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Regulatory Constitutional Law: Protecting Immigrant Free Speech Without Relying on the First Amendment

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Cover Page Footnote

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I am grateful to Jason Cade and Alina Das for thoughtful comments on earlier drafts.

REGULATORY CONSTITUTIONAL LAW: PROTECTING IMMIGRANT FREE SPEECH WITHOUT RELYING ON THE FIRST AMENDMENT

Michael Kagan[*]

The Supreme Court has long deprived immigrants of the full protection of substantive constitutional rights, including the right to free speech, leaving undocumented immigrants exposed to detention and deportation if they earn the government's ire through political speech. The best remedy for this would be for the Supreme Court to reconsider its approach. This Essay offers an interim alternative borrowed from an analogous problem that arises under the Fourth Amendment. Under the Constitution, the Supreme Court has indicated that illegally obtained evidence may be suppressed in a removal proceeding only if the Fourth Amendment violation was "egregious." Yet, some circuit courts have indicated that a regulation protecting immigrants from unjustified arrests and interrogations offers an autonomous, and potentially stronger, basis for suppressing evidence, suggesting that regulations may protect constitutional rights even where the Supreme Court has declined to fully enforce the Constitution. Using the Fourth Amendment example as an analogy, this Essay will propose regulations that would protect immigrants from selective prosecution for engaging in free speech, thus filling a gap left by the Supreme Court.

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I. INTRODUCTION

When seeking to protect civil liberties, the Constitution is not the only place to turn. For immigrants, it is often the least helpful. In this Essay, I address the vulnerability of immigrant activists to repression by the federal government in the form of deportation. While the government cannot directly censor speech just because the speaker is undocumented,[1] the government can potentially target the speaker for deportation.[2] To do so removes a dissenter from the country and warns anyone else who might speak out that they can be similarly targeted.

This vulnerability is alarming because immigrant speech is central to the immigrant rights movement and public discourse about immigration policy. To be clear, no one's free speech should require any special justification. Everyone should have this freedom protected. But it is important to articulate what is at stake. Political movements depend on storytelling, symbols, and, most importantly, people. The immigrant rights movement is strongest when immigrants are at its center—when their stories and their opinions set the agenda. Other people can and should certainly add their voices. But nonimmigrants can only speak on the issue in the abstract or through secondhand stories. It is not the same.

For all these reasons, if anyone in the Department of Homeland Security ever wants to suppress the movement for immigrant rights, it would be smart to try to silence the immigrant activists at the movement's heart. This would be a form of speaker discrimination in which the government targets people not only for what they say, but also for who they are.[3] While citizens and (maybe) legal permanent residents would still be able to speak freely in favor of undocumented immigrants, impacted people themselves could easily be shut out. They would be talked about but

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[1] *See* Bridges v. Wixon, 326 U.S. 135, 148 (1945) ("Freedom of speech and of press is accorded aliens residing in this country." (citing Bridges v. California, 314 U.S. 252 (1941))).

[2] *See* United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904) (rejecting a First Amendment challenge claiming "that the [Immigration A]ct is unconstitutional so far as it provides for the exclusion of an alien because he is an anarchist").

[3] *See generally* Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. U. L. REV. 765 (2015) [hereinafter Kagan, *Speaker Discrimination*] (arguing that the speaker discrimination principle is a useful tool in understanding the Supreme Court's First Amendment jurisprudence).

rarely heard from. In the process, the movement would be weakened considerably. Alarmingly, that might not be terribly difficult for the government to do under present law. The Supreme Court has (mostly) foreclosed selective prosecution defenses in deportation cases. Therefore, Immigration and Customs Enforcement (ICE) could launch a fairly open campaign against visible immigrant organizers and leaders and might succeed at scaring many back into the shadows.

In this Essay, I attempt to offer a partial, inadequate, but nevertheless meaningful remedy: a regulation. In an attempt to bolster immigrants' First Amendment freedoms, I borrow from the Fourth Amendment context. There are already regulations in place that limit custodial interrogations and arrests by ICE with potentially more accessible enforcement than the Fourth Amendment has on its own.[4] The Biden Administration has specifically indicated that it opposes selective enforcement for expressive activities.[5] It should put this policy into a binding regulation to leave immigrant activists less vulnerable to reprisals for their free speech now or by a future administration.

II. THE PROBLEM: IMMIGRANT FREE SPEECH UNDER THE CONSTITUTION

From one perspective, undocumented immigrants in the United States have robust freedom of speech—the same freedom enjoyed by every citizen. The government cannot assert prior restraint against a newspaper op-ed because the author happens to lack a proper visa. There is no separate rule about what constitutes incitement if the speaker is a noncitizen. An immigrant can walk into a courthouse with a jacket that says, "Fuck the Draft," the same as any American citizen can. It does not matter if the Pentagon Papers were leaked to a reporter who lacked papers. There is one First Amendment, and it is for everyone.

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[4] *See* 8 C.F.R. § 287.8(b)(2) (2021) (regulating interrogations); *id.* § 287.8(c)(2) (2021) (regulating arrests).

[5] Memorandum from Alejandro N. Mayorkas, Sec'y, U.S. Dep't of Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't 5 (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf, *vacated*, Texas v. United States, No. 6:21-CV-00016, 2022 WL 2109204 (S.D. Tex. June 10, 2022).

Sort of.

From another perspective, undocumented immigrants have nearly no free speech rights at all. Or more precisely, they only have as much freedom to speak as the Executive Branch allows them to have. That is because a government wishing to repress the speech of undocumented immigrants need not resort to the traditional tools of direct censorship against which the First Amendment offers a direct defense. Instead of censoring speech directly, the government can just remove the speaker. After all, undocumented immigrants are, by definition, prima facie removable under the Immigration and Nationality Act.[6]

Perhaps the most important fact about immigration enforcement in the interior of the United States is that there are far more potentially removable immigrants here than ICE could possibly arrest, detain, or deport. As a result, setting enforcement priorities—and exercising prosecutorial discretion to deport or not deport certain immigrants—is arguably the most decisive policy choice to be made regarding undocumented immigrants inside the United States.[7] As a simple matter of mathematical odds, an undocumented immigrant stands a good chance of avoiding deportation at any given time simply because there are many more potentially deportable immigrants than ICE has the capacity to arrest, detain, and remove. But that also means that an undocumented immigrant would likely consider it rational to keep a low profile to avoid becoming a target.

Consider the 2022 dispute over Jamal Simmons, who had been recently hired as a communications aide to Vice President Kamala Harris. More than a decade earlier, Simmons tweeted: "Just saw 2 undocumented folks talking on MSNBC. One Law student the other a protester. Can someone explain why ICE is not picking them up?"[8] He was forced to apologize for a remark that suggested, at least, a cavalier approach to deportation. The people he saw on television

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[6] *See* 8 U.S.C. § 1227.

[7] *See generally* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015).

[8] Dartunorro Clark, *Harris' New Communications Director Apologizes After Backlash to 2010 Deportations Tweet*, NBC NEWS (Jan. 7, 2022, 4:57 PM), https://www.nbcnews.com/politics/white-house/harris-new-communications-director-apologizes-after-backlash-2010-deportations-tweet-n1287194.

were prominent undocumented activists Erika Andiola and Cesar Vargas.[9] Andiola accepted Simmons's apology.[10]

This relatively minor political incident highlights two critical facts about immigrant speech. First, the visible appearance of undocumented activists in the public arena is extremely important for immigrant rights advocacy. The voices of impacted people are critical in any movement for policy change. In advocacy, it is not just what is said that matters. The identity of the speaker also impacts the message and its potency.[11] First Amendment doctrine has embraced this reality. In *City of Ladue v. Gilleo*, the Supreme Court wrote,

> A sign advocating "Peace in the Gulf" in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile.[12]

But then there is the second reality highlighted by Simmons's offensive tweet. How can undocumented immigrants speak out if their survival in the United States depends on not attracting attention? Simmons's tweet seemed to assume ICE would or should target any deportable immigrant who simply appears on its radar. Such an approach would not even require any intention to repress immigrant rights activists. If mere visibility were enough to put an immigrant at risk, then this alone would likely be enough to keep immigrants from appearing on cable news or writing an op-ed. But that is just the start for an undocumented immigrant who speaks out in favor of immigration reform. Quite likely, she is not just making herself visible. She is also likely to visibly criticize the precise government agency that would have to decide whether to

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[9] *See* Erika Andiola (@ErikaAndiola), TWITTER (Jan 7, 2022, 5:18 PM), https://twitter.com/ErikaAndiola/status/1479578321151139840.

[10] *See* Erika Andiola (@ErikaAndiola), TWITTER (Jan 8, 2022, 2:15 PM), https://twitter.com/ErikaAndiola/status/1479894601020235779?s=20&t=Rw57xKUjIeLF7xWu3A7MLw.

[11] *See* Kagan, *Speaker Discrimination*, *supra* note 3, at 766–68 (discussing the importance of speaker identity).

[12] City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994).

target her for arrest. The risk of retaliation here seems especially high, and some ICE retaliation cases of exactly this type have happened.[13]

Standard First Amendment law should offer at least some shield from this problem through the defense of selective prosecution or the analogous claim of First Amendment retaliation. This defense, which is well established in criminal law, is not easy to raise successfully, even when permitted. As one court said, "there is a presumption that prosecution for violation of the criminal law is in good faith."[14] A defendant bears "the heavy burden" of showing that similarly situated people have not been targeted and that the government acted with bad faith.[15] Yet, this defense can be successful and has a prominent history in immigration law. It was raised, with partial success, by ex-Beatle John Lennon to resist deportation in the 1970s.[16] Lennon was targeted by the federal government because of his anti-war activism, but the facially legitimate ground for deportation invoked against him was a British conviction for possession of cannabis resin.[17] In 1975, the Second Circuit wrote of Lennon's case, "The courts will not condone selective deportation based upon secret political grounds."[18]

Despite that hopeful signal from a circuit court, the Supreme Court has been far less willing to protect immigrants from selective enforcement. In 1904, the Court denied that deportation even had a

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[13] *See, e.g.*, Ragbir v. Homan, 923 F.3d 53, 60–61 (2d Cir. 2019) (describing a First Amendment retaliation claim in a decision to deport Ravi Ragbir), *vacated sub nom.* Pham v. Ragbir, 141 S. Ct. 227 (2020) (mem.); Joel Rose, *An Immigrant Activist Says ICE Deported Him in Retaliation. Now He's Back in the U.S.*, NAT'L PUB. RADIO (Dec. 15, 2021, 10:40 AM), https://www.npr.org/2021/12/15/1064224812/immigrant-activist-deported-ice-retaliation-rojas (describing the case of Claudio Rojas).

[14] United States v. Amon, 669 F.2d 1351, 1355–56 (10th Cir. 1981) (quoting United States v. Bennett, 539 F.2d 45, 54 (10th Cir. 1976), *cert. denied*, 429 U.S. 925).

[15] United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974); *see also* Steve R. Johnson, *The Selective Enforcement Defense in Civil and Criminal Tax Cases*, 2008 A.B.A. SEC. TAX'N NEWSQUARTERLY 14, 14–15 (quoting *Berrios* in reference to criminal tax prosecutions).

[16] *See generally* Lennon v. INS, 527 F.2d 187 (2d Cir. 1975).

[17] *See id.* at 188 ("We are . . . called upon to decide whether Lennon's 1968 British conviction for possession of cannabis resin renders him . . . an excludable alien . . . .").

[18] *Id.* at 195.

bearing on free speech concerns.[19] In a case concerning the deportation of an anarchist, the Court said,

> We are at a loss to understand in what way the act is obnoxious to [the First Amendment] objection. . . . It is, of course, true that if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled, he is in fact cut off from worshipping or speaking or publishing or petitioning in the country, but that is merely because of his exclusion therefrom.[20]

That case is antiquated; it came before the advancement of civil liberties in twentieth century constitutional law.[21] But it set a tone.

In the 1990s, the Supreme Court came quite close to closing the door to selective prosecution as a defense to deportation.[22] In the 1999 case of *Reno v. American-Arab Anti-Discrimination Committee* (*AADC*), the Court said, "As a general matter—and assuredly in the context of claims such as those put forward in the present case—an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation."[23] I have argued elsewhere that the *AADC* decision probably does not completely close the door to a selective prosecution defense in an especially extreme case.[24] The Court itself held back slightly, allowing that in the future there might be "a rare case in which the alleged basis of discrimination is so outrageous" that a selective

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[19] *See* United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904) (dismissing Turner's challenge to the Alien Immigration Act of 1903 on First Amendment grounds for its targeting of anarchists).

[20] *Id.*

[21] *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666–67 (1925) (incorporating the First Amendment free speech right against the states); De Jonge v. Oregon, 299 U.S. 353, 365 (1937) (holding that the First Amendment protects "peaceable assembly"); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (holding compelled speech unconstitutional).

[22] *See* Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237, 1282 (2016) [hereinafter Kagan, *When Immigrants Speak*] ("Concededly, parts of *AADC* indicate that there is no First Amendment selective prosecution defense against deportation.").

[23] Reno v. Am.-Arab Anti-Discrimination Comm. (*AADC*), 525 U.S. 471, 488 (1999).

[24] *See* Kagan, *When Immigrants Speak*, *supra* note 22, at 1267–68 ("[T]here are subtle indications in *AADC* that the ground has shifted considerably since the era of the *Turner* decision and that the holding of the *AADC* case may be tied quite closely to its facts.").

prosecution claim could be successfully raised.[25] But if selective prosecution is a difficult defense in a normal context, it certainly seems even harder in a deportation case.

That, then, is the problem. Immigrant speech is vital, should be protected, and, in theory, is entitled to the same protection from direct censorship as anyone else's.[26] But immigrants take risks when they speak out publicly merely by their visibility, and they will face unique difficulties raising a selective prosecution defense if the government targets them for deportation in retaliation for their free expression.[27] This problem should be fixed, and the best way to address it would be for courts to revisit the *AADC* decision or to at least narrow its application.

In short, *AADC* was a case in which bad facts have made very bad law.[28] The immigrants at issue were accused of supporting terrorist organizations and may not even have been engaged in First Amendment protected activity.[29] An undocumented activist who campaigns for immigration reform and appears on cable news or speaks at a rally is a lot more like John Lennon than the *AADC* respondents. Indeed, in 2018, the Second Circuit found that *AADC* did not foreclose a First Amendment retaliation claim by an activist with a final order of removal who had been the target of open hostility from the local ICE office.[30] But going forward, this Essay will assume that the Constitution does not offer enough to protect immigrant free speech rights and will discuss an alternative.

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[25] *AADC*, 525 U.S. at 491.

[26] *See* Kagan, *When Immigrants Speak*, *supra* note 22, at 1240 (explaining how *Citizens United* could protect immigrant speech (citing Citizens United v. FEC, 558 U.S. 310 (2010))).

[27] *See id.* ("Yet, because Elsayed was in the United States as a non-citizen on a temporary visa, he was vulnerable to government action triggered by his speech in a way that a citizen would not have been.").

[28] *See id.* at 1268, 1280 (arguing that *AADC* should be limited to its unusual facts).

[29] *See id.* at 1280 (explaining that the government "withdrew the Communism ground for deportation" and that the actual reason for deportation was respondents' memberships in a terrorist organization).

[30] *See* Ragbir v. Homan, 923 F.3d 53, 71 (2d Cir. 2019) (holding that *AADC* did not foreclose plaintiff's claim because the government's alleged conduct "plausibly fits within the 'outrageous[ness]' exception to *AADC*" (alteration in original)), *vacated sub nom.* Pham v. Ragbir, 141 S. Ct. 227 (2020) (mem.) (remanding for further consideration in light of *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020)).

III. THE ANALOGY: UNREASONABLE SEARCH AND SEIZURE IN IMMIGRATION REGULATIONS

The weak application of constitutional civil liberties in the context of immigration enforcement is hardly limited to the First Amendment. It is also a problem under the Fourth Amendment. In *INS v. Lopez-Mendoza*, the Supreme Court held that respondents in removal proceedings generally cannot suppress evidence obtained through Fourth Amendment violations.[31] In fact, there is good reason to think that major parts of the immigration enforcement system systematically and routinely violate protections against unreasonable searches and seizures.[32] Yet, a constitutionally suspect system persists through "[j]udicial [u]nderenforcement of the Constitution."[33] The Supreme Court, however, did not completely slam the door here. A plurality of the Supreme Court found that a person facing deportation can in fact suppress evidence if it was obtained through an "egregious violation[] of Fourth Amendment or other liberties that might transgress notions of fundamental fairness."[34]

An immigrant in removal trying to suppress evidence has one tool that is not available in a free speech case. In addition to the Bill of Rights, a regulation independently addresses unreasonable searches and seizures. In fact, there is a set of rules that appear to set out general Fourth Amendment norms within the Code of Federal Regulations. For example, there is a regulation that only permits custodial interrogation by an immigration officer when the officer possesses "reasonable suspicion, based on specific articulable facts."[35] Another says that "[a]n arrest shall be made only when the designated immigration officer has reason to believe that the person to be arrested has committed an offense against the United States

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[31] INS v. Lopez-Mendoza, 468 U.S. 1032, 1045–46 (1984).

[32] *See generally* Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. 125 (2015) (critiquing the lack of Fourth Amendment protection for immigrants).

[33] Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180, 190 (2013).

[34] *Lopez-Mendoza*, 468 U.S. at 1050; *see also* Oliva-Ramos v. Att'y Gen. of U.S., 694 F.3d 259, 271–72 (3d Cir. 2012) (explaining that the majority of the Supreme Court in *Lopez-Mendoza* endorsed suppression of evidence for egregious violations).

[35] 8 C.F.R. § 287.8(b)(2) (2021).

or is an alien illegally in the United States."[36] The "reason to believe" standard for a warrantless arrest also appears in the statute,[37] and courts have generally interpreted it to mean probable cause.[38]

Such rules are hardly remarkable on their face. They seem to merely restate well-established Fourth Amendment doctrine. But they may in fact add something new: an enforcement mechanism stronger than what the Fourth Amendment offers on its own. The Ninth Circuit has held that evidence may be suppressed if it was obtained either in violation of the Constitution or in violation of the regulation. In its 2019 decision in *Sanchez v. Sessions*, the court held that the exclusionary rule applies to removal proceedings in two situations.[39] The first is "when the agency egregiously violates a petitioner's Fourth Amendment rights."[40] The second is "when the agency violates a regulation promulgated for the benefit of petitioners and that violation prejudices the petitioner's protected interests."[41] This second holding is the important one. It suggests that the regulations may fill the hole left by the Supreme Court's decision in *Lopez-Mendoza.* It would allow suppression of evidence even if the violation is not "egregious."

This is an emerging idea and there is a circuit split on the matter. The Second Circuit in particular seems to disagree. In *Maldonado v. Holder*, the court found that to suppress evidence by invoking the regulations, a respondent in removal proceedings must "assert *egregious* violations" of the regulations, just like with the Fourth Amendment.[42] The Second Circuit, at least in this case, said that a motion to suppress based on the regulations would fail "[f]or the

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[36] *Id.* § 287.8(c)(2).

[37] 8 U.S.C. § 1357(a)(2).

[38] *See* Au Yi Lau v. U.S. INS, 445 F.2d 217, 222 (D.C. Cir. 1971) ("[T]he *arrest* provision must be read in light of constitutional standards, so that 'reason to believe' must be considered the equivalent of probable cause."); *see also* United States v. Sanchez*,* 635 F.2d 47, 62 n.13 (2d Cir. 1980) (citing *Au Yi Lau*); Lee v. INS, 590 F.2d 497, 500 (3d Cir. 1979) (same); United States v. Cantu*,* 519 F.2d 494, 496 (7th Cir. 1975) (same).

[39] Sanchez v. Sessions, 904 F.3d 643, 649 (9th Cir. 2018).

[40] *Id.*

[41] *Id.*; *see also* Perez Cruz v. Barr, 926 F.3d 1128, 1145–46 (9th Cir. 2019) ("Because the agents violated 8 C.F.R. § 287.8(b)(2), Perez Cruz is entitled to suppression of the evidence gathered as a result of that violation." (citing *Sanchez*, 904 F.3d at 653)).

[42] Maldonado v. Holder, 763 F.3d 155, 164 (2d Cir. 2014) (emphasis added).

[same] reasons discussed above," referencing the court's analysis of the Fourth Amendment.[43] That said, the Second Circuit offered little reasoning why the regulations should mean the same thing as the Fourth Amendment. Moreover, in an earlier case, the Second Circuit relied on the regulations (not the Constitution) to suppress a statement by a respondent in removal proceedings where the respondent was in custody and was not informed of his rights before questioning.[44] In that case, the Second Circuit said nothing about the violation being egregious.

I am aware of only one other circuit court reaching this issue, and it seems to agree with the Ninth Circuit. The Third Circuit, in *Oliva-Ramos v. Attorney General*, offered a lengthy dissection of the regulations governing seizure[45] and warrantless arrests[46] by ICE officers. For both regulations, the Third Circuit held that probable cause was required and defined probable cause with reference to the normal standards of criminal cases, not the "egregious" standard in *Lopez-Mendoza*.[47]

The Ninth Circuit's position is logically convincing and supported by the Supreme Court's decision in *Lopez-Mendoza*. In *Lopez-Mendoza*, in which the Supreme Court established the "egregious violation" standard, the Court carefully stated that it was dealing only with a remedy for a constitutional violation, not for a violation of an agency regulation.[48] It is thus entirely consistent with *Lopez-Mendoza* for the regulation to have a meaning distinct from the Fourth Amendment, and for the regulation to be more strict. The Second Circuit erred by assuming without analysis that the *Lopez-*

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[43] *Id.*

[44] *See* Singh v. Mukasey, 553 F.3d 207, 215–16 (2d Cir. 2009) (stating that 8 C.F.R. § 287.3(c) requires the examining officer to inform an alien of his rights).

[45] Oliva-Ramos v. Att'y Gen. of U.S., 694 F.3d 259, 283–84 (3d Cir. 2012) ("This regulation[, 8 C.F.R. § 287.8(b)(1),] incorporates the test that 'a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980))).

[46] *See id.* at 268 (reviewing Board of Immigration Appeals dispositions of arguments based on alien arrest regulations, including 8 C.F.R. § 287.3(c)).

[47] *See id.* at 285–86 (interpreting 8 C.F.R. § 287.8(c)(2)(i) as a probable cause requirement for alien arrests).

[48] INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 ("[N]o challenge is raised here to the INS's own internal regulations."); *see also id.* at 1044 (noting that the INS "has its own comprehensive scheme for deterring Fourth Amendment violations by its officers").

Mendoza rule applied to the regulation. The Supreme Court explicitly said that regulations might be different.

To be clear, the regulations do not state a remedy for their violation. That is certainly a weakness—one the Department of Homeland Security should fix. Nevertheless, when the immigration regulation requiring reasonable suspicion for a custodial interrogation was first proposed in 1992, the Department of Justice stated that it aimed to "bring immigration officers in line with other Department of Justice law enforcement officers."[49] That seems to invoke the normal rules applicable in the criminal context, where law enforcement officers are subject to the full exclusionary rule under the Fourth Amendment. The Ninth Circuit reasoned that the regulation was meant to implement Fourth Amendment norms and to be enforced. The court wrote, "The regulation and the Fourth Amendment standards it reflects are undoubtedly for the benefit of petitioners and not mere best-practices suggestions for immigration officers."[50]

While I would personally prefer that the Fourth Amendment apply with full force to deportation cases, there is a coherent logic in allowing regulations to be more protective. A constitutional norm is rigid. By contrast, the government can choose to bind itself to rules beyond what the Bill of Rights requires through regulations. This is normal. For example, some states offer judicial review after a warrantless arrest faster than required under the Constitution.[51] The advantage of allowing this is that if the government finds the additional protection unworkable, it can change it; in this case, it can simply engage the rulemaking process to issue less protective regulations. But so long as the regulations are on the books, they should be enforced.

IV. APPLYING THE ANALOGY TO THE PROBLEM

Let us assume the exclusionary rule is indeed more protective under the regulations than it is under the Fourth Amendment. This

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[49] Enhancing the Enforcement Authority of Immigration Officers, 57 Fed. Reg. 47,011, 47,011 (Oct. 14, 1992) (codified at 8 C.F.R. pts. 242, 287).

[50] Sanchez v. Sessions, 904 F.3d 643, 652 (9th Cir. 2018).

[51] *See, e.g.*, MO. REV. STAT. § 544.170 (requiring a probable cause determination after a warrantless arrest within twenty-four hours); ALASKA STAT. § 12.25.150 (same).

then offers a path to restore some protection from selective enforcement for immigrant activists who exercise their free speech rights. The Department of Homeland Security should issue regulations providing that an immigration court must terminate removal proceedings if the respondent can show that the immigration officers either became aware of her or chose to take action against her because of activity that is protected by the First Amendment.[52]

ICE itself has, in the past, been willing to terminate removal proceedings to remedy civil rights violations in the context of immigration enforcement. This happened, for example, in Charlotte, North Carolina in 2012 when it became clear that a group of immigrants had been arrested through "unlawful policing practices."[53] If dismissal can be used by immigration prosecutors on a discretionary basis to remedy abuses, it could also be wielded by immigration judges, making it a more reliable systematic remedy.

At least on paper, the Executive Branch currently appears to have some willingness to address the free speech issue. The Biden Administration has already declared a policy against selective enforcement. The Department of Homeland Security's September 2021 Guidelines for the Enforcement of Civil Immigration Law state that "[a] noncitizen's exercise of their First Amendment rights . . . should never be a factor in deciding to take enforcement action." [54] The trouble, however, is that these Guidelines are just guidelines. They are not enforceable in court, and there is no remedy for a person who believes they have been violated.[55] Enacting binding regulations would show that the Biden Administration means it.

Enacting regulations has an added benefit: transparency and public engagement. To issue the regulations that I am proposing, the Department of Homeland Security would go through an informal rulemaking process on which the public would have the

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[52] This rule would not allow a person to bootstrap a free speech defense to removal by engaging in a public protest against ICE after ICE initiated action against her. She would need to show by direct or circumstantial evidence that the First Amendment activity precipitated the ICE action.

[53] Cade, *supra* note 33, at 184.

[54] Memorandum from Alejandro N. Mayorkas, *supra* note 5, at 5.

[55] *See* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (differentiating agency rules from mere administrative guidance).

opportunity to comment.[56] In the short run, this would be a healthy process; however, the greatest benefit may not be in the enactment of the regulations. The real boon to transparency and engagement would come in the event of the regulations' proposed repeal. If a future administration wants the option of engaging in selective immigration enforcement against activists, it would need to announce that intention by proposing a repeal. That public announcement would provide an opportunity for public objection. It would make repressive, anti-liberty intent clear. That would be preferable to a stealth campaign against activists because it at least allows public opinion to act as a check against government abuse.

V. CONCLUSION

Selective enforcement is not the only First Amendment problem facing immigrants. When immigrants seek visas to enter the country, the Supreme Court permits the government to bar them for speech-related reasons on standards far more relaxed than what would apply under the First Amendment for direct limitations on expression.[57] The Supreme Court has also upheld restrictions on immigrants' participation in partisan election-related expenditures.[58] As a general matter, constitutional protection of immigrants' civil liberties is weak. That is a problem that originates with the Supreme Court and that only the Supreme Court can fully remedy.

Yet, the other branches of government need not remain on the sidelines. As Jason Cade has written, the Executive shares a responsibility with the Judiciary for enforcing constitutional

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[56] *See* Administrative Procedure Act § 4(b), 5 U.S.C. § 553(c) (providing for submissions from interested persons regarding new rules).

[57] *See* Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) ("[W]hen the Executive exercises this power [to make policies and rules for exclusion of aliens] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.").

[58] *See* Bluman v. FEC, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) ("[T]he government may bar foreign citizens (at least those who are not lawful permanent residents of the United States) from participating in the campaign process that seeks to influence how voters will cast their ballots in the elections."), *aff'd*, 132 S. Ct. 1087 (2012) (mem.).

norms.[59] In particular, the Executive Branch has already issued regulations about warrantless arrests and custodial interrogations of immigrants.[60] There is good reason—and some circuit-level caselaw—to think that these regulations offer stronger protection from unreasonable searches and seizures than does the Fourth Amendment.[61] The Biden Administration has already said that it opposes selective enforcement of immigration law in the free speech context, but it has not issued anything binding. Enacting regulations on this point would offer substantial protection against the vulnerability of immigrant activists who fear government reprisal.

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[59] Cade, *supra* note 33, at 195–96 (arguing that where the Supreme Court has narrowed constitutional guarantees, the Executive Branch still has the authority and responsibility to "uphold the fuller breadth" of the Constitution's guarantees).

[60] *See* 8 C.F.R. § 287.8(c)(2)(ii) (2021) ("A warrant of arrest shall be obtained . . . ."); 8 C.F.R. § 287.8(b) (allowing immigration officers to question a person without suspicion if they do not restrain the individual's freedom).

[61] *See* Perez Cruz v. Barr, 926 F.3d 1128, 1145 (9th Cir. 2019) (finding a seizure impermissible because border agents' suspicionless detention and questioning of Perez Cruz violated 8 C.F.R. § 287.8(b)(2)).