8 U.S.C. § 1252(a)(2)(D).

¹⁰⁵ See, e.g., *Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 114 (2d Cir. 2008); *Mohamed v. Gonzales*, 477 F.3d 522, 526 (8th Cir. 2007); *Puri v. Gonzales*, 464 F.3d 1038, 1041 (9th Cir. 2006); *Alexandre v. Attorney General*, 452 F.3d 1204, 1206 (11th Cir. 2006).

¹⁰⁶ *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring).

¹⁰⁷ Cases arising from the United States’ detention of suspected terrorists at Guantanamo Bay Naval Base reaffirmed the traditional understanding that, because a writ of habeas corpus was directed against the jailer on the detainee’s behalf, an issuing court’s jurisdiction over the jailer—not the detainee—is the paramount question in determining the jurisdictional power of a court to issue the writ. See generally *Rasul v. Bush*, 542 U.S. 466 (2006), superseded by statute, Pub. L. No. 109-148, div. A, title X, 119 Stat. 2680, 2739-44 (2005); *Boumediene v. Bush*, 553 U.S. 723 (2008).

¹⁰⁸ *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (“[S]ome judicial intervention in deportation cases is unquestionably required by the Constitution.”) (internal quotation marks and citation omitted).

to removal on the basis of criminal convictions. But, facing resource limitations, the executive must decide against whom it should seek a removal order. Those constraints become even more acute when it comes to effectuating such orders. Thus, those ultimately removed¹⁰⁹ from the United States are done so only after ICE takes two affirmative steps: 1) the initiation of proceedings; and 2) the effectuation of removal. But the decision gap between the branches taking those steps creates unfettered, unreviewable discretion.

C. Retaliation

“As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹¹⁰ Thus, “as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions” for engaging in protected speech.¹¹¹ This protection is not limited to the realm of criminal prosecutions but extends to all manner of governmental benefits or punishments.¹¹²

1. Modern doctrine

The earliest causes of action for unlawful arrest stemmed from the common law tort equivalent of false imprisonment.¹¹³ “At common law, false imprisonment arose from a ‘detention without legal process,’ whereas malicious prosecution was marked ‘by *wrongful institution of legal process.*’”¹¹⁴ The presence of probable cause was generally a complete defense for peace officers to a claim of false imprisonment.¹¹⁵ Two

¹⁰⁹ This analysis excludes the vast number of individuals removed pursuant to “expedited removal.” Expedited removal is available against certain categories of recently-arrived aliens who are incapable of demonstrating long-term presence within the United States—generally those apprehended near the border.

¹¹⁰ *United States v. Alvarez*, 567 U.S. 709, 716 (2012) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)).

¹¹¹ *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (citing *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998)).

¹¹² *Perry v. Spinderman*, 408 U.S. 593, 597 (1972) (“[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.”).

¹¹³ *Wheeler v. Nesbitt*, 65 U.S. 544, 549–50 (1861) (noting that “[w]ant of reasonable and probable cause” is an “element in the action for a malicious criminal prosecution”); *see also* RESTATEMENT OF TORTS § 653 (AM. LAW INST. 1938).

¹¹⁴ *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019) (quoting *Wallace v. Kato*, 549 U.S. 384, 389–90 (2007)).

¹¹⁵ *See* THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS, OR, THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 175 (Chicago, Callaghan 1880); 1 F. HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 207–08 (Boston, Little, Brown & Co. 1859).

cases undergird modern First Amendment retaliation doctrine and define in what circumstances that general presumption might be overcome: *Mt. Healthy City School District Board of Education v. Doyle*¹¹⁶ and *Hartman v. Moore*.¹¹⁷

Fred Doyle sued the Mt. Healthy, Ohio school board after his teaching contract was not renewed, he alleged, because of his comments on school policy to a local radio program.¹¹⁸ The board countered, arguing that Doyle would have been let go due to unrelated workplace problems regardless of his radio appearance.¹¹⁹ The Supreme Court concluded that even though Doyle had shown that his statements were one of the factors which led to his termination, he had not shown that they were the but-for cause of his termination.¹²⁰ But, because of his initial showing that his conduct was protected First Amendment activity and that the board considered that conduct during their decision making, the Court remanded so that the district court could allow the Board to show by a preponderance of the evidence that Doyle's employment would have been discontinued irrespective of his protected conduct.¹²¹

In *Hartman*, William Moore was indicted for various violations of federal lobbying laws stemming from his advocacy against the implementation of ZIP+4 by the postal service.¹²² After his acquittal—in which the district court remarked that there was a “complete lack of direct evidence” against the defendants¹²³—Moore filed suit against five postal inspectors and the charging Assistant United States Attorney alleging they had instigated and undertaken the prosecution in response to Moore's criticisms of the Postal Service.¹²⁴

Hartman posed a problem not present in *Mt. Healthy's* civil context: the arresting officer and the prosecutor are almost never the same person. Thus, the retaliatory animus of the officer may be irrelevant to the prosecutor's decision to charge a suspect. And because prosecutors enjoy absolute immunity,¹²⁵ the crux of a retaliatory prosecution claim is that

¹¹⁶ 429 U.S. 274 (1977).

¹¹⁷ 547 U.S. 250 (2006).

¹¹⁸ *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 281–83 (1977).

¹¹⁹ Brief for Respondent at *6, *Mt. Healthy*, 429 U.S. 274 (No. 75-1278).

¹²⁰ *Mt. Healthy*, 429 U.S. at 287.

¹²¹ *Id.*

¹²² *Hartman v. Moore*, 547 U.S. 250, 252 (2006). Although irrelevant, the nature of the dispute is fascinating: Moore's company produced multiline optical scanners which would have been rendered obsolete to his largest customer, the Postal Service, had ZIP+4 become the norm; it obviously has not. Ironically, Moore's company did not receive a renewed contract for multiline readers.

¹²³ *United States v. Recognition Equip. Inc.*, 725 F. Supp. 587, 596 (D.D.C. 1989).

¹²⁴ *Hartman*, 547 U.S. at 254.

¹²⁵ *Imbler v. Pachtman*, 424 U.S. 409 (1976). Absolute prosecutorial immunity is a longstanding feature of common law. See *Bradley v. Fisher*, 80 U.S. 335 (1872) (first recognizing absolute prosecutorial immunity); accord *Floyd v. Barker*, 12 Coke 23, 77 Eng. Rep. 1305 (1608) (early

the arrestor exerted improper influence over the prosecutor—that there is a nexus between the two. In *Hartman* the court held that “[a] plaintiff alleging a retaliatory prosecution must show the absence of probable cause for the underlying criminal charge.”¹²⁶ “If the plaintiff proves the absence of probable cause, then the *Mt. Healthy* test governs: The plaintiff must show that the retaliation was a substantial or motivating factor behind the prosecution, and, if that showing is made, the defendant can prevail only by showing that the prosecution would have been initiated without respect to retaliation.”¹²⁷ By requiring plaintiffs alleging retaliatory prosecution to plead and prove that probable cause—the nexus—did not exist, the Court protected the prosecutor’s prerogative while preserving an avenue for relief.¹²⁸

Having addressed the civil and prosecutorial contexts, it was inevitable that the Court would be asked to address what standard applied when individuals alleged retaliatory arrest. The first two cases to present this question were met with artful dodges.

At a shopping mall in Beaver Creek, Colorado, Vice President Dick Cheney was confronted by Steven Howards who was, simply put, not a fan.¹²⁹ Secret Service agents assigned to the Vice President’s detail overheard Howards remark that he planned to ask the Vice President “how many kids he’[d] killed” that day.¹³⁰ While confronting the Vice President, Howards allegedly placed his hand on the Vice President’s shoulder.¹³¹ After a brief investigation, Agent Gus Reichle arrested Howards¹³²—the state harassment and assault charges against him were ultimately dismissed.¹³³ Nevertheless, Howards sued Reichle and his colleagues, alleging their decision to arrest him was in retaliation for his statements about the Vice President.¹³⁴

Although presented with an opportunity to establish a standard for determining what a plaintiff must prove to show a retaliatory arrest, the Court dodged in *Reichle v. Howards*.¹³⁵ The Tenth Circuit below had held that the agents were not entitled to qualified immunity for their

recognition of the immunity); *Yates v. Lansing*, 5 Johns. 282, 291–96 (N.Y. 1810) (tracing history of the immunity).

¹²⁶ *Lozeman v. City of Riviera Beach*, 138 S. Ct. 1945, 1947 (2018) (citing *Hartman*, 547 U.S. at 265–66).

¹²⁷ *Id.*

¹²⁸ After nearly a decade of further proceedings, Moore finally lost his case against the inspectors at trial. *Moore v. Hartman*, 102 F. Supp. 3d 35 (D.D.C. 2015).

¹²⁹ *Reichle v. Howards*, 566 U.S. 658, 660 (2012).

¹³⁰ *Id.*

¹³¹ *Id.* at 661.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 662.

¹³⁵ 566 U.S. 658 (2012).

conduct as it related to Howards' First Amendment claim.¹³⁶ In a unanimous opinion, the Court, perhaps tautologically, concluded that because it was not established that a retaliatory arrest unsupported by probable cause amounted to a constitutional violation—the dodged question—the agents were entitled to qualified immunity.¹³⁷ And since answering that question was enough to reverse, the Court chose that path of least resistance.¹³⁸

Five months after Steven Howards was arrested, Fane Lozman was, too.¹³⁹ But it would take until 2018 for the Court to be presented with Lozman's case and, with it, a second opportunity to resolve the unanswered question from *Reichle*.

A longtime critic of his local government, Lozman was arrested at a city council meeting when he refused to vacate the podium.¹⁴⁰ This arrest was only the latest in a series of actions taken by the city against Lozman: He was fined for failing to muzzle his dachshund (who had no history of misbehavior) and was sued by the city in admiralty in a dispute arising from his houseboat.¹⁴¹ In a now-familiar pattern, Lozman sued.

Recognizing the long history of animosity between Lozman and his local government, the Court concluded that Lozman's arrest was no ordinary arrest.¹⁴² Unlike in *Reichle* where the arrest comprised the totality of the interaction between the citizen and the government, Lozman's saga with the City spanned years.¹⁴³ Moreover, transcripts from prior city council meetings showed that council members sought to use City resources to "intimidate" Lozman.¹⁴⁴ Unlike in *Reichle*, then, Lozman's beef was not with the officer who arrested him, but with the council who ordered him arrested pursuant to their policy of retaliation.¹⁴⁵ "On facts like these, *Mt. Healthy* provides the correct standard for

¹³⁶ *Howards v. McLaughlin*, 634 F.3d 1131, 1149 (10th Cir. 2011).

¹³⁷ *Reichle*, 566 U.S. at 669–71.

¹³⁸ *Id.* at 663 ("If the answer to either question is 'no,' then the agents are entitled to qualified immunity. We elect to address only the second question.")

¹³⁹ Compare *McLaughlin*, 634 F.3d at 1135 (noting date of Howards' arrest as June 16, 2006), with *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1950 (2018) (citing Def.'s Ex. 505, Doc. 687) (noting date of Lozman's arrest as November 2006).

¹⁴⁰ *Lozman*, 138 S. Ct. at 1949–50.

¹⁴¹ *City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel, Approximately Fifty-Seven Feet In Length*, 649 F.3d 1259, 1263 (11th Cir. 2011) (noting that the dachshund in question—Lady—was, by all accounts, a very good girl). That libel gave rise to Lozman's first victory in the Supreme Court. See *Lozman v. City of Riviera Beach*, 568 U.S. 115 (2013).

¹⁴² *Lozman v. City of Riviera Beach*, 138 S. Ct. 1949 (2018).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1954 ("Instead Lozman alleges more governmental action than simply an arrest. His claim is that the City itself retaliated against him pursuant to an official municipal policy of intimidation") (internal quotation marks and citation omitted).

assessing a retaliatory arrest claim.”¹⁴⁶ The Court remanded the case to apply *Mt. Healthy* and afford the City the opportunity to prove that Lozman’s conduct was not the but-for cause of his arrest, thus leaving the question presented—whether a claim of retaliatory arrest is defeated as a matter of law by the presence of probable cause for the arrest—unanswered yet again.¹⁴⁷

2. The *Nieves* standard

Russell Bartlett’s enjoyment of Arctic Man—the subarctic bacchanal which descends upon Paxson, Alaska, each spring—was cut short when he was arrested by Trooper Luis Nieves on April 13, 2014.¹⁴⁸ The two men had previously encountered one another earlier that day when a well-lubricated Bartlett began shouting at neighboring partiers to not talk to Nieves, who was asking them to place their keg inside their RV. Nieves and Bartlett exchanged words, then parted.¹⁴⁹ Their separation was not long for this world.

Later that evening, a second trooper was questioning two individuals when Bartlett reappeared, carrying with him his message of non-compliance.¹⁵⁰ After observing the second trooper push Bartlett away, Nieves rushed over and arrested Bartlett.¹⁵¹ During the course of the arrest, Nieves purportedly said to Bartlett, “bet you wish you had talked to me now.”¹⁵² And while the charges against him were ultimately dropped, Bartlett sued, alleging the arrest was retaliatory.¹⁵³ After his grant of summary judgment was reversed by the Ninth Circuit, Trooper Nieves sought certiorari from the Supreme Court.¹⁵⁴

In a 2019 opinion for himself and four others, Chief Justice Roberts concluded that the existence of probable cause to arrest Bartlett defeated his claim as a matter of law. Drawing on *Mt. Healthy* and *Hartman*, the Court held that probable cause will defeat most claims but that “objective evidence that [the plaintiff] was arrested when otherwise similarly situated individuals not engaged in the same sort of

¹⁴⁶ *Id.* at 1955.

¹⁴⁷ *Id.* at 1954 (“Whether in a retaliatory arrest case the *Hartman* approach should apply, thus barring a suit where probable cause exists, or, on the other hand, the inquiry should be governed only by *Mt. Healthy* is a determination that must await a different case.”).

¹⁴⁸ *Bartlett v. Nieves*, No. 4:15-cv-00004-SLG, 2016 U.S. Dist. LEXIS 87805 at *1–2 (D. Alaska July 17, 2016).

¹⁴⁹ *Nieves v. Bartlett*, 139 S. Ct. 1715, 1720 (2019).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1720–21.

¹⁵² *Id.* at 1721 (citing *Bartlett v. Nieves*, 712 F. App’x 613, 616 (9th Cir. 2017)) (cleaned up).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

protected speech had not been” may allow such claims to go forward.¹⁵⁵ Thus, a jaywalker who is arrested may be able to sustain his burden, but the protestor in a crowd will not, particularly because “protected speech is often a ‘wholly legitimate consideration’ for officers when deciding whether to make an arrest.”¹⁵⁶ But for that rare case where an individual can provide objective evidence that he was arrested while individuals similarly situated but for their silence were not, the *Mt. Healthy* standard governs.¹⁵⁷

3. In immigration

Neither the First nor Fifth Amendment “acknowledge[] any distinction between citizens and resident aliens.”¹⁵⁸ Nor does either recognize the distinction between those lawfully and unlawfully present.¹⁵⁹ But the ability of aliens to enforce those rights is not identical to that of their citizen peers.

The Court first addressed a claim of retaliatory removal in 1904.¹⁶⁰ After delivering a speech in New York City calling for general labor strikes, John Turner was arrested and detained on Ellis Island pending deportation for being an anarchist. The Court held that no First Amendment violation had taken place because Turner would be free to speak somewhere else following his deportation.¹⁶¹ During the Cold War the

¹⁵⁵ *Id.* at 1727.

¹⁵⁶ *Id.* at 1724 (internal quotation marks and citation omitted). That protected speech may be a legitimate consideration in a context such as a riot does not render it legitimate in the immigration context. A rabbleroising demonstrator who fails to disperse may be deemed more likely to escalate a situation because of her protected speech. But an immigration activist who is subjected to removal proceedings explicitly because of her anti-ICE rhetoric poses no such risk of escalation in a heated situation. And, unlike local law enforcement, ICE’s Enforcement and Removal Operations officers are not tasked with maintaining public order at a demonstration.

¹⁵⁷ *Id.* at 1725 (citing *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1952 (2018)).

¹⁵⁸ *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (Murphy, J., concurring)). *But see also* Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237 (2016).

¹⁵⁹ *Zadvydas v. Davis*, 533 U.S. 678, 693–94 (2001). The Department of Justice in 2015 filed a brief in a class action against the Department of Homeland Security which argued that aliens unlawfully present in the United States are not protected by the First Amendment. *See* Federal Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction at 11–13, *Pineda-Cruz v. Thompson*, No. 15-cv-00326, 2015 WL 3922298 (W.D. Tex. May 7, 2015). The outcome of that case did not turn on whether aliens unlawfully present were, in fact, protected by the First Amendment. *See* Dkt. 54, Notice of Voluntary Dismissal, *Pineda-Cruz*, 15-cv-00326 (W.D. Tex. Sept. 9, 2015). The government cites as authority for that proposition a published district court opinion, but that case addressed whether a nonresident noncitizen could claim the protections of the First Amendment in a defamation action against him. *See Hoffman v. Bailey*, 996 F. Supp. 2d 477 (E.D. La. 2014).

¹⁶⁰ *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904) (argued by Clarence Darrow and future Justice James Clark McReynolds).

¹⁶¹ *Id.* at 292.

Court sanctified the deportation of Communists¹⁶² and former Communists.¹⁶³ And in *Kleindienst v. Mandel*¹⁶⁴ the Court permitted exclusion of a Belgian socialist despite recognizing that it would prevent resident citizens from hearing his message.¹⁶⁵

But the seminal case in the area of selective removal is *Reno v. American-Arab Anti-Discrimination Committee (AADC)*.¹⁶⁶ Eight members of the Popular Front for the Liberation of Palestine—then a terrorist organization in the eyes of the federal government¹⁶⁷—faced deportation because, according to the FBI Director, of their First Amendment activity.¹⁶⁸ Rejecting their challenge, the Supreme Court in 1999 held that “an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.”¹⁶⁹ Selective prosecution claims in the criminal context “invade a special province of the Executive—its prosecutorial discretion.”¹⁷⁰ Those alleging selective prosecution must introduce clear evidence to displace “the presumption that a prosecutor has acted lawfully.”¹⁷¹ Moreover, “[e]xamining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy.”¹⁷²

Unlike in the context of criminal law enforcement where constitutional challenges merely “postpone the criminal’s receipt of his just deserts [sic],” selective-enforcement challenges in the deportation context “permit and prolong a continuing violation of United States law.”¹⁷³ The mere unlawful presence of the alien in the United States for the duration of the challenge, in other words, is a sufficient justification for the government to remove the alien.

¹⁶² *Harisiades v. Shaughnessy*, 342 U.S. 580, 594–96 (1952).

¹⁶³ *Galvan v. Press*, 347 U.S. 522, 531–32 (1954).

¹⁶⁴ 408 U.S. 753 (1972).

¹⁶⁵ *Id.* at 760–70.

¹⁶⁶ 525 U.S. 471 (1999) [hereinafter *AADC*].

¹⁶⁷ *Id.* at 473.

¹⁶⁸ *Hearings before the Senate Select Comm. on Intel. on the Nomination of William H. Webster, to be Dir. of Cent. Intel.*, 100th Cong. 95 (1987) (“[A]ll of them were arrested because they are alleged to be members of a world-wide Communist organization which under the McCarran Act makes them eligible for deportation . . . [I]n this particular case if these individuals had been United States citizens, there would not have been a basis for their arrest.”).

¹⁶⁹ *AADC*, 525 U.S. at 488.

¹⁷⁰ *Id.* at 489.

¹⁷¹ *Id.* (citing *United States v. Armstrong*, 517 U.S. 456, 463–64 (1996)).

¹⁷² *Id.* at 490 (quoting *Wayte v. United States*, 470 U.S. 598, 607–08 (1985)).

¹⁷³ *Id.*

Moreover, as was particularly the case in *AADC* (and *Knauff* and *Mezei*, too), inquiry into the motives of immigration officials may result in “the disclosure of foreign-policy objectives and (as in this case) foreign-intelligence products and techniques.”¹⁷⁴ And although “the consequences of deportation may assuredly be grave, they are not imposed as a punishment,” “the contention that a violation must be allowed to continue because it has been improperly selected is not powerfully appealing.”¹⁷⁵ The Court did not, however, foreclose lower courts from hearing habeas corpus petitions in the “rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome,” but it offered no guidance as to what “outrageous” might be.¹⁷⁶

III. RETALIATORY DISCRETION: THE CASE OF RAVIDATH RAGBIR

One scholar has catalogued at least a dozen instances in which a high-profile immigration activist has been subject to removal proceedings,¹⁷⁷ and there is reason to believe that count is underinclusive.¹⁷⁸ One case in particular has teed up the question of whether an Article III court can consider claims of retaliatory deportation through habeas corpus.

Admitted to the United States as a lawful permanent resident in 1994, Ravidath Ragbir was convicted of federal wire fraud in 2001.¹⁷⁹ Like many aliens convicted of federal crimes, his conviction rendered him eligible for deportation¹⁸⁰ from the United States because both of his crime of conviction is an “aggravated felonies” under the Immigration and Nationality Act.¹⁸¹ After his conviction was affirmed,¹⁸² his

¹⁷⁴ *Id.* at 491.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Jason A. Cade, *Judicial Review of Disproportionate (or Retaliatory) Deportation*, 75 WASH. & LEE L. REV. 1427, 1443–45 (2018).

¹⁷⁸ That survey measured until March 2018. *See id.* at 1445 n.95.

¹⁷⁹ *Ragbir v. Homan*, 923 F.3d 53, 58 (2d Cir. 2019), *vac'd sub nom. Pham v. Ragbir*, No. 19-1046, 2020 WL 5882107 (U.S. Oct. 5, 2020). All facts here are portrayed in the light most favorable to Ragbir partially for demonstrative purposes, but also because that is the light in which reviewing courts have viewed them. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

¹⁸⁰ 8 U.S.C. § 1227(a)(2)(A)(iii) (authorizing removal of those aliens convicted of aggravated felonies, defined at 8 U.S.C. § 1101(a)(43)(M) to include frauds involving a loss of greater than \$10,000); *see also* 8 C.F.R. § 1001.1(p) (cancelling lawful permanent resident status for those against whom a final order of removal has been entered).

¹⁸¹ 8 U.S.C. § 1101(a)(43)(M)(i) (defining “aggravated felonies”). It is worth noting that the list of “aggravated felonies” has grown substantially over time. This growth is particularly concerning because it renders more aliens potentially deportable, but as described *supra* Part III.B.2, the government enjoys discretion as to against whom it will pursue immigration proceedings.

¹⁸² *United States v. Ragbir*, 38 F. App'x 788, 794 (3d Cir. 2002).

petition for certiorari denied,¹⁸³ and his 30-month sentence completed, the government sought and obtained an order of final removal against Ragbir.¹⁸⁴ Challenges to that order were fruitless.¹⁸⁵

Like many undocumented aliens, Ragbir was not removed. For nearly a decade Ragbir benefited from this discretion: On four occasions between 2011 and 2018, ICE granted Ragbir administrative stays of removal. During the period of these stays, Ragbir was required to check in with immigration officials and refrain from illegal conduct.¹⁸⁶ While enjoying ICE's grace, Ragbir became an outspoken critic of American immigration policy.¹⁸⁷ This criticism drew significant media coverage.¹⁸⁸

In January 2018 Ragbir's lawyers began meeting with the Deputy Director of ICE's New York office—Scott Mechkowski—to discuss renewing Ragbir's stay of removal. During one meeting, Mechkowski told Ragbir's counsel that he had met with Jean Montrevil—with whom Ragbir had co-founded an immigration-rights group—and told him, “Jean, from me to you . . . you don't want to make matters worse by saying things.”¹⁸⁹ Montrevil was deported by ICE a short time later.¹⁹⁰ During that same conversation with Ragbir's counsel, Mechkowski remarked that “there isn't anybody in this entire building that doesn't . . . know about [Ragbir].”¹⁹¹ At a follow-up meeting four days later, Mechkowski stated that he felt “resentment” about a protest Ragbir had led against ICE in 2017.¹⁹² Three days later, Mechkowski informed Ragbir at a face-to-face meeting that his application for a renewal of his stay was denied and that his stay was being terminated prematurely.¹⁹³ Ragbir was arrested and flown to Florida for deportation that afternoon.¹⁹⁴ Meanwhile Ragbir's counsel filed a habeas petition in the Southern District of New York which was ultimately granted

¹⁸³ *Ragbir v. United States*, 537 U.S. 1089 (2002).

¹⁸⁴ *Ragbir*, 923 F.3d at 58.

¹⁸⁵ *Ragbir v. Holder*, 389 F. App'x 80, 85 (2d Cir. 2010); *Ragbir v. Lynch*, 640 F. App'x 105, 108 (2d Cir. 2016); *Ragbir v. Barr*, No. 18-1595, 2019 U.S. App. LEXIS 37203, at *3 (2d Cir. July 30, 2019); *Ragbir v. United States*, No. 17-1256, 2019 U.S. Dist. LEXIS 13236, at *85–86 (D.N.J. Jan. 25, 2019), *appeal pending*, No. 19-1282 (3d Cir. 2019) (stay of judgment pending appeal denied Feb. 27, 2019).

¹⁸⁶ Pursuant to 8 C.F.R. § 212.5(d), immigration officials “may require reasonable assurances” that an alien whose removal has been stayed will make any required appearances and will “depart the United States when required to do so.”

¹⁸⁷ *Ragbir*, 923 F.3d at 59.

¹⁸⁸ *See id.* at 59 n.8; *see also*, Cade, *supra* note 177, at 1444 n.91.

¹⁸⁹ *Ragbir*, 923 F.3d at 60 (citation omitted).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* (citation omitted).

¹⁹² *Id.* (citation omitted).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

on the basis that Ragbir's immediate detention and removal violated his due process rights to an orderly departure.¹⁹⁵ Ragbir then filed a lawsuit seeking declaratory and injunctive relief against a litany of ICE officials, alleging that the decision to remove him was in retaliation for his First Amendment conduct.¹⁹⁶

The district court concluded that it lacked jurisdiction over Ragbir's claims as a result of § 1252(g).¹⁹⁷ Because the response to Ragbir's conduct did not fall within the "outrageous" discrimination exception to the general rule set forth in *AADC*, *he was not entitled to challenge his removal*.¹⁹⁸ It thus avoided the Suspension Clause question and dismissed the case.

Not so, said the Second Circuit.¹⁹⁹ The Second Circuit concluded that (a) § 1252(g) precludes judicial review of the decision to terminate or deny a stay and (b) that constitutional claims are "nonstatutory" under that subsection.²⁰⁰ The court thus proceeded to determine whether *AADC* foreclosed Ragbir's claim of retaliatory removal.²⁰¹ It did not: Because Ragbir was previously a lawful resident, his removal was "indeed a punishment"²⁰² seemingly meted out in response to "speech on a matter of 'public concern.'"²⁰³ Not only was Ragbir's speech on a matter of public concern, thus "occup[ying] the highest rung of the hierarchy of First Amendment values,"²⁰⁴ but it was speech concerning "political change" lying at the "core" of political speech.²⁰⁵ Repression of such activity "trenches upon an area in which the importance of First Amendment protections *is at its zenith*."²⁰⁶

The court then weighed these interests against the government's "interest in having unchallenged discretion to deport Ragbir."²⁰⁷ It wasn't close. Unlike in *AADC*, where the aliens were members of a terrorist group, Ragbir alleged "the Government undertook the deportation to silence criticism of the responsible agency."²⁰⁸ Moreover, Ragbir's

¹⁹⁵ Ragbir v. Sessions, 18-cv-236, 2018 U.S. Dist. LEXIS 13939, at *7 (S.D.N.Y. Jan. 29, 2018).

¹⁹⁶ Ragbir, 923 F.3d at 60–61.

¹⁹⁷ Ragbir v. Homan, No. 18-cv-1159, 2018 U.S. Dist. LEXIS 86753, at *9–18 (S.D.N.Y. May 23, 2018).

¹⁹⁸ *Id.* at *25–26.

¹⁹⁹ Ragbir, 923 F.3d 53.

²⁰⁰ *Id.* at 64–65.

²⁰¹ *Id.* at 62–67.

²⁰² *Id.* at 71.

²⁰³ *Id.* at 69 (quoting *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011)).

²⁰⁴ *Id.* (quoting *Snyder*, 562 U.S. at 451–52).

²⁰⁵ *Id.* (quoting *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988)).

²⁰⁶ *Id.* at 70 (quoting *Meyer*, 486 U.S. at 425)).

²⁰⁷ *Id.* at 72.

²⁰⁸ *Id.*

presence in the United States was not “an ongoing violation of United States law.”²⁰⁹ A lawful permanent resident rendered deportable by a criminal conviction has no legal obligation to deport himself, and his continued presence in the country is not a violation of any law, unlike immigrants who enter the country without authorization or inspection.²¹⁰ Only after an order of final removal is entered does an alien lose lawful permanent resident status.²¹¹ And even though ICE had indeed received an order of final removal against Ragbir, it affirmatively authorized his presence in the country for nearly a decade.²¹²

After the Second Circuit deemed the government’s conduct “outrageous” within the meaning of *AADC*, the Suspension Clause question that the district court had dodged became unavoidable. Ragbir had exhausted both direct review of his order of removal and his statutorily authorized single motion to reopen those proceedings long before the alleged retaliation took place,²¹³ thus leaving him no “adequate substitute” to habeas corpus.²¹⁴ Thus, because Congress has not suspended the writ, the Second Circuit concluded that the application of § 1252(g) to his case violated the Constitution.²¹⁵

Although the Second Circuit remanded to the district court to determine what relief might be appropriate if Ragbir succeeded in demonstrating that retaliatory animus motivated ICE’s decision, it did suggest that a delay in his removal equivalent to the most recent stay granted by ICE would balance both the government’s interest in removing “aliens convicted of ‘aggravated felonies’” and Ragbir’s First Amendment interests.²¹⁶

²⁰⁹ *Id.* (quoting *AADC*, 525 U.S. 471, 491 (1999)). Recall: In *AADC*, none of the aliens had established lawful permanent residence in the United States; all had temporary visas the terms of which they had violated, rendering them deportable. 525 U.S. at 473.

²¹⁰ See Gerald L. Neuman, *Terrorism, Selective Deportation, and the First Amendment after Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 342 (2000).

²¹¹ 8 U.S.C. § 1231(a).

²¹² *Ragbir*, 923 F.3d at 58–59.

²¹³ *Id.* at 58–59, 62, 62 n.10 (“[T]he Government does not dispute, that [Ragbir] 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.”). *Cf.* 8 U.S.C. § 1229a(c)(7) (specifying that aliens are entitled to one motion to reopen their immigration proceedings and that any such motion must be filed within ninety days of the entry of the final order of removal).

²¹⁴ *Ragbir*, 923 F.3d at 73–74.

²¹⁵ *Id.* at 78–99.

²¹⁶ *Id.* at 79 n.34 (citing Memorandum from John Kelly, Sec’y of Dep’t of Homeland Sec., to Kevin MacAleenan, Acting Comm’r, U.S. Customs & Border Prot. (Feb. 20, 2017) (on file with author)). It is notable that prior Administrations had even more emphatically stated that aliens convicted of aggravated felonies were the highest enforcement priority for DHS. See, e.g., Memorandum from Jeh Charles Johnson, Sec’y of Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir. of Immigr. & Customs Enf’t (Nov. 20, 2014) (on file with author) (classifying as “Priority 1,” the “highest priority to which enforcement resources should be directed,” “aliens convicted of

The government sought rehearing, which was denied.²¹⁷ The Supreme Court granted, vacated, and remanded the government's petition for a writ of certiorari in light of its prior opinion in *Department of Homeland Security v. Thuraissigiam*.²¹⁸

Thuraissigiam presented the question of whether an alien seeking asylum but subject to so-called "expedited removal"²¹⁹ could seek review of his asylum claim through habeas corpus.²²⁰ The Court said "no".²²¹ But it went further. Justice Alito's opinion for the Court raises doubts as to whether aliens in removal proceedings are within the protection of the Suspension Clause. Because aliens seek not discharge from custody but the right to remain in the United States, Justice Alito argued, they do not seek the "simple" remedy that habeas protected at the Founding.²²² Instead, they seek a new legal right—to remain in the United States. Moreover, Justice Alito argued that many of the cases discussed previously²²³ from the "finality era" of the late 19th to mid-20th centuries are irrelevant to the Suspension Clause analysis because those courts drew their authority from the then-applicable laws granting habeas jurisdiction in immigration matters.²²⁴ Of course, the value of the finality era cases comes not from their reliance on the Suspension Clause, but in their discussion of the scope of habeas corpus.

In any event, Justice Alito's opinion in *Thuraissigiam* reaffirmed that "[t]he writ of habeas corpus as it existed at common law provided a vehicle to challenge all manner of detention by government officials, and the Court had held long before that the writ could be invoked by aliens already in the country who were held in custody pending deportation."²²⁵ Thus, there should be no reason for the Second Circuit to reach a different result on remand.²²⁶

an "aggravated felony" as defined by the INA).

²¹⁷ Order Denying Petition for Rehearing and/or Rehearing En Banc, *Ragbir v. Homan*, 923 F.3d 53 (2d Cir. 2019) (No. 18-1597).

²¹⁸ 140 S. Ct. 1959 (2020).

²¹⁹ *Thuraissigiam* was apprehended just twenty-five yards from the United States' border with Mexico, thus rendering him eligible for the trimmed-down removal proceeding known as "expedited removal." 140 S. Ct. at 1964–65; see also 8 U.S.C. § 1225(b)(1)(A)(i), (iii)(I–II) (outlining eligibility for expedited removal).

²²⁰ *Thuraissigiam*, 140 S. Ct. at 1963.

²²¹ *Id.* at 1969.

²²² *Id.* at 1971.

²²³ See *supra* at Part II.

²²⁴ *Thuraissigiam*, 140 S. Ct. at 1975–81.

²²⁵ *Id.* at 1981.

²²⁶ The *Thuraissigiam* Court's discussion of due process is likewise inapposite to *Ragbir*'s case; *Ragbir* was a lawful permanent resident, not unlawful entrant.

IV. THE CASE FOR HABEAS JURISDICTION

Ragbir's case presents circumstances markedly different from those in *Thuraissigiam*.²²⁷ And if the Second Circuit recognizes as much and reaffirms its original holding, it is quite likely that Ragbir's case will present one of the first opportunities for the Court to give meaning to *AADC*'s reservation of "outrageous" conduct.²²⁸ If the Court finds that ICE's conduct towards Ragbir was "outrageous" as (un)defined by *AADC*, it will be forced to address whether § 1252(g) applied to the stay-of-removal context violates the Suspension Clause. It should answer both in the affirmative.

A. Aliens and the First Amendment

1. *AADC* is distinguishable

Any theory under which Ragbir can receive habeas review of his detention presupposes a world in which deportable aliens can prevail on a claim of selective enforcement. *AADC* may have foreclosed that possibility. But Justice Scalia's reservation of "outrageous conduct" offers hope, as does the recognition that much of the Court's doctrine relating to governmental retaliation was established *after AADC* was decided.²²⁹ So, too, does the unique context of the aliens in *AADC*.

Under modern statutes, the aliens in *AADC* might have been prosecuted for providing material support to a terrorist organization. The foreign policy rationale which supports much of the Plenary Power doctrine upon which immigration law is based—and which was explicitly relied upon in *AADC* as a reason to deny those aliens relief—is inapposite in the context of speech about immigration as a domestic policy matter. "[S]peech critical of the exercise of the State's power lies at the very center of the First Amendment."²³⁰ Although one could describe discourse on immigration as a meta-foreign policy issue, that is almost certainly a bridge too far. And "when retaliation against protected

²²⁷ Unlike in *Thuraissigiam*, Ragbir does seek "simple release": his objective is to remain in the United States as he did pursuant to the stay of removal issued by DHS. That the "law" that resulted in his detention is regulatory in nature is of no matter. But for DHS's decision to terminate his stay, Ragbir would be free within the United States. *Cf. Thuraissigiam*, 140 S. Ct. at 1974 ("The relief that a habeas court may order and the collateral consequences of that relief are two entirely different things. Ordering an individual's release from custody may have the side effect of enabling that person to pursue all sorts of opportunities that the law allows.")

²²⁸ It is quite likely that, unless the government elects not to seek certiorari, the Court would once again take up Ragbir's case, particularly given recent changes to the Court's membership: "Holding that an Act of Congress unconstitutionally suspends the writ of habeas corpus is momentous." *Thuraissigiam*, 140 S. Ct. at 1978.

²²⁹ *Hartman, Reichle, Lozman, and Nieves* all post-date *AADC*.

²³⁰ *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991).

speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress.”²³¹ Ragbir is not the only individual who has been subjected to allegedly retaliatory enforcement by ICE in recent years:²³² In 2018, a Commentator cataloged a dozen such cases²³³ in recent years; there is no reason to believe the number has decreased.

One might argue that Ragbir’s advocacy of relaxed immigration policy in the United States can continue from his native Trinidad and Tobago, much as the Court suggested in *Turner*, where the anarchist would be deported to Australia to continue his speech. But that, too, ignores not only the nature of the First Amendment but the nature of rights in general. In another context the Court has reinforced the principle that the availability of alternative venues is not an adequate substitute for direct protection of a right.²³⁴ Moreover, First Amendment jurisprudence has shifted hard against curtailing speech since *AADC*.²³⁵

This presupposes that Ragbir has First Amendment rights at all.²³⁶ The Court has never directly addressed whether unlawfully present aliens are protected by the First Amendment, but the alternative would represent an outcome surprising to many. It strains credulity to believe that ICE could deport all unlawfully present aliens who are Catholic but not those who are Protestant. It is similarly implausible that ICE could allow Catholics, but not Protestants, to worship in immigration

²³¹ *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1954 (2018).

²³² Indeed, Ragbir’s prayer for relief and the body of his complaint both suggest that a court could provide relief in his case to individuals other than Ragbir. See Complaint at 40–41, *Ragbir v. Homan*, 18-cv-1159, 2018 U.S. Dist. LEXIS 102443 (S.D.N.Y. June 19, 2018).

²³³ *Cade*, *supra* note 177, at 1443 nn.86–88, 1444 nn.89–92, 1445 nn.93–95.

²³⁴ See, e.g., Transcript of Oral Argument at 37–38, *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274).

²³⁵ See generally *Citizens United v. FEC*, 558 U.S. 310 (2010); *Snyder v. Phelps*, 562 U.S. 443 (2011); *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786 (2011); *Knox v. Serv. Emps. Int’l Union*, 567 U.S. 298 (2012); *United States v. Alvarez*, 567 U.S. 709 (2012); *McCullen v. Coakley*, 573 U.S. 464 (2014); *Janus v. AFSCME, Council 31* 138 S. Ct. 2448 (2018).

²³⁶ Before the Second Circuit, the government did not argue that Ragbir lacked First Amendment rights as a result of his deportability. Compare Brief for U.S., *Ragbir v. Homan*, 923 F.3d 53 (2d Cir. 2019) (No. 18-1597), with *Ragbir v. Homan*, No. 18-cv-1159, 2018 U.S. Dist. LEXIS 86753 (S.D.N.Y. May 23, 2018) (“Political speech is worthy of the highest protection and so long as Ragbir remains in the United States, the First Amendment guarantees his freedom to speak and associate on any subject of his choosing.”), thus the argument is forfeited, if not waived. See *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 595 (2020) (“The Second Circuit ‘did not address the[se] argument[s], and, for that reason, neither shall we.’”) (quoting *F. Hoffmann–La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 175, (2004)); *Jander*, 140 S. Ct. at 597 (Gorsuch, J., concurring) (“[I]t is beyond debate that [q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)); see also *Granite Rock Co. v. Int’l Brotherhood of Teamsters*, 561 U.S. 287, 306 (2010) (declining to consider argument not presented in the court of appeals); *Cooper Indus., Inc. v. Avall Servs., Inc.*, 543 U.S. 157, 168–69 (2004) (same). Cf. *Nautilus, Inc. v. Biosing Instruments, Inc.*, 572 U.S. 898, 913 (2014) (“[W]e are a court of review, not of first view.”) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

detention. Nor is it plausible to imagine a world in which ICE could condition a stay of removal on an alien's agreement to not engage in political speech—which the Court has repeatedly identified as the core of the First Amendment.²³⁷ And if ICE did enact such a policy, courts would have jurisdiction to hear such challenge, jurisdictional considerations notwithstanding.²³⁸

2. *Nieves* is irrelevant

Ragbir was decided before the Court's decision in *Nieves*, a fact the government took pains to emphasize in its petition for rehearing before the Court of Appeals. That reliance may be misplaced. For decades the government has repeatedly emphasized—not incorrectly—that immigration proceedings are not criminal and that deportation is not a punishment.²³⁹ And the Court has repeatedly agreed: “While the consequences of deportation may assuredly be grave, they are not imposed as a punishment.”²⁴⁰ But the Court has drawn sharp lines between claims of retaliatory civil action (such as employment) and retaliatory criminal action (such as arrest or prosecution).²⁴¹ *Nieves* dealt with the question of arrest by law enforcement on criminal charges. Given immigration removal is not criminal, *Nieves*'s broadside against retaliatory criminal arrest claims is inapposite.

While it does not bolster *Ragbir*'s claim, *Nieves* does not undermine *Mt. Healthy*, particularly in light of *Lozeman*. Recall, *Lozeman* distinguished between the heat-of-the-moment arrests like those in *Nieves* and *Reichle* and a pattern or practice of governmental discrimination. The decision to remove an individual from the United States is not “a dangerous task that requires making quick decisions in ‘circumstances that are tense, uncertain, and rapidly evolving.’”²⁴² Instead, removal decisions are made by ICE officials and presented before a neutral magistrate. Even in those cases that are not reviewed by an Immigration Judge or a court due to delegated discretion (like *Ragbir*'s), ample time

²³⁷ See, e.g., *Janus*, 138 S. Ct. at 2463–64 (2018); *Citizens United*, 558 U.S. at 328, 339–41 (2010); see also *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (striking down on First Amendment grounds a law which criminalized access to certain major social media websites by sex offenders).

²³⁸ See *Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) (eschewing “uncritical literalism” when construing phrases like “arising from” to, in that case, allow for consideration of a habeas petition challenging indefinite detention without bail hearings) (citation omitted).

²³⁹ See, e.g., *AADC*, 525 U.S. 471, 491 (1999).

²⁴⁰ *Id.* (citing *Carlson v. Landon*, 324 U.S. 524, 537 (1952)); see also *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (“[R]emoval proceedings are civil . . .”) (citation omitted); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“A deportation proceeding is a purely civil action . . .”).

²⁴¹ See Part II.C.1 above.

²⁴² *Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019) (describing the nature of making arrests) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)).

exists for ICE to consider an alien's suitability for a stay. In Ragbir's case, his counsel was in discussions with ICE officials for months before the meeting at which Ragbir was detained.²⁴³

Moreover, the decision to arrest an individual and the decision to pursue the charges of arrest are often made by different individuals within different organizations in the arrest context. In Russell Bartlett's case, for example, his arrest may have been inspired by impermissible animus, but the decision of the local district attorney—who may be accountable to a different polity than the arresting officer—to pursue otherwise-valid charges against him is entitled to a presumption of regularity and impartiality.²⁴⁴ Attributing the animus held by Trooper Nieves to prosecuting attorneys would require prosecuting attorneys to conduct substantial investigations into an officer's subjective motivations before pursuing charges. It is unclear whether prosecutors can make such evaluations in an unbiased way. Nor is it clear who would review any such determinations.

But ICE acts alone and unsupervised in the realm of stays of removal. Much like the school board in *Mt. Healthy* and the city council in *Lozman*, the decision to remove prominent ICE critics is clouded in a fog of uncertainty. As Gerald Neuman and others have noted, "Prosecutorial and adjudicative functions may be mixed, creating psychosocial and economic disincentives to the impartial resolution of cases once they have been brought."²⁴⁵ Is ICE choosing to remove Ragbir because his number is up, or because he is a "persistent gadfly"²⁴⁶ much like Fane Lozman? One frequently intoned virtue of the administrative state is its responsiveness to political pressures from the President. But in a system constrained by statute and regulation, the exercise of discretion in individual cases cuts both ways. Supporters of the Obama Administration's deferred action initiatives cited *AADC* as a basis for discretionary nonenforcement regimes.²⁴⁷ In any event, the officer-prosecutor division in the immigration context is far less clear than in the criminal context. All immigration authority is centralized in the unitary executive.

²⁴³ *Ragbir v. Homan*, 923 F.3d 53, 60 (2d Cir. 2019) (noting that Ragbir's application for renewal of his stay was filed in November 2017 and still under consideration, according to ICE, on January 10, 2018).

²⁴⁴ See generally *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[T]he presumption of regularity supports their prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'" (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14–15, (1926)).

²⁴⁵ Neuman, *supra* note 31, at 1023.

²⁴⁶ Adam Liptak, *A Persistent Gadfly Wins Again in the Supreme Court*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/18/us/politics/a-persistent-gadfly-wins-again-in-the-supreme-court.html> [<https://perma.cc/5RF7-ZWKV>].

²⁴⁷ Cf. *Arizona v. United States*, 567 U.S. 387, 394–98 (2012).

B. The Habeas Question

The problem in precluding habeas relief for retaliatory conduct is that, as in the case of Ragbir, alternative routes are often foreclosed. A final order of removal was entered against Ragbir in 2007. From that time until his arrest by ICE 2018, his continued presence in the United States was pursuant to stays of removal.²⁴⁸ Once an order of removal is entered against an immigrant and all appeals before the Board of Immigration Appeals and the Court of Appeals are exhausted, no judicial review stands between an alien and deportation.²⁴⁹ Thus, if the alleged retaliatory conduct takes the form of a denial or termination of a stay of removal, no neutral magistrate will ever be interposed between authorities and arbitrary enforcement. This is so despite the Court's recent recognition that habeas review remains available for immigrants perpetually detained pending removal.²⁵⁰

In its petition for rehearing before the Second Circuit, the government went to great lengths to emphasize that the order of removal entered against Ragbir had twice been sanctified by other Article III courts.²⁵¹ But that assertion, like the Sixth Circuit's in *Hamama v. Adducci*,²⁵² misses the crucial distinction between review of the entry of the order and the order's ultimate execution. In *Hamama*, the Sixth Circuit concluded that an alien's ability to move to reopen their proceedings affords aliens an "adequate and effective"²⁵³ forum to challenge their ultimate removal.²⁵⁴ But this view elides the fact that federal law provides aliens just one motion to reopen their removal proceedings, while the Executive can grant limitless stays of removal. That mismatch yields ample opportunity for abuse: Simply because Ragbir was able to challenge the grounds for the order's entry does not mean he has the ability to challenge any of the myriad legal or factual developments which may have arisen during the eleven years between the order's entry and its execution.

To be sure, the decision to stay Ragbir's removal is one committed to DHS's discretion.²⁵⁵ But that discretion should not allow immigration

²⁴⁸ From 2007–2011 Ragbir's removal was stayed as he pursued appeals.

²⁴⁹ Congress was well aware of this phenomenon as well as the breadth of discretion afforded immigration authorities in selecting whom to deport. See *AADC*, 525 U.S. 471, 483–84 (1999).

²⁵⁰ See *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

²⁵¹ Petition for Rehearing at 9–11, *Ragbir v. Homan*, 923 F.3d 53 (2d. Cir. 2019) (No. 18-1597).

²⁵² *Hamama v. Adducci*, 912 F.3d 869 (6th Cir. 2018), *cert. denied*, No. 19-294, 2020 WL 3578681 (U.S. July 2, 2020).

²⁵³ *Id.* at 876.

²⁵⁴ *Id.* at 875.

²⁵⁵ 8 U.S.C. § 1231(c)(2)(A) authorizes the Attorney General to promulgate regulations regarding the granting of discretionary relief; he has done so. See 8 C.F.R. § 241.6.

officials to convert an order of final removal into a Sword of Damocles hanging above the heads of immigrants like Ragbir. Besides, the government's actions speak louder than its words: for eleven years ICE deemed Ragbir insufficiently dangerous to prioritize. Claims that Ragbir is a criminal the government has prioritized for deportation reveal the breadth of the discretion ICE is afforded in seeking and effectuating removals under current law.

It is not clear what good habeas review will do, though. No one challenges that Ragbir is removable based on his conviction. Numerous administrations have prioritized deportation of those convicted of aggravated felonies.²⁵⁶ One of the crucial legitimating features of a standards-based system is a guarantee of reviewability. And although the immigration system is superficially governed by rules, the two-step discretion afforded to immigration authorities injects nearly limitless discretion in the realm of deportable lawful permanent residents.

As the Court of Appeals suggested in *Ragbir*, perhaps a remedy is that Ragbir is permitted to remain in the country for the duration of his most recent stay—something of an expectation damages theory of habeas relief. Or perhaps the value is in naming-and-shaming government officials, thus potentially opening them to liability in a civil damages suit brought by the alien regardless of his location. Maybe damages, but not a stay, is the correct remedy.²⁵⁷ Answers are not ventured here. Regardless of the relief Ragbir is ultimately afforded or denied, that he be given his day in court is essential to vindicating the fundamental promise of habeas corpus: to protect against the “dangerous engine of arbitrary government.”²⁵⁸

V. CONCLUSION

Since John at Runnymede, the principle that no person should be imprisoned but in accordance with the law has suffused the common law.²⁵⁹ And as Lord Coke wrote in his *Institutes*, “if a man be taken or committed to prison *contra legem terrae*, against the Law of the land,” “[h]e may have an *habeas corpus*.”²⁶⁰ We are far from the scenario envisioned by Madison 220 years ago in which “[i]f aliens had no rights

²⁵⁶ See *supra* note 216.

²⁵⁷ Recent scholarship examines the availability of other civil actions in situations like Ragbir's. See Matthew Miyamoto, Comment, *Whether 8 U.S.C. § 1252(g) Precludes the Exercise of Federal Jurisdiction over Claims Brought by Wrongfully Removed Noncitizens*, 86 U. CHI. L. REV. 1655 (2019).

²⁵⁸ 1 WILLIAM BLACKSTONE, COMMENTARIES *136.

²⁵⁹ See 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 1112–21 (3d ed. 1944).

²⁶⁰ SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 55 (6th ed. 1681).

under the Constitution, they might not only be banished, but capitally punished, without a jury or the other incidents to a fair trial.”²⁶¹ But current immigration law layers unreviewability upon discretion. As Professor Hart counseled a half century ago, “a power to lay down general rules, even if it is plenary, does not necessarily include a power to be arbitrary.”²⁶² The dual-discretion enjoyed by the Executive—choosing whom to make removable, and choosing from those whom to remove—invites arbitrariness. And as Justice Holmes observed, “the decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith.”²⁶³

The presumption of judicial review in America is strong for good reason. “The ‘check’ the Judiciary provides to maintain our separation of powers is enforcement of the rule of law through judicial review.”²⁶⁴ Thus for the narrow class of aliens like Ragbir—those (a) who were lawfully present in the United States then (b) rendered removable due to a criminal conviction or similar immigration infraction but (c) still present pursuant to stays of removal and (d) who have exhausted their sole motion to reopen—the Suspension Clause guarantees that their claims of “outrageous” retaliatory removal—“*contra legem terrae*”—be heard in court. As this piece and others have argued, the Suspension Clause has always functioned as a backstop: if judicial review is otherwise unavailable, the traditional remedy of habeas corpus cannot be suspended absent a clear Congressional statement.²⁶⁵

Those concerned with the strain on judicial resources that may result from recognizing the conclusion urged above can take solace in a simple legislative fix. Just as Congress in the mid-twentieth century shifted immigration oversight from habeas corpus to petitions for review, a modern Congress could cure any Suspension Clause concerns by

²⁶¹ JAMES MADISON, THE VIRGINIA REPORT OF 1799–1800 TOUCHING THE ALIEN AND SEDITION LAWS 233 (1850).

²⁶² Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1390 (1953).

²⁶³ *Chin Yow v. United States*, 208 U.S. 8, 12 (1908).

²⁶⁴ *Dep’t of Transp. v. Ass’n of Am. R.R.s*, 575 U.S. 43, 76 (2015) (Thomas, J., concurring) (cleaned up).

²⁶⁵ Richard H. Fallon, Jr., Comment, *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068, 1084 (1998).

reforming the current system of motions to reopen immigration proceedings. Such a move would resupply the requisite “adequate alternative” to avoid running afoul of the Suspension Clause while preserving efficiency and discretion in immigration enforcement.