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Judicial Review of Disproportionate (or Retaliatory) Deportation

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Abstract

This Article focuses attention on two recent and notable federal court opinions considering challenges to Trump Administration deportation decisions. While finding no statutory bar to the noncitizens' detention and deportation in these cases, the court in each instance paused to highlight the injustice of the removal decisions. This Article places the opinions in the context of emerging immigration enforcement trends, which reflect a growing indifference to disproportionate treatment as well as enforcement actions founded on retaliation for the exercise of constitutional rights. Judicial decisions like the ones considered here serve vital functions in the cause of immigration law reform even as they uphold government enforcement decisions. They help motivate advocates, promote inter-branch dialogue, and provide progress toward judicial innovation. This Article focuses particular attention on this steps-on-the-way function, suggesting how the concerns these courts have expressed may one day soon produce a greater measure of judicial scrutiny of removal decisions on proportionality grounds.

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Table of Contents

I. Introduction

On May 30, 2017, Judge Stephen Reinhardt authored an opinion denying Andres Magaña Ortiz's emergency request that the Ninth Circuit temporarily block the government from deporting him to Mexico.[1] Even while finding that the court lacked authority to grant a stay of removal in the case, Judge Reinhardt penned a scathing five-page opinion explaining why the government's decision to deport Mr. Ortiz was "inhumane" and "contrary to the values of this nation and its legal system."[2]

1. *See* Ortiz v. Sessions (*Ortiz II*), 857 F.3d 966, 966–67 (9th Cir. 2017) (denying Mr. Ortiz's request for stay of removal).

2. *Id.* at 968.

In a decision issued on January 29, 2018, Judge Katherine Forrest of the Southern District of New York likewise found no statutory irregularities in the Department of Homeland Security's decision to detain and enforce a removal order against Ravideth Ragbir.[3] Nevertheless, Judge Forrest granted Mr. Ragbir's habeas petition, holding that the Due Process Clause required Immigration and Customs Enforcement (ICE) to release him so that he could get his affairs in order and say goodbye to his family prior to deportation. This result was required, she explained, because "this country allowed petitioner to become a part of our community fabric, allowed him to build a life with and among us . . . ."[4] Additionally, Judge Forrest noted with "grave concern" allegations that the government was targeting Ragbir for removal on the basis of his political advocacy.[5] Those concerns are now front and center in related litigation.[6]

In this Article, I briefly discuss each of these notable decisions and then place them in a larger context, explaining their significance within the Trump Administration's deportation regime. Present-day interior immigration enforcement is marked by two major trends. First, the Department of Homeland Security (DHS) has abandoned the prior Administration's priority-driven enforcement policies and adopted a mass and indiscriminate approach to enforcement. The result is that the DHS now endeavors to deport virtually anyone who is deportable, whether or not the individual can demonstrate the sort of significant positive equities, or lack of negative ones, that previously helped

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3. *See* Ragbir v. Sessions, 18-cv-236, 2018 WL 623557, at *2 (S.D.N.Y. Jan. 29, 2018) ("The Court agrees that the statutory scheme governing petitioner's status is properly read to allow for his removal without further right of contest.").

4. *See id.* at *2 (granting Mr. Ragbir's habeas petition).

5. *See id.* at *1 n.1 ("The Court also notes with grave concern the argument that petitioner has been targeted as a result of his speech and political advocacy on behalf of immigrants' rights and social justice.").

6. *See* Ragbir v. Homan, No. 1:18-cv-01159, 2018 WL 3038494 (S.D.N.Y. June 19, 2018); *Immigrant Rights Leader Ravi Ragbir and Community Organizations File First Amendment Lawsuit Challenging the Targeting of Immigrant Rights Activists*, NAT'L IMMIGR. PROJECT (Feb. 9, 2018), https://www.nationalimmigrationproject.rg/pr/2018_9Feb_ragbir-v-homan.html (last visited Sept. 21, 2018) ("The lawsuit seeks . . . a preliminary and permanent injunction restraining the government from selectively enforcing immigration laws against individuals based on protected political speech.") (on file with the Washington and Lee Law Review).

stave off removal. Second, though to a less prevalent extent, current DHS practice suggests a growing pattern of what appears to be targeted retaliatory action against immigrant activists who openly express criticism of the Administration's policies through protected speech activities.[7]

Especially against this backdrop, judicial decisions such as those considered in this Article serve important functions. They attract media attention and galvanize the efforts of advocates to fight and seek reform of the Administration's policies, both on behalf of particular individuals and more broadly. They also function as signals to the political branches that policy or rule changes are needed. Finally, the decisions represent an accretion of authority toward more substantive proportionality review. As the judicial pronouncements (and related litigation) considered in this Article illustrate, the harsh results caused by the Administration's policies may well lead judges to engage in a more searching review of enforcement actions. Courts increasingly will be confronted with difficult questions about proportionality, due process, equal protection, and protected speech. This Article outlines doctrinal developments that may eventually cause courts to stay excessively harsh but otherwise valid removal orders on substantive constitutional grounds. A close look at the Court's recent jurisprudence in the deportation context reveals increasing sensitivity to proportionality concerns, lending additional weight to new challenges based on due process, the First Amendment, or arbitrary and capricious review. Of particular importance are hybrid claims, in which the joint force of multiple constitutional violations may combine to justify judicial intervention in egregious situations.

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7. *See, e.g.*, John Burnett, *Immigration Advocates Warn ICE Is Retaliating for Activism*, NPR (March 16, 2018, 10:29 AM), https://www.npr.org/2018/03/16/593884181/immigration-advocates-warn-ice-is-retaliating-for-activism (last visited Sept. 9, 2018) (noting that at least "two dozen cases of immigrant activists and volunteers who say they have been arrested or face fines for their work") (on file with the Washington and Lee Law Review); *Undocumented Activist Targeted by ICE Asks Immigration Judge to Throw Out Case Based on First Amendment*, MIJENTE (Mar. 13, 2018), https://mijente.net/2018/03/13/undocumented-activist-targeted-by-ice/ (last visited Sept. 9, 2018) (documenting an immigrant activist's argument that she is being singled out for deportation by ICE precisely because of her years of political activity against the agency) (on file with the Washington and Lee Law Review); *see also infra* Part II.B (acknowledging Ragvi Ragbir's activism as a particularly concerning factor in his proceedings).

The Article proceeds as follows. Part II discusses the judicial opinions reviewing challenges to DHS's decisions to remove Andres Magaña Ortiz and Ravi Ragbir, as well as related litigation that grapples with claims of retaliatory enforcement. This examination places each decision in the larger context of enforcement trends in the first year of the Trump Administration. Part III explains the significance of each decision today, including by showing how they further dialogue with the political branches and galvanize awareness and advocacy regarding the issues. Finally, Part IV considers key legal principles that might enable courts to engage in more substantive proportionality review of removal orders in future litigation.

II. Two Notable Lower Court Decisions

A. Ortiz v. Sessions*: "Even the 'Good Hombres' Are Not Safe"*[8]

As Judge Reinhardt recounted, Mr. Ortiz entered the United States without authorization in 1989 at age fifteen.[9] Over three decades, Mr. Ortiz built a life and deep ties in the United States.[10] He worked his way up from fruit-picker to owner of a twenty-acre coffee farm, while also managing operations on 150 additional acres that support entrepreneurial efforts by others.[11] Ortiz married a U.S. citizen, built a house, and supported three U.S. citizen children, currently of high school and college age.[12] The eldest daughter attended University of Hawaii, an education

8. *Ortiz II*, 857 F.3d at 968.

9. *See id.* at 967 ("Magana Ortiz . . . first entered the United States at 15 . . . . [h]is immigration case concluded with a decision to remove Magana Ortiz because of his 1989 illegal entry into the United States.").

10. *See id.* (detailing Mr. Ortiz's life in the United States).

11. *See* Derek Hawkins, *Facing Deportation, Hawaii Coffee Farmer, Father of Three Returns to Mexico After 28 Years*, WASH. POST (July 10, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/07/10/facing-deportation-hawaii-coffee-farmer-father-of-three-returns-to-mexico-after-28-years/?noredirect=on&utm_term=.d95e48c91d5f (last visited Sept. 9, 2018) (documenting Mr. Ortiz's success as a coffee farmer) (on file with the Washington and Lee Law Review).

12. *See Ortiz II*, 857 F.3d 966, 967 (9th Cir. 2017) ("All of his children, ages 12, 14, and 20, were born in this country and are American citizens . . . .").

which Mr. Ortiz financed.[13] He paid taxes and contributed to society in other ways, as well.[14] For example, as Judge Reinhardt explained, Ortiz "has worked with the United States Department of Agriculture in researching the pests afflicting Hawaii's coffee crop, and agreed to let the government use his farm, without charge, to conduct a five-year study."[15]

DHS initiated removal proceedings against Ortiz in 2011, apparently on the basis of unauthorized entry and presence in the United States.[16] The immigration judge denied Ortiz's request for cancellation of removal or voluntary departure and ordered him removed on December 22, 2011.[17] Nevertheless, and unsurprisingly in light of his circumstances, Ortiz received successive stays of removal from DHS, which, Judge Reinhardt noted, were granted to "allow[] him to remain with his family and pursue available routes to legal status."[18] Notably, Mr. Ortiz's wife had filed a family-based petition that would allow him to adjust his status inside the United States to lawful permanent residence as the immediate family member of a U.S. citizen.[19]

In March 2017, however, DHS—in keeping with new policies implemented following President Trump's inauguration—denied any further stays of removal.[20] Mr. Ortiz filed a habeas petition in the district court of Hawaii for an emergency nine month stay, but it was denied.[21]

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13. *See id.* ("[Ortiz's] eldest daughter currently attends the University of Hawaii, and he is paying for her education.").

14. *See id.* ("In his time in this country Magana Ortiz has built a house, started his own company, and paid his taxes.").

15. *Id.*

16. *See* Ortiz v. Sessions (*Ortiz I*), CIVIL 17-00210 LEK-KJM, 2017 WL 2234176, at *1 (D. Haw. May 22, 2017) ("DHS initiated removal proceedings against Magana Ortiz by filing a Notice to Appear ("NTA") on March 22, 2011 with the Immigration Court in Honolulu.").

17. *See id.* ("The Immigration Judge held a merits hearing and, on December 22, 2011, denied Magana Ortiz's applications for relief . . . .").

18. *Ortiz II*, 857 F.3d at 967.

19. *See id.* ("Magana Ortiz is currently attempting to obtain legal status on the basis of his wife's and children's citizenship, a process that is well underway. It has been over a year since his wife, Brenda, submitted her application to have Magana Ortiz deemed her immediate relative.").

20. *See id.* ("[T]he government on March 21, 2017 reversed its position, and ordered [Ortiz] to report for removal the next month.").

21. *See Ortiz I*, 2017 WL 2234176, at *7 (denying Mr. Ortiz's habeas

On appeal, the Ninth Circuit agreed that the district court lacked authority to stay the order.[22] Nevertheless, it issued a searing decision condemning DHS's failure to grant Ortiz a stay while his wife's family-based petition was adjudicated. Judge Reinhardt described the agency's removal decision as "contrary to the values of this nation and its legal system."[23] This approach to immigration enforcement, he noted, "diminishes not only our country but our courts."[24] He added that "Ortiz and his family are in truth not the only victims . . . . Among the others are judges who, forced to participate in such inhumane acts, suffer a loss of dignity and humanity as well."[25] As I discuss in Part IV, courts might yet intervene in "inhumane" deportation decisions on a more robust basis than Judge Reinhardt acknowledged. For present purposes, however, Judge Reinhardt's takeaway was aptly put: under the Trump Administration "even the 'good hombres' are not safe."[26]

One telling feature of the opinion is that Judge Reinhardt explicitly characterized the substantive interests at stake for Ortiz and his family as "rights."[27] In addition to the hardship facing Ortiz, the court emphasized concerns related to family integrity, including the children's "right to be with their father" and Mrs. Ortiz's "right to be with her husband."[28] As the court noted, none of them speak Spanish or has ever lived in Mexico.[29] Judge Reinhardt also catalogued significant property interests implicated by Ortiz's deportation, including removal from his land, forfeiture of a substantial business, and disruption of his

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petition).

22. *See Ortiz II*, 857 F.3d at 966–67 (noting that the court did not have authority to grant Mr. Ortiz's request for a stay of removal).

23. *Id.* at 968.

24. *Id.*

25. *Id.*

26. *Id.*

27. *See, e.g.*, *id.* at 967 ("The government's insistence on expelling a good man from the country in which he has lived for the past 28 years deprives his children of their right to be with their father, his wife of her right to be with her husband . . . .").

28. *Id.*

29. *See id.* at 968 ("All three children were born in the United States; none has ever lived in Mexico or learned Spanish.").

investment in his eldest daughter's education.[30] According to the court, the family will no longer be able to occupy their home after Ortiz is deported.[31]

On the government's side of the ledger, Judge Reinhardt observed that the underlying immigration offenses in Mr. Ortiz's case were not grave or recent. His primary immigration offense was entering the U.S. without inspection nearly twenty years ago, before a change in law that made unlawful entry a bar to adjustment of status to lawful permanent residence.[32] The court noted that Ortiz did have at least one, and possibly two, convictions for driving under the influence.[33] But the most recent of these—if it was in fact a conviction—occurred fourteen years ago.[34] In any event, the court noted, both offenses involved "at most" a fine with probation.[35] Indeed, the government itself had conceded during the underlying proceedings that there was no question as to Ortiz's good moral character.[36]

One reasonable way of summing up the court's opinion would be to say that Ortiz's removal raised significant proportionality concerns. There were substantial rights at stake, and the balance of interests as articulated by the Ninth Circuit tipped heavily in favor of Ortiz. His positive, mitigating equities were unusually

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30. *See id.* at 967 (explaining the property Mr. Ortiz risks losing as a result of deportation).

31. *See id.* at 968 n. 2 ("The family's right to occupy their home will terminate upon Magana Ortiz's removal.").

32. *See* 8 U.S.C. §1182(a)(6)(A)(i) (2012) (noncitizens who enter the United States without inspection are inadmissible); 8 U.S.C. §1255(a) (2012) (noncitizens who enter without inspection are ineligible for adjustment of status). The general bar to adjustment of status for persons who entered without inspection is not applicable for persons who entered before April 1, 1997. *See* IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 129 (14th ed.) (collecting authorities); PAUL VIRTUE, ACTING EXEC. ASSOC. COMM., INS, *Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the INA*, 5-6 HQ IRT 50/51.2, 96 Act 043 (June 17, 1997).

33. *See Ortiz II*, 857 F.3d 966, 967 (9th Cir. 2017) ("Although he apparently has two convictions for driving under the influence, the latest of them occurred fourteen years ago, and he has no history of any other crimes.").

34. *See id.* at n. 1 (noting some confusion as to whether Mr. Ortiz's second DUI resulted in a conviction).

35. *Id.*

36. *See id.* ("Indeed, even the government conceded during the immigration proceedings that there was no question as to Magana Ortiz's good moral character.").

high in the face of relatively minor and distant negative factors. His removal would result in clear and substantial hardship. Indeed, the penalty imposed by removal was even greater—perhaps far greater—than the court perceived. Recall that Ortiz's wife had filed a pending family petition as immediate relative.[37] Because Ortiz entered the United States prior to April 1, 1997, he was eligible to adjust status to lawful permanent residence on the basis of this petition without having to leave the country.[38] Once deported, however, Ortiz became subject to two separate penalties that barred him from lawful reentry for ten years.[39] Thus, this was just the sort of case that, common sense suggests, warranted the agency's exercise of discretion to stay removal.

B. Ragbir v. Sessions*: "There Are Times When Statutory Schemes May Tread on Rights that Are Larger, More Fundamental"* [40]

Ravidath Ragbir, a well-known and highly respected community leader in New York City, has resided in the United States for twenty-five years.[41] He became a legal permanent

37. *See id.* ("Magana Ortiz is currently attempting to obtain legal status on the basis of his wife's and children's citizenship, a process that is well underway. It has been over a year since his wife, Brenda, submitted her application to have Magana Ortiz deemed her immediate relative."). Additionally, Ortiz would shortly become eligible to immediately benefit from a separate petition that could be filed by his soon to be twenty-one-year-old U.S. citizen child. *See id.* ("This August, his eldest daughter, Victoria, will turn 21, and will also be able to file an application for her father.").

38. *See supra* note 32 and accompanying text (explaining why Mr. Ortiz's pre-1997 entry date makes him eligible to adjust his residency status despite unlawful entry and unauthorized presence). Ortiz would still have to reopen the prior removal order. But with an approved I-130 and good moral character not in doubt, this typically would be matter of course.

39. *See* 8 U.S.C. § 1182(a)(9)(A)(ii)(I) (2012) (placing a ten-year bar on readmission for any noncitizen ordered removed); 8 U.S.C. § 1182(a)(9)(B) (2012) (establishing a ten-year bar on readmission for anyone who accrued at least one year of unlawful presence before leaving the United States). *Cf.* State Farm v. Campbell, 538 U.S. 408, 425 (2008) (holding unconstitutional on due process grounds civil penalties "exceeding a single-digit ratio" to the consequences that are otherwise applicable).

40. Ragbir v. Sessions, 18-cv-236, 2018 WL 623557, at *2 (S.D.N.Y. Jan. 29, 2018).

41. *See id.* at *1 n.3 (noting that Mr. Ragbir came to the United States in

resident in 1994, but lost that status when he was ordered removed in 2007 following a conviction for wire fraud activities as a mortgage loan processor.[42] Nevertheless, in light of his long residence and other mitigating factors, Ragbir was granted successive stays of removal that authorized him to work and remain in the United States.[43] He is married to a U.S. citizen, has a child who is a U.S. citizen, and has devoted his life to social justice advocacy.[44]

With his last administrative stay of removal scheduled to expire on January 19, 2018, Mr. Ragbir submitted a renewal request in November 2017, based in part on a pending motion to reopen his removal proceedings.[45] During a check-in with ICE on January 11, 2018, however, Ragbir was abruptly detained.[46] The ICE Field Office Director indicated that the stay application had been denied and that Mr. Ragbir would be promptly deported to Trinidad and Tobago.[47] ICE officers then transported a handcuffed Ragbir to Newark Airport (interrupted only by a short visit to a local hospital, after he lost consciousness). He was then flown to Miami, Florida.[48]

On January 29, 2018, Judge Katherine Forrest of the Southern District of New York granted Ragbir's habeas petition just as DHS was preparing to deport him.[49] As in the case of Ortiz

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1994).

42. *See id.* at *3 n.11 (noting the reason for the deportation order).

43. *See id.* at *2 n.6 (detailing Mr. Ragbir's numerous stays of removal from 2011 through 2016).

44. *See id.* at *1 n.2, n.3 (detailing Mr. Ragbir's personal life).

45. *See id* at *2 n.6 ("[Ragbir's] most recent stay renewal request was filed on November 16, 2017.").

46. *See id.* at *1 ("[O]n January 11, 2018, Ravidath Ragbir was suddenly taken into custody. He was informed that his time in this country was at an end . . . .").

47. *See* Amended Declaration of Field Office Dir. Thomas R. Decker at 10–11, ¶ 36 Ragbir v. Homan, 1:18-cv-01159 (S.D.N.Y. Mar. 13, 2018) ECF No. 56-1 [hereinafter Decker Amended Declaration] (explaining that "the plan was to take [Ragbir] into custody and transport him to . . . Trinidad and Tobago . . ."). In apparent departure from normal procedure, Scott Mechkowski, ICE Field Office Director, handled the check-in personally, revealing the intense scrutiny on Ragbir's case. *See id.* at 11, ¶ 38 (explaining that Thomas Decker did not meet with Ragbir on January 11, 2018).

48. *See id*. at 11, ¶¶ 37–41.

49. *See* Ragbir v. Sessions, 2018 WL 623557, at *3 (granting Ragbir's habeas

in the Ninth Circuit,[50] Judge Forrest found the government's actions in Ragbir's case to be statutorily authorized.[51] Nevertheless, she held, the agency's implementation of the statutory scheme "tread on rights that are larger, more fundamental"—indeed, "rights that define who we are as a country."[52] Accordingly, she ordered his release so that he could get his affairs in order and have an opportunity to say goodbye to his family.[53]

Although Judge Forrest did not engage in an explicit balancing of interests, she made clear that she was invoking the liberty and due process norms of the Fifth Amendment, which she described as constitutional "North Stars."[54] Citing *Mathews v. Eldridge*,[55] in which the Supreme Court set forth controlling, balancing-based procedural due process principles, the judge observed that "if due process means anything at all, it means that we must look at the totality of circumstances and determine whether we have dealt fairly when we are depriving a person of the most essential aspects of life, liberty, and family."[56]

In this case, the government had long allowed Ragbir to become "part of the community fabric" and to "build a life with and among us."[57] For years, he had been employed with express authority, helped support and raise his citizen child with his citizen spouse, and worked actively to better the local and national community.[58] This, the judge wrote, required the government at

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petition).

50. *See supra* Part II.A (explaining that the court in Ortiz found no statutory deficiencies in the government's actions).

51. *See* Ragbir v. Sessions, 18-cv-236, 2018 WL 623557, at *2 (S.D.N.Y. Jan. 29, 2018) ("The Court agrees that the statutory scheme governing petitioner's status is properly read to allow for his removal without further right of contest.").

52. *Id.* at *2.

53. *See id.* at *3 ("[T]he Court is convinced that it must grant the petition for habeas corpus. Constitutional principles of due process and the avoidance of unnecessary cruelty here allow and provide for an orderly departure. Petitioner is entitled to the freedom to say goodbye.").

54. *Id.* at *2.

55. 424 U.S. 319 (1976).

56. *See Ragbir*, 2018 WL 623557, at *2 (citing Mathews v. Eldridge, 424 U.S. 319, 334 (1976), for the proposition that "due process, unlike some legal rules, is not a technical conception with fixed content . . .; due process is flexible . . . .").

57. *Id.*

58. *See id.* at *1 n.3 (explaining Ragbir's work as an immigrant rights

least to allow him "orderly departure when the time came," marked by the "avoidance of unnecessary cruelty."[59] Judge Forrest also invoked the Eight Amendment's guarantee that individuals "not [] be subjected to excessive sanctions."[60] She explained that despite being nominally non-punitive, the processes and penalties employed in Ragbir's case were "shock[ing]" and "unusual."[61] Throughout her opinion, Judge Forrest pointed to the gratuitously cruel nature of the government's approach to Ragbir's case.[62] In substance, like Judge Reinhardt, Judge Forrest invoked norms of proportionality in reviewing the government's actions. In addition, by recognizing a constitutionally protected "right to say goodbye," Judge Forrest's proportionality review went further than the Ninth Circuit, though she stopped well short of identifying a right to remain in the face of an otherwise valid removal order.

Finally, although she touched on the point only briefly in a footnote, Judge Forrest observed "with grave concern" the possibility that Ragbir was being "targeted as a result of his speech and political advocacy on behalf of immigrants' rights and social justice."[63] Ragbir has a national reputation for his activism as an immigrant rights leader.[64] Much of this work is service-oriented, focusing on advocacy and informational programs for immigrants.

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advocate).

59. *Id* at *2.

60. *Id.* at *3 n.10 (quoting Miller v. Alabama, 567 U.S. 460, 469 (2012) and Roper v. Simmons, 543 U.S. 551, 560 (2005)).

61. *Id.*

62. *See id.* at *1 ("The wisdom of our Founders is evident in the document that demands and requires . . . an aversion to acts that are unnecessarily cruel."); *id.* at *2 ("In sum, the Court finds that when this country allowed petitioner to become a part of our community fabric, . . . it committed itself to avoidance of unnecessary cruelty . . . ."); *id.* at *3 ("Here, instead, the process we have employed has also been unnecessarily cruel.").

63. *Id.* at *1, n.1 (citing United States v. Alvarez, 567 U.S. 709, 716 (2012) for the principle that "as a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

64. *See, e.g.*, Memorandum of Law of Amici Curiae Scholars and Public Interest Advocates and Organizations in Support of Ravidath Lawrence Ragbir's Motion for Declaratory, Injunctive, and Habeas Corpus Relief at 2–4, Ragbir v. Homan, No. 18-Civ.-1159, 2018 WL 2338792 (S.D.N.Y. Mar. 8, 2018); Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction at 2–3, Ragbir v. Homan, No. 18-Civ.-1159, 2018 WL 2338792 (S.D.N.Y. Mar. 8, 2018).

Notably, as Executive Director of the New Sanctuary Coalition of New York City, he has frequently and publicly challenged aspects of both the current and the previous Administrations' immigration policies.[65] He has testified before the New York City Council regarding immigration matters and local leaders have sought his counsel. In 2017, the New York State Association of Black and Puerto Rican Legislators awarded Ragbir the Immigrant Excellence Award, and a South Asian American advocacy group presented him with the ChangeMaker Award.[66] In sum, he is a highly visible political activist.

This retaliatory-enforcement concern is now front and center in related litigation before Judge Kevin Castel of the Southern District of New York, from whom Ragbir and others have sought a preliminary injunction, primarily on the basis of a First Amendment claim.[67]

C. The Larger Context of Immigration Enforcement Under the Trump Administration

DHS's decisions to remove Ortiz and Ragbir are illustrative of the larger picture of immigration enforcement in the first eighteen months of the Trump presidency. Two trends in particular mark the approach of DHS thus far to interior immigration enforcement. The first, and most predominant trend, is characterized by mass, indiscriminate deportation.[68] This new policy direction was

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65. *See* Ragbir v. Sessions, 18-cv-236, 2018 WL 623557, at *1 n.3 (S.D.N.Y. Jan. 29, 2018) ("[Ragbir] is the Executive Director of the New Sanctuary Coalition of New York City, sits on the Steering Committee of the New York State Interfaith Network for Immigration Reform, and has served as the Chair of the Board of Families for Freedom.").

66. *See supra* notes 64–65 and accompanying text (listing Ragbir's accolades).

67. *See* Ragbir v. Homan, 1:18-cv-01159, 2018 WL 2338792, at *2 (S.D.N.Y. May 23, 2018); *see also Immigrant Rights Leader Ravi Ragbir and Community Organizations File First Amendment Lawsuit Challenging the Targeting of Immigrant Rights Activists*, NAT'L IMMIGR. PROJECT (Feb. 9, 2018), https://www.nationalimmigrationproject.org/pr/2018_9Feb_ragbir-v-homan.html (last visited Sept. 9, 2018) (documenting statement from plaintiff's counsel regarding the claim's First Amendment basis) (on file with the Washington and Lee Law Review).

68. *See* Jason A. Cade, *Sanctuaries as Equitable Delegation in an Era of Mass Immigration Enforcement*, 113 NW. L. REV. (forthcoming 2018),

initiated within a week of President Trump's inauguration in a series of executive orders on immigration enforcement.[69] One of these, entitled Enhancing Public Safety in the Interior of the United States, explained the Administration's new enforcement priorities.[70] It directed DHS to prioritize the removal of noncitizens charged or suspected of any criminal offense, as well as those subject to final removal orders.[71] Another order, entitled Border Security and Immigration Enforcement Improvements, directed immigration authorities to detain and remove all "individuals apprehended on suspicion of violating Federal or State law, including Federal immigration law."[72]

Shortly thereafter, then-Secretary of Homeland Security John Kelly issued new agency memoranda that discarded the Obama Administration's prosecutorial discretion guidelines.[73] Likewise, ICE Associate Director Matthew Albence directed agency officers to "take enforcement action against all removable aliens encountered in the course of their duties."[74] The executive orders, together with the implementing agency memoranda, classify

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3053609 [hereinafter Cade, *Sanctuaries*].

69. *See, e.g.*, Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 30, 2017) (explaining the Trump Administration's immigration enforcement policy); *see also* Meridith McGraw, *A Timeline of Trump's Immigration Executive Order and Legal Challenges*, ABC NEWS (Jun. 29, 2017, 12:22 PM), https://abcnews.go.com/Politics/timeline-president-trumps-immigration-executive-order-legal-challenges/story? id=45332741 (last visited Sept. 9, 2018) (detailing the series of events surrounding Trump's 2017 executive orders on immigration).

70. *See* Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 30, 2017) (explaining the Trump Administration's immigration enforcement policy).

71. *See id.* at 8800

> Prioritize for removal . . . aliens who . . . (b) have been charged with any criminal offense, where such charge has not been resolved; (c) Have committed acts that constitute a chargeable criminal offense . . . (f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States . . . .

72. Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 30, 2017).

73. Memorandum from U.S. Dep't of Homeland Sec. Sec'y John Kelly to U.S. Customs and Border Protection Acting Comm'r et al., on Enf't of the Immigration Laws to Serve the Nat. Interest 2 (Feb. 20, 2017) (rescinding previous field guidance and memoranda from the Department of Homeland Security regarding immigration enforcement).

74. Memorandum from U.S. Dep't of Homeland Sec., Immigration and Customs Enf't Exec. Assoc. Dir. Matthew Albence to All Enforcement & Removal Operations Employees 1 (Feb. 21, 2017).

virtually all removable noncitizens as priorities for enforcement, regardless of their equities or circumstances. As Secretary Kelly emphasized, "If you're here illegally, you should leave or you should be deported."[75] ICE Director Thomas Homan sounded the same theme: "There's no population off the table. If you're in this country illegally, we're looking for you and we're going to apprehend you."[76]

None of this has turned out to be empty posturing or rhetoric. Almost every day, news outlets publish stories on the Trump Administration's immigration enforcement activities. These reports tell the stories of families torn apart, long-term residents suddenly detained, and the deportation of persons with extremely sympathetic circumstances.[77] From fiscal year 2016 to fiscal year 2017, immigration arrests of noncitizens without any criminal histories more than doubled, and the total number of immigration arrests rose by 42%.[78] Especially significant is the toll taken on noncitizens who have woven themselves into the fabric of our society. The number of cases pending in immigration court involving noncitizens who have lived in the United States for many years—and thus have developed connections making the impact of deportation more significant—has dramatically increased.[79]

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75. Kery Murakami, *Immigrant Deportations Up Sharply Under Trump*, MANKATO FREE PRESS (Aug. 19, 2017), http://www.mankatofreepress.com/news/local_news/immigrant-deportations-up-sharply-under-trump/article_a2b7b8d3-d00b-5839-9f1d-8de5d83b3696.html (last visited Sept. 9, 2018) (on file with the Washington and Lee Law Review).

76. Adam K. Raymond, *Deportations Are Down Under Trump, But Arrests of Non-Criminal Immigrants Surge*, N.Y. MAG. (Dec. 20, 2017), http://nymag.com/daily/intelligencer/2017/12/deportations-are-down-as-immigration-arrests-surge.html (last visited Sept. 9, 2018) (on file with the Washington and Lee Law Review).

77. *See, e.g.*, *supra* note 11 and accompanying text (documenting Magana Ortiz's story).

78. *See* IMMIGR. & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 2 (2017) ("[T]he number of administrative arrests rose from 77,806 to 110,568, a 42 percent increase."); *see also* Aria Bendix, *Immigration Arrests Are Up, But Deportation is Down Under Trump, But Arrests of Non-Criminal Immigrants Surge*, N.Y. MAG. (Dec. 20, 2017) (reporting on a 150% increase in noncriminal immigration arrests from Jan. 25. 2017 to April 29, 2017).

79. *See, e.g.*, *Immigration Court Cases Now Involve More Long-Time Residents*, TRAC IMMIGR. (Apr. 19, 2018), http://trac.syr.edu/immigration/reports/508/ (last visited Sept. 9, 2018) (comparing the number of immigration

According to data obtained by TRAC Immigration, of the new immigration court cases DHS filed in March 2018, for example, only 10% concerned new arrivals to the United States, while 43% had arrived two or more years ago.[80] By way of contrast, "the proportion of individuals who had just arrived in new filings during the last full month of the Obama Administration (December 2016) made up 72%, and only 6% had been here at least two years."[81]

The other enforcement trend involves apparent retaliation against those who criticize or do not cooperate with immigration authorities.[82] One aspect of this trend consists of the prioritization of enforcement resources within so-called "sanctuary" cities, where raids and other measures are designed to send a message to the offending jurisdiction as much as to net deportable noncitizens.[83] Another aspect of this development, and the one most pertinent to this Article, is reflected in DHS's apparent effort to prioritize the removal of politically-active noncitizens who speak out against government policies.[84] Ragbir, for instance, alleges that this form of retaliation drove ICE's decision to remove him even before the

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cases involving new arrivals versus immigrants who had resided in the United States for at least two years) (on file with the Washington and Lee Law Review).

80. *See id.* (graphing the percentage of immigration cases involving new arrivals and immigrants in the United States for at least two years).

81. *See id.* (reporting that based on latest recorded entry dates alone, at least 20% of cases filed since March 2018 involved immigrants who had been in the country for five years or more).

82. *See, e.g.*, Walter Ewing, *The Federal Government is Using Immigration Raids as Retaliation Against California*, IMMIGR. IMPACT (Feb. 8, 2018), http://immigrationimpact.com/2018/02/08/government-immigration-raids-california/ (last visited Sept. 9, 2018) (documenting increased immigration enforcement raids in response to California's declaration as a "sanctuary state") (on file with the Washington and Lee Law Review).

83. *See id.* ("[T]he recent raids were not simply an attempt to enforce federal immigration laws, but were also an act of retribution against a state government that dared not to transform its police officers into proxy immigration agents.").

84. *See, e.g.*, *Immigrant Rights Leader Ravi Ragbir and Community Organizations File First Amendment Lawsuit Challenging the Targeting of Immigrant Rights Activists*, NAT'L IMMIGR. PROJECT (Feb. 9, 2018), https://www.nationalimmigrationproject.org/pr/2018_9Feb_ragbir-v-homan.html (last visited Sept. 9, 2018) (challenging ICE's enforcement against Ragbir as "retaliatory and discriminatory") (on file with the Washington and Lee Law Review).

expiration of his current period of authorized stay and resolution of his pending motion to reopen his proceedings.[85]

Ragbir's case is by no means the only example of potentially retaliatory behavior by ICE. News reports suggest that an ever-growing number of seemingly "good hombres" may have been targeted for removal on the basis of First-Amendment-protected speech. The reports concern the following persons, many of whom are movement organizers and outspoken critics of the Trump Administration:

> Daniela Vargas, arrested by ICE when departing an immigrant-rights rally in Jackson, Mississippi (March 2017).[86]
>
> Arturo Hernando Garcia, an outspoken immigrant rights activist, detained by ICE in Colorado in April 2017. Supporters argue that the unexpected arrest is linked to Jeanette Vizguerra, who had taken refuge in the same church as Mr. Garcia.[87]
>
> Claudia Rueda, a college student who has protested deportation policies and engaged in immigration activism, allegedly arrested by ICE in retaliation for her activism (May 2017).[88]

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85. *See id.* ("These high profile actions prompted Arnold & Porter and the New York University Immigrant Rights Clinic to file suit today to challenge federal immigration officials' retaliatory and discriminatory enforcement of immigration laws against Mr. Ragbir and other immigrant rights activists on the basis of their protected political speech.").

86. *See* John Burnett, *See The 20+ Immigration Activists Arrested Under Trump*, NPR (Mar. 16, 2018), https://www.npr.org/2018/03/16/591879718/see-the-20-immigration-activists-arrested-under-trump (last visited Sept. 9, 2018) ("Daniela Vargas was leaving a rally in Jackson, Miss., where she had spoken in favor of undocumented rights. ICE pulled over the car she was riding in and arrested her because her DACA status had expired.") (on file with the Washington and Lee Law Review).

87. *See* Jesse Paul, *Arturo Hernandez Garcia Gets Back to Family, Work After Deportation Delayed*, DENVER POST (May 4, 2017, 6:00 AM), https://www.denverpost.com/2017/05/04/arturo-hernandez-garcia-deportation-delay/ (last updated May 4, 2017, 9:26 AM) (last visited Sept. 9, 2018) ("Immigrant advocates—and Hernandez Garcia himself—feel the arrest was possibly fueled by politics under President Donald Trump and potentially the notoriety of Jeanette Vizguerra, a Mexican woman who has taken sanctuary in the First Unitarian Society of Denver, the same church that harbored Hernandez Garcia.") (on file with the Washington and Lee Law Review).

88. *See id.* ("Claudia Rueda is an immigration activist and college student who protested U.S. deportation policies, as well as the arrest of her mother on drug smuggling charges. Rueda was arrested by immigration agents on May 18,

> Siham Byah, arrested late in 2017, allegedly due to her political activism (November 2017).[89]
>
> Baltazar Aburto Gutierrez, detained in Washington by ICE after a news report published his criticism of his long-time partner's deportation to Mexico. Agents allegedly told Gutierrez: "You're the one from the newspaper." (December 2017).[90]
>
> Jean Montrevil, an immigrant-rights activist and co-leader of the New Sanctuary Coalition of NYC, arrested the same week as Ragbir and deported to Haiti (January 2018).[91]
>
> Maru Mora-Villalpando, allegedly targeted due to her political speech after ICE officials identified her through an interview she gave to a Seattle newspaper criticizing the agency (February 2018).[92]

2017, and released 22 days later.").

89. *'No Warning Whatsoever.' Mother from Nahant Taken into ICE Custody*, WCVB (Nov. 8, 2017), http://www.wcvb.com/article/no-warning-whatsoever-mother-from-nahant-taken-into-ice-custody/13453943 (last updated Nov. 8, 2017, 6:59 PM) (last visited Sept. 9, 2018) (citing her outspoken criticism of the Moroccan dictatorship) (on file with the Washington and Lee Law Review).

90. *See id.* ("ICE agents arrested the Mexican shellfish worker in Ocean Park, Wash., in December 2017, after he was quoted in a newspaper complaining about his longtime partner's deportation to Mexico.").

91. *See* John Burnett, *See The 20+ Immigration Activists Arrested Under Trump*, NPR (March 16, 2018, 10:30 AM), https://www.npr.org/2018/03/16/591879718/see-the-20-immigration-activists-arrested-under-trump (last visited Sept. 9, 2018) ("On Jan. 3, Immigration and Customs Enforcement agents arrested Jean Motrevil, a prominent immigrant rights activist from Haiti who co-founded the New Sanctuary Coalition.") (on file with the Washington and Lee Law Review); Katie Egan, *Federal Crackdown on Immigration Activists Threatens to Chill Free Speech*, ACLU (Jan. 30, 2018, 1:00 PM), https://www.aclu.org/blog/free-speech/rights-protesters/federal-crackdown-immigration-activists-threatens-chill-free (last visited Sept. 9, 2018) ("In New York, Jean Montrevil and Ravi Ragbir—both prominent immigrants' rights activists and leaders of the New Sanctuary Coalition of New York City—were arrested within a week of each other.") (on file with the Washington and Lee Law Review).

92. *See* Gene Johnson, *Deportation Document Described Immigrant Activist's Protests*, AP NEWS (Feb 27, 2018), https://www.apnews.com/ec59e1c1780146cb9d3b96b669bb0926/Deportation-document-described-immigrant-activist's-protests (last visited Sept. 9, 2018) ("'I'm being put in deportation proceedings because of my political stance, because of my media presence, because I've utilized my freedom of speech,' the activist, Maru Mora-Villalpando, told reporters . . . .") (on file with the Washington and Lee Law Review).

> Alejandra Pablos, an anti-Trump activist and a field coordinator for the National Latina Institute for Reproductive Health, held in detention since March 2018.[93]
>
> Six leaders from the immigrant-advocacy organization *Migrant Justice*—Victor Garcia Diaz, Alfredo Alcudia Gamas, Enrique Balcazar Sanchez, Zully Palacios Rodriguez, Yesenia Hernandez Ramos, and Esau Peche Ventura—detained and put into removal proceedings (March 2018).[94]

And there are others.[95]

To be sure, it may be difficult, in at least some of these cases, to parse the Administration's enforcement motivations. Removal decisions concerning some of these individuals might simply flow from the mass deportation project that also ensnared Ortiz and countless others. Ragbir, for example, has a prior conviction

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93. *See id.* (reporting that although Pablos has lawful permanent residence, she is potentially deportable on the basis of a past conviction for driving under the influence).

94. *See* Burnett, *supra* note 91

> [Migrant Justice] in Burlington, Vermont, has had six leaders arrested over a period of 14 months. All are undocumented. Migrant Justice advocates for dairy workers in Vermont. The arrested leaders are Victor Garcia Diaz, Alfredo Alcudia Gamas, Enrique Balcazar Sanchez, Zully Palacios Rodriguez, Yesenia Hernandez Ramos, and Esau Peche Ventura.

95. *See, e.g.*, Cora Currier, *FBI Pressed Detained Anti-ICE Activist for Information on Protests, Offering Immigration Help*, INTERCEPT (Aug. 7, 2018, 5:23 PM), https://theintercept.com/2018/08/07/fbi-pressed-detained-anti-ice-activist-for-information-on-protests-offering-immigration-help/ (last visited Oct. 16, 2018) (reporting on allegations that aspiring filmmaker Sergio Salazar was stripped of DACA status and targeted for removal solely on the basis of political activism critical of ICE policies) (on file with the Washington and Lee Law Review); Myrna Orozco & Noel Andersen, *Sanctuary in the Age of Trump*, SANCTUARY NOT DEPORTATION (Jan. 2018) ("In August 2017, as Araceli Velasquez prepared to publicly announce she had entered Sanctuary, ICE went to her husband's workplace. The agent insisted on seeing and questioning Jorge and his co-workers, only leaving when the manager insisted that he show a warrant or leave."); John Bear, *Husband of Peruvian Woman Taking Sanctuary at Boulder Church Detained by ICE*, DENVER POST (Jan. 11, 2018, 10:17 PM), https://www.denverpost.com/2018/01/11/ingrid-encalada-latorre-husband-detained-immigration-boulder-sanctuary/ (last updated Jan. 12, 2018, 12:14 AM) (last visited Sept. 9, 2018) (reporting that ICE pulled over and arrested Eliseo Jurado Fernandez, the husband of Ingrid Encalada Latorre, a Peruvian woman who has taken sanctuary in a church in Boulder, Colorado) (on file with the Washington and Lee Law Review).

(however distant and arguably mitigated) as well as a final removal order, both of which bring him within the Administration's new priorities and policies.[96] Due to the necessity of his check-ins with ICE, he presented an easy target for enforcement. At the least, these circumstances give ICE the chance to explain away allegations of retaliatory intent.

The general subject of retaliation in immigration cases is a large one and must be left for another day. For present purposes, the key point to be made is simple and narrow: An emerging picture suggests that some of the Trump Administration's immigration actions are based, at least in part, on retaliation against vulnerable critics of the Administration's policies.[97]

III. The Significance of the Lower Court Decisions Today

The judicial opinions of Judge Reinhardt and Judge Forrest discussed in Part II present powerful judicial condemnations of disproportionate, excessively cruel discretionary enforcement actions. Even though the court in each case found the government's enforcement decisions to be statutorily justified, the opinions remain significant for a number of reasons. They provide beacons of both concern and of hope around which advocates have rallied. They signal to the political branches that the harsh results of current policy are pushing up against the bounds of legality. And they establish building blocks that other judges might put to use in constructing new legal theories for a more expansive judicial role in monitoring deportation policy in the future. This Part briefly elaborates on these points.

First, judicial pronouncements such as these can bolster the resolve of lawyers, activists, and politicians who care about the achievement of justice in government decision making about the

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96. *See* Decker Amended Declaration, *supra* note 47, at ¶ 14 (noting possible factors for Ragbir's deportation); Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction, 2–3, Ragbir v. Homan, 18-cv-01159 (March 7, 2018) (arguing that current DHS guidance prioritizes removal of noncitizens subject to final orders of removal or convicted of criminal offenses).

97. *See, e.g.*, *supra* Part II.B (examining cases where immigrant rights advocacy appeared to result in retaliatory enforcement action); *see also* notes 86–95 and accompanying text.

removal of noncitizens.[98] Judge Reinhardt's decision in the Ortiz case, for example, led to extensive media coverage and a professionally-produced video highlighting the injustice of his removal, narrated by Martin Sheen.[99] The opinion also contributed to the introduction of a private bill that would allow Mr. Ortiz to return to the United States.[100] Similarly, Judge Forrest's ruling garnered extensive political and media attention, as reports continue to shine a light on the government's efforts to remove Ravi Ragbir.[101] Thus, although Ortiz did not secure the relief he sought through litigation, and Ragbir's judicial fate remains uncertain, the fact that the courts' opinions express moral condemnation of the government's actions may eventually lead to success through other means.[102]

Second, and relatedly, the decisions contribute to an ongoing process of inter-branch dialogue.[103] Judicial review of agency action typically requires agency attorneys to explain and defend

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98. *See, e.g.*, Rosy Alvarez & Peter Rothberg, *Andres Magana Ortiz's Deportation Is Indefensible. Help Reverse It*, NATION (Aug. 11, 2017), https://www.thenation.com/article/andres-magana-ortizs-deportation-is-indefensible-help-reverse-it/ (last visited Sept. 9, 2018) (calling for action to return Ortiz to the United States) (on file with the Washington and Lee Law Review).

99. *See id.* (reporting through video the circumstances of Ortiz's deportation).

100. *See id.* ("Representative Tulsi Gabbard also introduced a bill to make Magaña Ortiz eligible for legal, permanent residency in the United States.").

101. *See, e.g.*, Derek Hawkins, *Federal Judge Blasts ICE for 'Cruel' Tactics, Frees Immigrant Rights Activist Ravi Ragbir*, WASH. POST (Jan. 30, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/01/29/federal-judge-blasts-ice-for-cruel-tactics-frees-immigrant-rights-activist-ravi-ragbir/?utm_term=.b58487cc4b8b (last visited Oct. 2, 2018) (reporting on Judge Forrest's *Ragbir* ruling) (on file with the Washington and Lee Law Review).

102. *See Ortiz II*, 857 F.3d 966, 968 (9th Cir. 2017) (commenting on the injustice of the government's actions); Ragbir v. Sessions, No. 18-cv-236, 2018 WL 623557, at *2–3 (S.D.N.Y. Jan. 29, 2018) (same).

103. *Cf.* Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1366 (2002) ("After all, whenever the Court defines rights based on legislative choices, it obviously and openly involves nonjudicial authorities in the formulation of constitutional doctrine."); Michael McCann, *How the Supreme Court Matters in American Politics: New Institutionalist Perspectives* 63, 71–73, *in* THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Gillman & Clayton eds. 1999).

the legality of the government action at issue.[104] That way, when judges review government action and then publish opinions, there is an information-generating effect that can have positive consequences (even if the particular action is upheld).[105]

The opinions in *Ortiz* and *Ragbir* signal to the current Administration—and to congressional overseers as well—that some immigration enforcement actions are highly problematic.[106] Notably, this message can have real content even if courts remain unwilling or unable to police particular forms of executive actions. This is so in part because legislatures and the executive have a duty to act constitutionally even if the judiciary does not fully enforce those obligations.[107] While it remains to be seen whether judicial scolding will temper this Administration's efforts, and, in particular, encourage more equitable enforcement decision-making in future cases, such an outcome is possible—at a retail level if not as a matter of agency policy—and more likely to occur as more problems are brought to light.[108] In addition, these sorts of judicial decisions signal to this or a future Congress that legal reform is necessary.[109] If current law allows results so disproportionate that multiple federal judges choose to devote scarce time to disparaging them in the pages of the federal

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104. *See* David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 101, 158 (2018) ("Judicial review, however, requires the executive branch to defend its legal reasoning in ways that discourse in other public forums cannot.").

105. *See id.* ("The case studies presented in this Article provide important examples of how judicial review can pierce political rhetoric . . . . The information-generating effects of judicial review continue under the Trump Administration.").

106. *See, e.g.*, *Ragbir*, 2018 WL 623557, at *2 (describing the government's actions as "unnecessarily cruel," shocking, and unusual).

107. *See* LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES 84–92 (2004); Jason A. Cade, *Policing the Immigration Police*, 113 COLUM. L. REV. SIDEBAR 180, 189–96 (2013) [hereinafter Cade, *Policing*] (discussing how gaps in judicial enforcement of constitutional provisions stemming from doctrines of deference should be filled by the other branches' independent duties to uphold the Constitution).

108. *Cf.* Cade, *Sanctuaries*, *supra* note 68 (discussing situations in which resistance to federal immigration enforcement efforts led to more equitable treatment in at least some individual cases).

109. *Cf.* Cade, *Policing*, *supra* note 107, at 189–96 (explaining why the political branches should act constitutionally even when the judicial branch's oversight is limited by jurisdictional or justiciability doctrines).

reporters, this push for modifications of the underlying laws to avoid such results may gain strength.

Finally, and perhaps most important, these decisions, and others like them, lend support to the idea that these cases involve enforceable substantive rights.[110] In cases involving less thorny issues of judicial review,[111] they thus may provide the scaffolding for building out constitutional doctrines that courts can invoke to provide equity-based relief. In this way, the decisions may represent a sort of "decisional foreshadowing."[112] The next Part points to some of the relevant jurisprudence that could lead courts to take further steps along this path.

IV. The Significance of the Lower Court Decisions Tomorrow

The concept of "proportionality" refers to the fit between the severity of a sanction and the gravity of the underlying offense, tempered by any mitigating or exacerbating factors.[113] Proportionality presents a tricky problem in immigration law. The enforcement of federal immigration law against noncitizens residing inside the United States has long produced harsh results.[114] For over a century, the courts have afforded the political branches wide latitude in formulating and executing the rules that

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110. *Cf.* Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1029 (2008) (observing that the Court's enemy combatant decisions are like "signposts directing the traveler to continue toward an eventual, more significant fork in the road").

111. *See* 8 U.S.C. § 1252(g) (2012) (cabining judicial review of DHS decisions "to commence proceedings, adjudicate cases, or execute removal orders").

112. Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1107 (2016).

113. *See generally* Austin Lovegrove, *Proportionality Theory, Personal Mitigation, and the People's Sense of Justice*, 69 CAMBRIDGE L.J. 321, 330 (2010) ("[T]he severity of the punishment should be proportionate to the seriousness of the offence in question; but it also should be appropriate, having regard to the offender's personal mitigation."); Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 416 (2012) ("Proportionality is the notion that the severity of a sanction should not be excessive in relation to the gravity of an offense.").

114. *See, e.g.*, Harisiades v. Shaughnessy, 342 US 580, 596 (1952) (upholding an act allowing for the deportation of legal aliens for their membership in the Communist Party); Fong Yu Ting v. United States, 149 U.S. 698, 732 (1893) (affirming the dismissal of three writs of habeas corpus).

govern the deportation of noncitizens.[115] Moreover, even in regulatory contexts outside of immigration law—such as the administration of criminal penalties—courts rarely review punishments on proportionality grounds.[116] Because of this pattern of judicial deference, commentators advocating for more proportional penalties in immigration law have tended to focus on legislative reforms.[117]

Nevertheless, decisions like the ones considered in this Article may move the needle toward a more active judicial role in proportionality review. This is all the more true in light of doctrinal developments taking place both inside and outside of immigration law. In particular, challenges to government action on the basis of combined constitutional concerns have gained a foothold in ways that may be relevant to the deportation field. In the following sections, I outline some of the key legal principles that may guide future courts.

One clarification before proceeding. I do not aim here to set out a precise formula for determining when a particular removal action violates the principle of proportionality. Rather, my more modest ambition is simply to lay out the tools that advocates and courts might employ to evaluate proportionality in appropriate cases. Through the adjudication of specific facts with these principles, standards may well develop. The overarching point, however, is simply that a commitment to proportional treatment requires someone in the process to meaningfully engage with the

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115. *See, e.g.*, Hiroshi Motomura, *Immigration Law After a Century of Plenary Power*, 100 YALE L.J. 545, 559 (1990) (quoting the *Harisiades* Court for its assertion that immigration and deportation policies are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference").

116. *See* Josh Bowers, *Plea-Bargaining's Baselines*, 57 WM. & MARY L. REV. 1083, 1090 (2016) ("For the Court, inquiries into proportionality and purpose are just too murky . . . ."); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3096 (2015) (identifying the lack of proportionality based review in the United States as a general matter but noting its use in Eighth Amendment cases).

117. *See* Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1729–41 (2009) (proposing legislative reforms to immigration policy to enhance proportionality); Angela Banks, *Problems, Possibilities, and Pragmatic Solutions: Proportional Deportation*, 55 WAYNE L. REV. 1651, 1672–76 (2009) ("[L]egislative and administrative reforms are necessary to protect against grossly excessive deportations.").

severity of the removal sanction as applied to particularized facts.[118] When differently-situated individuals are punished equally, the rationality of the removal system is at stake and the potential for disproportionality skyrockets.[119]

A. Fifth Amendment Proportionality Review

A still nascent body of scholarship has begun to explore whether federal courts have the authority to review removal orders on proportionality grounds. Michael Wishnie, for example, has argued that the Fifth Amendment's Due Process Clause might justify proportionality review in least some deportation contexts.[120] Angela Banks has advanced a similar claim.[121] The Supreme Court has found that the Fifth Amendment sometimes requires proportionality review of civil sanctions.[122] A key threshold

118. *Cf.* Lockette v. Ohio, 438 U.S. 586, 608 (1978) ("To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating evidence."); Eddings v. Oklahoma, 455 U.S. 104, 112–15 (1982) ("Just as a state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."); Hitchcock v. Dugger, 481 U.S. 393, 397–99 (1987) (holding that failure to consider non-statutory mitigating evidence of family background and rehabilitation violated the rule established in both *Eddings* and *Lockette*).

119. *Cf.* U.S. SENTENCING COMM'N, POLICY VIEWS ABOUT MANDATORY MINIMUM SENTENCES (2011) ("But when the offenders subject to a mandatory minimum are not similarly situated, the elimination of disparity creates a form of unfairness that often is even more troubling—excessive uniformity.").

120. *See* Wishnie, *supra* note 113, at 418 ("Nevertheless, a court should set aside a removal order as constitutionally impermissible in the rare case where the punishment of the removal order is grossly disproportionate to the underlying misconduct, just as the Fifth and Eighth Amendments require in other contexts.").

121. *See* Banks, *supra* note 117, at 1652 ("I offer an alternative basis for constitutional restraints on deportation: that the Fifth Amendment requires civil punitive measures to be proportionate. The Fifth Amendment protects against arbitrary government action procedurally and substantively."). The Takings Clause similarly has been interpreted to require "rough proportionality" between zoning permit conditions and the consequences of the proposed use of the property. *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 599 (2013) ("[A] unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use.").

122. *See* United States v. Halper, 490 U.S. 435, 447 (1989) ("[Double jeopardy]

consideration is whether any part of the sanction is intended to be punitive.[123] Civil sanctions that are solely remedial in nature would not be subject to proportionality constraints under the Court's due process precedents, but if there is a punitive component to the sanction then proportionality review would be appropriate.[124]

The Court primarily developed these principles in a series of cases assessing the appropriateness of hefty punitive damages in civil tort cases.[125] Such damages must be "both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."[126] In general, the Court has made clear that where punitive damage sanctions are "grossly excessive" in relation to the state's interests, they reach a level of arbitrariness that violates the substantive due process required by the Fifth Amendment.[127] In *BMW v. Gore*,[128] the Court set forth "guideposts" for case-by-case proportionality review of punitive civil sanctions: (1) the reprehensibility of the offense; (2) the ratio between the harm caused by the offense and the sanction; and (3) a comparison between the penalty and other civil or criminal

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protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.").

123. *See id.* at 447–48 (comparing remedial and punitive sanctions for double jeopardy purposes).

124. *See* Banks, *supra* note 117, at 1656 ("[T]he key question in determining whether or not a sanction is punishment is not whether it is criminal or civil, but whether it is remedial or punitive. Punitive measures in both contexts are subject to constitutional limitations."); Wishnie, *supra* note 113, at 425–26 ("[T]he decisive classification for proportionality review is whether a sanction is remedial or punitive. If deportation is wholly remedial, without any punitive element, then proportionality review is not required by the Constitution.").

125. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–85 (1996) (laying out three "guideposts" for whether a damage award is excessive and punitive).

126. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003).

127. *BMW of N. Am., Inc.*, 517 U.S. at 568; *see also* Pac. Mut. Life Ins. v. Haslip, 23 U.S. 1, 23 (1991) (noting that a damage award's gross excessiveness is an "important substantive due process concern").

128. 517 U.S. 559 (1996).

sanctions that could be imposed.[129] In *State Farm v. Campbell*,[130] the Court went so far as to set forth a readily administrable "single-digit ratio" rule of thumb for assessing disproportionality in this context.[131]

To be sure, courts might be willing to apply kindred principles in reviewing removal decisions only if those sanctions qualify as "punitive" in nature. But in fact, strong reasons support applying that label in this context. In deportation proceedings, there are typically two sanctions at issue: the deportation order itself, and the various statutory bars to reentry that follow from prior immigration violations. Moreover, with regard to each of these sanctions, Congress's underlying intent is rather clear. To begin with, regarding deportation itself, the sanction of banishment has long been used to punish both citizens and noncitizens found to have engaged in unlawful activity.[132] While the Court has taken pains to avoid formally characterizing deportation as a direct sanction for criminal activity, thereby avoiding the constitutional requirement of criminal procedure rights,[133] its functional use as a kind of punishment has continued to the present day in the United States, as illustrated through extensive legislation in the late twentieth century that expanded the kinds of criminal activity leading to removal and that narrowed or eliminated discretionary relief in many cases.[134]

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129. *See id.* at 575–85 (laying out three "guideposts" for whether a damage award is excessive and punitive).

130. 538 U.S. 408 (2003).

131. *See id.* at 410 ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

132. *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 39–43, 74–83 (2007) (describing how convicts historically were sometimes subject to banishment); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 513 (2007) ("From ancient Rome to eighteenth and nineteenth century Britain, France, and Russia, common forms of criminal punishment included exile, banishment, and transportation (particularly by Britain to the American and Australian colonies).").

133. Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) ("Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.").

134. *See generally, e.g.*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (1996); Illegal Immigration Reform and

The Supreme Court in cases both new and old has recognized deportation as a "particularly severe 'penalty.'"[135] In *Padilla v. Kentucky*,[136] for example, the Court observed that it is "'most difficult' to divorce the penalty [of deportation] from the conviction."[137] In *Dada v. Mukasey*,[138] the Court likewise noted "the penalties attendant to deportation," including the re-entry bars.[139] Lower courts also have routinely characterized deportation and reentry bars as penalties.[140]

Banks and Wishnie have identified further support in the legislative record for the conclusion that these immigration sanctions were intended to be punitive.[141] Senator William Roth explained that an intent behind the 1996 amendments was to make "more crimes punishable by deportation."[142] Similarly, the

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Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009 (1996). Both Acts significantly (1) widened crime-related grounds for deportation, especially through the definitions of so-called "aggravated felonies," and (2) constricted equitable relief for noncitizens deportable on these grounds. *See generally* Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661 (2015); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1890–91 (2000) ("This situation is the result of some fifteen years of relatively sustained attention to this issue, which culminated in two exceptionally harsh laws: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).").

135. Padilla v. Kentucky, 559 U.S. 365, 373 (2010) (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)); Bridges v. Wixon, 326 U.S. 135, 147 (1945) ("As stated by Mr. Justice Brandeis speaking for the Court in Ng Fung Ho v. White, deportation may result in the loss 'of all that makes life worth living.'") (internal citation omitted).

136. 559 U.S. 365 (2010).

137. *Id.* at 366.

138. 554 U.S. 1 (2008).

139. *Id.* at 11.

140. *See* Wishnie, *supra* note 113, at 434 (collecting cases including *Dada*).

141. *See id.* at 433–34 (recounting Chair of the House Judiciary Committee Hyde's characterization of immigration sanctions as punitive); Banks, *supra* note 117, at 1669 ("Not only is deportation in these cases justified as a mechanism for retribution, deterrence, and incapacitation, historically it has been understood as punishment, and the legislative history of these particular deportation grounds indicate a desire to punish.").

142. Lindsay Macdonald, *Why the Rule-of-Law Dictates that the Exclusionary Rule Should Apply in Full Force to Immigration Proceedings*, 69 U. MIAMI L. REV. 291, 304 n.117 (2014) ("According to Senator Roth, for example, IIRIRA expanded

Chair of the House Judiciary Committee, Henry Hyde, explained that the purpose behind the reentry bars was "to validate our immigration laws, and to put some penalty on people who cross into our country illegally."[143] Other legislators concurred in these sentiments.[144]

Because removal orders and the statutory bars on lawful return to the United States are appropriately characterized as penalties, they implicate substantive due process concerns. Accordingly, Professor Banks has argued that punitive enforcement actions against lawful permanent residents should, in some cases, be deemed unconstitutional for proportionality reasons. Professor Wishnie expanded on this analysis to encompass unauthorized noncitizens with compelling equities. No less important, he has identified a statutory hook for proportionality review in a provision of the INA requiring immigration judges to review and enter a judgment of removal, which he argues must be read to incorporate proportionality principles to avoid an unconstitutional application of law.[145]

In sum, Fifth Amendment due process offers an avenue by way of which claims of disproportionate immigration penalties might be considered. Applying this doctrine in cases like Ortiz's might well have justified more robust judicial intervention.[146] In the next subpart, I add to the mix a quick survey of recent Supreme Court case law regarding deportation challenges. Because this jurisprudence has a proportionality-sensitive cast, it offers further

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the grounds of deportation 'to include more crimes punishable by deportation.'").

143. *Immigration Control and Financial Responsibility Act of 1996: Hearing of H. Judiciary Comm.*, 104th Cong. (1995).

144. *See, e.g.*, *id.* (statement of Rep. Elton Gallegly that "if we don't have penalties for illegal immigration, for heaven's sakes, how are we ever going to deal with this issue?"); *id.* (statements of Rep. Howard Berman that the unlawful presence bars impose "a very harsh penalty" and that "[t]here is no doubt a 10 year bar is a penalty").

145. *See* Wishnie, *supra* note 113, at 441–45 (arguing that the canon of constitutional doubt requires construing 8 U.S.C. § 1229a(c)(1)(A)—an INA provision directing that "[a]t the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States"—to require proportionality review).

146. *See supra* Part II.A (explaining why a judicial stay of the removal order in Ortiz's case would have avoided a ten-year bar to lawful reentry based on his U.S. citizen spouse's family petition).

support for judicial adoption of a proportionality-based due process restraint on removal orders.

B. Proportionality-Enhancing Developments

Despite the general reluctance of courts to enter the territory of equity-balancing, it is far from clear that the Court is closed to the idea of proportionality review in deportation cases. Indeed, in the last fifteen years, the Court has in substance recognized that removal of noncitizens with no path to status, or who have a criminal history, will sometimes be inappropriate on equitable or humanitarian grounds. More specifically, the Court has issued many rulings that structure the system so that proportionality concerns can be weighed at some point in the process, whether by federal or non-federal actors. This overarching doctrinal theme may help support the future development of a generalized constitutional principle of substantive proportionality review.

The survey begins with *Arizona v. United States*,[147] in which the Court struck down, as preempted by federal law, most of the challenged portions of Arizona's omnibus immigration enforcement bill.[148] In so doing, Justice Kennedy's opinion for the majority stressed the "immediate human concerns" raised by immigration enforcement decisions.[149] The Court candidly acknowledged that "[r]eturning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission."[150] In other words, removal might be a disproportionate sanction for the underlying immigration violation. Accordingly, the Court focused on the need to protect federal choices regarding the use of equitable discretion from state disruption.[151] To be sure, nothing in the

147. 567 U.S. 387 (2012).

148. *See id.* at 393 ("The United States filed this suit against Arizona, seeking to enjoin [the omnibus bill] as preempted.").

149. *Id.* at 396.

150. *Id.*

151. *See* Jason A. Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. DAVIS L. REV. 1029, 1047–49 (2017) ("In *Arizona*, however, the Court declined to employ the states-can-mirror-federal-law reasoning, focusing instead on the need to protect federal choices regarding prosecutorial discretion from disruption.").

decision mandates the application of proportionality principles. Even so, the Court at least acknowledged that a noncitizen's formal deportability is not dispositive to the question of whether he or she *should* be removed.[152]

The Court's *Padilla* decision also sought to mitigate unfair deportations by requiring that defense counsel accurately convey the immigration consequences of a potential conviction to his or her client.[153] Repeatedly emphasizing that deportation is a "strict penalty,"[154] Justice Stevens's opinion for the majority explicitly highlighted how the Court's ruling would enable and incentivize defense attorneys to "plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence."[155] The Court thus expanded the equitable frame beyond immediate criminal proceedings to incorporate deportation consequences.

In another series of cases, the Court has required and refined a "categorical approach" to determining the immigration consequences of convictions.[156] In general, these cases have rejected the government's efforts to interpret criminal deportation categories expansively, by requiring a strict categorical match between the elements of the penal offense and the relevant

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152. *See* Arizona v. United States, 567 U.S. 387, 396 (2012) ("Returning an alien to his own country *may* be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission." (emphasis added)).

153. *See* Padilla v. Kentucky, 559 U.S. 356, 371 (2010) ("It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.'").

154. *Id.* at 365, 366, 373.

155. *Id.* at 373.

156. *See, e.g.*, Sessions v. Dimaya, 138 S. Ct. 1204, 1211 (2018) (recognizing that the "categorical approach" is used to determine if a conviction "falls within the ambit" of the residual clause); Mellouli v. Lynch, 135 S. Ct. 1980, 1986 (2015) ("The categorical approach 'has a long pedigree in our Nation's immigration law.'" (citing Moncrieffe v. Holder, 569 U.S. 184, 191 (2013))); Carachuri-Rosendo v. Holder, 560 U.S. 563, 577 n.11 (2010) (distinguishing that case from Nijhawan v. Holder, 557 U.S. 29 (2009), which rejected the categorical approach); Lopez v. Gonzalez, 549 U.S. 47, 60 (2006) ("In sum, we hold that a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law.").

immigration statutory provision.[157] These rulings, the Court has noted, allow noncitizens "to enter 'safe harbor' guilty pleas" that preserve possibilities for equitable relief in immigration court or sometimes avoid immigration sanctions altogether.[158] At bottom, the jurisprudence has created proportionality-enhancing effects by rejecting overly broad definitions of the criminal-removal grounds.[159]

In these and other cases, which I explore in more detail elsewhere,[160] the Court seems to have anticipated that discretionary choices would help ameliorate the disproportionate effects of an overbroad and unforgiving legislative scheme. At least to this extent, a wide body of recent Supreme Court case law has evinced solicitude for proportionality concerns in deportation proceedings. The Court thus has recognized that claims to membership—and membership rights—in the American community are broader than strictly contemplated by code law, including for persons with no path to lawful status and persons with criminal histories.[161] Although these precedents do not firmly establish substantive proportionality review, they lay groundwork for future expansion. This past is prelude to a future, more proportionality-conscious judicial approach.

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157. *See* Cade, *supra* note 151, at 1060–69 (cataloging decisions upholding the categorical approach and explaining its benefits); Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1725–27 (2011) (explaining the "implications of deviating from a Categorical Analysis").

158. Mellouli v. Lynch, 135 S. Ct. 1980, 1987 (2015) (quoting Jennifer Lee Koh, *The Whole Better Than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 307 (2012)).

159. *See* Cade, *supra* note 151, at 1104 ("The categorical approach cases do mitigate the harshness of the aggravated felony provisions by rejecting broad interpretations of the criminal removal grounds. In this way, as a practical matter many of the cases do have a substantive, proportionality-enhancing effect.").

160. *See id.* at 1071–81 (discussing the Court's "second-look" and arbitrary enforcement cases).

161. *See id.* at 1095–100 (explaining "the significance of this expansive conception of which persons have some claim to continued presence that the Court believes is appropriately evaluated prior to the imposition of banishment"); *see, e.g.*, *Padilla*, 559 U.S. at 384–85 (expanding Sixth Amendment rights for non-resident defendants).

C. Arbitrary Enforcement Review

To the extent the Administration's removal policies fail to rationally distinguish between potential targets, another Supreme Court development in the immigration context may prove to be increasingly relevant and is worthy of careful assessment: arbitrary and capricious review.[162] In *Judulang v. Holder*,[163] thus far a little-examined decision issued in 2011, the Court employed arbitrary and capricious (or "hard-look") review to evaluate one very particularized agency immigration policy.[164] The case concerned INA Section 212(c), which authorized discretionary relief from crime-based deportation. Although Congress repealed this waiver in 1996, its protection nonetheless has remained applicable so long as the relevant conviction predated the repeal.[165] Because the waiver provision was located in the INA's inadmissibility section, as opposed to the deportation section, the agency initially applied it only in cases involving persons seeking entry (or re-entry) to the United States.[166] Litigation challenging the agency's failure to extend comparable equitable relief to lawful permanent residents facing deportation resulted in a revised policy making Section 212(c) available in deportation cases as well, but only if the operative removal category also had an equivalent or comparable provision in the INA's inadmissibility section.[167]

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162. *See generally* 5 U.S.C. § 706(2) (2012) (providing authority to courts to "set aside agency action" if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). Three recent lower court decisions have applied arbitrary and capricious review in the immigration context to find unlawful the Trump Administration's revocation of the Deferred Action for Childhood Arrivals program. *See* Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1029 (N.D. Cal. 2018); Batalla Vidal v. Nielson, 291 F. Supp. 3d 260, 269 (E.D.N.Y. 2018); NAACP v. Trump, 298 F. Supp. 3d 209, 215–16 (D.D.C. 2018).

163. 565 U.S. 42 (2011).

164. *See id.* at 45 ("This case concerns the Board of Immigration Appeals' . . . policy for deciding when resident aliens may apply to the Attorney General for relief from deportation under a now-repealed provision of the immigration laws.").

165. *See id.* at 48 (recounting how the Court revived Section 212(c) in INS v. St. Cyr, 533 U.S. 289, 326 (2001)).

166. *See id.* at 47 (explaining how Section 212(c) applied to aliens seeking entry or re-entry).

167. *See id.* at 46–50 (explaining the agency's implementation of 212(c) and

In due course, this "comparable grounds" policy was also challenged in a case that found its way to the Supreme Court. In that case, the Justices unanimously agreed that the government's "comparable grounds" policy resulted in an "arbitrary and capricious" restriction on eligibility for equitable relief from removal for noncitizens charged under any deportation provisions that did not have inadmissibility equivalents.[168] The Court's opinion, authored by Justice Kagan, expressed discomfort with an enforcement approach that failed to weigh noncitizens' "fitness to remain in the country."[169] As Justice Kagan explained, the agency's comparable grounds approach "does not rest on any factors relevant to whether an alien . . . *should* be deported."[170] This was problematic because, in the Court's view, enforcement relief provisions like Section 212(c) should be tied to a noncitizen's equitable merit,[171] taking into account "the alien's prior offense or his other attributes and circumstances."[172] To do otherwise would result in impermissible arbitrariness.[173]

Notably, the Court highlighted a link between general agency policies that disregard individuals' equities in this country and individual prosecutorial enforcement decisions based on those policies: "[U]nderneath this layer of arbitrariness lies yet another, because the outcome of the Board's comparable-grounds analysis itself may rest on the happenstance of an immigration official's charging decision."[174] Because convictions frequently implicate more than one deportation category, ICE agents can choose which of several charges to pursue, some of which might appear only the in the deportation section of the INA.[175] Thus, through

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related litigation).

168. *See id.* at 55, 59–60 (holding that the agency's comparable grounds policy violated the Administrative Procedures Act).

169. *Id.* at 55.

170. *Id.* at 58 (emphasis added).

171. *See id.* at 56 (emphasizing that the agency's comparable grounds approach to determining eligibility for equitable relief "has nothing to do with whether a deportable alien . . . merits the ability to seek a waiver" and in fact "is as extraneous to the merits of the case as a coin flip would be").

172. *Id.* at 55.

173. *See id.* at 56 (comparing the process to "a coin flip").

174. *Id.* at 57.

175. *See id.* at 58 ("And the Government has provided no reason to think that immigration officials must adhere to any set scheme in deciding what charges to

discretionary charging decisions alone, a front-line official could intentionally (or arbitrarily) foreclose the possibility of equitable relief pursuant to Section 212(c) by invoking a removal provision that lacked a comparable inadmissibility ground.[176] The Court found intolerable the likelihood of injustice created by such an arbitrariness-laden scheme: "An alien appearing before one official may suffer deportation; an identically situated alien appearing before another may gain the right to stay in the country."[177] "Deportation decisions," the Court admonished, "cannot be made a 'sport of chance.'"[178]

All of this may seem a bit far into the weeds of a particular statutory tangle, but there are two key points for present purposes. First, the Court in *Judulang* reviewed the agency's enforcement scheme as a product of both agency policy and individual prosecutorial decisions, in light of the separate "layer[s] of arbitrariness" they create.[179] This framing could well apply to other immigration enforcement activities, including those highlighted in this Article. Second, the Court scrutinized whether the agency's approach to enforcement, through both policy and discretionary enforcement actions, focused sufficiently on the "merits of the case."[180] *Judulang* thus broke new ground by applying "an independent evaluation of the merits of an immigration agency's policy, rather than just a review of the

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bring, or that those officials are exercising their charging discretion with § 212(c) in mind.").

176. *See id.* (explaining how an immigration official's charging decision can be arbitrary). In Judulang's case, for example, his conviction for involuntary manslaughter could be charged as either a "crime involving moral turpitude" removal ground or a "crime of violence" aggravated felony ground, or both. *Id.* at 52–54. The crime involving moral turpitude has a comparable inadmissibility ground but the crime of violence aggravated felony does not, so the agency's decision to charge him under the latter provision made him ineligible for discretionary relief. *See id.* at 52 ("As part of its decision, the BIA considered whether Judulang could apply for § 212(c) relief. It held that he could not do so because the "crime of violence" deportation ground is not comparable to any exclusion ground, including the one for crimes involving moral turpitude.").

177. *Id.* at 58.

178. *Id.* at 59 (quoting Di Pasquale v. Karnuth, 158 F.2d 878, 879 (2d Cir. 1947)).

179. *Id.* at 57.

180. *Id.* at 56.

rationality of the process employed in developing that policy."[181] Importantly, the Justices went so far as to find that "rational operation of the immigration laws" requires attention to a noncitizen's "fitness to remain in the country," based on, for example, that person's "prior offense or his other attributes and circumstances."[182] In other words, the Court suggested that the agency's approach to implementation of the statute in the deportation context must reflect some attempt at normative balancing.

Thus, to the extent that the government's decisions to remove noncitizens like Ortiz or Ragbir can be traced to general agency policies that facilitate arbitrary or capricious results in individual cases—and in both matters the courts seemed to suggest that such a characterization would be appropriate—*Judulang* provides both an independent tool for judicial intervention, as well as additional support for the application of substantive due process. And while the Trump Administration's removal policies may well be supportable by statutory authority, that fact does not foreclose a judicial finding of capriciousness. As Jennifer Koh has pointed out, "the mere fact that an agency's organic statute permits a particular practice does not necessarily guarantee that it should clear the 'hard look' threshold."[183] Statutory authorization is a necessary baseline for agency action, but courts must nevertheless go on to determine whether the agency's implementation of that authority is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[184] In the deportation context, the Court explained in *Judulang*, the agency's implementation of its

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181. Jeffrey D. Stein, *Delineating Discretion: How* Judulang *Limits Executive Immigration Policy-Making Authority and Opens Channels for Future Challenges*, 27 GEO. IMMIGR. L.J. 35, 48 (2012).

182. Judulang v. Holder, 565 U.S. 42, 53–55 (2011).

183. *See* Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement*, 96 WASH. U. L. REV. (forthcoming 2018) (manuscript at 58) (applying the reasoning of *Judulang* to the government practice of reinstating prior expedited removal orders).

184. 5 U.S.C. § 706(2) (2012); *see also* Animal Legal Def. Fund, Inc., v. Perdue, 872 F.3d 602, 619 (D.C. Cir. 2017) ("[T]he mere fact that a regulatory scheme is generally consistent with the agency's authorizing statute does not shield each agency action taken under the scheme from arbitrary and capricious review."); Koh, *supra* note 183, at 76–79 (discussing relevant case law).

statutory authority must contend with the "high stakes for an alien who has long resided in this country" and a normative evaluation of factors such as his "fitness to remain in the country."[185]

To be sure, *Judulang* involved a challenge under Administrative Procedures Act, and did not directly consider a constitutional due process challenge.[186] Nevertheless, the opinion reveals much about the Justices' thinking with respect to removal decisions that arbitrarily subject some noncitizens to removal, but not similarly situated others. This kind of hard-look scrutiny is also fitting when the government's policy approaches are excessively uniform, treating differently-situated persons the same.[187] And these underlying concerns may well influence future decisions based on new varieties of due process or equal protection challenges.

D. Retaliatory Enforcement and the First Amendment

Ragbir and others have alleged that the Trump Administration is specifically targeting them for enforcement in retaliation for their criticism of its policies.[188] Retaliatory removal decisions based on protected speech raise distinct proportionality concerns.[189] If enforcement choices in these cases thus function as sanctions on core political speech, does the First Amendment offer

185. *Judulang*, 565 U.S. at 55.

186. *See id.* at 52 ("This case requires us to decide whether the BIA's policy for applying § 212(c) in deportation cases is 'arbitrary [or] capricious' under the Administrative Procedure Act . . . .").

187. *See supra* note 119 and accompanying text (citing sources criticizing "excessive uniformity" in sanctions).

188. *See supra* Part II.B (discussing the *Ragbir* case and Ragbir's First Amendment argument).

189. *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 730 (2012) (Breyer, J., concurring) ("Ultimately the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications."); Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 999–1002 (2012) (explaining penalty-sensitive free speech adjudication and arguing for its expansion in First Amendment law); Jackson, *supra* note 116, at 3105, 3140–41 (discussing proportionality in constitutional law generally, including First Amendment principles).

any protection? The issue is complex but here I will sketch some basic contours.

Supreme Court case law to date is inconclusive—and inconsistent—with respect to First Amendment protections for noncitizens.[190] In a handful of cases, the Court has said that noncitizens possess First Amendment rights. *Bridges v. Wixon*,[191] for example, ruled that a legal permanent resident residing in the United States for two decades could not be deported on the basis of his activities and affiliation with the Communist Party.[192] In rejecting the government's attempt to deport him pursuant to a removal category involving persons who advocate the violent overthrow of the government, the Court broadly stated that, "Freedom of speech and of press is accorded aliens residing in this country. So far as this record shows . . . the utterances made by him were entitled to that protection."[193] Similarly, in a 1953 case involving the government's attempt to exclude on security grounds a lawful permanent resident who was returning from working abroad, the Court noted that the First Amendment, like the Fifth Amendment, does not distinguish between citizens and "resident" noncitizens.[194]

These immigrant-protective precedents concerned lawfully present noncitizens, however, and case law concerning the First Amendment rights of unauthorized noncitizens is less settled.[195] The fundamental question of when unauthorized noncitizens can claim the protection of the First Amendment has yet to be

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190. *See generally* Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237 (2016) (examining problematic areas of First Amendment law affecting noncitizens).

191. 326 U.S. 135 (1945).

192. *See id.* at 137–38, 157 (reversing the circuit court's decision to deport Bridges).

193. *Id.* at 147–48.

194. *See* Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) ("Such rights include those protected by the First and the Fifth Amendments . . . . None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority.").

195. *See* Kagan, *supra* note 190, at 1244–53 (exploring cases dealing with the issue of whether certain Amendments apply to noncitizens). *See generally* Bluman v. Fed. Election Comm'n, 565 U.S. 1104 (2012) (affirming, without an opinion, a statutory ban on donations to candidates by all foreign nationals except LPRs).

definitively determined.[196] In *United States v. Verdugo-Urquidez*,[197] handed down in 1990, Justice Rehnquist's plurality opinion stated that "the people" protected by various constitutional provisions "refers to a class of people who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[198] The meaning of that statement, as well as its weight in light of the facts of the case and Justice Kennedy's key concurrence, remains contestable.[199] Moreover, other Court precedent makes clear that persons without lawful immigration status residing in the United States can claim the protection of the Fourth and Fifth Amendments, which strongly supports a parallel First Amendment right.[200] Nevertheless, the government has seized on *Verdugo-Urquidez* to argue that at least some unauthorized noncitizens lack constitutional protections afforded to "the people," and that claim has made headway with some lower courts.[201]

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196. *See* Kagan, *supra* note 190, at 1244–53 (exploring the meaning of "the people" in Supreme Court decisions).

197. 494 U.S. 259 (1990).

198. *Id.* at 265 (considering Fourth Amendment claim brought by a Mexican national whose home abroad in Mexico was searched by DEA agents).

199. *See, e.g.*, Michael Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 681–85 (2003) (demonstrating that the Framers intended "the people" to incorporate constitutional protections for non-LPR noncitizens); Cade, *supra* note 107, at 187–88 (arguing that Justice Kennedy's key concurrence in *Verdugo-Urquidez* turned on the extraterritoriality of the search rather than the status of the defendant); United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) ("If the search had occurred in a residence within the United States, I have little doubt that the full protections of the Fourth Amendment would apply.").

200. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 205 (1982) (making clear that undocumented children can bring a constitutional Equal Protection challenge to a state's decision to exclude them from public school); Arizona v. United States, 567 U.S. 387, 411–15 (2012) (making clear that undocumented noncitizens can raise Fourth Amendment challenges to unlawful detention); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (recognizing the constitutional Equal Protection rights of noncitizens); Wong Wing v. United States, 163 U.S. 228, 237 (1896) (recognizing that the Constitution's criminal procedure protections apply to noncitizens); *see also* Cade, *Policing*, *supra* note 107, at 189 (pointing out that "eight Justices in *Lopez-Mendoza* agreed that the Fourth Amendment protects undocumented noncitizens").

201. *See* Kagan, *supra* note 190, at 1245–49 (surveying relevant First Amendment jurisprudence); D. Carolina Núñez, *Inside the Border, Outside the*

Furthermore, in *Reno v. American-Arab Anti-Discrimination Committee (AADC)*[202] the Court proclaimed that "[a]s a general matter, and assuredly in the context of claims such as those put forward in the present case—an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation."[203] Despite the first-blush breadth of this statement, however, there are good reasons not to give it too much weight in the context of evaluating challenges to retaliatory enforcement efforts against noncitizens engaging in core political speech. First, the government in *AADC* had targeted members of the Popular Front for the Liberation of Palestine, which was categorized as an international terrorist organization.[204] Thus, the government's foreign policy concerns were particularly weighty, and the activities it targeted seemed to fall outside the protection of the First Amendment altogether.[205]

Second, the Court distinguished future cases in which "the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome."[206] It is unclear whether

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Law: Undocumented Immigrants and the Fourth Amendment, 85 S. CAL. L. REV. 85, 96–112 (2011) (surveying parallel developments in Fourth Amendment law).

202. 525 U.S. 471 (1999).

203. *Id.* at 488.

204. *See id.* at 473 ("[T]he Popular Front for the Liberation of Palestine (PFLP), [is] a group that the Government characterizes as an international terrorist and communist organization."). For an argument that the government's terrorism designations can be highly politicized and problematic, see Gerald Neuman, *Terrorism, Selective Deportation and the First Amendment After* Reno v. AADC, 14 GEO. IMMIGR. L.J. 313, 322–37 (2000) and Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 317–55 (2002).

205. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 591–92 (1952) (declining to extend First Amendment protections to members of a Communist group); Neuman, *supra* note 204, at 313 ("In Part III of the majority opinion, Justice Scalia stated that the First Amendment does not guarantee a defense of selective prosecution in deportation proceedings, or at least, that it does not guarantee such a defense in circumstances like those of the case at bar."); Kagan, *supra* note 190, at 1280 (noting that under current law the PFLP's "conduct could constitute the crime of providing material support to a terrorist organization under the Anti-Terrorism and Effective Death Penalty Act of 1996").

206. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999). While the respondents alleged that "the INS was selectively enforcing immigration laws against them in violation of their First and Fifth Amendment rights," *id.* at 474, the Court focused its analysis only on their claim that the

retaliatory enforcement against unauthorized noncitizens engaging in core, non-violent political speech on subjects of great public concern would meet this still-undefined "outrageous" threshold, thereby rendering invalid an otherwise valid removal order (or some other remedial action). But since the time that *AADC* was handed down, the Court has increasingly recognized "important constitutional limitations" on the government's immigration powers, particularly with respect to the rights of persons who have already established ties within the United States.[207]

Although arising in a different context, the Court's recent decision in *Lozman v. City of Riviera Beach*,[208] might be relevant to this inquiry. There, the Court held that claims of government retaliation on the basis of First Amendment protected activity are viable even where there has been a valid arrest supported by probable cause.[209] While *Lozman* involved a civil rights claim following a criminal arrest, the Court's analysis may still have implications for the immigration field. In particular, Justice Kennedy's opinion for the majority noted that "criticisms of public officials" or other speech petitioning the government for policy changes are "high in the hierarchy of First Amendment values."[210] If DHS is acting pursuant to a policy or pattern of retaliatory animus when it detains and deports outspoken noncitizens like Ravi Ragbir, a broad reading of *Lozman* further supports a First

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government was discriminating based on First Amendment protected activity, rather than Equal Protection. *Id.* at 475, 480, 487–92, 488 n.10.

207. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (opining that both executive and legislative immigration "power is subject to important constitutional limitations"); Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017) (holding that statute setting different residency requirements for U.S. citizen fathers and mothers seeking to transmit birthright citizenship to their non-marital children born outside the United States violates the Equal Protection Clause). *See generally* Cade, *supra* note 151, at 1049–82 (discussing cases illustrating the Court's general evolution towards more protective rulings for noncitizens inside the United States).

208. 138 S. Ct. 1945 (2018).

209. *See id.* at 1955 (ruling that Lozman need not prove an absence of probable cause to proceed with his retaliatory arrest claim against the City).

210. *Id.* at 1954–55. For historical evidence that the Framers intended the constitutional right to petition to apply to undocumented noncitizens, see Wishnie, *supra* note 199.

Amendment defense notwithstanding the legality of those enforcement actions.[211]

At the very least, the Court's existing doctrine in this area does not foreclose the retaliatory enforcement claims brought by Ragbir and others. While there will often be difficulties regarding proof of motive, where these can be surmounted in particularly outrageous cases courts may well find the First Amendment prohibits the government from using deportation to silence its critics. In other words, the First Amendment provides another vehicle for assessing claims challenging the proportionality of imposing removal as retaliation for protected speech activities. And, as I explain in the next section, such claims are all the more likely to find a foothold where they connect up with other constitutional harms.

E. Combining Constitutional Concerns

The preceding discussion considered doctrinal developments that might support more searching proportionality review of removal decisions pursuant to the APA or constitutional safeguards provided by substantive due process or the First Amendment. As I have argued, courts may be able to incorporate proportionality principles in the removal context through the independent application of these principles. In this Part, I consider whether proportionality review might also find footing in cases that recognize judicially enforceable limitations rooted in a combination of constitutional protections. An emerging literature has begun to examine the implications of the Court's so-called "hybrid rights" cases,[212] which recognize and honor the "joint decisional force of two or more constitutional provisions."[213]

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211. *See* Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1951 (2018) ("Lozman's claim is that, notwithstanding the presence of probable cause, his arrest at the city council meeting violated the First Amendment because the arrest was ordered in retaliation for his earlier, protected speech: his open-meetings lawsuit and his prior public criticisms of city officials.").

212. *See* Dan T. Coenen, *Freedom of Speech and the Criminal Law*, 97 B.U. L. REV. 1533, 1595–1601 (2017) (discussing "hybrid rights" cases).

213. Coenen, *supra* note 112, at 1070; *see also* Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1310–11 (2017) (listing examples of causes of action involving more than one constitutional

Obergefell v. Hodges[214] illustrates the potential of hybrid-rights analysis.[215] There, the Court held unconstitutional state laws prohibiting same-sex marriage.[216] To reach this conclusion, the Court identified a number of related but distinct concerns protected by constitutional due process, including the right to intimate associations, the right to individual autonomy, and the protection of children.[217] Critically, these concerns were amplified by equal protection principles triggered by the discriminatory effect of same-sex marriage bans.[218] In Michael Coenen's words, "the Due Process Clause alone might fail to resolve the question of whether a ban on same-sex marriage is unconstitutional, but once the Equal Protection Clause is added to the picture, the question can only come out one way."[219]

The Court's immigration rulings also have sometimes employed constitutional combination analysis. *Plyler v. Doe*,[220] for example, raised the question whether states can constitutionally deny public education to the children of undocumented noncitizens.[221] The combined harms of a law both depriving children of a right to education and discriminating on the basis of immigration status (and possibly race) led the Court to invalidate the law.[222] Here too, only the joint force of the Equal Protection and

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amendment).

214. 135 S. Ct. 2584 (2015).

215. *See id.* at 2602–03 (stating that the Due Process Clause and Equal Protection Clause "are connected in a profound way").

216. *See id.* at 2607–08 ("It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.").

217. *See id.* at 2597 ("In addition these [Due Process] liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.").

218. *See id.* at 2603 (using bans on interracial marriage as an example).

219. Coenen, *supra* note 112, at 1079.

220. 457 U.S. 202 (1982).

221. *See id.* at 205 ("The question presented by these cases is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens.").

222. *See id.* at 223–24 (explaining that the challenged law did not satisfy the intermediate level of constitutional scrutiny applied by the Court).

Due Process Clauses facilitated the result.[223] Similarly, some scholars have cast the Court's ruling in *Arizona* as based on equal-protection-informed federalism.[224]

The idea that clauses might be combined to advance proportionality is arguably inherent in U.S. constitutional design writ large.[225] As Vicki Jackson has written:

> Proportionality bears a special relationship to government in a constitutional democracy. For an essential idea of constitutional democracy is that in confrontations between citizens and government, government is restrained and avoids oppressive and arbitrary action. The means to achieve this goal are varied, but requiring proportionality of action is one way in which the idea of limited government can be realized.[226]

The Constitution's Preamble reflects this democratic commitment to "establish justice" as a governing principle.[227] To be sure, the Preamble has never been understood to confer any rights not specifically granted by the Constitution, but it may provide interpretive support for the idea of a general (or implied) authority for some form of constitutional proportionality review, including through hybrid claims.[228]

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223. Moreover, as Brandon Garrett and Kerry Abrams have argued, had the Court viewed other immigration cases through the proper intersectional constitutional lens, the results might have come out differently. *See* Abrams & Garrett, *supra* note 213, at 1324–26 (discussing Fiallo v. Bell, 430 U.S. 787 (1977)).

224. *See* HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 130–42 (2014); Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POL'Y 1, 4 (2013) ("Courts should revitalize the equality norm in deciding whether a particular state immigration provision impedes federal interests or hinders federal goals."). Arguably, federalism analysis also sometimes incorporates proportionality norms. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 520 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."); Cade, *supra* note 151, at 1042–46 (arguing that proportionality norms informed the Court's federalism analysis in *Arizona*).

225. *See* Jackson, *supra* note 116, at 3106–09 (discussing scholars tracing proportionality from Aristotle through the Magna Carta to influence the design of U.S. constitutional democracy).

226. *Id.* at 3108–09.

227. U.S. CONST. pmbl.

228. *Cf.* Stenberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) ("[T]he Constitution of the United States [is] designed, among other things, 'to establish Justice.'"); Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 54–55

Some immigration enforcement actions undoubtedly will implicate multiple constitutional rights, each of which is independently relevant to the government's attempt to remove the noncitizen. Aggregated in particularly egregious cases, these constitutional concerns might sometimes accumulate sufficient decisional strength to invalidate removal orders. For example, noncitizens who have been targeted on racial grounds, and who also have compelling ties and significant equities may be able to point to both the Equal Protection and Due Process Clauses of the Fifth Amendment (as well as, potentially, the Fourth Amendment). Sometimes other constitutional constraints will be relevant too, such as retaliation-based First Amendment claims. At least in cases where the asserted basis for the removal penalty derives from a criminal conviction, the Cruel and Unusual Punishment Clause of the Eighth Amendment could be invoked as well. To the extent these claims arise from arbitrary and capricious removal policies, the principles articulated in *Judulang* may also be relevant.[229]

As these rights accumulate, they may gain sufficient combined strength to justify invalidation of a deportation order. There may be situations in which the proportionality protections of the Due Process Clause or Eighth Amendment alone would not justify a stay of removal, but, if coupled with government retaliation on the basis of protected speech or an unlawful seizure, would together accumulate sufficient weight for judicial intervention.[230] Such relief may be rare, and likely would more typically involve long-time legal residents or persons with clear pathways to lawful status. But even in the case of an unauthorized noncitizen, the appropriateness of hybrid-rights proportionality review may sometimes be relatively clear, for example where the person is a DACA recipient who bears little or no culpability in the underlying immigration offense, knows only this country, and has other strong

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(1994) (Stevens, J., concurring) ("[I]t is entirely appropriate for a court to give controlling weight to the Founders' purpose to 'establish Justice.'").

229. *See supra* Part IV.C (detailing the Court's "hard look" review of an agency immigration policy).

230. *Cf.* Arial Porat & Eric A. Posner, *Aggregation and Law*, 122 YALE L.J. 2, 46–51 (2012) (explaining how government activity implicating multiple constitutional rights, while individually weak, may nevertheless "normative[ly] aggregat[e]" to produce a joint constitutional violation).

favorable factors, but who DHS has nonetheless targeted for removal on the basis of First Amendment protected protest speech.

Indeed, Judge Forrest's habeas decision in Ragbir's case seems to present a not-quite-articulated cumulative constitutional analysis. Recall that the Court not only invoked the Due Process Clause's protection of liberty and notice requirement, but also gestured towards the Eighth Amendment's prohibition against cruel and unusual punishment (Ragbir's removal order was predicated upon a years-prior criminal conviction), and the First Amendment's protections of core political speech.[231] While these might independently have failed to generate any form of relief, Judge Forrest found that together they at least compelled the government to release him temporarily to return to his family.[232] If a court were to more concretely aggregate the government's constitutional infringements in a case like Ragbir's, an even stronger judicial remedy might well be warranted.

To be sure, the appropriate remedy will depend on the circumstances of each case and the joint strength of the cumulative proportionality concerns implicated. In certain cases, for example, a judicially-imposed delay (rather than outright invalidation) of the government's desired action might suffice.[233] In Ortiz's case, for example, a stay of removal would have allowed time for adjudication of his wife's family's petition, thereby avoiding the ten-year bar to adjustment of status triggered by his removal from the country.

Much more can be said, but not within the confines of these pages. For now, I simply flag the possibility that this emerging hybrid rights jurisprudence might provide a substantial foothold from which courts can move forward in engaging in at least limited proportionality review of removal decisions.

V. Conclusion

Judicial admonishments of the federal government's indiscriminate and excessive approach in cases such as Mr. Ortiz's

231. *See* Ragbir v. Sessions, No. 18-cv-236, 2018 WL 623557, at *1–3 (S.D.N.Y. Jan. 29, 2018) (addressing multiple constitutional issues).

232. *See id.* at *3 (granting the petition for habeas corpus).

233. *But see* 8 U.S.C. § 1252(f) (2012) (limiting injunctive relief).

and Mr. Ragbir's are noteworthy. The courts' decisions have salutary effects even if the relief offered is limited. No less important, these decisions at least gesture towards proportionality review of deportation. In this Article, I have outlined doctrinal developments that may lead courts to travel farther down this path in the future. To be sure, if proportionality review is to find its way into judicial scrutiny of removal orders, it will most likely be at the retail level, rather than through invalidation of underlying statutory criteria for deportation. The federal courts have long afforded Congress significant leeway in shaping rules governing entry and removal of noncitizens.[234] Despite that general deference, however, recent doctrinal developments—particularly with regard to hybrid rights and proportionality-based reasoning in other contexts—might one day soon prompt courts to intervene in disproportionate or retaliatory deportation.

234. *But see, e.g.*, Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017) (holding that a statute setting different residency requirements for U.S. citizen fathers and mothers seeking to transmit birthright citizenship to their non-marital children born outside the United States violates the Equal Protection Clause).