No. 19-1046

In the Supreme Court of the United States

MATTHEW T. ALBENCE, ET AL., PETITIONERS,

v.

RAVIDATH LAWRENCE RAGBIR, ET AL.

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

BRIEF IN OPPOSITION

ALINA DAS
JESSICA ROFÉ
WASHINGTON SQUARE LEGAL SERVICES, INC. IMMIGRANT RIGHTS CLINIC
New York University School of Law
245 Sullivan St., 5th Floor
New York, NY 10012
(212) 998-6430
alina.das@nyu.edu

R. STANTON JONES
Counsel of Record
WILLIAM C. PERDUE
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
stanton.jones@arnoldporter.com

EMILY NEWHOUSE DILLINGHAM
ARNOLD & PORTER KAYE SCHOLER LLP
70 W. Madison St., Ste. 4200
Chicago, IL 60602

QUESTIONS PRESENTED

Respondent Ravidath Lawrence Ragbir is one of the nation's leading immigrant-rights activists. A native of Trinidad and Tobago, he has lived in the United States with the government's express authorization for more than 25 years. Since 2007, he has been subject to a final order of removal. In 2008, immigration officials released him from custody under an Order of Supervision allowing him to live and work here, and beginning in 2011 they granted him a series of administrative stays of removal. During 2017, Respondent organized public rallies and engaged in other forms of political expression that brought significant negative publicity to U.S. immigration officials in New York and the laws and policies they enforce.

In January 2018, immigration officials abruptly revoked Respondent's Order of Supervision and existing administrative stay of removal, denied his pending application for a renewed administrative stay, and detained him for the purpose of immediately deporting him—all in retaliation for his core political speech.

The questions presented are:

1. Whether, consistent with the First Amendment, immigration officials may deport a noncitizen in retaliation for core political speech criticizing those same immigration officials and the laws and policies they enforce.

2. Whether 8 U.S.C. § 1252(g) strips all federal courts of jurisdiction over Respondent's retaliatory removal claims, and if so, whether section 1252(g) is unconstitutional as applied under the Suspension Clause, the First Amendment, or Article III.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued Page(s)

Constitution, Statutes & Regulations

Regulations—Continued Page(s)

Other Authorities

BRIEF IN OPPOSITION

INTRODUCTION

"Free speech is the bedrock of American democracy. Our Founding Fathers protected this sacred right with the First Amendment to the Constitution. The freedom to express and debate ideas is the foundation for all of our rights as a free people." So said the President of the United States in a recent Executive Order.[1]

In this case, a panel of the Second Circuit found "strong … evidence" that immigration officials are attempting to deport one of the nation's leading immigrant-rights activists in retaliation for his outspoken criticism of those very officials and the laws and policies they enforce, and that federal courts have jurisdiction to adjudicate his First Amendment claim. Pet. App. 36a. Thereafter, the government sought panel and en banc rehearing on the theory that this Court's intervening decision in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), warranted reversal of the panel's decision. *Nieves* held that an individual police officer's probable cause to arrest a person for a criminal offense generally bars a section 1983 damages claim alleging that the arrest was retaliatory. In the government's view, *Nieves* mandates a categorical rule foreclosing any First Amendment claim that the U.S. government is attempting to deport political activists in retaliation for their protected speech. Unsurprisingly, the Second Circuit denied rehearing without any noted dissent or even a call for a poll.

For good reason. *Nieves* does not conceivably affect any aspect of the Second Circuit's holding that the First

[1] Exec. Order No. 13,925, 85 Fed. Reg. 34079 (May 28, 2020) (punishing private social media companies in retaliation for one company's fact-check notation flagging the President's dissemination of misinformation about the upcoming presidential election).

Amendment prohibits the government from silencing respondent Ravi Ragbir's political speech by deporting him. *Nieves* applies to section 1983 damages actions alleging retaliatory criminal arrest by individual police officers acting in the spur of the moment, not First Amendment actions like this one seeking declaratory, injunctive, and habeas relief from the government's attempt to deport a leading political activist in retaliation for his core political speech. Even if *Nieves* were relevant here, the exception recognized by this Court in *Nieves* itself and the holding in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), would apply.

Undeterred, the government asks this Court not to grant plenary review, but instead to grant, vacate, and remand for the Second Circuit to reconsider its decision in light of *Nieves*. It is unorthodox at best for the government to seek only a GVR when the Second Circuit, in denying rehearing, has already rejected the government's argument that *Nieves* controls. Even if this Court were to accede to the government's request for a GVR, why would the same court of appeals that already rejected the government's *Nieves* argument suddenly adopt it? No litigant, not even the U.S. government, is entitled to a third bite at the apple when no fact or law has changed.[2]

Nor does this Court's recent decision in *Department of Homeland Security v. Thuraissigiam*, No. 19-161 (June 25, 2020), warrant a GVR. *Thuraissigiam*'s Suspension Clause holding is inapposite here, and regardless, the government has never disputed that, if Re-

[2] In August 2019, the author of the panel's 2–1 opinion in this case announced he was retiring effective January 2020. On September 26, 2019, the Second Circuit denied the government's rehearing petition. On February 21, 2020, after receiving multiple extensions of time, the government filed its petition for a writ of certiorari.

spondent has a colorable First Amendment claim, other provisions of the Constitution—beyond the Suspension Clause—independently mandate that federal courts have jurisdiction over the claim.

There is no legitimate basis for further appellate proceedings in this case. The Court should deny the government's petition so that Respondent, more than two years after filing this lawsuit, can finally have his day in court. Alternatively, if the Court believes that there is a real question whether the U.S. government may lawfully deport leading political activists in retaliation for their core political speech, it should grant plenary review to decide that question for itself.

STATEMENT OF THE CASE

A. Factual Background

1. Respondent Ravi Ragbir has lived in the United States with the authorization of the U.S. government for more than a quarter of a century. A native of Trinidad and Tobago, he became a lawful permanent resident in 1994. His wife is a U.S. citizen, as is his daughter. Pet. App. 5a.

In 2001, Respondent was convicted of wire fraud arising from his employment as a low-level mortgage loan processor. *Id.*; *see United States v. Ragbir*, 38 F. App'x 788, 791 (3d Cir. 2002). In 2006, after Respondent completed his sentence, ICE initiated removal proceedings, resulting in an order of removal that became final in 2007. Pet. App. 6a. In 2010, the Second Circuit denied Respondent's petition for review of his removal order. *Id.* In 2012, the Board of Immigration Appeals denied Respondent's motion to reconsider or reopen, and in 2016, the Second Circuit denied Respondent's petition for review. *Id.*

Respondent was detained throughout his immigration proceedings until 2008, when ICE released him from

custody because he "did not commit a crime of violence and does not appear to be a flight risk." C.A. App. at A-0050. The Order of Supervision, pursuant to which ICE released Respondent, granted him legal authorization to live and work in the United States. *Id.* at A-0051. The Order of Supervision provided that if and when ICE should decide to deport Respondent, he "will, at that time, be given an opportunity to prepare for an orderly departure." *Id.* at A-0050. Typically, an "orderly departure" entails giving a noncitizen several months to say goodbye, put his or her affairs in order, and purchase an airline ticket or other means of travel before leaving the country. *Id.* at A-0051, A-0131.

In 2011, ICE granted Respondent an administrative stay of removal affirmatively stating that ICE would not seek to deport him during the following year. Pet. App. 6a. ICE renewed that stay three times, in 2013, 2014, and 2016. *Id.* In November 2017, Respondent applied to renew the stay a fourth time. *Id.* at 7a. By its terms, Respondent's third stay renewal should have extended through January 19, 2018. C.A. App. at A-0056.

2. "[S]ince his release from custody, [Respondent] has lived a life of a redeemed man." *Ragbir v. Sessions*, No. 18-cv-236 (KBF), 2018 WL 623557, at *3 n.11 (S.D.N.Y. Jan. 29, 2018), *vacated as moot*, 2019 WL 6826008 (2d Cir. July 30, 2019). Over the last decade, Respondent has become perhaps the most influential immigrant-rights activist in New York City, and one of the most influential in the nation. In recognition of his advocacy, Respondent has received numerous awards, including from the Episcopal Diocese of Long Island and the New York State Association of Black and Puerto Rican Legislators. Pet. App. 8a. He is the Executive Director of co-Respondent New Sanctuary Coalition of New York City, an interfaith network of congregations, organizations, and individuals who stand in solidarity with fami-

lies and communities resisting detention and deportation. C.A. App. at A-0043-48. Respondent established the Coalition's Accompaniment Program, which has organized and trained hundreds of volunteers to accompany noncitizens to court dates and check-ins. *Id.* These volunteers ensure that noncitizens do not face these difficult experiences alone, and also bear witness to the human costs of our current system of immigration detention and deportation. *Id.* at A-0048.

On March 9, 2017, Respondent reported to ICE's New York Field Office for a scheduled check-in. Pet. App. 8a. In the spirit of the Accompaniment Program he established, Respondent was accompanied by family, lawyers, faith leaders, and local elected officials. *Id.* But ICE officials quickly demanded that Respondent's companions leave. *Id.* Afterwards, Respondent and elected officials spoke out against ICE, and the event generated significant negative public attention for the agency. *Id.*

Following Respondent's March 2017 check-in, ICE's approach to the Coalition changed dramatically. ICE began to limit Coalition volunteers' access to check-in appointments. C.A. App. at A-0070. On January 3, 2018, ICE began surveilling the Coalition's offices at Judson Memorial Church in Greenwich Village. *Id.* at A-0054. That same day, ICE officers arrested activist Jean Montrevil, one of the Coalition's co-founders, while he was on a lunch break outside his home. *Id.* at A-0123. ICE immediately transferred Montrevil to a detention center in Florida and deported him to Haiti just days later. *Id.* at A-0054.

On January 5, 2018, faith leaders associated with the Coalition met with ICE New York Field Office Deputy Director Scott Mechkowski to discuss Montrevil's case. *Id.* at A-0054-55. Unprompted, Mechkowski brought up Respondent and his public remarks after the March 2017 check-in, and he disparaged the elected officials who had

criticized ICE. Pet. App. 9a. Mechkowski stated that Respondent's and Montrevil's cases were the two highest profile cases in his office, and it "bother[ed]" him that "there isn't anybody in [ICE's] entire building that doesn't … know about [Respondent]. Everybody knows this case. No matter where you go." *Id.*

Mechkowski also stated that ICE had planned Mr. Montrevil's arrest to avoid public outcry—ICE "didn't want the display of wailing kids and wailing clergy." C.A. App. at A-0054-55. Mechkowski made clear that faith leaders could not accompany Respondent to his next check-in. *Id.* And while Mechkowski denied that ICE was surveilling Respondent, he stated: "I know where Mr. Ragbir lives, and I have seen him walking around, and I could have taken him myself." *Id.* Mechkowski also stated that he had told Mr. Montrevil directly: "[Y]ou don't want to make matters worse by saying things." Pet. App. 9a.

On January 8, 2018, Respondent's counsel spoke with Mechkowski, who stated that he had heard Respondent's public statements and continued to see him at protest vigils. *Id.* at 9a-10a. Mechkowski also expressed "resentment" about the March 2017 check-in. *Id.*

On January 10, 2018, Respondent's counsel received an email indicating that his November 2017 application for a renewed administrative stay of removal was still pending and no decision had been reached. *Id.* at 10a.

Respondent reported for his next scheduled check-in on January 11, 2018. In a departure from standard practice, Mechkowski instructed Respondent to report not to the assigned Deportation Officer, but directly to Mechkowski. C.A. App. at A-0056. At the check-in, Mechkowski stated that a decision had been made that morning to deny Respondent's application for a renewed stay, that ICE would not wait any longer for a decision on Respondent's motion to reopen, and that Mechkowski

would enforce the removal order immediately. Pet. App. 10a. Respondent briefly lost consciousness when he heard the news. Mechkowski had Respondent arrested then and there. C.A. App. at A-0056-57.

Contrary to applicable regulations and standard ICE practice, Respondent was not provided with an arrest warrant, *see* 8 C.F.R. § 241.2, 241.3(a), notice of the revocation of his Order of Supervision, *see* 8 C.F.R. § 241.4(l), or any notice or explanation for revoking his existing administrative stay, which by its terms did not expire for another week. C.A. App. at A-0057-58. ICE officers also took Respondent and his wife to separate hospitals, rushed his medical clearance, processed him curbside at Newark Airport, and flew him to a detention facility in Florida that very afternoon. *Id.* ICE had purchased the tickets to Florida the previous day, and intended to deport him the following morning, again in violation of applicable regulations. *Id.*; *see* 8 C.F.R. § 241.22; *Ying Fong v. Ashcroft*, 317 F. Supp. 2d 398, 403 (S.D.N.Y. 2004). Only temporary stays prevented his immediate deportation. *See Ragbir v. Sessions et al.,* 18-civ-236-KBF, ECF No. 12 (S.D.N.Y. Jan. 11, 2018) (stay in habeas case); *Ragbir v. United States*, No. 17-cv-1256-KM, ECF No. 16 (D.N.J. Jan. 11, 2018) (stay in post-conviction relief case).

The day of his arrest, Respondent filed a habeas petition, and on January 29, 2018, the district court granted the petition and ordered his immediate release. Noting that "this country allowed [Respondent] to become a part of our community fabric … [and] to build a life with and among us," the court held that ICE's actions evinced "unnecessary cruelty" and violated due process. *Ragbir*, 2018 WL 623557, at *2. The court described ICE's conduct towards Respondent as "treatment we associate with regimes we revile as unjust." *Id.* at *1. The court further "note[d] with grave concern the argument that

[Respondent] has been targeted as a result of his speech and political advocacy on behalf of immigrants' rights." *Id.* at *1 n.1.

Respondent is not the only noncitizen ICE has targeted for advocating on behalf of immigrants' rights. The Complaint in this case documented a sharp spike in immigration enforcement actions across the country targeting activists and protected political speech. C.A. App. at A-0061-66.

B. Proceedings Below

1. On February 9, 2018, Respondent and several organizations filed this action for declaratory, injunctive, and habeas relief, seeking review of the government's unlawful retaliation against Respondent, the Coalition, and members of co-Plaintiff immigration advocacy organizations, in violation of the First Amendment. C.A. App. at A-0074-76. In lieu of litigating a temporary restraining order, the government consented to a stay of Respondent's removal, pending the district court's resolution of a motion for a preliminary injunction, which the Plaintiffs filed on February 12, 2018. *Id.* at A-0019-20.

The government opposed the preliminary injunction motion on March 7, 2018, attaching declarations from ICE New York Field Office Director Thomas Decker and Deputy Director Mechkowski. *Id.* at A-0027-28. Among other concessions, Decker and Mechkowski admitted that they knew about the public attention paid to Montrevil and Respondent, that they surveilled Montrevil and Respondent, and that they lied to counsel about their surveillance and when they decided to deport Respondent. *See id.* at A-0153-54, A-0164, A-0166-67.

2. On May 23, 2018, the district court dismissed "all claims ... to declare unlawful and to enjoin the execution of [Respondent]'s final order of removal," and denied the motion for a preliminary injunction "insofar as it seeks to

stay removal of plaintiff Ragbir." Pet. App. 58a, 78a. The district court did not dispute any of Respondent's factual contentions. To the contrary, the court "accepted as true" Respondent's allegations that Petitioners "are executing the order of removal to silence [Respondent] and stifle his advocacy of immigrant rights." *Id.* at 73a.

Instead, the district court based its ruling on two legal holdings. First, the court held that 8 U.S.C. § 1252(g) eliminates federal courts' jurisdiction to adjudicate any claim challenging the execution of a final removal order, including constitutional claims that could not have been asserted in any other judicial or administrative forum. *Id.* at 61a-72a. Second, the court held that it need not decide whether section 1252(g)'s stripping of jurisdiction is constitutional as applied to Respondent's claims, because Mr. Ragbir "has no viable constitutional claim." *Id.* at 75a n.8.

3. Respondent appealed and moved the district court for a stay of removal pending appeal, which the district court denied on June 19, 2018. *Id.* at 13a.

Respondent then moved the court of appeals for a stay of removal pending appeal. On July 19, 2018, the court granted a "temporary stay." *Id.* On August 15, 2018, the motions panel ordered expediting briefing and oral argument and directed the parties to notify the court immediately "if the stay issued by the District Court for the District of New Jersey" in connection with Respondent's post-conviction relief case "was withdrawn or vacated before [the court of appeals] heard the appeal." *Id.* at 14a.

On November 1, 2018, just three days after argument, the court of appeals merits panel granted a stay of removal pending resolution of the appeal. C.A. dkt. no. 168.

4. On April 25, 2019, a divided panel of the Second Circuit vacated the district court's decision and remanded for further proceedings. Pet. App. 48a-50a.

a. The majority held that Respondent has stated a viable First Amendment claim, that the Suspension Clause requires the availability of a habeas proceeding in light of section 1252(g)'s purported stripping of jurisdiction, and that the district court accordingly had jurisdiction over Respondent's First Amendment claim. *Id.* at 3a-50a.

To begin, the majority held that section 1252(g) purports to foreclose all jurisdiction over Respondent's First Amendment claim. *Id.* at 16a-22a. In so holding, the majority rejected Respondent's arguments that section 1252(g) is best read not to strip federal courts of jurisdiction over Respondent's claim in the first place. *Id.* The majority held, however, that the Suspension Clause mandates the availability of a habeas proceeding because Respondent has stated a viable First Amendment claim.

On the merits, the majority stated that, under this Court's decision in *Reno v. American-Arab Anti-Discrimination Committee* ("*AADC*"), 525 U.S. 471 (1999), "[a]s a general matter—and assuredly in the context of claims such as those put forward in [*AADC*]—an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." Pet. App. 27a (quoting *AADC*, 525 U.S. at 488). "Especially important for the situation" in this case, however, *AADC* "declined to 'rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that" a noncitizen could state such a constitutional claim. *Id.* at 28a (quoting *AADC*, 525 U.S. at 491).

The majority "conclude[d] that [Respondent's] claim involves 'outrageous' conduct" giving rise to a viable claim. *Id.* at 29a. Without attempting to "delineate the

boundaries of what constitutes an 'outrageous' claim within the meaning of *AADC*," the majority found it sufficient that "[Respondent's] speech implicates the highest protection of the First Amendment, he has adduced plausible—indeed, strong—evidence that officials responsible for the decision to deport him did so based on their disfavor of [Respondent's] speech (and its prominence), [Respondent] has a substantial interest in avoiding deportation under these circumstances, and the Government's interests in avoiding any inquiry into its conduct are less pronounced than in *AADC*." *Id.* at 36a. "In these circumstances," the majority held, "the basis for the alleged discrimination against [Respondent] qualifies as 'outrageous' under *AADC*." *Id.*

The majority rejected the government's argument that because "the existence of probable cause to arrest an individual defeats a plaintiff 's First Amendment retaliation claim," the existence of a "valid final order of removal" likewise "bars [a] claim that Government officials sought to deport [a noncitizen] in retaliation for his speech." *Id.* at 23a. Even if it "were to accept the Government's analogy of that aspect of Fourth Amendment law to the execution of final orders of removal," *id.*, the majority found that its precedents rejecting First Amendment retaliation claims challenging arrests and prosecutions supported by probable cause would not apply when, as here, a plaintiff has made an adequate showing "that his speech has been or will be suppressed," *id.* at 25a. The majority thus did not reach Respondent's "contention that [this Court's] decision in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), has broadened the scope of potential retaliatory arrest claims that are permissible under our precedents." Pet. App. 25a n.18.

The majority then held that, notwithstanding section 1252(g), "the Suspension Clause … entitles [Respondent]

to the constitutionally mandated minimum scope of the privilege of the writ of habeas corpus." *Id.* at 36a. The Clause's habeas protections, the majority explained, "extend fully to aliens subject to an order of removal." *Id.* at 37a. And the majority rejected "the Government's argument that [Respondent] is not in custody," finding that Respondent's "imminent deportation … effects a present, substantial curtailment of [his] liberty." *Id.* at 39a, 42a-43a.

Because "the district court improperly dismissed [Respondent's] claim for lack of subject matter jurisdiction" and denied a preliminary injunction on the same basis, the court of appeals "vacate[d] that order and remand[ed] to the district court." *Id.* at 48a. The court further stated that its "order of November 1, 2018, staying [Respondent's] removal shall remain in force until [the court's] mandate issues," and "direct[ed] the district court to enter a stay of [Respondent's] removal following the issuance of [the] mandate, to continue at least until such time that the district court has reconsidered, consistently with [the court's] opinion, whether a stay should remain in place through adjudication of the motion for a temporary injunction or the merits of the case." *Id.* at 49a.

b. Judge Walker dissented. Despite "agree[ing] with much of the reasoning in the majority opinion," the dissent would not have remanded the case or reached the question whether Respondent stated a viable First Amendment claim, because, in the dissent's view, "the Government's retaliation against Ragbir has ended and its taint has dissipated." *Id.* at 51a. According to the dissent, Respondent "plausibly alleged that the Government's retaliation occurred on January 11, 2018," when he was detained and very nearly deported, "[b]ut the taint of any retaliation ended no later than January 29, 2018, … when [Respondent] was released from custody

following the district court's grant of his habeas corpus petition." *Id.*

The dissent also expressed "reservations about the majority's discussion of *AADC's* 'outrageous' exception to the § 1252(g) removal of jurisdiction." *Id.* at 53a. Although "agree[ing] that the complaint sufficiently alleged that the Government acted improperly when it shortened [Respondent's] administrative stay, arrested him, and held him in custody in preparation for his departure," the dissent "can easily imagine much more 'outrageous' acts of government impropriety, such as the deliberate and unjustified use of grossly excessive force or vindictive placement in solitary confinement." *Id.* at 54a-55a.

5. On September 26, 2019, the Second Circuit denied the government's petition for panel and en banc rehearing, which had asserted that this Court's intervening decision in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), warranted reversal of the panel's decision. Pet. App. 80a.

REASONS THE PETITION SHOULD BE DENIED

Neither *Nieves* nor *Thuraissagiam* warrants a GVR. The Second Circuit already considered and rejected the government's *Nieves* argument in denying rehearing, and in any event *Nieves* has no bearing on the Second Circuit's holding that the First Amendment prohibits the government from deporting Respondent in retaliation for his core political speech. *Thuraissagiam*'s Suspension Clause holding is likewise inapposite, and regardless, the government has never disputed that, if Respondent has a colorable First Amendment claim, other provisions of the Constitution independently mandate jurisdiction. A GVR is all the more unwarranted because the decision below is correct on both the merits and jurisdiction.

I. There Is No Basis To Grant, Vacate, and Remand in Light of *Nieves*

Because the Second Circuit already considered *Nieves* in denying the government's petition for rehearing, a GVR based on *Nieves* is inappropriate. In any event, *Nieves* is inapposite. Its holding involves section 1983 damages actions based on criminal arrests by individual police officers, not a First Amendment challenge to the execution of a civil removal order or other immigration-related actions. And to the extent precedent regarding criminal proceedings carries over to the immigration context, it is this Court's decision in *Lozman*, not *Nieves*, that applies here, because ICE attempted to remove Respondent as part of a nationwide pattern and practice of retaliating against immigrant-rights activists to silence their speech. Finally, even if *Nieves* were the relevant precedent in this case, its exception for discretionary decisions would apply.

A. The Second Circuit Already Considered *Nieves* in Denying the Government's Rehearing Petition

The government claims that the Second Circuit "did not have an opportunity to consider whether the rule in *Nieves* should apply similarly in the immigration context here." Pet. 13. That is false. As the government concedes, "[t]his Court had issued its decision in *Nieves* by the time the court of appeals denied panel rehearing and rehearing en banc." *Id.* at 13 n.3. Indeed, this Court decided *Nieves* more than five months before the Second Circuit denied the government's rehearing petition.

The government says that the Second Circuit's "denial of rehearing does not indicate that the court has ever considered the effect of *Nieves* on this case." *Id.* But of course it does. The government squarely presented its *Nieves* argument to the Second Circuit in its rehearing petition, which very closely tracks the government's petition for certiorari. *Compare* C.A. dkt. no. 207 at 9-11

with Pet. 10-13. The suggestion that the Second Circuit would not have engaged in a measured and thoughtful evaluation of the government's arguments and this Court's decisions, including *Nieves*, is irresponsible conjecture at best. Because the Second Circuit had ample opportunity to consider the government's *Nieves* argument in connection with the petition for rehearing, there is no basis for a GVR in light of *Nieves*, and the Court should deny the government's petition.

Regardless, even if the government had not expressly raised *Nieves* in its petition for rehearing, *Nieves* is inapposite here, as discussed below, and thus does not constitute an "intervening development" warranting GVR. Pet. 13 (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)). But if the Court believes there is a legitimate question whether *Nieves* somehow gives the U.S. government license to deport political activists in retaliation for their core political speech criticizing U.S. immigration law and policy, the Court should grant plenary review and decide the question for itself, rather than GVR to a court of appeals that already rejected the argument.

B. *Nieves* Is Inapposite

As the government acknowledges, "this case involves the asserted selective enforcement of immigration laws rather than, as in *Nieves*, the asserted selective enforcement of criminal laws." Pet. 12. That should end the matter. *Nieves* has no bearing on this case, not only because it addresses only section 1983 damages actions based on criminal arrests, but also because Respondent's claims are governed instead by this Court's ruling in *Lozman* and, alternatively, because the exception in *Nieves* for discretionary actions applies.

1. *Nieves* held only that the existence of probable cause defeats a section 1983 damages lawsuit alleging that a person's criminal arrest by a police officer was re-

taliatory. It does nothing to alter the First Amendment jurisprudence prohibiting retaliation by government officials, nor did any party contend otherwise in *Nieves*. As Justice Gorsuch explained in his concurrence in *Nieves*, "[b]oth sides accept that an officer violates the First Amendment when he arrests an individual in retaliation for his protected speech," and "[t]hey seem to agree, too, that the presence of probable cause does not undo that violation or erase its significance." 139 S. Ct. 1730 (Gorusch, J. concurring). Justice Gorsuch further explained that "[i]f the state could use these laws not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties, and little would separate us from the tyrannies of the past or the malignant fiefdoms of our own age." *Id.* "So if probable cause can't erase a First Amendment violation, the question becomes whether its presence at least forecloses a civil claim for damages as a statutory matter under § 1983." *Id. Nieves*'s holding that probable cause forecloses a § 1983 damages claim does not mean that police officers may lawfully retaliate against people based on their political speech. By contrast, the government here seeks a ruling that the First Amendment *permits* ICE officials to retaliate against Respondent by deporting him. Such a ruling would antithetical to First Amendment precedent and would bring us one step closer to "the tyrannies of the past or the malignant fiefdoms of our own age." *Id.*

What's more, a central rationale of *Nieves*'s holding—that unmeritorious retaliatory arrest claims could "land [police] officer[s] in years of litigation," thereby deterring officers from engaging in active enforcement of criminal laws, 139 S. Ct. at 1725—is far afield from this case. Further, the Court's conclusion that a person's speech at the moment of his or her criminal arrest may often be relevant to the arrest itself, given the frequent

need for police officers to make split-second decisions, *id.* at 1724, has no bearing on immigration determinations like the attempt to deport Respondent here, which instead follow analysis of a person's compliance with civil immigration law and therefore cannot be informed or dictated by an immigrant's political speech. There is no basis for extending the holding of *Nieves* beyond the context of section 1983 damages actions based on criminal arrests, much less to the entirely distinct immigration-related context here.

2. If any decision of this Court regarding criminal proceedings merits attention here, it is *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), not *Nieves*. As the government noted below, *Lozman* holds that a plaintiff "may assert a retaliatory arrest claim … even when probable cause existed for the arrest," when "the plaintiff alleges that the arrest was the result of 'the existence and enforcement of an official policy motivated by retaliation.'" Gov. Br. 40 (quoting *Lozman*, 138 S. Ct. at 1954). *Lozman* thus distinguished between "an ad hoc, on-the-spot decision by an individual officer" and a scenario where "the government itself orchestrates the retaliation." *Id.* at 1954. Such orchestration "elevate[s]" the retaliation to "official government policy" and thus requires "a compelling need for adequate avenues of redress." *Id.*

That is exactly what happened here. ICE sought to remove Respondent not in isolation, but as part of an extensive nationwide pattern and practice of retaliating against immigrant-rights activists for their criticism of U.S. immigration law and policy. The government expressly allowed Respondent to live and work in this country for more than a quarter century, changing course only recently in response to his prominent political dissent. Because the attempt to deport Respondent

resulted from an "official policy" of retaliation, *Lozman*, not *Nieves*, applies.

3. Even if *Nieves* applied here—and it does not—Respondent's circumstances place him squarely within the exception for situations in which "officers have probable cause to make arrests, but typically exercise their discretion not to do so." 139 S. Ct. at 1727. ICE authorizes an estimated 2.3 to 2.9 million people to live in this country under ICE supervision, including at least 900,000 people with deportation orders.[3]

The government's own briefing below confirms that this exception applies here. In the court of appeals, the government acknowledged that ICE repeatedly made "discretionary decisions" to allow Respondent to stay in the country. Gov. Br. 43. And the government's petition for certiorari acknowledges that "this case involves the asserted selective enforcement of immigration laws." Pet. 12. There is no credible basis to dispute that this exception recognized in *Nieves* applies here, and for that reason as well, there is no basis for a GVR.

---

[3] See T. Rinaldi, *As Immigration Detention Soars, 2.3 Million People Are Also Regularly Checking In with Immigration Agents*, Public Radio International (May 23, 2017), https://www.pri.org/stories/2017-05-23/immigration-detention-soars-23-million-people-are-also-regularly-checking (reporting that 2.3 million people were under ICE supervision); Michael E. Miller, *They Fear Being Deported. But 2.9 Million People Must Check In Anyway*, Wash. Post (Apr. 25, 2019), https://www.washingtonpost.com/local/they-fear-being-deported-but-29-million-immigrants-must-check-in-with-ice-anyway/2019/04/25/ac74efce-6309-11e9-9ff2-abc984dc9eec_story.html (reporting that 2.9 million people were under ICE supervision).

II. There Is No Basis To Grant, Vacate, and Remand in Light of *Thuraissigiam*

In the alternative, the government's petition requests a GVR in light of this Court's then-forthcoming decision in *Thuraissigiam*, "if … appropriate." Pet. 10, 16. Now that the Court has decided *Thuraissigiam*, it is apparent that a GVR is not "appropriate." *Thuraissigiam*'s Suspension Clause holding is inapposite, and regardless, the government has never disputed that, if Respondent has a colorable First Amendment claim, other provisions of the Constitution—beyond the Suspension Clause—independently ensure federal courts' jurisdiction over the claim.

A. *Thuraissigiam* Is Inapposite

1. *Thuraissigiam* concerned the constitutionality of 8 U.S.C. § 1252(e)(2), which limits the availability of judicial review for "applicants for admission" who are placed in expedited removal proceedings at a port of entry or apprehended shortly after crossing the border elsewhere. *See* 8 U.S.C. § 1225(b)(1)(A)(i), (iii)(II). If an asylum officer determines that such an applicant lacks a "credible fear of persecution" a supervisor reviews that determination, but section 1252(e)(2) provides that the determination is not reviewable in court, via habeas or otherwise.

In *Thuraissigiam*, the applicant was promptly apprehended 25 yards from the border, and he was denied asylum and ordered deported through an expedited removal proceeding. Slip op. 2. The noncitizen argued that the Constitution required review of his habeas petition seeking "vacatur of his removal order and an order directing [the Department] to provide him with a new … opportunity to apply for asylum and other relief from removal." *Id.* at 13 (citations and quotation marks omitted). The government argued that no review was re-

quired beyond what was provided for by statute. U.S. Br. 21-31.

This Court held that section 1252(e)(2) is constitutional under the Suspension Clause as applied to the noncitizen who was apprehended 25 yards from the border. Slip op. at 2. In particular, the Court held that section 1252(e)(2) constitutionally deprived federal courts of habeas jurisdiction over the noncitizen's claim that an asylum officer had improperly determined that he lacked a credible fear of persecution. Assuming without deciding that the Suspension Clause "protects the writ as it existed in 1789" and "extends [no] further," *id.* at 11, the Court held that habeas in 1789 "provided a means of contesting the lawfulness of restraint and securing release," but did not "permit a petitioner to claim the right to enter or remain in a country or to obtain administrative review potentially leading to that result," *id.* at 12 (quotation marks omitted). The noncitizen in *Thuraissigiam* conceded that his "confinement … [wa]s lawful," and "[w]ithout a change in status, he would remain subject to arrest, detention, and removal." *Id.* at 14. His claim, the Court therefore held, fell outside the protection of the Suspension Clause.

This Court also rejected the noncitizen's due process claim, holding that "as to 'foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law,' 'the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.'" *Id.* at 34 (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892)). The Court found that this rule applied even though the noncitizen "succeeded in making it 25 yards into U. S. territory before he was caught." *Id.* at 35.

2. The habeas relief Respondent seeks here could not be more different from the relief sought in *Thuraissigiam*. Unlike the noncitizen in *Thuraissigiam*, Respondent directly challenges the constitutionality of the restraint on his liberty inherent in the government's imminent threat to deport him unconstitutionally. As the Second Circuit held, the government's attempt to deport Respondent "necessarily involves a period of detention" and would again if no stay were in place. Pet. App. 42a. The government acknowledges this holding, Pet. 15, but does not challenge it or suggest that *Thuraissigiam* has any bearing on it. Release from this restraint on his liberty is all the relief Respondent seeks, since he had authorization to remain in this country lawfully before the government's retaliatory attempt to deport him. Respondent has not challenged his final removal order, asked for any change in his immigration status, or disputed that the government ultimately may deport him—so long as it does not do so in retaliation for his protected speech (or in any other unconstitutional manner).

By contrast, in *Thuraissigiam*, the constitutionality of the restraint on the noncitizen's liberty was not in question—indeed, the noncitizen conceded that he was not seeking release from that restraint at all. Slip op. at 17. Instead, the noncitizen sought a new immigration status that would allow him to remain in this country lawfully. This Court's opinion stressed that "simply releasing [the noncitizen] would not provide the right to stay in the country that his petition ultimately seeks," and the Court noted repeatedly that his plea was "ultimately to obtain authorization to stay in this country"—"to enter or remain" here and to gain "authorization … to remain in a country other than his own." *Id.* at 2, 12, 14, 16.

To be sure, releasing Respondent from the restraint inherent in the government's threatened unconstitution-

al deportation would have the effect of allowing him to remain in this country, at least for a time. But as in numerous habeas cases the Court discussed in *Thuraissigiam*, "that [would be] due not to the writ[] ordering … release, but to U.S. immigration law." Slip op. at 20. Under immigration law, Respondent was authorized to live in the U.S. at liberty until the point at which the government lawfully revoked that authorization. *See* 8 U.S.C. § 1231(a)(6); 8 C.F.R. 241.5. Release does not give Respondent status, it only prevents the government from restraining his liberty based on an unconstitutional retaliatory motive.

Put another way, "[t]he relief that a habeas court may order and the collateral consequences of that relief are two entirely different things." *Id.* The noncitizen in *Thuraissigiam* sought to stay here not as a collateral consequence of release, but as part of the judicial relief sought in habeas. Not so here. Respondent seeks the traditional habeas relief of release, and he would remain in this country only as a collateral consequence thereof.

B. The Government Below Did Not Dispute that the Constitution Mandates Jurisdiction over any Colorable Constitutional Claim

In any event, the government's arguments about *Thuraissigiam* are a sideshow, because the government below did not dispute that if Respondent has a colorable First Amendment claim, then federal courts *must* have jurisdiction under the First Amendment itself or under Article III. That is so regardless of the Suspension Clause.

Before the court of appeals, Respondent argued forcefully and repeatedly that to the extent section 1252(g) purports to bar all judicial review of a colorable constitutional claim, that provision is unconstitutional—if not under the Suspension Clause, then under the First Amendment itself and under Article III. *See* C.A. Br. 28-

29; C.A. Reply Br. 2-5, 8, 12-14. That continues to be Respondent's position. *See infra* Section III.B. But in its briefing to the court of appeals, at oral argument, and even in its petition to this Court, the government has *never* offered any response to those arguments—none whatsoever. The government thus effectively concedes that, if Respondent has a colorable First Amendment claim, federal courts have jurisdiction—*regardless* of whether section 1252(g) as applied contravenes the Suspension Clause.

To be sure, the government cannot create subject-matter jurisdiction by consent, and on remand from a GVR, the court of appeals would have to assure itself of jurisdiction. *See Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). But a GVR is unwarranted without a "reasonable probability" of a different outcome on remand, *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001), and there can be no reasonable probability that the court of appeals would find no jurisdiction here when the government does not even assert—much less persuasively argue—that jurisdiction is lacking. Regardless of what *Thuraissigiam* holds or the Suspension Clause requires, if Respondent has a colorable First Amendment claim, federal courts have jurisdiction to hear it.

III. The Decision Below Is Correct

A GVR is all the more unwarranted because the decision below is correct, both on the merits and as to jurisdiction.

A. Removing a Noncitizen in Retaliation for Core Political Speech Violates the First Amendment

The court of appeals held that on the "outrageous" facts of this case, Respondent has stated a viable First Amendment claim that the government is attempting to deport him in retaliation for his core political speech crit-

ical of U.S. immigration and policy as well as the very ICE officials trying to deport him. If this sounds obviously correct, it is. For numerous reasons, the First Amendment prohibits an extreme retaliatory deportation like this one.

1. As the court below found, Respondent's "speech implicates the apex of protection under the First Amendment." Pet. App. 29a. "His advocacy for reform of immigration policies and practices is at the heart of current political debate among American citizens and other residents." *Id.* at 29a-30a. Such "speech on a matter of 'public concern' is at 'the heart of … First Amendment protection,' and 'occupies the highest rung of the hierarchy of First Amendment values.'" *Id.* at 30a (quoting *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011)). "Because [Respondent']s speech concerns 'political change,' it is also 'core political speech' and thus 'trenches upon an area in which the importance of First Amendment protections *is at its zenith*.'" *Id.* (emphasis in original) (quoting *Meyer v. Grant*, 486 U.S. 414, 421-22, 425 (1988)). "Indeed, his 'speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Id.* (quoting *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991)).

2. The government's retaliation against Respondent "was egregious." *Id.* (capitalization omitted). This Court has long "described viewpoint discrimination as a 'blatant' 'violation of the First Amendment.'" *Id.* at 31a (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). And Respondent's "plausible allegations and evidence … support that the Government singled him out for deportation based not only on the viewpoint of his political speech, but on the public attention it received." *Id.* In cataloguing the mountain of evidence establishing ICE officials' retaliatory motives, the court below highlighted the ICE Deputy Director's

explicit statement that "you don't want to make matters worse by saying things." *Id.* at 31a-32a (quoting C.A. App. at A0252). "A plausible, clear inference is drawn that [Respondent's] public expression of his criticism, and its prominence, played a significant role in the recent attempts to remove him." *Id.* at 32a. "To allow this retaliatory conduct to proceed would broadly chill protected speech, among not only activists subject to final orders of deportation but also those citizens and other residents who would fear retaliation against others." *Id.* Such retaliation cannot stand.

Making matters worse, as the Complaint in this case describes in detail, ICE sought to deport Respondent as part of an extensive nationwide pattern and practice of retaliating against immigrant-rights activists for their criticism of U.S. immigration law and policy.

3. Respondent "has a substantial interest in avoiding deportation based on his speech." *Id.* at 34a. He has lived in this country for 25 years, and his wife and daughter are U.S. citizens. And "since his release from custody, [Respondent] has lived a life of a redeemed man." *Ragbir*, 2018 WL 623557, at *3 n.11. He continues working tirelessly on behalf of immigrants' rights and fighting against U.S. immigration laws and policies he believes are inhumane.

4. This is not a case like *AADC* involving "national-security and foreign-policy concerns about terrorism." Pet. App. 34a. To the contrary, Respondent's "plausible allegation is that the Government undertook the deportation to silence criticism of the responsible agency"—ICE—after "his continued presence … was expressly sanctioned by successive stay orders and work permits." *Id.* at 34a-35a.

At least in these extreme and outrageous circumstances, the court below correctly concluded that Respondent stated a viable First Amendment claim.

B. The District Court Had Jurisdiction over Respondent's First Amendment Claim

The court of appeals also correctly held that the district court had jurisdiction over Respondent's First Amendment claim. Indeed, there are *four* independent bases for jurisdiction here.

1. The court of appeals correctly held that, to the extent section 1252(g) purports to bar review of Respondent's First Amendment claim, that provision as applied violates the Suspension Clause. As the court explained, Respondent "faces imminent deportation, which necessarily involves a period of detention," and "must comply … with the Government's orders 'at any time and without a moment's notice.'" Pet. App. 42a-43a (quoting *Hensley v. Mun. Court*, 411 U.S. 345, 351 (1973)). "That effects a present, substantial curtailment of [Respondent]'s liberty." *Id.* at 43a. Respondent seeks release from that curtailment, which would "prevent the Government from deporting him" unless and until a new constitutionally valid decision to deport him is made. *Id.* at 39a. Respondent thus seeks relief that "a habeas court has the authority to grant." *Id.*

2. Although the court of appeals did not reach the question, barring any judicial review of Respondent's First Amendment claim also would violate the First Amendment itself. As this Court observed in *Thuraissigiam*, "it is possible to imagine all sorts of abuses … that could be imposed on people in this country if the Constitution allowed Congress to deprive the courts of any jurisdiction to entertain claims regarding [detention] abuses." Slip op. at 23 n.21. "If that were to happen, it would no doubt be argued that constitutional provisions other than the Suspension Clause guaranteed judicial review." *Id.* This case presents exactly the kind of abuse the Court referenced, and the First Amendment requires a remedy.

When defining the jurisdiction of federal courts—no less than when undertaking other legislative tasks—Congress "shall make no law … abridging the freedom of speech." U.S. Const., amend. I. Yet if applied here, section 1252(g) would be just such a law, depriving Plaintiffs' of any relief for a First Amendment violation. Such a "total denial of any remedy, in either the state or federal courts, [i]s not a mere regulation of jurisdiction," but an unconstitutional denial of a substantive right. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1383 (1953).

3. Barring review of Respondent's First Amendment claim also would violate Article III. Article III provides that "[t]he judicial power shall extend to all cases, in law and equity, arising under th[e] Constitution." U.S. Const., art. III, § 2. These cases are of a special status—they "enter into the national policy, affect the national rights, and may compromit the national sovereignty." *Martin v. Hunter's Lessee*, 14 U.S. 304, 335 (1816). Federal jurisdiction over such cases thus "ought not … to be restrained, but should be commensurate with the mischiefs intended to be remedied, and, of course, should extend to all cases whatsoever." *Id.*

As one leading scholar has explained, "[w]ith respect to cases arising under the Constitution, the need for mandatory jurisdiction of the national judiciary was manifest" in the Constitutional Convention and ratification debates. Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205, 246-47 (1985). To ensure the Constitution's status as the supreme law of the land, it plainly "would have been insufficient simply to empower, but not oblige, Congress to give federal courts jurisdiction in these cases." *Id.* at 250. There is and must be federal jurisdiction over colorable constitutional claims.

4. Finally, although the court of appeals held that section 1252(g) applies here, Pet. App. 16a-22a, that provision is best read not to strip federal courts of jurisdiction over Respondent's claim in the first place. "[W]here Congress intends to preclude judicial review of constitutional claims[,] its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988). "[T]his heightened showing" is required "in part to avoid the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* (quotation marks omitted).

Here, section 1252(g) lacks the "clear and convincing evidence" of congressional intent necessary to bar review of Mr. Ragbir's constitutional claims. *Johnson v. Robison*, 415 U.S. 361, 373 (1974) (quotation marks omitted). Beginning with the text, section 1252(g) does not even mention "constitutional" claims. Other neighboring provisions, by contrast, expressly cover "constitutional" challenges. 8 U.S.C. § 1252(a)(2)(D), (b)(9), (e)(3)(A)(i). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (brackets and quotation marks omitted).

Section 1252(g) also limits federal courts' jurisdiction only over claims "arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders." This language is "narrow"—it does not "cover[] all claims arising from deportation proceedings or impose[] a general jurisdiction limitation." *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, No. 18–587, slip op. at 12 (2020) (quotation marks omitted). Here, Respondent's claim arises not from the execution of his removal order per se, but ra-

ther from immigration officials' decision to retaliate against protected speech.

Even where the language of section 1252(g) applies, moreover, it contains an exception—"except as provided in this section." And the rest of section 1252 expressly preserves noncitizens' right to seek judicial review—including "review of constitutional claims or questions of law." That structure evinces a congressional intent to *preserve* judicial review of constitutional claims, not to eliminate it. Even in *AADC*, while the Court rejected the noncitizen plaintiffs' constitutional avoidance argument, it did so on the ground that the plaintiffs there had no valid constitutional claim. But the Court did not dispute that the avoidance canon would *require* interpreting section 1252(g) to allow effective review of a colorable constitutional claim, or that the statute was indeed susceptible to such an interpretation.

***

The government in this case does not ask for plenary review, but rather only a GVR in light of two decisions of this Court. One of those decisions, *Nieves*, the court of appeals already considered on rehearing and correctly deemed irrelevant. The other, *Thuraissigiam*, is similarly irrelevant—indeed, on its face it relates to only one of multiple independent grounds for federal jurisdiction in this case. A GVR is accordingly unwarranted. If the Court believes, however, that there is a real question whether the U.S. government may lawfully deport leading political activists in retaliation for their core political speech, it should grant plenary review to decide that question for itself.

CONCLUSION

The Court should deny the petition for a writ of certiorari, or in the alternative, grant plenary review.

Respectfully submitted.

ALINA DAS
JESSICA ROFÉ
WASHINGTON SQUARE
LEGAL SERVICES, INC.
IMMIGRANT RIGHTS
CLINIC
New York University
School of Law
245 Sullivan St., 5th Floor
New York, NY 10012
(212) 998-6430
alina.das@nyu.edu

R. STANTON JONES
Counsel of Record
WILLIAM C. PERDUE
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
stanton.jones@arnoldporter.com

EMILY NEWHOUSE DILLINGHAM
ARNOLD & PORTER
KAYE SCHOLER LLP
70 W. Madison St., Ste. 4200
Chicago, IL 60602

JULY 2020