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Cover Page Footnote

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EXECUTIVE DISCRETION AND FIRST AMENDMENT CONSTRAINTS ON THE DEPORTATION STATE

Jennifer Lee Koh[*]

Given the federal courts' reluctance to provide clarity on the degree to which the First Amendment safeguards the free speech and association rights of immigrants, the immigration policy agenda of the President now appears to determine whether noncitizens engaging in speech, activism, and advocacy are protected from retaliation by federal immigration authorities. This Essay examines two themes: first, the discretion exercised by the Executive Branch in the immigration context; and second, the courts' ambivalence when it comes to enforcing immigrants' rights to be free from retaliation. To do so, this Essay explores the Supreme Court's influential 1999 decision in Reno v. American-Arab Anti-Discrimination Committee*, which held that statutory restrictions on judicial review prevent noncitizens from bringing First Amendment-based selective deportation claims as a defense to deportation. In particular, it draws attention to the Court's implicit suggestion that foreclosing judicial review of such claims was necessary to preserve the legitimacy of positive exercises of prosecutorial discretion to the benefit of immigrants. The Essay then turns to the relationship between executive discretion in the immigration context and the possibility of robust, judicially enforceable First Amendment protections for immigrants, especially individuals facing immigration enforcement action. It highlights how a different dimension of executive discretion—the operation of low- and mid-level discretion in the deportation state—provides agency officials with extensive opportunities to*

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retaliate against noncitizens for their political speech and activity. The Essay concludes with the suggestion that judicially enforceable First Amendment constraints on this low- and mid-level discretion are both possible and necessary, while expressing concern over the Supreme Court's endorsement of broader restrictions on noncitizens' access to the federal courts.

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I. INTRODUCTION

The courts have long been reluctant to commit to a clear position on the degree to which the First Amendment's free speech and association provisions extend to immigrants,[1] despite a troubled history between the aspirations of the constitutional protection and operation of the immigration laws.[2] Whether noncitizens receive protection from retaliation for engaging in First Amendment-protected activity, especially when that retaliation takes on the form of immigration enforcement activity, now appears to depend heavily upon the immigration policy agenda of the sitting President. During the Trump Administration, reports of enforcement activity against individuals who engaged in speech, activism, and advocacy around immigration became an alarming and frequent occurrence[3] —much of which implicated political speech criticizing the government on public affairs, which the Supreme Court has characterized as enjoying the highest level of protection under the Constitution.[4] President Biden took office with pledges to

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[1] *See* Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237, 1240 (2016) (arguing that "[t]he case law is conflicted, limited in scope, and, in some important ways, simply unclear about how far the government can go" with respect to repressing immigrant speech).

[2] The immigration laws—both expressly and as a matter of implementation—have at times served as a means to sanction or exclude views perceived by U.S. government officials as unpopular or dangerous. *See* JULIA ROSE KRAUT, THREAT OF DISSENT: A HISTORY OF IDEOLOGICAL EXCLUSION AND DEPORTATION IN THE UNITED STATES 2 (2020) (explaining that ideological exclusion is a "form of government censorship" that has been used to bar or expel immigrants "because of their political beliefs, expressions, and associations").

[3] *See* IMMIGRANT RTS. VOICES, https://www.immigrantrightsvoices.org/#/ (last visited Feb. 25, 2022) (documenting over 1,000 cases involving allegations of retaliation against noncitizens for immigration-related activism and speech from 2017–2020); Alina Das, *Deportation and Dissent: Protecting the Voices of the Immigrant Rights Movement*, 65 N.Y. L. SCH. L. REV. 225, 231–39 (2020–21) (detailing how the Trump Administration targeted different vocal groups and individuals for their speech beginning in 2017); Nick Pinto, *Across the U.S., Trump Used ICE to Crack Down on Immigration Activists*, INTERCEPT (Nov. 1, 2020, 7:00 AM), https://theintercept.com/2020/11/01/ice-immigration-activists-map/ ("Immigration authorities under President Donald Trump's administration have pursued a widespread campaign of official retaliation against immigrant rights advocates around the country . . . .").

[4] *See, e.g.,* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (recognizing "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (speech concerning "matters of public concern" are "at the heart of the First

significantly shift course with respect to immigration policy.[5] It remains to be seen whether meaningful change in the immigration realm takes place amidst litigation challenges from states and weakening political will within the Administration.[6] But the Biden Administration's approach to retaliation against immigrants has shown some modest signs of change. While the risk of retaliation against immigrants remains, particularly in immigration detention, reports of targeted retaliation against noncitizens have not matched the scale, intensity, or visibility of the prior administration. In a memorandum issued by Department of Homeland Security (DHS) Secretary Alejandro Mayorkas on the use of prosecutorial discretion in immigration enforcement, DHS asserted that First Amendment-protected activity should "never be a factor in deciding to take enforcement action."[7] Under the Biden Administration, prominent immigrant rights activists who were previously deported or

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Amendment's protection"); Connick v. Meyers, 461 U.S. 138, 145 (1983) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." (internal citations omitted)).

[5] *President Biden's Executive Actions on Immigration*, CTR. FOR MIGRATION STUD., https://cmsny.org/biden-immigration-executive-actions/ (last visited Mar. 26, 2022) (explaining that President Biden "set forth an ambitious immigration agenda . . . committing both to reverse harmful policies implemented by the Trump Administration and to revitalize the US immigration system more broadly").

[6] *See infra* note 14; Zolan Kanno-Youngs, Michael D. Shear & Eileen Sullivan, *Disagreement and Delay: How Infighting Over the Border Divided the White House*, N.Y. TIMES (Apr. 9, 2022), https://www.nytimes.com/2022/04/09/us/politics/biden-border-immigration.html (describing division amongst Biden leadership on the handling of border policy); Jonathan Blitzer, *The Disillusionment of a Young Biden Official*, NEW YORKER (Jan. 28, 2022), https://www.newyorker.com/news/the-political-scene/the-disillusionment-of-a-young-biden-official (describing further infighting and resignations within the Biden Administration regarding immigration policies in the face of political pressures).

[7] Memorandum from Alejandro N. Mayorkas, Sec'y of U.S. Dep't of Homeland Sec., to Tae D. Johnson, Acting Dir. of U.S. Immigr. & Customs Enf't 5 (Sept. 30, 2021) [hereinafter Mayorkas Memo], https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf. This memorandum has been the subject of litigation challenges by certain states, with the litigation focusing on the guidance to prioritize certain categories of noncitizens for detention and deportation despite statutory provisions that subject a broader population of persons to immigration enforcement. At the time of this Essay's preparation, the Fifth Circuit has upheld a district court's vacatur of the memorandum based on Administrative Procedure Act (APA) violations, *see* Texas v. United States, 40 F.4th 205 (5th Cir. 2022), while the Sixth Circuit has reversed a district court's injunction of the same memorandum due to likely lack of standing, lack of final agency action and failure to demonstrate a sufficient likelihood of success on the merits. *See* Arizona v. Biden, 40 F.4th 375 (6th Cir. 2022).

targeted for deportation have—with tremendous legal advocacy and grassroots organizing support—achieved some progress in their efforts to defend against deportation or return to the country after deportation.[8]

This symposium on the First Amendment and immigration, taking place in the second year of the Biden Administration, presents a timely opportunity to reflect upon the relationship between two themes: first, the discretion exercised by the Executive Branch in the immigration context, and second, the courts' ambivalence when it comes to enforcing First Amendment protections for immigrants experiencing government retaliation. To do so, this Essay explores the Supreme Court's analysis in an influential 1999 case, *Reno v. American-Arab Anti-Discrimination Committee (AADC)*.[9] In *AADC*, the Court held that statutory restrictions on judicial review prevented noncitizens from bringing First Amendment-based selective enforcement claims as a defense to deportation, with some possibility for review in cases involving outrageous retaliation.[10] In particular, the Essay draws attention to the Court's implicit suggestion that foreclosing such claims was necessary to preserve the legitimacy of positive exercises of prosecutorial discretion to the benefit of immigrants.[11]

After presenting the tensions raised in *AADC*, this Essay then reflects upon the relationship between the Executive Branch's

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[8] *See, e.g.*, Nina Shapiro, *Government Drops Deportation Case Against Washington State Immigration Activist*, SEATTLE TIMES (Sept. 22, 2021, 8:03 AM), https://www.seattletimes.com/seattle-news/government-drops-deportation-case-against-immigration-activist-maru-mora-villalpando/ (discussing resolution of removal proceedings against Seattle-based immigration activist Maru Mora Villalpando); Joel Rose, *An Immigrant Activist Says ICE Deported Him in Retaliation. Now He's Back in the U.S.*, NPR (Dec. 15, 2021, 10:40 AM), https://www.npr.org/2021/12/15/1064224812/immigrant-activist-deported-ice-retaliation-rojas (discussing deportation and subsequent returns of activists Claudio Rojas and Jean Montrevil); Nick Pinto, *ICE Settles with Immigrant Rights Leader Who Sued over First Amendment Violations,* INTERCEPT (Feb. 24, 2022, 12:27 PM), https://theintercept.com/2022/02/24/ice-ravi-ragbir-deportation-first-amendment/ (discussing the three-year reprieve of deportation granted to New York-based activist Ravi Ragbir); *id.* (noting that these individuals, represented by leading immigration lawyers, filed affirmative lawsuits and received ongoing grassroots community support prior to the government's grants of relief).

[9] 525 U.S. 471 (1999)

[10] *Id.* at 491–92.

[11] *See infra* Part II.

prerogative to exercise prosecutorial discretion and the possibility of robust, judicially enforceable First Amendment protections for immigrants facing immigration enforcement action.[12] As various immigration scholars have observed, the nature of the President and Executive Branch's discretion to implement the immigration laws has become a central feature of the immigration system.[13] At the same time, the Executive's prerogative to implement the immigration laws in a manner that does not reflect the harshest possible version of the statutory language remains, in some quarters, highly contested by states that have challenged various forms of executive action in the federal courts.[14] Furthermore, a

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[12] *See infra* Part III. The focus of this Essay is on the free speech and association rights of noncitizens. It is worth noting that government retaliation against immigration activists can implicate the religion-based free exercise dimensions of the First Amendment, although they fall outside the scope of this Essay. *See generally* Memorandum of Law Filed on Behalf of 140 Religious Leaders, Institutions, and Membership Organizations as Amicus Curiae in Support of Plaintiffs' Motion for Preliminary Injunction, Ragbir v. Homan, No. 18-cv-01159 (S.D.N.Y. Mar. 6, 2018) (describing historical examples of social movements acting as a result of religious conviction and expressing concern that retaliation against immigrant activists will undermine the ability of amici to practice their faith).

[13] *See generally, e.g.*, ADAM B. COX & CRISTINA M. RODRIGUEZ, THE PRESIDENT AND IMMIGRATION LAW (2020) (examining the President's sweeping power over immigration law).

[14] States have filed a number of litigation challenges to the Biden Administration's exercise of discretion in the immigration context, resulting in nationwide injunctions against the federal government. *See, e.g.*, Texas v. United States, No. 6:21-cv-00016, 2021 WL 3683913, at *61 (S.D. Tex. Aug. 19, 2021) (issuing preliminary injunction against immigration enforcement priorities memorandum); Texas v. United States, 14 F.4th 332, 337–38 (5th Cir. 2021), *vacated*, 24 F.4th 407 (5th Cir. 2021) (finding that the United States was likely to succeed on ability of immigration officials to issue enforcement priorities (citing *AADC*, 525 U.S. at 483)); *see also* Texas v. United States, 549 F. Supp. 3d 572, 621, 624 (S.D. Tex. July 16, 2021) (enjoining granting of new DACA applications based, in part, on the existence of a statutory scheme that renders most DACA beneficiaries removable). Courts have also enjoined significant policies related to the border. *See, e.g.*, Texas v. Biden, 554 F. Supp. 3d 818, 853–57 (N.D. Tex. 2021) (granting nationwide injunction against termination of Migrant Protection Protocols), *aff'd*, Texas v. Biden, 20 F.4th 928 (5th Cir. 2021), *rev'd*, Biden v. Texas, 142 S. Ct. 2528 (June 30, 2022); Louisiana v. CDC, No. 6:22-cv-00885, 2022 WL 1604901, at *23 (W.D. La. May 20, 2022) (granting nationwide injunction against the termination of Title 42 policy at border). In an opinion with broad implications for the cases cited above, on June 30, 2022, the Supreme Court held in *Texas v. Biden* that the lower federal courts lack authority to issue injunctive relief against the immigration agencies due 8 U.S.C. § 1252(f)(1), which states that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of" various provisions of the Immigration and Nationality Act. Biden, 142 S. Ct. at 2540. *See also id*. at n.4 (expressing "no view" on whether

meaningful feature of contemporary executive discretion in the immigration context is that low- and mid-level immigration enforcement officers exercise high levels of discretionary decision-making in areas that have strong liberty interests, such as decisions related to physical detention and physical removal. But the exercise of low- and mid-level discretion has become a pressure point at which the First Amendment's free speech guarantee has become particularly vulnerable as far as retaliatory action by the immigration enforcement agencies is concerned.[15]

Accordingly, immigration enforcement retaliation can take on multiple forms and reflect numerous decisions, such as the decision to not renew a stay of removal, the decision to process a person for immediate deportation, the decision to detain, and the decision to transfer a person to another detention facility, to name a few. Each of these decisions implicates the discretion of immigration agents operating with minimal transparency and significant authority.[16]

One might question the urgency of examining free speech protections for immigrants under the Biden Administration, which has held itself out as a shift away from the excesses—even the terrors, for immigrant communities—of the Trump era.[17] But reflecting upon government retaliation under the prior administration does indeed matter, especially due to the possibility that a future President could again adopt a singularly aggressive, anti-immigrant policy agenda. Moreover, despite the Biden Administration's shifts in rhetoric around immigration in comparison to the Trump Administration, the immigration agencies continue to possess many of the tools and structures that make retaliation against immigrants possible: access to a range of surveillance tools with minimized constitutional limitations, the power to detain and deport, the diffusion of responsibility and high concentrations within the lower ranks of the bureaucracy, and

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section 1252(f)(1) bars lower courts from issuing non-injunctive relief, such as declaratory orders or vacatur under the APA).

[15] *See infra* Part III.

[16] See *infra* notes 95–100.

[17] *See* Stella Burch Elias, *Law as a Tool of Terror*, 107 IOWA L. REV. 1, 1 (2021) (arguing that immigration policy under the Trump Administration employed tools of terrorism and imposed terror on immigrant communities).

political pressure to signal support for strict enforcement of the immigration laws.[18]

Additionally, several insights about immigration law more broadly emerge from examining retaliation against immigrants. First, studying retaliation demonstrates how access to First Amendment free speech protections for noncitizens, particularly when it comes to undocumented immigrants and access to the federal courts, remains unclear as a matter of formal law and doctrine.[19] Second, the experience of immigrant retaliation affirms the prominence of low-level executive discretion in immigration, especially the impact of decisions made in the shadows of formal immigration law where little transparency, or even official process, exists.[20] Third, despite the opacity of formal law and constitutional protection, studying this area reveals emerging social norms around immigrants, immigrant speech, and immigrant membership in the United States.

The Essay proceeds as follows. Part II focuses on *Reno v. AADC*'s treatment of prosecutorial discretion in the immigration context and the question of First Amendment protections for noncitizens, particularly undocumented immigrants. Part II observes that the *AADC* majority justifies its decision to bar retaliatory deportation claims based, in part, on the rationale of protecting executive discretion from judicial intervention. Part III shifts focus to executive discretion in the immigration context more broadly, both in terms of categorical exercises of favorable discretion for immigrants as well as the low- and mid-level discretion that permeates the immigration enforcement bureaucracy. As Part IV demonstrates, the existence of low- and mid-level discretion over areas involving high liberty interests—namely, deportation and detention—provides agency officials with extensive opportunities to retaliate against noncitizens for their political speech and activity. The Essay concludes with the suggestion that judicially enforceable First Amendment constraints on executive discretion are both possible and necessary. Finally, it expresses concern over the

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[18] *See infra* notes 95–100.

[19] *See* Kagan, *supra* note 1, at 1241 (characterizing the "nature of immigrant free speech rights" as "unsettled").

[20] *See infra* Part III.

Supreme Court's endorsement of broader restrictions on noncitizens' access to the federal courts.

II. *RENO V. AADC* AND THE RELATIONSHIP BETWEEN EXECUTIVE DISCRETION AND ROBUST FIRST AMENDMENT PROTECTIONS FOR NONCITIZENS

For much of U.S. history, the federal courts have not laid down clear principles governing the relationship between the First Amendment's commitment to freedom of speech and the immigration laws. On one hand, a strong argument that the First Amendment applies to all persons who are physically in the United States, irrespective of immigration status, exists.[21] The Supreme Court has stated that "[f]reedom of speech and of press is accorded [to] aliens residing in this country."[22] Moreover, the Court's prior assertions that due process rights apply to all persons present in the United States should extend to other constitutional rights, including the First Amendment.[23] On the other hand, the Court has invoked the plenary power doctrine to insulate immigration statutes from constitutional review, including First Amendment review.[24] The reach of plenary power has been particularly strong

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[21] *See* Michael Kagan, *Do Immigrants Have Freedom of Speech*?, 6 CALIF. L. REV. CIR. 84, 84 (2015) (identifying arguments supporting and undermining First Amendment rights of undocumented immigrants).

[22] Bridges v. Wixon, 326 U.S. 135, 148 (1945).

[23] *See* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (applying the Due Process Clause's safeguard against indefinite detention to immigrants within the United States, regardless of status); *see also* Plyler v. Doe, 457 U.S. 202, 215 (1982) (concluding that undocumented immigrants "may claim the benefit of the Fourteenth Amendment's guarantee of equal protection"); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (noting that all persons, including immigrants "whose presence in this country is unlawful, involuntary, or transitory" are entitled to the protections of the Due Process Clauses in the Fifth and Fourteenth Amendments); Kwong Hai Chew v. Colding, 344 U.S. 590, 591–92 (1953) (holding that Attorney General does not have the authority to deny a hearing to lawful permanent resident in opposition to an order for permanent exclusion and deportation); Wong Wing v. United States, 163 U.S. 228, 238 (1896) ("All persons within the territory of the United States are entitled to the protection guarantied [sic] by [the Fourteenth, Fifth, and Sixth] amendments, and that even aliens shall not be held to answer for a . . . crime . . . nor be deprived of life, liberty, or property without due process of law.").

[24] *See* Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (holding that Congress has delegated to the Executive Branch conditional exercise of Congress's plenary power to exclude aliens or

where governmental action is framed as part of the Executive's discretion to grant benefits to individuals physically outside the United States.[25] Federal courts also have issued some decisions suggesting that the First Amendment's reference to "the people" does not include undocumented immigrants.[26]

Reno v. AADC remains a critical case for assessing the ability of noncitizens, particularly undocumented individuals, to enforce First Amendment free speech protections in federal court. Other scholars have provided insightful, close readings of *AADC*—particularly the scope of its holding, the quality of the majority's reasoning, and its implications for the First Amendment rights of noncitizens more broadly.[27] Here, I highlight two aspects of the

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prescribe the conditions for their entry into the United States and that courts will not weigh the Attorney General's decision against the First Amendment interests of those who would communicate with the alien); Galvan v. Press, 347 U.S. 522, 522 (1954) (emphasizing Congress's broad power over admission of aliens and their right to remain); United States *ex rel*. Turner v. Williams, 194 U.S. 279, 290 (1904) (finding that "the deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law, and that the provisions of the Constitution securing the right of trial by jury have no application"). The Court has applied mainstream First Amendment principles to a noncitizen's claim that a statutory deportation ground violated the constitutional guarantee, even if ultimately rejecting the claim. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 591–92 (1952) (finding no First Amendment protection for speech and activities advocating forceful or violent overthrow of government).

[25] *See Kleindienst*, 408 U.S. at 765–66 (emphasizing national sovereignty interests associated with the plenary power to exclude individuals not yet admitted to United States).

[26] *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (suggesting that "the people" referenced in various constitutional amendments is reserved only for "persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"). The inclusion of undocumented individuals within the constitutional reference to "the people" has also arisen in the Second Amendment context, although courts have been split. *Compare* United States v. Carpio-Leon, 701 F.3d 974, 979 (4th Cir. 2012) (restricting application of the Second Amendment to "law-abiding, responsible citizens," which did not include undocumented immigrants), *with* United States v. Meza-Rodriguez, 798 F.3d 664, 670–72 (7th Cir. 2015) (finding that the Second Amendment applies to undocumented persons, so long as they demonstrate "substantial connections" to United States), *and* United States v. Perez, 6 F.4th 448, 449 (2d Cir. 2021) (declining to rule on application of Second Amendment to undocumented persons).

[27] *See, e.g.*, Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After* Reno v. AADC, 14 GEO. IMMIGR. L.J. 313, 314 (2000) (arguing that *AADC*'s "rejection of the plaintiffs' selective enforcement claim might be reconciled with the First Amendment, but that the opinion is overly general in its criticism of challenges to selective enforcement"); David Cole, *Damage Control? A Comment on Professor Neuman's Reading of* Reno v. AADC,

Court's decision: the majority's discussion of prosecutorial discretion in immigration and its treatment of the First Amendment rights of undocumented individuals.

AADC involved a challenge to the Immigration and Naturalization Service's (INS) decision to institute deportation proceedings against eight noncitizens based on their political affiliation.[28] Those individuals—known as the "L.A. Eight"—included seven nationals of Palestine and one national of Kenya.[29] Six of the L.A. Eight had entered the country on temporary, nonimmigrant visas, while the remaining two held lawful permanent resident status.[30] All were members of an organization known as the Popular Front for the Liberation of Palestine (PFLP).[31] Petitioners alleged that in January 1987, the government had "target[ed] them for deportation because" of their association with the PFLP, which the Court described as "politically unpopular" and viewed by the U.S. government as an "international terrorist and communist organization."[32] They raised selective enforcement claims under the First and Fifth Amendments in federal district court and found traction in the lower courts.[33] The Central District of California issued a preliminary injunction against the government's efforts to deport six of the petitioners, noting that First Amendment concerns contributed to its finding of irreparable injury.[34] The Ninth Circuit rejected the government's claims that the court lacked jurisdiction and upheld the preliminary injunction, ruling for the petitioners with respect to the First Amendment

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14 GEO. IMMIGR. L.J. 347, 348 (2000) (agreeing that *AADC* does not undermine broad First Amendment claims of noncitizens); Hiroshi Motomura, *Judicial Review in Immigration Cases After* AADC*: Lessons from Civil Procedure*, 14 GEO. IMMIGR. L.J. 385, 387 (2000) (analyzing *AADC* with a focus on implications for interpretation of judicial review statutes in the immigration context); David A. Martin, *On Counterintuitive Consequences and Choosing the Right Control Group: A Defense of* Reno v. AADC, 14 GEO. IMMIGR. L.J. 363, 365 (2000) (defending *AADC*'s First Amendment rationale).

[28] *See* Reno v. AADC, 525 U.S. 471, 472–73 (1999).

[29] *Id.* at 473.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 471–73.

[33] *Id.* at 473–74.

[34] *See id.* at 475. Before the jurisdiction stripping provisions were enacted, the Ninth Circuit Court of Appeals "rejected the Attorney General's argument that selective-enforcement claims are inappropriate in the immigration context." *Id.*

claims.[35] But much of the lower court litigation took place before 1996, a pivotal year in U.S. immigration law history.[36] In 1996, Congress passed two pieces of sweeping immigration legislation, the Antiterrorism and Effective Death Penalty Act (AEDPA)[37] and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[38] which included multiple provisions limiting judicial and habeas review over immigration actions, amongst other changes to the immigration laws.[39] The central issue before the Supreme Court thus involved one such provision, 8 U.S.C. § 1252(g), which sought to limit federal court jurisdiction over "the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act."[40]

Given that § 1252(g) was enacted into law while the litigation was pending, the Court's opinion focused on which jurisdictional provision applied, § 1252(g) or the pre-1996 version (under which the case for judicial review of the *AADC* claims was significantly stronger).[41] Transitional rules exempted most of IIRIRA's jurisdictional bars to litigation pending at the time of the law's implementation, and the Ninth Circuit had allowed the claims to proceed.[42] The Supreme Court's holding that IIRIRA's more restrictive statute applied was in part a technical question of

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[35] American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1052 (9th Cir. 1995).

[36] *See* Jennifer M. Chacon, *The 1996 Immigration Laws Come of Age*, 9 DREXEL L. REV. 297, 298 (2017) (recounting that 1996 "was the year that a Republican Congress passed and President Bill Clinton signed three pieces of bipartisan legislation that fundamentally changed the narrative about immigrants in the U.S.").

[37] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

[38] Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009, 546–724 (1996).

[39] *See* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1444–65 (1997) (describing restrictions on judicial review enacted by IIRIRA and AEDPA).

[40] Reno v. AADC, 525 U.S. 471, 477–78 (1999) (quoting 8 U.S.C. § 1252(g)).

[41] *See id.* at 473 (framing the issue as whether the IIRIRA provision "restricting judicial review of the Attorney General's 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act' . . . deprives the federal courts of jurisdiction over respondents' suit" (quoting 8 U.S.C. § 1252(g))).

[42] *See id.* at 475 (recounting the Ninth Circuit's merits determination regarding selective enforcement claims and statutory prohibition on judicial review prior to issuance of removal order).

statutory analysis; the Court emphasized the text of § 1252(g) and its interaction with an IIRIRA provision addressing the application of the new law to then-pending cases.[43]

But the Court also emphasized Congress's interest in protecting the Executive's ability to exercise prosecutorial discretion from judicial review,[44] and in doing so, issued what has become significant language in contemporary debates regarding the legitimacy of such discretion. The Court specifically pointed to the use of deferred action as an example, relying on a leading immigration law treatise on the agency's "regular practice" of using deferred action and its role in "ameliorat[ing] [] harsh and unjust outcome[s]" in immigration enforcement.[45] As the decision stated, "[a]t each stage the Executive has discretion to abandon the endeavor" of removal.[46] The Court went on to recognize the regular agency practice of "exercising that discretion for humanitarian reasons or simply for its own convenience."[47] Indeed, the federal government has since relied on *AADC* to defend the legality of deferred action amidst challenges to DACA and other forms of prosecutorial discretion in immigration.[48]

The *AADC* majority found persuasive the principle that in order for the immigration agency to exercise prosecutorial discretion favorably towards immigrants, it should not be burdened by the possibility of judicial intervention—or at least by litigation based on

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[43] *See id.* at 487 (reasoning that § 306(c)(1) "command[s] that 1252(g) be applied 'without limitation' (*i.e.*, including the '[e]xcept as provided' clause) to 'claims arising from all past, pending, or future exclusion, deportation, or removal proceedings'").

[44] *See id.* at 484 ("There was good reason for Congress to focus special attention upon, and make special provision for, judicial review of the Attorney General's discrete acts . . . .").

[45] *Id.* (quoting CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 72.03 (1998)).

[46] *Id.* at 483.

[47] *Id.* at 483–84.

[48] *See, e.g.*, Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53,736 (Sept. 28, 2021) (stating that "[t]he Supreme Court's 8–1 decision in *AADC* . . . is noteworthy[,] [e]mphasizing the breadth of the Executive power to decide whether to grant deferred action"); Mayorkas Memo, *supra* note 7, at 2 (referencing the Supreme Court's decision in *Arizona v. United States* and describing *AADC* by reference to Justice Scalia's opinion that "emphasized that enforcement discretion extends throughout the entire removal process, and at each stage of it the executive has the discretion to not pursue it").

the First Amendment.[49] Indeed, the opinion cited with concern litigation claims permitted to proceed against the agency for failures to exercise prosecutorial discretion under the pre-1996 jurisdictional rules.[50] As the Court put it, "Since no generous act goes unpunished, however, the INS's exercise of this discretion opened the door to litigation in instances where the INS chose *not* to exercise it."[51] According to the Court, Congress sought to "protect[] the Executive's discretion from the courts."[52] As such, reading § 1252(g) to bar the petitioner's selective enforcement claims was consistent with legislative intent.[53] The Court accepted that Congress might have particular interest in the immediate application of § 1252(g) given what the Court took as its "narrower" focus, in comparison to other judicial review provisions, on the commencement, adjudication, and execution of removal orders.[54] The Court rejected the suggestion that the provision barred "all claims arising from deportation proceedings" or otherwise imposed a "general jurisdictional limitation."[55] Instead, § 1252(g) was "specifically directed at the deconstruction, fragmentation, and hence prolongation of removal proceedings."[56]

AADC is far from the only case to suggest that the discretionary nature of the agency's actions serves as a rationale for precluding judicial review.[57] The general principle that an agency's

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[49] *See AADC*, 525 U.S. at 485 (reasoning that "Section 1252(g) seems clearly designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations").

[50] *See id.* at 485 ("Such litigation was possible because courts read § 1105a's prescription that the Hobbs Act shall be 'the sole and exclusive procedure for the judicial review of all final orders of deportation' to be inapplicable to various decisions and actions leading up to or consequent upon final orders of deportation, and relied on other jurisdictional statutes to permit review.").

[51] *Id.* at 484.

[52] *Id.* at 486.

[53] *See id.* at 487 ("Our narrow reading of § 1252(g) makes sense of the statutory scheme as a whole, for it resolves the supposed tension between § 306(c)(1) and § 309(c)(1).").

[54] *See id.* at 482 ("The provision applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'").

[55] *Id.*

[56] *Id.* at 487.

[57] *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 830 (1985) ("[R]eview is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge

discretionary actions are immune from judicial review constitutes a recurring theme throughout administrative and immigration law.[58] The Administrative Procedure Act's prohibition on judicial review for actions "committed to agency discretion by law"[59] reflects the same principle. Multiple provisions enacted in the 1996 immigration laws likewise bar judicial review of discretionary decisions by the agencies.[60] But "discretion" is not a blunt tool, either. Many agency actions with a discretionary component remain reviewable,[61] and whether agency action is sufficiently discretionary so as to preclude judicial review can produce deep disagreement.[62]

Nonetheless, *AADC*'s reliance on the need to preserve executive discretion as a basis for applying the jurisdictional bar and discounting the First Amendment stakes is worth noting. The petitioners urged the Court to apply the doctrine of constitutional avoidance to the jurisdiction-stripping provision, arguing that the complete unavailability of federal court access to pursue their First Amendment claims raised constitutional problems that could be avoided by reading § 1252(g) to permit review.[63] The Court rejected the *AADC* petitioners' constitutional avoidance argument, and in

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the agency's exercise of discretion."). Indeed, courts have generally limited *AADC*'s jurisdictional ruling to the three actions—the decision to commence proceedings, adjudicate cases, or executive removals—described in § 1252(g). *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1907 (2020) (reasoning that the rescission of DACA "is not a decision to 'commence proceedings,' much less to 'adjudicate' a case or 'execute' a removal order").

[58] *See* JARED P. COLE, CONG. RSCH. SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 12 (2016) (describing how judicial review is unavailable under the Administrative Procedure Act "if the agency's action is legally committed to the agency's discretion").

[59] 5 U.S.C. § 701(a)(2).

[60] *See AADC*, 525 U.S. at 486 ("Of course *many* provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts—indeed, that can fairly be said to be the theme of the legislation.").

[61] *See* 5 U.S.C. § 706(2)(B) (providing for judicial review of agency action that is "contrary to constitutional right").

[62] *See* Texas v. United States, 809 F.3d 134, 166–69 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016) (finding that creation of deferred action for parents of U.S. citizens and lawful permanent residents under Obama Administration was not sufficiently discretionary to preclude judicial review under Administrative Procedure Act).

[63] *AADC*, 525 U.S. at 487–88.

doing so, effectively determined that Congress's interest in preserving executive discretion from judicial interference in the immigration context outweighed the First Amendment concerns present in the case. [64]

Underscoring the uneasy relationship between First Amendment protections and agency discretion, the *AADC* majority went further than necessary in its analysis of the First Amendment-based constitutional doubt claims. Although the applicability of the First Amendment to the petitioners had not been briefed, the majority nonetheless took the opportunity to assert that "[a]s a general matter . . . an alien unlawfully in this country has *no constitutional right* to assert selective enforcement as a defense against his deportation."[65] The Court reasoned that the rationales for heavily disfavoring selective enforcement claims in the criminal context apply even more forcefully where deportation is concerned.[66] The *AADC* majority emphasized the skepticism the Court had expressed in a prior opinion towards allowing courts to scrutinize the exercise of prosecutorial discretion in criminal law cases, such as delay, chilling law enforcement, and "undermin[ing] prosecutorial effectiveness by revealing the Government's enforcement policy."[67]

The Court stated that these criminal law concerns were "greatly magnified in the deportation context," thereby suggesting that First Amendment protections do not constrain the government's decision to bring immigration enforcement proceedings.[68] Regarding delay, the Court emphasized that the consequence of allowing a selective enforcement claim to proceed would "permit and prolong a continuing violation of United States law," such that delay in immigration cases was even more harmful than delay in criminal cases.[69] On the potential chilling effect on law enforcement, the

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[64] *See id.* ("We do not believe that the doctrine of constitutional doubt has any application here.").

[65] *Id.* at 488 (emphasis added).

[66] *Id.* at 490.

[67] *Id.* (quoting Wayte v. United States, 470 U.S. 598, 607 (1985)).

[68] *Id.*

[69] *Id.* As the Court stated, criminal process delay "merely" puts off "the criminal's receipt of his just deserts," with the implication being that the criminal act is already complete. *Id.* Furthermore, because "[p]ostponing justifiable deportation . . . is often the principal object of resistance to a deportation proceeding," the Court suggested that permitting selective enforcement litigation would interfere with the agency's enforcement of "routine status

Court drew attention to the potential foreign policy and foreign intelligence interests at stake in the immigration context.[70] Finally, the Court emphasized that the interests of noncitizens are simply "less compelling than in criminal prosecutions" and that deportation is "not imposed as a punishment."[71] The Court did, however, leave room for the possibility of an outrageousness exception—that there might be "a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome."[72] Nonetheless, the upshot of the majority's decision is that the legitimacy of prosecutorial discretion in immigration might not peacefully coexist with robust First Amendment protections for noncitizens.

The precise meaning of the Court's announcement about First Amendment rights in the immigration context has been subject to considerable debate and discussion. Justice Souter, who would have adopted the constitutional avoidance arguments, insisted that the majority's language regarding the First Amendment was dicta.[73] In a symposium devoted to *AADC* published the year after the decision, Professors David Cole (who represented the *AADC* petitioners) and Gerald Neuman shared the view that the decision should be strictly read as limited to the use of selective enforcement as a defense to deportation, and not as a blanket denial of the First Amendment to undocumented people.[74] Both also raised strong criticisms of the functional reasons given by the Court, particularly

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requirements." *Id.* Deportation, in the Court's eyes, was necessary "to bring to an end *an ongoing violation* of United States law." *Id.* at 491.

[70] *Id.* at 490–91. For instance, the majority suggested that the "Executive should not have to disclose its 'real' reasons for deeming nationals of a particular country a special threat" and suggested that the Executive would have the prerogative, if it so wished, to "simply wish[] to antagonize a particular foreign country by focusing on that country's nationals." *Id.*

[71] *Id.* at 491.

[72] *Id.*

[73] *Id.* at 510 n.5.

[74] *See* Cole, *supra* note 27, at 358–59; Neuman, *supra* note 27, at 314. Courts have found that the First Amendment applies to governmental action, outside the immigration enforcement context, that undermines the free speech and association rights of people likely to be undocumented. *See, e.g.*, Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 940–41 (9th Cir. 2011) (en banc) (finding that local ordinance aimed at regulation of day laborers and prohibiting "stand[ing] on a street or highway and solicit[ing], or attempt[ing] to solicit, employment, business, or contributions from an occupant of any motor vehicle" to be facially unconstitutional speech restriction).

the Court's "ongoing violations" rationale and reliance on foreign affairs.[75] *AADC* might viably be limited to its facts, which were unique in terms of the terrorism context of the petitioners' First Amendment protected activity, as well as the application and timing of the jurisdictional bar.[76] The Court made note of the fact that "the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity."[77]

Still, the decision has had lasting impacts. As Professor Michael Kagan has pointed out, government lawyers during the Obama Administration argued that undocumented immigrants have no First Amendment rights at all in a case raising claims of retaliation against detained immigrants engaged in a hunger strike.[78] During the Trump Administration, when courts found that instances of selective deportation fell within § 1252(g), *AADC* was a sword for the government.[79] Even if *AADC*'s influence has arguably weakened in recent years, its jurisdictional holding has remained influential. Some courts applied the outrageousness exception to cases in which the immigration enforcement agencies targeted immigration activists and leaders who were critical of U.S. immigration policy, like the court in *Ragbir v. Homan*.[80] The Second Circuit in *Ragbir*

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[75] *See* Cole, *supra* note 27, at 361 ("It is not true that recognizing selective enforcement as a defense will always require the toleration of an 'ongoing violation.'"); Neuman, *supra* note 27, at 342–45 (discussing the flaws of the "continuing violation" argument).

[76] *See* Kagan, *supra* note 1, at 1268–69 (noting that the members of the group fighting deportation in *AADC* were affiliated with a government-labeled "international terrorist and communist organization").

[77] *AADC*, 525 U.S. at 491–92.

[78] *See* Kagan, *supra* note 21, at 85–86 (discussing DOJ arguments raised against plaintiffs' claims in *Pineda-Cruz v. Thompson*, No. 15-CV-326, 2015 WL 1868560 (W.D. Tex. Apr. 23, 2015)).

[79] *See* Das, *supra* note 3, at 243 (noting that the government "relied on *AADC* to seek dismissal of any First Amendment challenge to deportation" during the Trump Administration).

[80] *See, e.g.*, Ragbir v. Homan, 923 F.3d 53, 68–72 (2d Cir. 2019) (applying the outrageousness exception where officials targeted Ragbir based on their disfavor of his speech, his substantial interest in avoiding deportation under these circumstances, and less pronounced government interests in avoiding inquiry into its conduct than in *AADC*), *cert. granted, vacated sub nom.*, Pham v. Ragbir, 141 S. Ct. 227 (2020); Rueda Vidal v. U.S. Dep't of Homeland Sec., 536 F. Supp. 3d 604, 618–19 (C.D. Cal. 2021) (holding that Rueda Vidal "asserted sufficiently outrageous conduct" where the "violations of her rights to political speech and familial association [were] implicated in her DACA denial").

found that § 1252(g) violated the Constitution's Suspension Clause, which prohibits Congress from suspending access to habeas relief in certain situations.[81] Nonetheless, *AADC* continues to present a formidable obstacle to immigrants seeking judicial redress in response to government retaliation for their activism.

AADC has thus come to stand for important—albeit contested—principles with respect to both the significant nature of Executive Branch discretion in the immigration context and limited judicial remedies for retaliation against immigrant speech. Since 1999, both areas have grown in prominence and importance in the immigration field. But few commentators have examined how executive discretion and limited judicial review interact with each other in the specific context of the First Amendment, and whether—as *AADC* implies—the two are not compatible. One exception is Professor David Martin, who shortly after the *AADC* decision praised the Court's approach to the relationship between the Court's recognition of the legitimacy of prosecutorial discretion and its reluctance to embrace First Amendment protections for undocumented immigrants.[82] According to Professor Martin, *AADC*'s decision to foreclose First Amendment claims would ultimately benefit noncitizens because it could "free up a more humane use of enforcement discretion" by the immigration agencies in the future by alleviating concerns about litigation risk.[83] Interestingly, Professor Martin's assessment took place over a decade prior to substantial deployments of deferred action by the Executive Branch. As the next section shows, executive discretion has come to occupy a central role in contemporary immigration law.

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[81] *See Ragbir*, 923 F.3d at 73–78 (concluding that the Suspension Clause entitled Ragbir to a habeas corpus proceeding as to the basis for the Government's impending action to deport him); *see also* Daniel Simon, *Immigration, Retaliation, and Jurisdiction*, 2020 U. CHI. LEGAL F. 477, 503 (arguing for application of Suspension Clause to Section 1252(g) in government retaliation cases involving certain procedural posture).

See Ragbir, 923 F.3d at 73–78 (co

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III. THE CENTRALITY OF EXECUTIVE BRANCH DISCRETION IN IMMIGRATION LAW

This Part discusses developments in Executive Branch discretion in immigration law and broadens the discussion of executive discretion beyond the types of government action contemplated in *AADC*. In particular, it draws attention to the nature of discretion that exists amongst front- and mid-line officers in the immigration enforcement bureaucracy in order to lay context for the nature of government retaliation against noncitizens in the current era.

Since the Court's decision in *AADC*, the role of the President and Executive Branch in shaping immigration law and policy has grown tremendously, for a variety of structural reasons largely unrelated to the concerns identified in the decision. When the Court issued *AADC*, the government was still in the process of implementing the 1996 legislation, such that the full impact of those laws had not yet taken effect.[84] IIRIRA and AEDPA broadened the statutory grounds on which people have become subject to deportation . Those laws also restricted noncitizens' opportunities to defend themselves against removal before the agency and in the federal courts, for instance by creating stricter standards to apply for discretionary relief from removal and by restricting judicial review of removal orders.[85] As a result, initial Executive Branch decisions over who to target for potential removal have effectively become one of the most important decisions in the system.[86] Practical resource constraints have also become a prominent justification for the necessity of executive-level prosecutorial discretion. Given the mismatch between the large numbers of people actually subject to potential enforcement and the number of people for whom the federal government has the resources to deport, some prioritization amongst the removable population is necessary and inevitable. The

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[84] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009–546.

[85] *See supra* Part II.

[86] *See generally* COX & RODRIGUEZ, *supra* note 13 (calling this Executive Branch power "extraordinary"). Cox and Rodriguez have influentially used the phrase "de facto" delegation to describe how legislative enactments amounted to a de facto delegation of immigration power to the Executive Branch. *See id.* at 193–194.

Supreme Court's federal preemption analysis has arguably underscored the legitimacy of Executive Branch discretion in immigration as well. The Court emphasized in *Arizona v. United States* that the federal government—referring to the immigration agencies—retains "broad discretion" to "decide whether it makes sense to pursue removal at all."[87] The ability of high-level Executive Branch officials to issue general policies that result in exempting some members of the removable population from actual removal has thus become a regular feature of the contemporary immigration landscape.[88]

While the exercise of prosecutorial discretion has existed for decades (including in the years prior to *AADC*),[89] its use became acutely prominent—and controversial—in the 2010s with the creation of, and efforts to rescind, categorical deferred action for young people and their parents.[90] Multiple agency memoranda have set forth immigration enforcement priorities that directed enforcement officers to deprioritize the deportations of certain groups of people.[91] My goal is not to rehash this history or debate the legality of such actions, but simply to highlight that top-down, categorical exercises of Executive Branch discretion in the immigration context have become widespread, prominent, and

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[87] Arizona v. United States, 567 U.S. 387, 396 (2012).

[88] *See generally* COX & RODRIGUEZ, *supra* note 13 (outlining the Executive Branch's immigration power).

[89] *See generally* SHOBA SIVAPRASAD WADHIA, THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015) (examining the use of prosecutorial discretion throughout the history of immigration law).

[90] *Deferred Action for Childhood Arrivals (DACA): An Overview*, AM. IMMIGR. COUNCIL, https://www.americanimmigrationcouncil.org/research/deferred-action-childhood-arrivals-daca-overview (last visited March 26, 2022). The 2012 creation of DACA, 2014 attempted creation of DAPA and an expanded form of DACA, 2018 rescission of DACA, and 2020 restoration of DACA have been the subject of extended litigation and commentary. *See, e.g.*, Crane v. Napolitano, 920 F. Supp. 2d 724, 747 (N.D. Tex. 2013), *aff'd sub nom.*, Crane v. Johnson, 783 F.3d 244, 255 (5th Cir. 2015) (dismissing action by ICE officers' union and State of Mississippi against the 2012 creation of DACA); United States v. Texas, 579 U.S. 547, 547–48 (2016) (per curiam) (affirming Fifth Circuit's injunction against 2014 DAPA and extended DACA programs); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 912 (2020) (finding attempted rescission of DACA in 2018 invalid as arbitrary and capricious agency action); Texas v. United States, No. 1:18-CV-00068, 2021 WL 3022434, at *1–3 (S.D. Tex. July 16, 2021) (enjoining granting of new DACA applications).

[91] *See* Mayorkas Memo, *supra* note 7, at 2 ("[W]e need to exercise our discretion and determine whom to prioritize for immigration enforcement action.").

central to the administration of the immigration system while also remaining subject to litigation, debate, and criticism. It is worth noting that the creation of high-level, categorical deferred action was the direct result of grassroots activism, led by undocumented young people who had spent years advocating for legislative change in the form of the DREAM Act and then shifted their focus away from the legislature and towards the Executive Branch.[92]

Executive discretion in the immigration context is multifaceted and encompasses multiple dimensions.[93] One critical aspect of discretion involves the nature of the front-line, low- and mid-level discretion that runs throughout the immigration bureaucracy.[94] To be sure, the discretionary authority possessed by rank-and-file officers in the immigration enforcement agencies is distinct from the exercises of humanitarian grants of lenience discussed in *AADC*.[95] The two forms of discretion are closely linked, though. Taking DACA as an example, scholars have explained how the Obama Administration's decision to protect certain young people from deportation ultimately took the form of a program involving affirmative adjudications by the benefits-granting agency, United States Citizenship and Immigration Services (USCIS), in significant part because of the need to constrain front-line discretion amongst the rank and file of the enforcement bureaucracy (principally, officers at ICE).[96] In other words, placing the decision

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[92] *See* MICHAEL A. OLIVAS, PERCHANCE TO DREAM: A LEGAL AND POLITICAL HISTORY OF THE DREAM ACT AND DACA 69–71 (2020) (detailing the Obama Administration's plan for prosecutorial discretion with support of immigration organizations and advocates following the Administration's inability to get the DREAM Act passed in Congress).

[93] *See generally* Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in Immigration Law*, 71 TUL. L. REV. 703 (1997) (setting forth models of discretion in immigration law).

[94] *See* Jennifer Lee Koh, *Executive Defiance and the Deportation State*, 130 YALE L.J. 948, 960–62 (2021) (noting the concentration of power within "the lower levels of the immigration bureaucracy").

[95] *See* Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama's Immigration Actions*, 50 U. RICH. L. REV. 665 678-81 (2016).

[96] *See* Stephen Lee & Sameer M. Ashar, *DACA, Government Lawyers, and the Public Interest*, 87 FORDHAM L. REV. 1879, 1881 (2019) ("Rather than trusting 'immigration cops' within ICE to sort migrants for removal, political appointees opted to empower immigration officials within [USCIS], an agency with experience in redistributing benefits to immigrants."); COX & RODRIGUEZ, *supra* note 13, at 177–180 (describing decision to place

to grant DACA in the hands of USCIS, with written guidelines and standards, would minimize opportunities for front-line officers to disregard the President's directives to provide some protection from removal that would otherwise be left to the discretionary whims of ICE enforcement. The need for top-down discretion flows from the existence of this bottom-level discretion.

The tension between top-level discretion (largely driven by the President) and front-line discretion (through individual field offices of ICE and rank-and-file agents) is at the heart of much of the removal process and extends beyond the decision of whether to select an individual for deportation. It has also become more pronounced since *AADC*, given the astronomical growth of the size, enforcement capacity, and basic structure of ICE and CBP.[97] A broad array of decisions with strong physical liberty implications remains subject to the authority of ICE agents operating outside of a courtroom-like setting with few constraints. These decisions include, for instance, whether to physically detain following an ICE arrest; whether to grant bond or require continued detention; whether to revoke or increase bond after an initial release; whether to place conditions, such as ankle monitoring, on a person's release; whether to grant or deny a stay of removal; and whether to place certain persons in removal proceedings before an immigration judge or employ summary, or what I have called "shadow," removals outside of immigration court.[98] In the detention setting, an array of decisions takes place far from the specter of the legal process, such as whether to physically transfer individuals to different detention centers; whether to place individuals in solitary confinement; whether to revoke detention center privileges, such as participation in work or access to the commissary; whether to subject a person to

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adjudication of DACA into USCIS after efforts to implement prosecutorial discretion memoranda encountered resistance among ICE agents).

[97] *See* Jennifer Lee Koh, *Downsizing the Deportation State*, 16 HARV. L. & POL'Y REV. 301, 319–20 (2021) (detailing the increase in congressional funding for such agencies).

[98] *See* Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 227–29 (2017) (discussing expedited removal, administrative removal, reinstatement of removal, stipulated removal, and in absentia orders of removal as shadow removal processes involving no or minimal immigration court participation); *see also* Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 22–24 (2014) (discussing the role of prosecutorial discretion in decisions to use expedited removal, administrative removal, and reinstatement).

a physical beating; and whether to physically restrain an individual, for instance through the use of shackles.[99] To be sure, internal supervisory structures within ICE exist, such as through Field Office Directors who exercise control over specific geographic offices and are typically civil servants, as opposed to political appointees.[100]

Despite the high liberty interests at stake, the decisions made by frontline and mid-level officers are subject to few, if any, law-like standards. Detention decisions made by ICE officers, for instance, may be subject to internal risk assessment tools that reflect political algorithmic bias and may be resistant to top-down reform efforts.[101] According to data released by ICE in 2018, about seventy percent of all detained persons cannot have detention decisions reviewed by an immigration judge due to the operation of mandatory detention statutes.[102] When detained persons are released from custody on bond, those people can be re-detained, and their bond can be "revoked at any time in the discretion of" agency officials, who are not judges.[103] Decisions to grant administrative stays of removal, while subject to the consideration of certain regulatory and statutory factors, are subject to the discretion of supervisory ICE

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[99] *See, e.g.*, Savannah Kumar, *Compelling Labor and Chilling Dissent: Creative Resistance to Coercive Uses of Solitary Confinement in Prisons and Immigration Detention Centers*, 36 HARV. BLACKLETTER L.J. 93, 102–05 (2020) (describing use of solitary confinement in ICE detention, including as way to discourage protest of work programs) Fatma E. Marouf, *The Unconstitutional Use of Restraints in Removal Proceedings*, 67 BAYLOR L. REV. 214, 248–50 (2015) (describing ICE policies with respect to use of restraints on detained persons during removal proceedings); Adrienne Pon, *Identifying Limits to Immigration Detention Transfers and Venue*, 71 STAN. L. REV. 747, 759–62 (2019) (describing justifications cited by government for transfers across ICE detention facilities, including the belief that "Congress gave ICE the authority to engage in this practice if it so chooses").

[100] *Leadership*, IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/leadership/organizational-structure (last visited March 23, 2022).

[101] *See* Robert Koulish & Kate Evans, *Punishing with Impunity: The Legacy of Risk Classification Assessment in Immigration Detention*, 36 GEO. IMMIGR. L.J. 1, 6 (2021) (discussing changes to the RCA algorithm and ICE intransigence).

[102] *See* Tara Tidwell Cullen, *ICE Released Its Most Comprehensive Immigration Detention Data Yet. It's Alarming*, NAT'L IMMIGR. JUST. CTR. (Mar. 13, 2018), https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet (reporting seventy-one percent of people detained were subject to mandatory detention).

[103] 8 C.F.R. § 236.1(c)(9) (2021).

officers, including district-level directors.[104] A lesser-known area in which mid-level officer discretion operates involves the practice of "Z holds," in which the DHS Office of Civil Rights and Civil Liberties (which may receive complaints of retaliation and other civil rights abuses, including in ICE detention) can place a temporary hold on a person's deportation while investigating their retaliation claims.[105] Decisions about who to place on deportation flights are left to the discretion of a complex web of actors, including ICE officers, whose administrative errors may result in defiance of federal court orders.[106] In the detention setting, decisions that bear upon the conditions of an individual's detention are subject to even fewer constraints.[107] Immigration judges typically view detention conditions as irrelevant to actual removal proceedings, but those conditions deeply affect the proceedings due to the manner in which inhumane detention conditions can lead immigrants to forfeit claims to relief.[108] The officers responsible for conditions exercise broad discretion, and they are sometimes not ICE officers at all, but rather employees of corporately owned prisons that contract with ICE.[109]

The existence of discretionary power amongst the lower ranks of the immigration enforcement agencies thus provides ample

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[104] *See id.* § 241.6(a) (outlining that stays of removal may be issued in the discretion of certain ICE officers and in consideration of certain statutory factors).

[105] NAT'L IMMIGR. PROJ. ET AL., PRACTICE ADVISORY: ADVOCATING FOR IMMIGRANT SURVIVORS OF MEDICAL ABUSE AT THE IRWIN COUNTY DETENTION CENTER 15 (2021), https://nipnlg.org/PDFs/practitioners/practice_advisories/pr/2021_05May_irwin-survivors.pdf ("[W]hile DHS is investigating your case, they have the power to put what is called a 'Z hold' on your immigration status, which could protect you from deportation while your claim is being investigated."). I am grateful to Mary Yanik for bringing this to my attention.

[106] *See* Koh, *supra* note 94, at 973–82 (discussing deportations in violation of federal court orders); *see also* Deborah M. Weissman, Angelina Godoy & Havan M. Clark, *The Final Act: Deportation by ICE Air*, 49 HOFSTRA L. REV. 437, 463–64 (2021) (describing deportation of individuals with pending litigation challenges).

[107] *See* Koulish & Evans, *supra* note 101, at 3 (noting current issues with immigrant detention).

[108] *Id.* at 14–15 (describing how conditions are partly determined and factors making them hard to directly challenge).

[109] *See* David S. Rubenstein & Pratheepan Gulasekaram, *Privatized Detention & Immigration Federalism*, 71 STAN. L. REV. ONLINE 224, 229–30 (2019) (describing the role of private detention facilities).

openings for the government to retaliate against noncitizens engaged in First Amendment protected speech.

IV. EXECUTIVE DISCRETION AND GOVERNMENT RETALIATION AGAINST IMMIGRATION SPEECH AND ACTIVISM

Both forms of executive discretion discussed above—the top-down exercise of prosecutorial discretion that flows largely from the President's policy agenda, and the frontline, mid-level decision-making in the immigration enforcement bureaucracy—influence the degree to which First Amendment protections for noncitizens engaged in activism and speech exist. This Part relies on the experience of retaliation during the Trump era to demonstrate how front- and mid-level agency discretion creates opportunities for retaliatory enforcement in the immigration context.

As noted in Part I, the political commitments of the President appear to have significant influence on whether noncitizens engaging in political activity and speech receive First Amendment protection.[110] As Professor Alina Das's scholarly and advocacy work demonstrates, the nature of retaliation against immigrants during the Trump Administration was extensive and damaging.[111] Immigrants who had openly criticized ICE became primary targets for deportation, including those who participated in public protests, displayed their political views on immigration policy through artistic or journalistic endeavors, or were prominent organizers in their communities.[112] Immigrants who sought to vindicate their rights through the legal process as witnesses, complainants, or plaintiffs were targeted.[113] The resulting harms have been extensive, even as those harms mirror the concerns upon which the First Amendment's free speech guarantee is premised. As Professor Das put it, government retaliation through the use of immigration enforcement power "stifles freedom of thought and expression,

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[110] *See supra* Part I.

[111] Das, *supra* note 3, at 228–31.

[112] *See id.* at 231–37 (describing the targets of Trump Administration efforts).

[113] *See id.* at 237.

manipulates public debate, and undermines the ability of critics to advocate political change."[114]

A key feature of the Trump Administration's immigration enforcement policies was the dismantling of immigration enforcement priorities altogether to encourage deportation—"tak[ing] the shackles off" of ICE agents, as one agency official notoriously put it.[115] The Trump Administration did not take public ownership over the patterns of retaliation against immigration advocates.[116] In fact, one DHS memo issued during the Trump era by Acting DHS Secretary Kevin McAleenan in 2019 stated that "DHS does not profile, target, or discriminate against any individual for exercising his or her First Amendment rights."[117] However, the existence of low-level discretion in the immigration enforcement bureaucracy coupled with the overall messaging put forth by senior leadership—that the Administration was devoted to encouraging mass deportation—was sufficient to enable such retaliation to flourish. An intentional, top-down strategy to retaliate against immigrant speech appears to have been unnecessary.

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[114] *Id.* at 239; *see also* ABBY JIANG, JENNIFER LEE KOH, AND ELICIA SHOTLAND, TARGETED BUT NOT SILENCED: A REPORT ON GOVERNMENT SURVEILLANCE AND RETALIATION AGAINST IMMIGRATION ORGANIZERS IN THE UNITED STATES 23–24 (2021) (summarizing the harms caused by retaliation and surveillance).

[115] *See* Nicholas Kulish, Caitlin Dickerson & Ron Nixon, *Immigration Agents Discover New Freedom to Deport Under Trump*, N.Y. TIMES (Feb. 25, 2017), https://www.nytimes.com/2017/02/25/us/ice-immigrant-deportations-trump.html (reporting on statements of then-White House Press Secretary Sean Spicer).

[116] The extent to which top-down directives directly prompted the categories of retaliation described in this Essay remains unclear. In the case of ICE's levying of civil fines under the Immigration and Nationality Act against immigrants taking sanctuary in houses of worship, immigration advocates reported that internal government documents obtained through the Freedom of Information Act (FOIA) confirmed the existence of directives from former ICE Acting Director Thomas Homan encouraging the use of such fines and also suggested the possibility of involvement by Trump's senior advisor Stephen Miller. *See* BRIEFING GUIDE: FOIA DOCUMENTS REVEAL ICE'S USE OF CIVIL FINES TO TARGET IMMIGRANT LEADERS IN SANCTUARY (2020), https://ccrjustice.org/sites/default/files/attach/2020/10/Briefing%20Guide_%20ICE%20Sanctuary%20Fines%20FOIA_October%2022%202020.pdf. Thanks to Sejal Zota from drawing this to my attention.

[117] Memorandum from Kevin K. McAleenan, Acting Sec'y of U.S. Dep't of Homeland Sec., to All DHS Employees (May 17, 2019), https://www.dhs.gov/sites/default/files/publications/info_regarding_first_amendment_protected_activities_as1_signed_05.17.2019.pdf.

Indeed, the capacity of the immigration enforcement agencies to engage in First Amendment-based retaliation flows in large measure from the discretionary authority that front-line and local supervisory officials have over noncitizens, especially noncitizens in custody or vulnerable to removal.[118] In this sense, modern immigration retaliation is distinguishable from *AADC*, which involved the question of selective deportation—i.e., targeting a person for physical removal from the country.[119] *AADC*-like targeting certainly did take place. Washington State immigration organizer Maru Mora Villalpando, for instance, received a Notice to Appear placing her in immigration proceedings, and internal agency emails circulated weeks beforehand reflected statements from officials opining that placing her in removal proceedings would "take away some of her 'clout.'"[120] Activist Jean Montrevil's deportation was preceded by comments from Field Office Director level officials discussing his profile and activism in the community.[121] Officials from the same New York office targeted Ravi Ragbir, whose work was identified along with Montrevil's as "noteworthy" and causing the Field Office Deputy Director to feel "resentment."[122] These cases also demonstrate the participation of supervisory officers within local ICE field offices.

Nonetheless, the decision to deport reflects only the tip of the proverbial iceberg when it comes to agency discretion and government retaliation. Even selective deportation, for instance, involves several different types of decisions—the decision to issue a

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[118] *See infra* Part III.

[119] Reno v. AADC, 525 U.S. 471, 472 (1999).

[120] E-mail from Marc J. Moore, ICE Field Off. Dir. (Nov. 20, 2017, 4:13 PM), https://justfutureslaw.org/wp-content/uploads/2020/04/A-1_ICE-0000618_image-Redact-Highlight_r.pdf.

[121] *See* Letter from N.Y.U. L. Sch. Immigr. Rts. Clinic & Cornell L. Sch. First Amend. Clinic to U.S. Dep't of Homeland Sec. Off. for Civ. Rts. & Civ. Liberties 19 (July 19, 2021) [hereinafter NYU/Cornell Letter], https://www.law.nyu.edu/sites/default/files/NYU%20Cornell%20DHS%20OCRCL%20Complaint_First%20Amendment%20Retaliation_Final%20Letter%20and%20Index%207%2019%202021%20web%20version.pdf. (highlighting Field Office Director Thomas Decker's statements that the Montrevil case was "noteworthy because [his] removal potentially could garner media attention").

[122] *Id.* at 24; *see also* Ragbir v. Homan, 923 F.3d 53, 60 (2d Cir. 2019) (describing retaliation allegations involving Ragbir), *cert. granted, vacated sub nom.*, Pham v. Ragbir, 141 S. Ct. 227 (2020).

charging document placing the person in removal proceedings, the decision to not renew a stay of removal, the decision to process a person for immediate deportation, the decision to detain, and the decision to transfer, to name a few.[123] These decisions operate with little transparency, even under ordinary principles of administrative law.[124] In Ragbir's case, for instance, he had for many years received administrative stays of an older removal order,[125] but a series of decisions enabled officials to exercise physical control over him, in what the Second Circuit treated as severe enough to rise to the level of the outrageousness contemplated by *AADC*.[126] These decisions included the decision to decline to renew his stay of removal, the decision to detain him, the decision to transfer him to a detention facility in the state of Florida, and the decision to refuse his return to New York.[127] Each of these decisions is governed by little to no law and is simply left up to the agency.[128]

Discretionary adjudicative decisions—such as DACA—have also been at the center of retaliation cases. The experience of DACA applicant Claudia Rueda, who was placed in removal proceedings after speaking out in protest regarding her mother's detention,

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[123] *See* E-mail from Marc J. Moore, *supra* note 120 (describing the decision to place Maru Mora [Villalpando] in removal proceedings); NYU/Cornell Letter, *supra* note 121, at 19, 24 (discussing Field Officer Director Decker's desire to deport Jean Montrevil and the attempted arrest and deportation of Ravi Ragbir); *Ragbir*, 923 F.3d at 60 (explaining the Government's denial of Ragbir's application for a renewed stay of removal and intention to enforce the removal order).

[124] *See* Shalini Bhargava Ray, *Immigration Law's Arbitrariness Problem*, 121 COLUM. L. REV. 2049, 2069–70 (arguing that discretionary decision-making in Executive Branch, while a "potential locus of proportionality" in the immigration system, "lacks adequate safeguards to prevent the arbitrary exercise of government power").

[125] *Ragbir*, 923 F.3d at 59.

[126] *See id.* at 69–73 ("In short, the Government's alleged conduct plausibly fits within the 'outrageous[ness]' exception to *AADC*.").

[127] *Id.* at 60–61.

[128] *See id.* at 72 (describing the wholly discretionary nature of removal and deportation proceedings). In response to a habeas action, a federal district court judge ordered his release from detention and recognized "with grave concern" the retaliation claims raised by Ragbir. Ragbir v. Sessions, No. 18-CV-236, 2018 WL 623557, at *1 n.1, *3 (S.D.N.Y. Jan. 29, 2018), *vacated sub nom.*, Ragbir v. Barr, No. 18-1595, 2019 WL 6826008, at *1 (2d Cir. July 30, 2019) (stating that the Government complied with the district court's order "thereby mooting the Government's appeal and foreclosing its opportunity to challenge the district court's judgment").

illustrates how DACA applications became part of government retaliation.[129] A district court found that the eventual denial of Rueda's DACA application was done as a retaliatory measure in violation of the First Amendment.[130] Although the DACA application itself would not fall within the ambit of § 1252(g)'s jurisdictional bar, the decision to place Rueda in removal proceedings appeared to trigger the statutory prohibition on judicial review of decisions to commence removal proceedings.[131] Accordingly, in permitting the case to go forward, the court had to overcome the jurisdictional challenge presented by *AADC* and found that the retaliation against Rueda rose to the level of outrageous retaliation contemplated as a possibility in *AADC*.[132] Denials of DACA status have appeared in other cases involving retaliation concerns, and DACA applications have become intermingled with decisions to deport and detain.[133]

The nature of ICE's detention authority deepens opportunities for retaliation against noncitizens who speak out. Much has been written (and litigated) about the removal of immigration judge authority over detention decisions by way of mandatory detention statutes enacted in 1996, but less is understood about the vast array of detention-related decisions exercised by ICE officials on a daily basis. As noted, detention and bond decisions made by ICE officers are subject to little more than internal administrative guidelines or algorithms.[134] And related detention decisions—e.g., whether to transfer a detained person to another distant facility, whether to place someone on ankle monitoring, and whether to revoke bond

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[129] Das, *supra* note 3, at 233.

[130] Rueda Vidal v. U.S. Dep't of Homeland Sec., 536 F. Supp. 3d 604, 618–19 (C.D. Cal. 2021).

[131] *See id.* at 618 (explaining that "agency action 'committed to agency discretion by law' is [typically] not subject to judicial review").

[132] *See id.* at 618–19 ("Because violations of her rights to political speech and familial association are implicated in her DACA denial, Rueda has asserted sufficiently outrageous conduct . . . .").

[133] *See* JIANG ET AL., *supra* note 114, at 5–6 (describing detention, deportation, and denial of DACA renewal of Beto Lopez Gutierrez); Ryan Devereaux & Cora Currier, *How an Occupy ICE Activist and DACA Recipient Was Deported for Tweeting*, INTERCEPT (Nov. 2, 2019, 4:00 AM), https://theintercept.com/2019/11/02/deportation-occupy-ice-daca/ (describing the detention and deportation of Sergio Salazar due to an expired DACA license).

[134] *See* Koulish & Evans, *supra* note 101, at 9 (detailing the necessary procedures for immigration detention).

and re-detain—are especially prone to discretionary decision-making.[135] Claudio Rojas, a prominent activist who had appeared in the film *The Infiltrators* (about immigrant activists who deliberately entered ICE detention facilities in efforts to provide legal information and advocacy to detained people), was detained during a regular supervisory ICE check-in and deported.[136] Similarly, in 2019, Jose Bello-Reyes recited a poem that openly criticized ICE's deportation and detention policies at a rally in Kern County, California.[137] Bello-Reyes had lived in the United States since age three and at the time of the rally had been released from ICE detention on a monetary bond of $10,000.[138] Thirty-six hours after reciting the poem, ICE officials appeared at his home, re-arrested him, revoked the $10,000 bond and replaced it with a $50,000 bond.[139] The agency detained him for an additional three months until a community bail fund posted the higher bond amount.[140] A similar dynamic played out in the case of Emilio Gutierrez-Soto, a prominent journalist who delivered speeches critical of ICE's asylum policies.[141] Gutierrez-Soto was in the process of seeking asylum and released from ICE detention through a mechanism known as parole, a discretionary tool that allowed for his release. But several months after delivering a speech while accepting a professional award from the National Press Club, he was arrested and his parole revoked.[142]

Some of the most dramatic forms of retaliatory government conduct are meted out on detained immigrants who are critical of detention conditions—often as a matter of literal survival—and who are especially prone to retaliation. People in detention have

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[135] AM. IMMIGR. COUNCIL, SEEKING RELEASE FROM IMMIGRATION DETENTION (2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/seeking_release_from_immigration_detention.pdf (providing an overview of the "process individuals must undergo to seek release from immigration detention").

[136] *See* NYU/Cornell Letter, *supra* note 121, at 15 (describing the deportation of Claudio Rojas).

[137] *See* Bello-Reyes v. Gaynor, 985 F.3d 696, 698 (9th Cir. 2021) (describing events prior to arrest by ICE).

[138] *Id.*

[139] *Id.* at 699.

[140] *Id.* at 698

[141] Gutierrez-Soto v. Sessions, 317 F. Supp. 3d 917, 921 (W.D. Tex. 2018).

[142] *Id.*

organized hunger strikes, provided testimony, and created oral and written documentation related to a broad range of complaints.[143] In response to hunger strikes in particular, they have received physical beatings, been placed in solitary confinement, been subjected to force-feeding, lost work and commissary privileges, and been separated from family members including children.[144] Reporting ICE misconduct has also arguably resulted in retaliatory deportations. In late 2020, the media broke news of whistleblower reports of forced gynecological procedures performed on women detained at the Irwin County Detention Facility in Georgia—allegations that prompted litigation, congressional inquiries, and criminal investigation.[145] But soon after the allegations were made public, a number of the women—who had spoken out against both the forced medical procedures as well as deplorable detention conditions at Irwin—were deported.[146] An expansive understanding of the ways in which the federal immigration agencies can retaliate against noncitizens engaged in First Amendment protected speech and activity calls for a rethinking of the role of the courts in restraining the executive branch.

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[143] *See, e.g.*, *Hunger Strikes*, FREEDOM FOR IMMIGRANTS, https://www.freedomforimmigrants.org/hunger-strikes (last visited March 25, 2022) (outlining immigrant hunger strikes in detention centers).

[144] *See generally* AM. CIV. LIBERTIES UNION & PHYSICIANS FOR HUM. RTS., BEHIND CLOSED DOORS: ABUSE AND RETALIATION AGAINST HUNGER STRIKERS IN U.S. IMMIGRATION DETENTION (2021), https://www.aclu.org/sites/default/files/field_document/aclu_phr_behind_closed_doors_final_1.pdf (describing force-feedings, solitary confinement, psychological coercion, and separation of families in response to hunger strikes in ICE detention during Obama and Trump Administrations).

[145] *See* Molly O'Toole, *ICE Is Deporting Women at Irwin amid Criminal Investigation into Georgia Doctor*, L.A. TIMES (Nov. 19, 2020, 4:58 PM), https://www.latimes.com/politics/story/2020-11-18/ice-deporting-women-at-irwin-amid-criminal-investigation-into-georgia-doctor (detailing how and when women are being deported after speaking out against conditions).

[146] *Id.*

V. CONCLUSION: FIRST AMENDMENT CONSTRAINTS ON THE DEPORTATION STATE

Recognizing how different forms of executive discretion operate in relation to concerns about government retaliation leads to several implications. The President's exercise of top-down discretion to issue enforcement priorities, direct agents to honor First Amendment norms, and ameliorate the impact of past retaliation is critical. But given the current state of the law and immigration politics, relying on the election of a President not hostile to immigrants is a tenuous strategy for protecting a constitutional right. Judicially enforceable First Amendment principles should apply to federal immigration enforcement authorities at multiple points along the discretionary decision-making spectrum and alongside robust visions of prosecutorial discretion from the President. This Essay concludes by identifying one area of promise and one area of concern when it comes to the capacity of the courts to preserve free speech protections for noncitizens.

An area of promise is the potential for courts to acknowledge that the discretionary nature of ICE's authority and its subsequent capacity to engage in retaliation against immigrants for exercising their First Amendment rights provides a basis for judicial intervention. *Bello-Reyes* serves as an example. After the retaliatory detention apparently prompted by his poetry recitation at an immigration rally, Bello-Reyes filed a habeas action, seeking to be restored to his pre-arrest custody status.[147] Although the Government argued that *AADC* should bar the court from exercising jurisdiction, the Court distinguished the precise governmental action at issue, emphasizing that the revocation of bond did not fall within the three specific categories of commencement of proceedings, adjudication of cases, or execution of removal orders listed in the judicial review provision.[148] The discretionary nature of the agency's revocation of Bello-Reyes's original bond amount also provided the court with a way to

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[147] *See* Bello-Reyes v. Gaynor, 985 F.3d 696, 699 (9th Cir. 2021) (summarizing the procedural history of the case before the Court).

[148] *Id.* at 700 n.4 ("*AADC* does not counsel for a different result.").

intervene.[149] The Government had argued that the Supreme Court's 2019 decision in *Nieves v. Bartlett*, which held that a suit for civil rights damages under 42 U.S.C. § 1983 for a claim of selective prosecution in the criminal context could not go forward where independent proof of probable cause exists,[150] should likewise bar Bello-Reyes's suit.[151] But the Ninth Circuit emphasized that unlike probable cause in criminal cases, which operates by way of an objective standard, "no equivalent benchmark exists" in the case of ICE's revocation of bond because "the decision is completely discretionary."[152] The discretionary nature of the immigration agency's actions thus became a basis for the Ninth Circuit to invoke First Amendment protection and remand the case to the district court with an order to determine whether the government had a retaliatory purpose in revoking Bello-Reyes's bond.[153]

In an era of expanded low-level discretion, broadening the jurisdiction of the federal courts to hear a greater array of First Amendment-based retaliation claims in the immigration context could provide a potential source of accountability, transparency, and restraint on the immigration enforcement agencies. In cases that involve agency decisions that are sufficiently distinguishable from the selective deportation context of *AADC*, judicial review may be particularly appropriate where, in the words of *Bello Reyes*, the agency's actions are "completely discretionary."[154] To be clear, allowing judicial review does not mean that every claim would succeed. But permitting a greater range of claims to move forward would better enable courts to develop principles to navigate the balance between the First Amendment and the government's discretionary authority.

Allowing for more claims would likely constitute a modest shift from the *AADC* scheme, which has allowed *some* claims to move forward upon a showing of outrageousness.[155] Doing away with an outrageousness requirement at the initiation of litigation would tilt

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[149] *Id.* at 701.

[150] Nieves v. Bartlett, 139 S. Ct. 1715, 1728 (2019).

[151] *See Bello-Reyes*, 985 F.3d at 698 ("The Government contends that ICE had probable cause to arrest Bello, and thus his retaliatory arrest argument fails under *Nieves*.").

[152] *Id.* at 701.

[153] *Id.* at 701–02

[154] *See* Bello Reyes v. Gaynor, 985 F.3d 696, 701 (9th Cir. 2021).

[155] *See supra* notes 122–23 (discussing Ravi Ragbir) and 129 (discussing Claudia Rueda).

the burden of proof slightly in favor of the noncitizen. Under the *AADC* framework, a noncitizen who wishes to have their First Amendment claim adjudicated must marshal the resources and evidence—evidence that may not be readily available at the start of litigation—to convince a court that the government's conduct was outrageous. Shifting the scales to favor judicial review would alleviate the heavy burden that currently falls to noncitizens to even assert jurisdiction.

The arguably shrinking jurisdiction of the federal courts in the immigration context, especially in the form of habeas review, presents a source of future concern. The question of whether courts have the potential to serve as a source of First Amendment protections for noncitizens continues to face challenges due to *AADC*, and it is further complicated by the Supreme Court's 2020 decision in *Department of Homeland Security v. Thuraissigiam*.[156] *Thuraissigiam* rejected a Suspension Clause challenge to a statutory provision that purported to preclude noncitizens in expedited removal proceedings from obtaining habeas review of decisions made during those proceedings.[157] Parts of the Court's majority opinion—authored by Justice Samuel Alito—extended beyond the expedited removal context and set forth a restrictive vision for when habeas relief could be available to undocumented individuals not subject to physical detention but who seek habeas review as a means of challenging prior removal orders.[158]

As noted, in the litigation brought by Ravi Ragbir, the Second Circuit found both that the retaliation against Ragbir satisfied *AADC*'s outrageousness exception and that § 1252(g)'s jurisdictional bar, if read to apply to Ragbir, violated the Suspension Clause.[159] In October 2020—several months after the Court's decision in *Thuraissigiam* but one month before Joe Biden was elected President—the Supreme Court vacated the Second Circuit's

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[156] 140 S. Ct. 1959, 1963 (2020).

[157] *See id.* (2020) ("Respondent's Suspension Clause argument fails because it would extend the writ of habeas corpus far beyond its scope . . . .").

[158] *See id.* at 1977–80 (explaining that "in all the cited cases concerning aliens detained at entry," the Court only considered release and expressed no opinion regarding entitlement to enter).

[159] *See* Ragbir v. Homan, 923 F.3d 53, 73–78 (2d Cir. 2019), *cert. granted, vacated sub nom.* Pham v. Ragbir, 141 S. Ct. 227 (2020) ("The constitutionally required scope of the privilege of the writ of habeas corpus encompasses Ragbir's claim.").

decision and remanded Ragbir's case to the federal appeals court with instructions to consider whether the litigation was moot under *Thuraissigiam*.[160] In December 2021, after remand by the Second Circuit to the district court at the Government's request, the district court dismissed the case upon the agreement of the parties.[161] Accordingly, the Suspension Clause and jurisdictional questions raised by *Thuraissigiam* and Ragbir's case will not receive full consideration in the federal courts. But given ongoing uncertainty over the ability of noncitizens to access district courts by way of habeas review—in addition to the many existing restrictions on judicial review that are embedded in the immigration statute—the question of whether the courts and the First Amendment itself will serve as a source of protection for activism, speech, and organizing by noncitizens remains unsettled.

This Essay has sought to highlight the interaction between executive discretion and free speech protections for noncitizens, both as a matter of past jurisprudence in *AADC* and as a matter of contemporary practice. While executive discretion on the part of the President can and should be exercised in a manner consistent with the First Amendment's commitment to protecting political speech, relying on top-down discretionary policy is tenuous and subject to change.

Ultimately, the fragility of First Amendment protections for noncitizens, particularly undocumented individuals, may underscore the importance of the very speech, organizing, and resistance for which many have experienced retaliation. To the extent that noncitizens succeeded in achieving redress from the courts and the Executive, it has often taken place in the context of strong grassroots organizing and mass mobilization, alongside creative and zealous lawyering. One of the few consistent sources of hope, dignity, and humanity in immigration law originates in immigrant communities themselves. Whether governing authorities allow those communities to have input in shaping the future of immigration law remains to be seen.

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[160] Pham v. Ragbir, 141 S. Ct. 227, 227 (2020).

[161] *See* Ragbir v. Homan, No. 1:18-cv-01159 (S.D.N.Y. Dec. 16, 2021) ("The stipulation of the parties filed with the Court . . . and executed on behalf of all parties to the action is an agreement by them to terminate this action on terms and conditions to which they have freely agreed.").