

2023

“Known Adversary”: The Targeting of the Immigrants’ Rights Movement in the Post-Trump Era

Azadeh Shahshahani

Chiraayu Gosrani

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/elj>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [First Amendment Commons](#), and the [Immigration Law Commons](#)

Recommended Citation

Azadeh Shahshahani & Chiraayu Gosrani, “Known Adversary”: *The Targeting of the Immigrants’ Rights Movement in the Post-Trump Era*, 72 Emory L. J. 1245 (2023).

Available at: <https://scholarlycommons.law.emory.edu/elj/vol72/iss5/5>

This Article is brought to you for free and open access by the Emory Law Journal at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory Law Journal by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

**“KNOWN ADVERSARY”: THE TARGETING OF THE
IMMIGRANTS’ RIGHTS MOVEMENT IN THE POST-TRUMP
ERA**

Azadeh Shahshahani

Chiraayu Gosrani

TABLE OF CONTENTS

INTRODUCTION	1246
I. THE FIRST AMENDMENT’S HOLLOWED OUT PROTECTIONS	1249
A. <i>Constitutional Exceptionalism</i>	1251
B. <i>Exceptionalism for Immigrants and the Plenary Power Doctrine</i>	1253
II. THE CHILLING OF THE IMMIGRANTS’ RIGHTS MOVEMENT	1256
A. <i>Indigenous Organizers, Faith Leaders, and Humanitarian Aid Workers at the Southern Border</i>	1256
B. <i>Grassroots Organizations and Their Organizers</i>	1265
C. <i>Immigrants in Detention</i>	1279
D. <i>‘Dreamers’ and Youth Leaders</i>	1291
III. LOOKING BEYOND THE COURTROOM: GUIDANCE FOR THE MOVEMENT	1296
A. <i>Demanding Policy Interventions as Reparations</i>	1296
B. <i>Facilitating Transparency and Accountability for Abolitionist Ends</i>	1297
C. <i>Bridging Cross-Movement Solidarity</i>	1298

INTRODUCTION

During the COVID-19 pandemic, immigrants in the custody of Immigration and Customs Enforcement (“ICE”) faced unprecedented threats to their health and well-being.¹ At the Stewart Detention Center (“Stewart”) in Georgia, one of the largest privately-run immigration detention centers in the country, individuals caged in close quarters reported falling ill en masse and urgently in need of medical attention.² Their pleas to be released—or to at least receive testing, protective equipment, and care—were being roundly ignored by jail staff.³ Immigrants decided to organize and demonstrate against their mistreatment by placing sheets on the windows and doors.⁴ In response, the prison deployed its Special Operations Response Team (“SORT”), a unit of correctional officers trained to use riot shields, helmets, pepper spray, and pepper ball ammunition for the sole purpose of suppressing disturbances.⁵ On at least two occasions in a two-week period, SORT officers pepper-sprayed, physically abused, and segregated immigrants in solitary confinement for their acts of protest.⁶ In a social media post, one officer alarmingly bragged that he had been in “call of duty mode” during one of the assaults and shot every immigrant in sight.⁷

For many years even prior to the COVID-19 pandemic, advocacy groups, including Project South, Georgia Detention Watch, and El Refugio, had been in close communication with immigrants at Stewart to report out and challenge the abuses inside the detention center.⁸ Immigration officials had taken notice.⁹ They began monitoring the organizations and their members online, at protests, and other organized activities.¹⁰ Internal documents revealed that at one point, an official was contemplating ways to remove El Refugio, an immigrants’ rights

¹ Emily Kassie & Barbara Marcolini, *‘It Was Like a Time Bomb’: How ICE Helped Spread the Coronavirus*, N.Y. TIMES, <https://www.nytimes.com/2020/07/10/us/ice-coronavirus-deportation.html> (Apr. 25, 2021).

² José Olivares, *ICE’s Immigration Detainees Protested Lack of Coronavirus Precautions—and SWAT-Like Private-Prison Guards Pepper-Sprayed Them*, INTERCEPT (May 5, 2020, 9:00 AM), <https://theintercept.com/2020/05/05/ice-stewart-immigration-detention-coronavirus-protest-pepper-spray/>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *See id.*

⁷ *Id.*

⁸ José Olivares & John Washington, *ICE Discussed Punishing Immigrant Advocates for Peaceful Protests*, INTERCEPT (June 17, 2021, 7:00 AM), <https://theintercept.com/2021/06/17/ice-retaliate-immigrant-advocates-surveillance/>.

⁹ *Id.*

¹⁰ *Id.*

organization and ministry that focuses on visiting and supporting people at Stewart, from the visitation program.¹¹ Officials were also closely monitoring the real-time presence of organizers at a vigil held by Georgia Detention Watch, an abolitionist organization which one ICE agent described as a “known adversary.”¹²

The simultaneous targeting of immigrants in detention and advocates on the outside follows a longstanding pattern of federal immigration officials engaging in surveillance and outright retaliation against individuals and organizations advocating for immigrants across the country.¹³ This targeting reached untold levels under the Trump administration.¹⁴ When immigrants’ rights defenders took to the streets to protest the administration’s anti-immigrant policies,¹⁵ emboldened federal immigration officials responded by using their unencumbered authority to surveil, deport, and detain protesting immigrants deemed a threat to their agenda.¹⁶ As Professor Alina Das wrote in a 2021 law review article, this campaign of targeting had a “chilling effect” on the immigrants’ rights movement across the country.¹⁷ All told, immigration officials engaged in over one thousand instances of retaliation and surveillance against the immigrants’ rights movement during the Trump administration.¹⁸

Since assuming office in January 2021, the Biden administration has sought to distance itself from the prior administration’s xenophobic policies and its pattern of rights violations.¹⁹ It specifically sought to reassure advocates, organizers, and the public that federal immigration officials can be held

¹¹ *Id.*

¹² *Id.*

¹³ See *Incidents, IMMIGRANT RTS. VOICES*, <https://www.immigrantrightsvoices.org/> (last visited June 13, 2022); Nick Pinto, *Across the U.S., Trump Used ICE to Crack Down on Immigration Activists*, INTERCEPT (Nov. 1, 2020, 7:00 AM), <https://theintercept.com/2020/11/01/ice-immigration-activists-map/> (noting that the mapping project “paints a picture of a practice so widespread as to seemingly constitute an official policy of using the powers of the state against critics of an unchecked immigration apparatus”).

¹⁴ See Pinto, *supra* note 13.

¹⁵ See, e.g., Jonah Engel Bromwich, *Lawyers Mobilize at Nation’s Airports After Trump’s Order*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html>; Creede Newton, *Protests Grow as Texas Moves Against ‘Sanctuary’ Cities*, AL JAZEERA (Feb. 2, 2017), <https://www.aljazeera.com/news/2017/02/protests-grow-texas-moves-sanctuary-cities-170202205015258.html>; Alexandra Yoon-Hendricks & Zoe Greenberg, *Protests Across U.S. Call for End to Migrant Family Separations*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/trumpprotests-family-separation.html>.

¹⁶ See Alina Das, *Deportation and Dissent: Protecting the Voices of the Immigrant Rights Movement*, 65 N.Y. L. SCH. L. REV. 225, 227 (2020).

¹⁷ *Id.* at 230–31.

¹⁸ See *Incidents, supra* note 13.

¹⁹ Rose, *infra* note 21.

“accountable” through enforcement guidance and oversight.²⁰ In September 2021, Department of Homeland Security (“DHS”) Secretary Alejandro Mayorkas promulgated new guidelines that shifted the agency’s resources from blanket enforcement action to focus on individuals deemed by federal immigration officials to “pose a threat to national security, public safety, and border security.”²¹ The new guidelines instruct immigration officials that an immigrant’s exercise of their First Amendment rights “should never be a factor in deciding [whether] to take enforcement action.”²²

In reality, the Biden administration has remained committed to an immigration system that inflicts harm on immigrant communities through terrorizing, detention, and mass separation.²³ The guidelines themselves still leave immigration officials with broad discretion to determine whether an immigrant is a priority.²⁴ With this discretion, federal officials have in fact detained immigrants at a greater rate than the previous administration did, often in ICE prisons with track records for abusing and dehumanizing immigrants.²⁵ In those detention centers, federal immigration officials, private prison operators, and municipal contractors have maintained a climate of brutal repression, silencing detained immigrants for speaking out about their mistreatment.²⁶ On the streets, immigration officials contracting with private data brokers are still keeping tabs on advocates and organizers.²⁷ At the border, the Biden administration has committed more resources to border militarism to undermine the rights of asylum seekers and indigenous migrants.²⁸ The

²⁰ *Id.* (“‘We will hold ourselves accountable internally, and we will hold ourselves accountable to the public externally,’ [Secretary Mayorkas] said.”).

²¹ Memorandum from Alejandro N. Mayorkas, Sec’y, Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf’t, on Guidelines for the Enforcement of Civil Immigration Law 2 (Sept. 30, 2021) [hereinafter Mayorkas Memo], <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>; see also Joel Rose, *New Immigration Enforcement Guidelines Focus on Threats to Public Safety*, NPR (Sept. 30, 2021, 10:31 PM), <https://www.npr.org/2021/09/30/1042153662/immigration-enforcement-public-safety>.

²² Mayorkas Memo, *supra* note 21, at 5.

²³ See Rose, *supra* note 21 (quoting Yaritza Méndez of Make the Road New York).

²⁴ *Id.*

²⁵ Uriel J. García, *The Number of Undocumented Immigrants in Detention Centers Has Increased by More Than 50% Since Biden Took Office*, TEX. TRIB. (Dec. 2, 2021, 5:00 AM), <https://www.texastribune.org/2021/12/02/joe-biden-ice-immigration-detention/>; Ryan Devereaux, *Joe Biden Detained Tens of Thousands of Asylum Seekers in the Last Year*, INTERCEPT (Apr. 21, 2022, 12:00 PM), <https://theintercept.com/2022/04/21/joe-biden-immigration-detention-asylum/>.

²⁶ See Devereaux, *supra* note 25.

²⁷ TAKE BACK TECH FELLOWS & CMTY. ORG. ADVISORS, TARGETED BUT NOT SILENCED: A REPORT ON GOVERNMENT SURVEILLANCE AND RETALIATION AGAINST IMMIGRATION ORGANIZERS IN THE UNITED STATES 20, <https://www.flipsnack.com/justfutures/targeted-but-not-silenced/full-view.html> (last visited Jan. 11, 2023).

²⁸ Cf. Devereaux, *supra* note 25 (noting the “prolonged detention of tens of thousands of asylum-seekers” under the Biden policy).

administration's tepid response to widespread constitutional violations across the deportation and detention system is a reminder that lasting protection for immigrants, including their right to dissent, will remain ephemeral under the status quo.²⁹

This Article asserts that retaliation is part and parcel of the deportation and detention machine, such that retaliatory enforcement action remains a threat to immigrants, movement leaders, and organizers. Part I discusses the constitutional framework of the First Amendment and how retaliation against immigrant rights organizers follows a historical pattern of excluding Black Americans and colonized people from First Amendment protection. Through the narratives of individual immigrant organizers and immigrant rights' defenders, Part II captures recent developments in First Amendment jurisprudence while identifying the ways in which retaliatory enforcement has been essential to maintaining the detention and deportation system. In Part III, this Article concludes by contemplating advocacy strategies and policy solutions that can aid movement actors in defending against retaliatory enforcement tactics and undoing the detention and deportation system as a whole.

I. THE FIRST AMENDMENT'S HOLLOWED OUT PROTECTIONS

“All we say to America is, ‘Be true to what you said on paper.’
... Somewhere I read of the freedom of speech.
Somewhere I read of the freedom of the press. Somewhere
I read that the greatness of America is the
right to protest for right.”

- *Martin Luther King, Jr., Memphis, April 3, 1968*³⁰

The First Amendment serves to prevent the government from making laws “abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the [g]overnment for a redress of grievances.”³¹ By safeguarding the free exchange of ideas, the First Amendment provides the people with the clearest means of vindicating other fundamental rights, privileges, and guarantees that form the foundation of democratic government.³² At its core, the First Amendment was intended to protect the right

²⁹ See Pinto, *infra* note 170.

³⁰ “*I’ve Been to the Mountaintop*” by Dr. Martin Luther King, Jr., AFSCME <https://www.afscme.org/about/history/mlk/mountaintop> (last visited Feb. 10, 2023).

³¹ U.S. CONST. amend. I.

³² See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”); *Thomas v. Collins*, 323 U.S. 516, 534 (1945) (holding that

to political speech—to speak on matters of public importance and criticize the government and its officials.³³ As the Supreme Court has long recognized, political speech “is more than self-expression; it is the essence of self-government.”³⁴

The First Amendment plays a fundamental role in protecting the right of the people to oppose government action without punishment or the fear of government reprisal. The freedom to oppose or challenge government action without risking arrest is “one of the principal characteristics by which we distinguish a free nation from a police state.”³⁵ For that very reason, retaliation is said to “offend[] the Constitution [because] it threatens to inhibit exercise of the protected right.”³⁶ As a general matter, the law is settled that “the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out.”³⁷ Even absent actual punishment, the courts have long recognized that government action can have a chilling effect on free expression.³⁸

In principle, the First Amendment protects immigrants just as extensively as any other group of people within society.³⁹ It should safeguard their right to oppose immigration policy without the risk of deportation, surveillance, or punishment. Yet, historically and in practice, Black Americans and colonized

a labor organizer’s right to speak and the rights of workers “to hear what he had to say” were abridged by a state law requiring organizers to register before soliciting union membership); *Red Lion Broad. Co. v. Fed. Comm’n*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . .”).

³³ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 274–75 (1964); *Das*, *supra* note 16, at 242.

³⁴ *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964); see also *Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality opinion) (“[P]olitical speech [is] at the core of what the First Amendment is designed to protect.”); *Meyer v. Grant*, 486 U.S. 414, 421–22, 425 (1988) (ranking political speech at the top of the First Amendment hierarchy).

³⁵ *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987).

³⁶ *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (second alteration in original) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998)).

³⁷ *Id.*

³⁸ William M. Carter, *The Second Founding and the First Amendment*, 99 TEX. L. REV. 1065, 1096 (2021).

³⁹ See *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (“Freedom of speech and of press is accorded [noncitizens] residing in this country.” (citing *Bridges v. California*, 314 U.S. 252 (1941))); David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 370 (2003) (“[B]oth the First Amendment’s protections of political and religious freedoms and the Fourth Amendment’s protection of privacy and liberty apply to ‘the people.’ The fact that the Framers chose to limit to citizens only the rights to vote and to run for federal office is one indication that they did not intend other constitutional rights to be so limited.”); see also Michael Kagan, *Do Immigrants Have Freedom of Speech?*, 6 CALIF. L. REV. CIR. 84, 91 (2015) (describing the application of the First Amendment to undocumented immigrants as an open question and arguing that it should apply).

people have been excluded from the ambit of First Amendment protection.⁴⁰ This exclusion laid the foundation for a surveillance state that later facilitated the modern deprivation of immigrants' rights, including the right to dissent and freely engage in political speech.⁴¹

A. *Constitutional Exceptionalism*

Despite the First Amendment's bold pronouncement, the canonical interpretation of the First Amendment has historically excluded Black Americans and other colonized people from its protection.⁴² This is so because the Constitution exists as a contradiction. It proclaimed universal liberty in theory, yet sanctioned human enslavement and indigenous genocide in practice.⁴³ As such, the contemporary understanding of the First Amendment must be filtered through the prism of this founding paradox.

Much like other aspects of the Constitution, the First Amendment ignored the perspective of colonized and enslaved people.⁴⁴ The impressions of enslaved Black people were explicitly excluded as a canonical source of the original meaning of the First Amendment.⁴⁵ By its text, the First Amendment only protected against infringements arising out of federal government action.⁴⁶ This understanding, of course, ignored the lived reality of Black and indigenous people, whose ability to dissent was being chilled not only by the federal government, but also most vehemently by states, private acts of bondage, genocide, and white vigilantism.⁴⁷

⁴⁰ Carter, *supra* note 38, at 1089.

⁴¹ GUPTA, *infra* note 55, at 8.

⁴² *Id.*

⁴³ Carter, *supra* note 38, at 1065 (citing slave narratives including *The Light and Truth of Slavery: Aaron's History*, which described the Constitution as "an inconsistency, a contradiction" that was "made to stab that very liberty which it was designed to shield. It becomes a reproach, a piece of hypocrisy, an abomination" (quoting THE LIGHT AND TRUTH OF SLAVERY: AARON'S HISTORY 9–10 (Univ. of N.C. at Chapel Hill electronic ed. 2000), <https://docsouth.unc.edu/neb/aaron/aaron.html>).

⁴⁴ *See id.* 1089.

⁴⁵ *Id.* (noting that although there is disagreement among legal scholars as to the proper methods of constitutional interpretation, there is general agreement that relevant Founding-era sources include, inter alia, the understandings of the ratifying public, but not necessarily those excluded from the public).

⁴⁶ *See id.* at 1097; *see also* U.S. CONST. amend. I ("Congress shall make no laws" (emphasis added)).

⁴⁷ Carter, *supra* note 38, at 1097 ("The formalistic state action doctrine, however, inadequately accounts for the lived reality, as noted by slave narratives . . . that vulnerable persons' free speech rights can be chilled as effectively by private violence, threats, and coercion as by government action.").

State law explicitly abridged the First Amendment rights of enslaved people.⁴⁸ The slavery regime, as enforced under state slave codes, expressly punished the exercise of speech by enslaved Black people and about Black freedom.⁴⁹ Every Southern state, except Kentucky, passed laws restricting speech, press, and discussion of abolition.⁵⁰ Mississippi's Slave Code, for example, criminalized the use of language "having a tendency to promote discontent among free colored people, or insubordination among slaves."⁵¹ Likewise, Georgia's Slave Code prohibited "the assembly of negroes under pretense of divine worship" and gave law enforcement authority to "dispense any assembly of slaves which may endanger the peace."⁵² In addition to legalized prohibitions on free speech, Black people and abolitionists faced violent suppression at the hands of vigilante, white supremacist mobs.⁵³ Under the Court's early interpretation of the First Amendment—which held that it only protected against acts of the federal government—such repression of the freedom of speech and worship were constitutionally sound.⁵⁴

From such a sweeping carve out to constitutional protection for Black people sprung First Amendment exceptions for later freedom movements. Since its creation in 1908, the Federal Bureau of Investigation ("FBI") has targeted people of color and dissidents through tactics that were developed to maintain "imperial occupation" abroad and "crush the labor movement" at home.⁵⁵ In the aftermath of the First World War, the FBI carried out a series of raids resulting in the "violent arrest[]" of six thousand people, mostly immigrants, "based . . . on their political activities and immigration status."⁵⁶ During the civil rights movement, the government's intelligence operatives turned their attention to Black radical thinkers and movement leaders.⁵⁷ Under its counter-intelligence program,

⁴⁸ *Id.* at 1084 & n.73.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1084 n.73 (citing RUSSEL B. NYE, *FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY 1830–1860* (1949)).

⁵¹ *Id.* at 1084 (quoting J. Clay Smith, Jr., *Justice and Jurisprudence and the Black Lawyer*, 69 NOTRE DAME L. REV. 1077, 1107 (1994)).

⁵² *Id.*

⁵³ *Id.* 1084–85 (further noting that the private mobs remained out of reach of the First Amendment given the threshold requirement of state action).

⁵⁴ *See* Das, *supra* note 16, at 241.

⁵⁵ AMITH GUPTA, *SPYING ON THE MARGINS: THE HISTORY, LAW, AND PRACTICE OF U.S. SURVEILLANCE AGAINST MUSLIM, BLACK, AND IMMIGRANT COMMUNITIES AND CONTEMPORARY STRATEGIES OF RESISTANCE* 8 (Azadeh Shahshahani & Manzoor Cheema eds., 2021), https://projectsouth.org/wp-content/uploads/2021/04/FINAL-Project-South_Spying-on-the-Margins_04.26.2021.pdf.

⁵⁶ *Id.* at 9.

⁵⁷ *Id.* at 12.

known colloquially as COINTELPRO, the federal government undertook a secret program to target and surveil Black civil rights leaders and disrupt organizing.⁵⁸ Among their egregious acts was the raid and execution of Black Panther Party organizers Fred Hampton and Mark Clark.⁵⁹

B. *Exceptionalism for Immigrants and the Plenary Power Doctrine*

Against the backdrop of constitutional exceptionalism, immigrants have been uniquely denied the right to freely dissent without the threat of retaliatory surveillance, exclusion, or expulsion.⁶⁰ This is partly explained by the fact that courts have shown great deference to the federal government over immigration law and its unwillingness to engage in judicial review of violative practices, even when it is being enforced to retaliate against immigrants for exercising their First Amendment rights.⁶¹ In legal circles, this is known as the plenary power doctrine.⁶² While the courts have described Congress's legislative power over patents, interstate commerce, and other areas as plenary, they have nonetheless found such powers constrained by the limits of the Constitution.⁶³ This is not so in the context of immigration law, where courts have treated the power of the federal government over immigration to be nearly unlimited, and the constitutional rights of immigrants to be extremely limited.⁶⁴

⁵⁸ *COINTELPRO and the History of Domestic Spying*, NPR (Jan. 18, 2006, 11:31 AM), <https://www.npr.org/templates/story/story.php?storyId=5161811>.

⁵⁹ GUPTA, *supra* note 55, at 12.

⁶⁰ *See, e.g., Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488 (1999) (concluding that unlawfully present noncitizens have “no constitutional right to assert selective enforcement as a defense against . . . deportation”); *Kleindienst v. Mandel*, 408 U.S. 753, 769–70 (1972) (holding that courts generally will not question the executive’s exercise of congressionally-delegated plenary power “to make policies and rules for exclusion of aliens”); *Galvan v. Press*, 347 U.S. 522, 530 (1954) (noting that congressional power over who can emigrate is purposely broad); *Harisiades v. Shaughnessy*, 342 U.S. 580, 593–95 (1952) (allowing U.S. residents to be deported for their past affiliation with the Communist Party); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292–95 (1904) (finding an entry ban against anarchists constitutional); *see also* Azadeh Shahshahani, *Silence Will Not Protect Us: Immigrants Speak Boldly Despite Threats of Violence*, COLORLINES (Nov. 13, 2019), <https://www.colorlines.com/articles/silence-will-not-protect-us-immigrants-speak-boldly-despite-threats-violence-op-ed>; Azadeh Shahshahani, *Government Spying on Immigrants in America Is Now Fair Game. What Next?*, GUARDIAN (Feb. 12, 2018, 8:18 AM), <https://www.theguardian.com/commentisfree/2018/feb/12/government-spying-immigrants-america>; Sweta Vohra, *Documents Show US Monitoring of Black Lives Matter*, AL JAZEERA (Nov. 28, 2017), <https://www.aljazeera.com/news/2017/11/28/documents-show-us-monitoring-of-black-lives-matter/>.

⁶¹ *See* Das, *supra* note 16, at 243.

⁶² *Plenary Power*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/plenary-power> (last visited Apr. 17, 2021) (defining plenary power as “[c]omplete power over a particular area with no limitations”).

⁶³ Brian G. Slocum, *Canons, The Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 365 (2007).

⁶⁴ *Id.*

The concept of plenary immigration power derives from racist origins.⁶⁵ In the *Chinese Exclusion Case*, the Supreme Court held that the Chinese Exclusion Act of 1888 was a constitutional exercise of federal power because the government's right to exclude people is "not . . . open to controversy" as an incident of sovereignty, and that it can be exercised "at any time . . . in the judgment of the government" and "cannot be abandoned or surrendered," nor "hampered, when needed for the public good, by any considerations of private interests."⁶⁶ When faced with a patently racist provision of the immigration code, the Court abdicated its constitutional duty to engage in probing judicial review of legislative acts. From this decision flowed a dangerous precedent for judicial review over immigration law.

Employing the plenary power doctrine, the Supreme Court has concluded that the federal government has the power to exclude and deport immigrants based on their political beliefs and associations.⁶⁷ A decade after its opinion in the *Chinese Exclusion Case*, the Court affirmed the deportation of an English anarchist based on Congress's broad authority to legislate grounds for deportation even when predicated upon political belief.⁶⁸ In *Kleindienst v. Mandel*, the Supreme Court affirmed the government's authority to refuse a visa to a Belgian journalist and Marxist theoretician who was invited to speak at universities.⁶⁹ Despite concluding that U.S. citizens hold a First Amendment interest in hearing the scholar's ideas, the Court fell back on the plenary power doctrine as granting the federal government vast power to exclude immigrants so long as the exercise is based on a "facially legitimate and bona fide" reason.⁷⁰ When a legitimate reason is offered, "the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against First Amendment interests of those who seek personal communication with the applicant."⁷¹

Fifty years later, the Court reached a similar holding in *Galvan v. Press*, where it affirmed the deportation of a Mexican citizen who had lived in the

⁶⁵ See, e.g., *The Chinese Exclusion Case*, 130 U.S. 581, 603–604 (1889) (holding an act excluding immigrants based on race to be constitutional).

⁶⁶ *Id.*; see also Hallie Ludsin, *Frozen in Time: The Supreme Court's Outdated, Incoherent Jurisprudence on Congressional Plenary Power over Immigration*, 47 N.C. J. INT'L L. 443, 472 (2022).

⁶⁷ See *The Chinese Exclusion Case*, 130 U.S. at 603.

⁶⁸ *United States ex rel. Turner v. Williams*, 194 U.S. 279, 290 (1904) (holding that the inherent sovereign power of the United States to govern admission of non-citizens overcame any First Amendment defenses, notably citing and affirming the *Chinese Exclusion Case*).

⁶⁹ 408 U.S. 753, 762, 770 (1972).

⁷⁰ *Id.* at 768–69.

⁷¹ *Id.* at 770.

United States for thirty-six years based solely on his past membership in the Communist Party.⁷² The Court held that the power of Congress over the admission of immigrants and their right to remain is “necessarily very broad, touching as it does basic aspects of national sovereignty.”⁷³ Justice Black, dissenting, cautioned early on that such an unchecked view of federal immigration power has severe repercussions for individuals who choose to exercise their rights to freedom of speech, association, and due process: “For joining a lawful political group years ago . . . petitioner now loses his job, his friends, his home, and maybe even his children, who must choose between their father and their native country.”⁷⁴ Between the First Amendment’s clear ban against abridgement of political speech and assembly, and the Fourteenth Amendment’s Due Process guarantee, Justice Black concluded: “I am unwilling to say . . . that despite these constitutional safeguards this man may be driven from our land because he joined a political party that California and the Nation then recognized as perfectly legal.”⁷⁵

The Supreme Court has never overruled its decisions in *Kleinstadt* and *Galvan*.⁷⁶ In fact, its decisions in the intervening years have further entrenched the federal government’s authority to carry out immigration enforcement, seemingly without any constitutional restraints. In *Reno v. American-Arab Anti-Discrimination Committee (“AADC”)*, the Supreme Court rejected the plaintiffs’ claims that the government had commenced deportation proceedings against them in retaliation for their membership in the Palestinian Liberation Organization, a group that the State Department had labeled as terrorist.⁷⁷ The Court applied a general rule that “an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation,” absent “outrageous” discrimination.⁷⁸ When an immigrant’s presence in the country is in violation of immigration laws, the Court stated, “the [g]overnment does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity.”⁷⁹ The federal government has since relied on the

⁷² See 347 U.S. 522, 530 (1954); *id.* at 532 (Black, J., dissenting).

⁷³ *Id.* at 530 (majority opinion).

⁷⁴ *Id.* at 533 (Black, J., dissenting).

⁷⁵ *Id.*

⁷⁶ Kagan, *supra* note 39, at 88. *But see id.* (questioning whether the Supreme Court today would “go quite so far”).

⁷⁷ *Reno v. Am.-Arab Anti-Discrimination Comm. (“AADC”)*, 525 U.S. 471, 473, 491–92 (1999).

⁷⁸ *Id.* at 488, 491.

⁷⁹ *Id.* at 491–92.

Court's decision in *AADC* to dismiss First Amendment challenges to deportation.⁸⁰

II. THE CHILLING OF THE IMMIGRANTS' RIGHTS MOVEMENT

A. *Indigenous Organizers, Faith Leaders, and Humanitarian Aid Workers at the Southern Border*

“[T]o oppose an immigrant is to oppose Jesus. . . . [I]f we do not stand on the side of immigrants right now, history will find us as the ones who were complicit in their persecution.”

- *Reverend Kaji Dousa*⁸¹

Under the Trump administration, the federal government wielded the southern border as a racist tool to exclude migrants. It built 450 miles of new fencing along the southern border and ramped up border arrests.⁸² It instituted the Migrant Protection Protocols, forcing predominantly asylum seekers of color to remain in Mexico while their cases were processed by immigration courts.⁸³ As part of a zero tolerance policy, the administration separated children from their families as a means of deterring families from seeking asylum.⁸⁴ Then, during the COVID-19 pandemic, it enacted regulations to enforce Title 42, an arcane and obscure public health statute, to expel migrants at the border under the racially veiled threat of disease.⁸⁵

The Trump era's reprehensible border policies were not a blip in the history of the southern border. According to scholar Harsha Walia, “[t]he . . . border must be understood not only as a racist weapon . . . but as foundationally organized through, and hence inseparable from, imperialist expansion, Indigenous elimination, and anti-Black enslavement.”⁸⁶ Pivotal to the ideology

⁸⁰ Das, *supra* note 16, at 243.

⁸¹ Complaint at ¶ 5, *Dousa v. U.S. Dep't of Homeland Sec.*, No. 19CV1255 LAB (S.D. Cal. July 8, 2019) [hereinafter *Dousa Complaint*].

⁸² Lauren Villagran, *Donald Trump Administration Touts Completion of 450 Miles of Border Wall*, EL PASO TIMES, <https://www.elpasotimes.com/story/news/2021/01/05/donald-trump-administration-border-wall-completion-el-paso-rio-grande-arizona/4142093001/> (Jan. 6, 2021, 7:32 AM).

⁸³ See *Migrant Protection Protocols*, U.S. DEP'T OF HOMELAND SEC. (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

⁸⁴ See Tom Nichols, *The Secret History of Family Separation*, ATLANTIC (Aug. 8, 2022), <https://www.theatlantic.com/newsletters/archive/2022/08/the-secret-history-of-family-separation/671081/>.

⁸⁵ Deepa Shivaram, *What to Know About Title 42, the Trump-Era Policy Now Central to the Border Debate*, NPR (Apr. 24, 2022, 5:00 AM), <https://www.npr.org/2022/04/24/1094070784/title-42-policy-meaning>.

⁸⁶ HARSHA WALIA, *BORDER AND RULE 21* (2021).

of manifest destiny, early border policies—most violently carried out by Andrew Jackson—were conceived of as a means of eliminating Indigenous people and furthering the enslavement of Black people.⁸⁷ Essential to Jackson's frontier ambitions was the surveillance and repression of colonized people at the borderlands.⁸⁸ Massacring and forcibly displacing indigenous people in the eastern United States, Jackson also openly sanctioned frontier warfare waged by white settlers and recognized the independent Republic of Texas as a slave state soon after Mexico decided to outlaw slavery and exclude white settlers from its territory in the 1830s.⁸⁹ Following the signing of the Treaty of Guadalupe Hidalgo in 1848 and the Gadsden Purchase of 1854, “the U.S. seized more than 525,000 square miles of territory” from Mexico and shifted the border south.⁹⁰ Mexicans living in the captured territories were rendered a “conquered people.”⁹¹ Indigenous communities had their land seized and “were forcibly assimilated into the [United States] nation-state.”⁹² For the Tohono and Hia C- ed O’odham peoples, the border—drawn without their consent or input—sliced directly through the middle of traditional O’odham territories and disrupted their traditional migration patterns.⁹³

This history of the border—though overlooked in mainstream discourse on immigration—“continues to animate [U.S.] imperial ambitions and racial-capitalist rule,” including the government’s violent control over the free movement of people.⁹⁴ Beginning in the 1990s, under a “tough on immigration” policy of prevention through deterrence, the federal government stepped up its militarization of the southern border.⁹⁵ It tripled the size of the U.S. Border Patrol, set up a series of walls, checkpoints, and blockades, and initiated ground and aerial surveillance to drive migrants away from ports of entry and toward more deadly routes through the Sonoran Desert, Arizona uplands, and southern Texas brush.⁹⁶ The government’s cruel logic was that death would deter. Sure enough, within six years of implementing its militarized policies, border deaths

⁸⁷ *Id.* at 22 (defining manifest destiny as “a tenet of territorial expansionism wherein northern and southern [U.S.] states found common ground in the belief that God had ordained frontier wars”).

⁸⁸ *Id.* at 22–23.

⁸⁹ *Id.*

⁹⁰ *Id.* at 23.

⁹¹ *Id.* (quoting RICHARD R. VALENCIA, *CHICANO STUDENTS AND THE COURTS: THE MEXICAN AMERICAN LEGAL STRUGGLE FOR EDUCATIONAL EQUALITY* 155 (2008)).

⁹² *Id.*

⁹³ Hilary Beaumont, *The Ghoulish, Bipartisan Tradition of Death at the Southern Border*, *NEW REPUBLIC* (Feb. 26, 2021), <https://newrepublic.com/article/161490/ghoulish-bipartisan-tradition-death-southern-border>.

⁹⁴ WALIA, *supra* note 86, at 23.

⁹⁵ *See id.* at 52.

⁹⁶ *See id.*; Beaumont, *supra* note 93.

increased by 509%.⁹⁷ According to the government's own data, over 7,000 migrants died crossing the borderlands in the twenty-year period from 1998 to 2018, with the true toll likely far higher.⁹⁸

The silencing of migrants, indigenous border detractors, and aid workers has been essential to the militarization of the border. During the Trump era, indigenous organizers challenging the construction of the border wall faced criminal prosecution; faith leaders leading migrants in prayer found themselves caught in the web of the government's secretive surveillance operations; volunteers providing mutual aid to stranded migrants were criminally prosecuted for aiding and abetting. While the Biden administration has sought to distance itself from the Trump administration's border policies, the narratives of indigenous organizers, faith leaders, and humanitarian aid workers at the border reveal that the prevention through deterrence paradigm remains alive and well, and that the silencing of migrants and their defenders will persist as part and parcel of United States border imperialism.

1. *Nellie Jo David and Amber Lee Ortega, Members of the O'odham Tribe*

Nellie Jo David and Amber Lee Ortega are members of the last generation of the Tohono O'odham and Hia Ced O'odham people that witnessed a demilitarized border.⁹⁹ Prior to the 1990s, Amber remembers freely migrating across the border as part of annual pilgrimages.¹⁰⁰ As the government stepped up its militarization of the border, migrants from the Americas were driven to cross remote tribal land in greater numbers.¹⁰¹ Amber's family and other tribal members came to the aid of stranded migrants by offering them food and water.¹⁰² As migrants came through tribal land, the O'odham once again witnessed their land becoming occupied territory, overrun with Border Patrol agents and border surveillance operations.¹⁰³

⁹⁷ WALIA, *supra* note 86, at 52.

⁹⁸ *Southwest Border Deaths by Fiscal Year*, U.S. BORDER PATROL, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-southwest-border-sector-deaths-fy1998-fy2018.pdf> (last visited Sept. 14, 2021).

⁹⁹ See Beaumont, *supra* note 93; Devereaux, *infra* note 101.

¹⁰⁰ See Beaumont, *supra* note 93.

¹⁰¹ Ryan Devereaux, "We are Still Here": Native Activists in Arizona Resist Trump's Border Wall, INTERCEPT (Nov. 24, 2019, 10:33 AM), <https://theintercept.com/2019/11/24/arizona-border-wall-native-activists/> ("Former Tohono O'odham chair Ned Norris Jr. once estimated that before Prevention Through Deterrence, 200 or so migrants crossed the nation each month; once the strategy went into effect, that figure ballooned to 1,500 a day.")

¹⁰² See *id.*; Beaumont, *supra* note 93.

¹⁰³ Devereaux, *supra* note 101.

In 2019, the Trump administration sought to construct a border wall in Organ Pipe National Monument, situated on O'odham land.¹⁰⁴ In order to mix concrete for the wall, the government began draining hundreds of thousands of gallons of water from a desert aquifer that feeds into the Quitobaquito Springs.¹⁰⁵ The natural springs were not only the sole source of fresh water in the surrounding area, but also a sacred and deeply spiritual site for the O'odham.¹⁰⁶ Responding to this threat to their culture and way of life, Amber, Nellie, and other members of the O'odham mobilized hundreds in protest of the border wall construction.¹⁰⁷

Following news coverage of their protests, Amber and Nellie were put on the radar of Border Patrol, setting off a chain of events culminating in their arrest.¹⁰⁸ In February 2020, the Border Patrol invited the press to watch as they blew up portions of the Organ Pipe National Monument while the chair of the Tohono O'odham Nation was testifying before Congress about the ongoing desecration of their tribal land; six months later, in September 2020, while praying at the springs, Amber and Nellie came across one of the wall construction crews.¹⁰⁹ In an act of resistance, they sat on the crew's vehicles and told the government contractors that they were not welcome.¹¹⁰ Tactical teams of Border Patrol and U.S. Park Service were deployed; Amber and Nellie were strip searched, shackled, and then driven to CoreCivic-operated Florence Correctional Center, where they were held incommunicado, without access to a lawyer, for over twenty-four hours.¹¹¹ CoreCivic staff told them that they could not be released, but also did not provide them with any information about their charges.¹¹² They spent the night in a cold cage.¹¹³ Only after they were released did they learn that they had been charged with two low-level misdemeanor offenses.¹¹⁴

¹⁰⁴ *Id.*

¹⁰⁵ *See id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See id.*

¹⁰⁸ *See* Ryan Devereaux, *Indigenous Activists Arrested and Held Incommunicado Following Border Wall Protest*, INTERCEPT (Sept. 16, 2020, 7:09 AM), <https://theintercept.com/2020/09/16/indigenous-activists-border-wall-protest/>.

¹⁰⁹ *Id.*; Ryan Devereaux, *Border Patrol Invited the Press to Watch It Blow Up a National Monument*, INTERCEPT (Feb. 27, 2020), <https://theintercept.com/2020/02/27/border-wall-construction-organ-pipe-explosion/>.

¹¹⁰ *See* Devereaux, *supra* note 108.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

Amber and Nellie were not alone. Just one month later, twelve more organizers were arrested following a protest near an immigration checkpoint on traditional O’odham land.¹¹⁵ Arizona state troopers were caught on video firing smoke canisters, tear gas, and rubber bullets, among other acts of excessive force.¹¹⁶

Amber fought the criminal charges by taking the government to trial in January 2022, arguing that the Religious Freedom Restoration Act (“RFRA”) protected her from being prosecuted for practicing her religion.¹¹⁷ A U.S. Magistrate Judge found Amber not guilty, ruling that the government had “substantial[ly] burden[ed]” Amber’s exercise of her religion by closing access to the Quitobaquito Springs.¹¹⁸

Amber fortunately prevailed in her RFRA defense.¹¹⁹ However, her prosecution during the Biden administration shows that the federal government continues to view borderlands organizers and indigenous tribal members as a threat to its border interests. Although President Biden vowed to end construction of a border wall,¹²⁰ his administration has nonetheless built new sections.¹²¹ With the wall construction at Organ Pipe National Monument now completed, the O’odham people have suffered permanent damage to their sacred sites and way of life.¹²² As Nellie commented, while the push to stop construction is “good,” “what we really need is a removal

¹¹⁵ Pablo Lopez, *Tohono O’odham Nation Condemns Use of Chemical Agents on Protestors, Destruction of Sacred Sites*, NEWS 4 TUCSON (Oct. 13, 2020), https://www.kvoa.com/news/local/tohono-o-odham-nation-condemns-use-of-chemical-agents-on-protesters-destruction-of-sacred-sites/article_e2c6822f-c936-5c0f-8fdf-e698c0d75529.html.

¹¹⁶ *Id.* (noting that four law enforcement officers were seen kneeling on one protestor).

¹¹⁷ Alisa Reznick, *Indigenous Protestor Arrested at Border Wall Argues Religious Freedom as Defense*, NPR (Jan. 18, 2022, 5:27 PM), <https://www.npr.org/2022/01/18/1073881749/indigenous-protester-arrested-at-border-wall-argues-religious-freedom-as-defense>.

¹¹⁸ Paul Ingram, *Native Activist Found Not Guilty in Border Protest After New Arguments on Religious Freedom Defense*, TUCSON SENTINEL (Jan. 19, 2022, 4:04 PM), https://www.tucson sentinel.com/local/report/011922_ortega_hearing/native-activist-found-not-guilty-border-protest-after-new-arguments-religious-freedom-defense/.

¹¹⁹ *Id.*

¹²⁰ Barbara Spunt, *Biden Would End Border Wall Construction, But Wouldn’t Tear Down Trump’s Additions*, NPR (Aug. 5, 2020, 10:00 AM), <https://www.npr.org/2020/08/05/899266045/biden-would-end-border-wall-construction-but-wont-tear-down-trump-s-additions>.

¹²¹ Ryan Devereaux, *Border Wall Construction Resumes Under President Joe Biden*, INTERCEPT (Sep. 18, 2022, 6:30 AM), <https://theintercept.com/2022/09/18/biden-trump-border-wall/>.

¹²² Alisa Reznick, *Border Wall Scars: ‘It Feels Like if Someone Got a Knife and Dragged it Across My Heart,’* ARIZ. PUB. MEDIA, <https://news.azpm.org/p/borderbiden/2021/2/4/188649-border-wall-scars-it-feels-like-if-someone-got-a-knife-and-dragged-it-across-my-heart/> (Feb. 4, 2021, 8:08 AM).

and a restoration.”¹²³ This call for reparations has yet to be answered by the Biden administration.

2. *Pastor Kaji Dousa*

In the early days of 2019, Pastor Kaji Dousa, a prominent New York City faith leader, was on her latest trip as part of the Sanctuary Caravan—a mobile clinic of faith leaders, humanitarian aid workers, and congregants—to provide ministerial care to migrant asylum seekers trapped at the borderlands.¹²⁴ She had been using a CBP program for expedited clearance of pre-approved “low risk” travelers, Secure Electronic Network of Travelers Rapid Inspection (“SENTRI”), to cross the border.¹²⁵

Back in New York, regional ICE officials had been tracking rallies and prayer vigils led by Pastor Kaji and her ministry.¹²⁶ On January 2, 2019, returning from ministry services in Tijuana, Pastor Kaji was stopped by a CBP agent on the Mexico side of the San Ysidro Port of Entry.¹²⁷ She was instructed to submit to secondary inspection, which allows CBP agents, entirely in their discretion, to continue a border inspection for further interviews and searches of individuals, their possessions, and electronic devices.¹²⁸ She was detained for hours without explanation and interrogated by CBP agents.¹²⁹

¹²³ *Id.*

¹²⁴ Ryan Devereaux, *Faith Under Fire: A Pastor's Legal Fight Against CBP Exposes a Reckless Surveillance Operation*, INTERCEPT (Mar. 6, 2022, 7:00 AM), <https://theintercept.com/2022/03/06/cbp-border-surveillance-migrant-caravan/>; Dousa Complaint, *supra* note 81, ¶¶ 9, 34 (“She heard their confession. She offered them absolution. She anointed the sick. She consoled the mourning. She laid hands on the injured. She offered grace to the anguished. She dedicated the children of migrants born on their journey in search of safe refuge. She officiated Christian marriage ceremonies for migrants who had never before been able to have a church-blessed wedding. In Tijuana, Pastor Dousa exercised all the duties of the Christian pastoral office.”).

¹²⁵ Dousa Complaint, *supra* note 81, ¶¶ 64–65.

¹²⁶ *Id.* ¶¶ 14, 68–71 (noting that “surveillance of Pastor Dousa ha[d] diminished attendance of migrants at church services she leads, depriving her of the ability to minister to her congregation and the community at large,” and listing several events in New York City led by Pastor Kaji that ICE had surveilled); see Jimmy Tobias, *Exclusive: ICE Has Kept Tabs on Anti-Trump Protesters in New York*, NATION (Mar. 6, 2019), <https://www.thenation.com/article/archive/ice-immigration-protest-spreadsheet-tracking/> (noting that among the organizations listed on an ICE spreadsheet titled “anti-Trump Protest[s]” was New Sanctuary Coalition).

¹²⁷ Dousa Complaint, *supra* note 81, ¶¶ 47–48.

¹²⁸ *Id.* ¶ 49; see Memorandum from Joseph V. Cuffari, Inspector Gen., to Troy A. Miller, Acting Comm’r, U.S. Customs & Border Prot., on CBP Targeted American Associated with the 2018–2019 Migrant Caravan 3 n.2 (Sept. 20, 2021) [hereinafter Sept. 2021 OIG Memo], <https://www.oig.dhs.gov/sites/default/files/assets/2021-09/OIG-21-62-Sep21.pdf> (describing secondary inspections).

¹²⁹ See Dousa Complaint, *supra* note 81, ¶¶ 49–54.

Months later, internal DHS documents supplied to local press revealed that DHS had been targeting dozens of journalists, attorneys, activists, and social media influencers at the borderlands for enhanced government surveillance.¹³⁰ Known as Operation Secure Line (“OSL”), this dragnet surveillance program was the result of a coordinated effort by DHS, the FBI, and CBP in response to the mass movement of asylum seekers at the border beginning in 2018.¹³¹ The OSL database included a picture of Pastor Kaji with a yellow “X” over her face and an accompanying note that read: “Disposition: SENTRI Revoked.”¹³² Her expedited clearance had seemingly been stripped for no legitimate reason but for exercising her First Amendment right to administer faith services to migrants.¹³³

The government’s surveillance of Pastor Kaji significantly burdened her ministry. Members of the Park Avenue Christian Church, many of whom are refugees and asylum seekers, expressed reluctance participating in worship services.¹³⁴ The church also reversed its plans to hold a pro se clinic for asylum seekers and to provide sanctuary to refugees.¹³⁵ Her parishioners expressed concern that surveillance of Pastor Kaji meant there might be a “microphone in the confessional.”¹³⁶ Such fear, caused by the government’s surveillance of Pastor Kaji, undermined her ability to provide pastoral care and guidance.

In July 2019, Pastor Kaji sued DHS and its subsidiary agencies, ICE and CBP, for interfering with her First Amendment right to provide pastoral services to migrants at the southern border.¹³⁷ The government sought to dismiss the case, arguing that Pastor Kaji had not suffered a concrete harm sufficient to show standing or a claim for relief.¹³⁸ In a January 2020 ruling denying the government’s motion to dismiss, the district court concluded that Pastor Kaji

¹³⁰ Tom Jones, Mari Payton & Bill Feather, *Source: Leaked Documents Show the U.S. Government Tracking Journalists and Immigration Advocates Through a Secret Database*, NBC NEWS 7, <https://www.nbcсандiego.com/news/local/source-leaked-documents-show-the-us-government-tracking-journalists-and-advocates-through-a-secret-database/3438/> (Jan. 10, 2020, 11:23 AM); see also Devereaux, *supra* note 124 (stating that Pastor Kaji was one of at least fifty-one U.S. citizens who were targeted and tracked by their own government for their proximity to asylum seekers).

¹³¹ Times Ed. Bd., Editorial, *The Government Has Secret Dossiers on Border Journalists, Lawyers and Activists*, L.A. TIMES (Mar. 8, 2019, 3:10 AM), <https://www.latimes.com/opinion/editorials/la-ed-trump-border-mexico-journalists-migrants-20190308-story.html>; see Jones et al., *supra* note 130.

¹³² Dousa Complaint, *supra* note 81, ¶¶ 13, 62.

¹³³ See *id.* ¶¶ 62–66.

¹³⁴ *Id.* ¶ 3, 76.

¹³⁵ *Id.* ¶ 77.

¹³⁶ *Id.* ¶ 79.

¹³⁷ See *id.* ¶ 1.

¹³⁸ Motion to Dismiss at 12, *Dousa v. U.S. Dep’t of Homeland Sec.*, No. 19cv1255-LAB (S.D. Cal. Nov. 13, 2019).

had standing to sue because the government's surveillance was a concrete harm.¹³⁹ Citing Ninth Circuit precedent, the court found that a party has standing when they are "chilled from participating in worship activities . . . because they fear the Government is spying on them."¹⁴⁰ The court acknowledged that Pastor Kaji had "plausibly shown" the government had surveilled her religious and political activities "for the better part of two years" and that she had withdrawn from her normal religious activities due to fear of ongoing surveillance.¹⁴¹ As of September 2022, Pastor Kaji's case was still on trial.¹⁴²

Despite a change in administration, the officials involved in OSL have remained on the job.¹⁴³ In some cases, their responsibilities at the border have even expanded.¹⁴⁴ In other instances, culpable officials have risen through the ranks. Pete Flores, who once oversaw several ports of entry along the southern border in the midst of OSL, is now one of the CBP's top officials.¹⁴⁵ In a September 2021 report, the Office of Inspector General within DHS—the office supposedly responsible for oversight—even legitimated CBP's placement of electronic alerts on journalists, attorneys, and other U.S. citizens, despite acknowledging that most were unnecessary, improper, or in violation of CBP policy.¹⁴⁶

More concerning, the very conditions that drove asylum seekers and advocates to converge at the borderlands in 2018 still exist in 2022.¹⁴⁷ This is by design.¹⁴⁸ The Biden administration's enforcement priorities continue the longstanding practice of treating any migrant who poses "a threat to border

¹³⁹ *Dousa v. U.S. Dep't of Homeland Sec.*, No. 19CV1255-LAB, 2020 WL 434314, at *5–6 (S.D. Cal. Jan. 28, 2020).

¹⁴⁰ *Id.* at *5 (alteration in original) (quoting *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 522 (9th Cir. 1989)).

¹⁴¹ *Id.*

¹⁴² Hans Holznagel, *Case of Minister Targeted for Work at U.S. Border Goes to Trial*, UNITED CHURCH CHRIST (Sept. 6, 2022), <https://www.ucc.org/case-of-minister-targeted-for-work-at-u-s-border-goes-to-trial/>.

¹⁴³ Devereaux, *supra* note 124.

¹⁴⁴ *Id.*

¹⁴⁵ *Executive Assistant Commissioner Pete Flores, Office of Field Operations*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/about/leadership-organization/executive-assistant-commissioners-offices/field-operations> (Jan. 5, 2022) (noting that Pete Flores leads over 31,000 uniformed and non-uniformed personnel, manages an annual budget of \$6.5 billion in part for operations at CBP's ports of entry, and previously served as Director of Field Operations for the San Diego Field Office, where he oversaw five ports of entry); *see also* Devereaux, *supra* note 124.

¹⁴⁶ *See* Sept. 2021 OIG Memo, *supra* note 128, at 5, 11; *see also* Devereaux, *supra* note 124.

¹⁴⁷ Devereaux, *supra* note 124.

¹⁴⁸ *See* Beaumont, *supra* note 93 (noting that the Biden Administration's borderland policies "are largely a continuation of prevention through deterrence, a bipartisan legacy of accepting mass death as the price of 'border security'").

security” as “a priority for apprehension and removal.”¹⁴⁹ Such “threats” include any migrant arrested while attempting to enter the country at the border or a port of entry, as well as any migrant without authorization apprehended in the interior after November 1, 2020—incidentally, two days prior to Election Day.¹⁵⁰

Under these practices, the Biden DHS has maintained the status quo and prevented migrants from accessing asylum—a right enshrined under domestic and international law—and detained asylum seekers en masse in an ever-expanding network of ICE prisons.¹⁵¹ Asylum seekers from Black-majority countries, such as Haiti, have been acutely subject to cruel and dehumanizing treatment.¹⁵² Without a safe way to present their asylum claims, migrants continue to turn to desperate—at times fatal—measures to reach safety.¹⁵³ As climate change continues to result in mass displacement and unprecedented incidences of extreme heat, the death toll at the borderlands is projected to continue rising.¹⁵⁴ In 2022, migrant deaths were on track to double from the previous year.¹⁵⁵

¹⁴⁹ Mayorkas Memo, *supra* note 21, at 4; *see also* Beaumont, *supra* note 93.

¹⁵⁰ Mayorkas Memo, *supra* note 21, at 4.

¹⁵¹ Ryan Devereaux, *Joe Biden Detained Tens of Thousands of Asylum-Seekers in the Last Year*, INTERCEPT (Apr. 21, 2022, 12:00 PM), <https://theintercept.com/2022/04/21/joe-biden-immigration-detention-asylum/>; Rebecca Gendelman, “*I’m a Prisoner Here*”: *Biden Administration Policies Lock Up Asylum Seekers*, HUM. RTS. FIRST (Apr. 21, 2022), <https://humanrightsfirst.org/library/im-a-prisoner-here-biden-administration-policies-lock-up-asylum-seekers/> (“Since January 2021, the vast majority of asylum seekers jailed by the Biden administration have been people seeking refugee protection after crossing the southern U.S. border—trapped between the administration’s use of Title 42 to turn away most asylum seekers and its use of ‘enforcement priorities’ against those who are not expelled.”).

¹⁵² *See* Marisa Penalzoza, *Haiti Faces Disasters and Chaos. Its People Are Most Likely to Be Denied U.S. Asylum*, NPR (Oct. 16, 2021, 7:00 AM), <https://www.npr.org/2021/10/16/1043458530/haitians-u-s-asylum-racist>; NICOLE PHILLIPS & TOM RICKER, *THE INVISIBLE WALL: TITLE 42 AND ITS IMPACT ON HAITIAN MIGRANTS* 7, <https://www.quixote.org/wp-content/uploads/2021/03/The-Invisible-Wall.pdf> (last visited Jan. 15, 2023) (finding that more Haitians have been removed by the policy and sent back to grave danger in the weeks since Biden took office than during all of the 2020 fiscal year); Gendelman, *supra* note 151, at 5 (finding that Black asylum seekers were detained longer and released on harsher requirements than asylum seekers from non-Black-majority countries, while simultaneously being subjected to discriminatory mistreatment in detention).

¹⁵³ Ana Adlerstein, *The Wall Is Literally Crippling People. Does Biden Care?*, DAILY BEAST, <https://www.thedailybeast.com/the-wall-is-literally-crippling-people-does-biden-care> (Mar. 28, 2021, 8:26 PM).

¹⁵⁴ *See Groups Urge Biden Administration to Plan for Extreme Heat in US Border Policies, Abandon Deterrence Model*, HUM. RTS. WATCH (Sept. 15, 2021, 8:00 AM), <https://www.hrw.org/news/2021/09/15/groups-urge-biden-administration-plan-extreme-heat-us-border-policies-abandon>.

¹⁵⁵ Julian Resendiz, *Migrant Deaths on Track to Double in 2022*, BORDER REP. (Aug. 25, 2022, 5:40 PM), <https://www.borderreport.com/immigration/migrant-deaths-on-track-to-double-in-2022/#:~:text=The%20Border%20Patrol%20has%20carried,Paso%20and%20southern%20New%20Mexico.>

Instead of formulating a humane response to such crises, the Biden administration has adhered to the militant “prevention through deterrence” paradigm. The administration’s proposed U.S. Citizenship Act of 2021 would grant DHS additional funding and unchecked discretion to deploy border surveillance technology and strengthen border infrastructure.¹⁵⁶ The administration also struck agreements with Mexico, Guatemala, and Honduras to deploy thousands of troops to their borders to deter northbound migration.¹⁵⁷ These policies continue the longstanding imperialist policy of treating migrants as disposable.¹⁵⁸

B. *Grassroots Organizations and Their Organizers*

“For all of these years my family, friends, and community were worried that I would be targeted by ICE because of my outspokenness. They were right—my public challenges to the system led them to retaliate against me.”

- Ravi Ragbir¹⁵⁹

1. *Jean Montrevil, Ravi Ragbir, and Members of the New Sanctuary Coalition*

Jean Montrevil emigrated to the United States from Haiti as a legal permanent resident in 1986.¹⁶⁰ A few years later, while still a teenager, Jean was convicted on drug charges.¹⁶¹ Shortly after his conviction, and without being given due process, Jean was found deportable.¹⁶² While Jean appealed the deportation order, he was allowed to continue working and living in the United States under an order of supervision.¹⁶³ In the thirty-some years since his

¹⁵⁶ Mijente (@ConMijente), TWITTER (Apr. 12, 2021, 3:17 PM), <https://twitter.com/ConMijente/status/138168797995930624>.

¹⁵⁷ Sandy Ovalle Martinez, *US Imperialism Is the Problem, Not Unaccompanied Minors*, SOJOURNERS (Apr. 15, 2021), <https://sojo.net/articles/us-imperialism-problem-not-unaccompanied-minors>.

¹⁵⁸ *See id.*

¹⁵⁹ Press Release, Just. for Ravi Ragbir, Immigrant Rights Leader Ravi Ragbir Receives Three-Year Deferred Action After Reaching Settlement on First Amendment Suit Challenging ICE Retaliation (Feb. 24, 2022), <https://istandwithravi.org/2022/02/24/press-release-immigrant-rights-leader-ravi-ragbir-receives-three-year-deferred-action-after-reaching-settlement-on-first-amendment-suit-challenging-ice-retaliation/>.

¹⁶⁰ Nick Pinto, *Trump Banished Immigration Rights Activist for Speaking Out. He’s Suing ICE to Come Back.*, INTERCEPT (Jan. 16, 2020), <https://theintercept.com/2020/01/16/jean-montrevil-deportation-first-amendment/>.

¹⁶¹ *Id.*

¹⁶² *Id.* (noting that Jean was not allowed a lawyer or witnesses during his immigration proceedings).

¹⁶³ *Id.* (reporting that Montrevil had lived under an order of supervision since 2005).

conviction, Jean married, raised four children, and started a company.¹⁶⁴ He also became involved “with Families for Freedom, an organization that offers support to detained immigrants and their families.”¹⁶⁵ Jean’s family described his life as a “story of redemption and growth.”¹⁶⁶

Like Jean, Ravi Ragbir moved to the United States more than twenty years ago and became a legal permanent resident soon after.¹⁶⁷ Following a criminal conviction, Ravi was ordered deported and held in immigration detention centers for several years during ongoing appeals.¹⁶⁸ When he was finally released in 2008, Ravi devoted himself to helping fellow immigrants in danger of deportation.¹⁶⁹ He “became one of the most visible advocates for undocumented immigrants in New York City,” all while living under an order of supervision and undergoing mandatory check-ins with the local ICE office.¹⁷⁰

Jean and Ravi became leaders of the New Sanctuary Coalition (“NSC”), a multi-faith organization dedicated to advancing immigrants’ rights by running workshops for refugees and asylees, accompanying immigrants to hearings and mandatory check-ins with ICE, and building mutual aid among New York’s immigrant communities.¹⁷¹ The organization and its leaders were outward-facing, political, and high-profile.¹⁷² As a consequence, Jean and Ravi immediately faced scrutiny from federal immigration officials who did not look kindly upon their public messaging critical of the immigration system.¹⁷³

ICE was acutely aware of Jean’s political organizing and sought to chill it using its enforcement power. Within a year of founding NSC, ICE inexplicably increased Jean’s supervision, enrolling him in the Intensive Supervision Appearance Program (“ISAP”).¹⁷⁴ He was required to wear an ankle shackle,

¹⁶⁴ Nick Pinto, *No Sanctuary*, INTERCEPT (Jan. 19, 2018, 12:18 PM), <https://theintercept.com/2018/01/19/ice-new-sanctuary-movement-ravi-ragbir-deportation/>.

¹⁶⁵ Pinto, *supra* note 160.

¹⁶⁶ *Id.*

¹⁶⁷ Pinto, *supra* note 164.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Nick Pinto, *ICE Settles with Immigrant Rights Leader Who Sued Over First Amendment Violations*, INTERCEPT (Feb. 24, 2022, 12:27 PM), <https://theintercept.com/2022/02/24/ice-ravi-ragbir-deportation-first-amendment/>.

¹⁷¹ Pinto, *supra* note 164 (noting that NSC’s work builds off of an earlier movement led by religious congregations in the 1980s to counteract the draconian immigration policies of the Reagan administration by relying on the government’s reluctance to breach houses of worship).

¹⁷² Pinto, *supra* note 160.

¹⁷³ *See id.*

¹⁷⁴ *Id.*

check in with an ICE agent more frequently, and abide by a strict curfew.¹⁷⁵ At a check-in in December 2009, while Jean was being taken into custody and processed for deportation, an ICE agent commented that Jean was the “one complaining to the Village Voice.”¹⁷⁶ After he was released on bond, and “in an unusual step,” Christopher Shanahan, then-director of ICE’s New York Field Office, personally met with Jean and his attorney to tell Jean to keep his head down and lay low.¹⁷⁷ “This can’t happen again,” he said, referring to Jean’s public criticism of ICE’s practices.¹⁷⁸ For the next few years, Jean took Shanahan’s advice and withdrew from the spotlight.¹⁷⁹

Following the election of Donald Trump, however, fear grew that both Jean and Ravi would be targeted for deportation.¹⁸⁰ Those fears were well-founded. Despite seven years without incident, at his first check-in following Trump’s election, Jean was detained, fingerprinted, and required to turn over property.¹⁸¹ Even though he was ultimately released due to pressure from advocates, the message was clear to Jean: “[T]hey were trying to scare me.”¹⁸² ICE told Jean to check back in on January 16, 2018, but they never intended to keep that appointment.¹⁸³

Instead, ICE initiated a carefully choreographed plan to deport Jean by depriving him of his lawyers and access to the courts for just long enough to get him on a plane to Haiti.¹⁸⁴ In the early morning hours of January 3, 2018, nearly two weeks before his scheduled check-in, Jean was arrested outside of his home by plainclothes ICE agents.¹⁸⁵ At the local ICE office, Jean was denied access to his lawyer and then transferred to a detention center in New Jersey.¹⁸⁶ Meanwhile, ICE kept Jean’s lawyer in the dark about his whereabouts.¹⁸⁷ On January 5, when Jean’s lawyer spoke with Scott Mechkowski, then-deputy director of ICE’s New York Field Office, he was told that ICE had “war-gamed

¹⁷⁵ *Id.* (describing the deleterious effects of this intensive supervision on Jean’s health and well-being).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *See id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

this over and over,” referring to Jean’s arrest.¹⁸⁸ That same day, without telling Jean’s attorney, ICE moved Jean to Krome Detention Facility in Florida.¹⁸⁹ Within days, Jean had been deported to Haiti before his lawyer or a court could intervene.¹⁹⁰

On the same night Jean was taken into custody, members of Ravi’s defense committee spotted at least three unmarked vehicles idling on the block of Judson Memorial Church, where NSC typically organized its meetings and activities.¹⁹¹ Similar cars were seen idling outside of Ravi’s apartment building in Brooklyn.¹⁹² Ravi was under surveillance, and there was growing fear that ICE was attempting to deport him in the same secretive manner as they had Jean.¹⁹³ Two days after spotting the suspicious cars, on January 5, 2018, four clergy members affiliated with NSC met with Scott Mechkowski to discuss their concerns that ICE had been surveilling Judson Memorial Church.¹⁹⁴ At the meeting, Mechkowski commented: “The other day Jean [Montrevil] made some very harsh statements. . . . I’m like, ‘Jean, from me to you . . . *you don’t want to make matters worse by saying things.*’”¹⁹⁵ Without prompting, Mechkowski then brought up Ravi, saying that he was “bother[ed]” by Ravi’s public profile and critical statements of ICE.¹⁹⁶ He described Jean and Ravi as “the two most high-profile cases that ICE had in New York City.”¹⁹⁷ On January 8, 2018, while speaking with Ravi’s lawyer, Alina Das, Mechkowski once again expressed displeasure at Ravi’s public profile.¹⁹⁸

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Pinto, *supra* note 164.

¹⁹² *Id.* (noting that a defense committee member spotted a DHS license plate on the floorboard of one of the vehicles parked outside of Ravi’s apartment building).

¹⁹³ *Id.*

¹⁹⁴ *Ragbir v. Homan*, 923 F.3d 53, 60 (2d Cir. 2019), *rev’d on other grounds*, *Pham v. Ragbir*, 141 S. Ct. 227 (2020) (mem.); *see also* Pinto, *supra* note 164. In *Pham*, the Court vacated the judgment and remanded the case to the U.S. Court of Appeals for the Second Circuit for further consideration in light of *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020). *Pham*, 141 S. Ct. at 227.

¹⁹⁵ *Ragbir*, 923 F.3d at 60 (alteration in original).

¹⁹⁶ *Id.* (alteration in original) (“I read something that Ravi [Ragbir] wrote, [stating] ‘do you think it’s easy walking around with a target [on you]?’ [Mechowksi said]. [He] also stated that it ‘bother[ed]’ him that ‘there isn’t anybody in this entire building that doesn’t . . . know about Ravi. Everybody knows his case. No matter where you go’” (alteration in original) (citation omitted)).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* (noting that Mechkowski felt “resentment” about Ravi’s March 2017 check-in).

At Ravi's next scheduled check-in on January 11, 2018, NSC members were on high alert.¹⁹⁹ Hundreds of Ravi's supporters gathered outside of the immigration building in solidarity with Ravi.²⁰⁰ Inside, Mechkowski informed Ravi that ICE had decided that morning to enforce Ravi's removal order and deny his application for a renewed stay of removal.²⁰¹ Upon being taken into custody, Ravi fainted.²⁰² When word came down that ICE had chosen to detain and deport Ravi, "[f]riends, colleagues, clergy, and city council members put their bodies in front of the [EMT] vehicle" taking Ravi away.²⁰³ By that evening, Ravi had been rushed from the hospital to immigration detention centers in Manhattan and New Jersey to the Krome Detention Center in Florida, where he awaited deportation to Trinidad.²⁰⁴ Ravi's counsel intervened immediately by filing a petition for a writ of habeas corpus in the Southern District of New York, which the district court granted on January 29, 2018.²⁰⁵ Ravi was released that same day.²⁰⁶

A week later, on February 9, 2018, Ravi, the New Sanctuary Coalition, and its organizational partners filed a civil rights lawsuit alleging violations of his First Amendment right to engage in protected speech.²⁰⁷ The lower court dismissed Ravi's claim for lack of subject-matter jurisdiction.²⁰⁸ The court concluded that 8 U.S.C. § 1252(g) stripped the court of jurisdiction over all claims challenging the validity of final orders of removal, even claims brought under the U.S. Constitution.²⁰⁹

On appeal, the U.S. Court of Appeals for the Second Circuit agreed with the district court that the government's conduct fell within the jurisdictional limitations of section 1252(g).²¹⁰ However, it found that the court retained

¹⁹⁹ See Pinto, *supra* note 164.

²⁰⁰ *Id.*

²⁰¹ *Ragbir*, 923 F.3d at 60 (further noting that Ravi had a current stay of removal at the time he was taken into custody, and only later did ICE inform Ravi and his counsel that it had rescinded the current stay).

²⁰² Pinto, *supra* note 164.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Ragbir*, 923 F.3d at 60–61.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 61 (stating that Ravi sought declaratory and injunctive relief to prevent the government from executing its removal order against him on the basis of his protected speech).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 61–62 (noting that district court's reasoning that 8 U.S.C. § 1252(g) "applies to 'any cause or claim' and applies 'notwithstanding any other provision of law (statutory or nonstatutory),' including 'any . . . other habeas corpus provision'" (quoting 8 U.S.C. § 1252(g))).

²¹⁰ *Id.* at 64.

jurisdiction under the Suspension Clause of the U.S. Constitution.²¹¹ Following Supreme Court precedent, the appellate court held that under the Suspension Clause, absent a formal suspension of the writ of habeas corpus, individuals in custody must be given either an “adequate substitute” to the writ or the writ itself “to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty.”²¹² Finding that there was no adequate substitute and that Ravi was in executive custody as an individual facing imminent deportation,²¹³ the court held that Ravi was entitled to the constitutional minimum scope of the writ of habeas corpus, which included review of his First Amendment claims.²¹⁴

The court further found that Ravi had pled a cognizable First Amendment claim.²¹⁵ Despite the government’s contention that *AADC* foreclosed Ravi’s claim, the court noted that the Supreme Court’s decision in *AADC* explicitly “declined to ‘rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome.’”²¹⁶ Turning to various factors for identifying outrageous discrimination, the court found that Ravi’s advocacy “implicates the apex of protection under the First Amendment” because it “is at the heart of current political debate among American citizens and other residents.”²¹⁷ Likewise, the government’s retaliation against Ravi was egregious in the eyes of the court.²¹⁸ ICE “singled him out for deportation based not only on the viewpoint of his political speech, but on the public attention it received.”²¹⁹ The court stated that allowing such retaliation to proceed would “broadly chill protected speech, among not only activists subject to final orders of deportation but also those

²¹¹ *Id.* at 73.

²¹² *Id.* (first quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 314 (2001); and then quoting *Boumediene v. Bush*, 553 U.S. 723, 787 (2008)).

²¹³ *Id.* at 75–76 (“If Ragbir were currently in the Government’s physical confinement or had already been deported, that Ragbir would be in custody is obvious. But that he has not been deported is not for a lack of effort on the part of the Government, which detained Ragbir without notice in January 2018 and sent him to Florida, where he was detained for weeks in anticipation of deporting him.” (footnote omitted)).

²¹⁴ *Id.* at 78–79.

²¹⁵ *Id.* at 69.

²¹⁶ *Id.* at 67–69 (quoting *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491–92 (1999)) (“*AADC* compels courts to evaluate the gravity of the constitutional right affected; the extent to which the plaintiff’s conduct or status that forms the basis for the alleged discrimination is actually protected; the egregiousness of the Government’s alleged conduct; and the plaintiff’s interest in avoiding selective treatment, as balanced against the Government’s discretionary prerogative.”).

²¹⁷ *Id.* at 69–70 (describing Ravi’s speech as “core political speech” that “trenches upon an area in which the importance of the First Amendment is *at its zenith*.” (quoting *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988))).

²¹⁸ *See id.* at 70.

²¹⁹ *Id.*

citizens and other residents who would fear retaliation against others.”²²⁰ Taken together, the government’s egregious retaliation against Ravi for exercising core political speech fell under “the ‘outrageous[ness]’ exception to *AADC*.”²²¹

In February 2022, Ravi agreed to settle his lawsuit against ICE in exchange for a three-year deferral of his deportation.²²² Under the terms of the agreement, the government did not have to admit to any wrongdoing.²²³ Although Ravi’s claims were not vindicated in court, Ravi and his defenders believed that the settlement was nonetheless a victory that, in the words of one of Ravi’s attorneys, served “as a warning to ICE and other public officials that they cannot abuse their powers by retaliating against those who speak out against them, and that if they do there are those . . . who will fight back.”²²⁴

In January 2020, following the Second Circuit’s favorable ruling in Ravi’s case, Jean and his lawyers filed a petition for a writ of habeas corpus, alleging that his deportation was carried out in retaliation for his political speech and seeking his return to the United States.²²⁵ In October 2021, Jean was granted a ninety-day humanitarian parole to reenter the United States and reunite with his family.²²⁶ Soon after, in December 2021, Jean, like Ravi, settled his First Amendment lawsuit with ICE in exchange for three years of deferred action.²²⁷ Jean’s attorney, Alina Das, described the settlement as a testament to the power of organizing, which “brought the government to the negotiating table and gave [them] this possibility.”²²⁸

²²⁰ *Id.* at 71.

²²¹ *Id.* (alteration in original).

²²² Pinto, *supra* note 170.

²²³ *Id.*

²²⁴ *Id.* (quoting one of Ravi’s lawyers, William Purdue).

²²⁵ See Stipulation and Order of Voluntary Dismissal at 1–2, *Montrevil v. Decker*, No. 20-cv-264 (E.D.N.Y. Dec. 15, 2021); see also Pinto, *supra* note 160.

²²⁶ See Deanna Garcia, *Immigrant Activist Jean Montrevil Comes Home to NY for 90-Days Parole*, DOCUMENTED (Oct. 20, 2021), <https://documentedny.com/2021/10/20/immigrant-activist-jean-montrevil-comes-home-to-ny-for-90-day-parole/>; “*Second Chance*”: *Deported to Haiti, Immigrant Activist Jean Montrevil Returns to the U.S. on Special Parole*, DEMOCRACY NOW! (Oct. 19, 2021), https://www.democracynow.org/2021/10/19/jean_montrevil_haiti_deportation_fight; see also Joel Rose, *Deported Activists Allowed Back into the U.S., Saying ICE Retaliated Against Them*, NPR (Dec. 14, 2021), <https://www.npr.org/2021/12/14/1064221041/deported-activists-allowed-back-into-the-u-s-saying-ice-retaliated-against-them> (noting that Jean was among several deported activists granted parole to return to the United States).

²²⁷ Stipulation and Order of Voluntary Dismissal at 3, *Montrevil v. Decker*, No. 20-cv-264 (E.D.N.Y. Dec. 15, 2021).

²²⁸ “*A Big Relief*”: *Haitian Immigrant Rights Leader Jean Montrevil Wins Victory in Fight to Stay in U.S.*, DEMOCRACY NOW! (Dec. 20, 2021), https://www.democracynow.org/2021/12/20/jean_montrevil_granted_deferred_action.

Despite the settlements in Jean and Ravi's cases, deferred action reflects a temporary reprieve from an ever-churning deportation system.²²⁹ Without permanent legal status or any pathway to citizenship, Jean and Ravi remain in limbo and under the threat of imminent deportation.²³⁰

2. *Enrique Balcazar, Zully Palacios Rodriguez, and Members of Migrant Justice*

Migrant Justice, a grassroots organization operating in Vermont, has fought for the rights of 1,500 migrant farm workers in Vermont.²³¹ For the past decade, Migrant Justice's advocacy has focused on bettering labor conditions at local dairy farms, advocating for changes in employment law related to collection of unpaid wages, and securing back wages through its Workers' Rights Hotline.²³² Migrant Justice also led the Milk with Dignity Campaign, "a farmworker-driven initiative to improve conditions in dairy supply chains," which culminated with Ben & Jerry's formal commitment to recognize the rights of migrant farm workers.²³³

As early as 2011, members of Migrant Justice were being targeted and surveilled by ICE.²³⁴ Shortly after Migrant Justice launched its first campaign against ICE that year against its collaboration with local law enforcement under the Secure Communities Program, one of its members, Danilo Lopez, was arrested by Vermont state police and handed over to ICE.²³⁵ In response, Migrant Justice organized against Danilo's detention and prompted independent investigations by the Governor of Vermont and the Vermont Human Rights Commission.²³⁶ Those investigations found a discriminatory motive behind his arrest.²³⁷ Despite Vermont expanding its anti-bias policing policy and its collection of roadside stop data in the intervening years, another Migrant Justice

²²⁹ See *id.* (Jean Montrevil: "[T]he case is not over yet. This is just a temporary three years, and then we have to file, go to the BIA and then get permanent status.").

²³⁰ See *id.*

²³¹ *About Migrant Justice*, MIGRANT JUST., <https://migrantjustice.net/> (last visited Jan. 17, 2023).

²³² Complaint at 6, *Migrant Just. v. Nielsen*, No. 5:2018-cv-00192 (D. Vt. Nov. 14, 2018).

²³³ *Id.*

²³⁴ *Id.* at 7.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *VT Human Rights Commission Unanimously Finds State Police Discriminated Against Daniel Alejandro, Lopez-Santiago During September Traffic Stop*, MIGRANT JUST. (Dec. 1, 2011), <https://migrantjustice.net/node/130>.

member was traffic stopped by a county deputy and turned over to ICE in February 2015.²³⁸

By March 2017, ICE had begun a “full-scale campaign to infiltrate and debilitate Migrant Justice.”²³⁹ ICE agents enlisted at least one civilian informant, whom they subsequently relied on to arrest Enrique and Zully.²⁴⁰ The informant’s text messages revealed that ICE knew that to “strike a blow” against Migrant Justice, they needed to target Enrique as a member who was “very outspoken” and that ICE had been surveilling Zully’s home for many weeks as part of a plan to arrest and deport her.²⁴¹ ICE had also begun colluding with the state DMV to obtain private information about Enrique in violation of state law.²⁴² These surveillance operations fell well beyond any “legitimate immigration enforcement practice.”²⁴³

On March 17, 2017, after leaving a Migrant Justice meeting together, Enrique and Zully were boxed in by three unmarked cars.²⁴⁴ Plainclothes officers ordered them to step out of their vehicle without first identifying themselves.²⁴⁵ One ICE agent unbuckled Zully from her seat “and physically removed her from the vehicle.”²⁴⁶ During their arrest, ICE agents made repeated reference to their affiliation with Migrant Justice.²⁴⁷ The agents forbade them from contacting Migrant Justice and warned that if they did make contact, “it will be worse for you.”²⁴⁸ When Enrique was brought to the detention center, the ICE agent told the prison officials that he had brought them “a famous person.”²⁴⁹ Both Enrique and Zully, like Jean and Ravi, had been classified as “high-profile cases” by the local ICE office.²⁵⁰

²³⁸ Complaint at 8, *Migrant Just. v. Nielsen*, No. 5:2018-cv-00192 (D. Vt. Nov. 14, 2018).

²³⁹ First Amended Complaint at 13, *Migrant Just. v. Nielsen*, No. 5:2018cv00192 (D. Vt. Feb. 7, 2019).

²⁴⁰ *Id.*

²⁴¹ *Id.* at 14 (quoting text messages sent by the informant to a trusted acquaintance).

²⁴² *Id.* at 15 (noting that DMV officials transmitted Enrique’s application for a Driver Privilege Card, a “biographic page,” copies of identification documents, the make and model of Enrique’s car, and his license plate number).

²⁴³ *See id.* at 13.

²⁴⁴ *Id.* at 15–16.

²⁴⁵ *Id.* at 16.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 17.

By early 2019, more than twenty members of Migrant Justice, including Enrique and Zully, had been arrested and detained by ICE.²⁵¹ In some arrests, ICE prepared Form I-213 as part of those members' removal cases, specifically mentioning the members' affiliation with Migrant Justice.²⁵² During the arrests and interrogation of the detained members, ICE spread misinformation about Migrant Justice, told arrestees that fellow Migrant Justice members would be the "next" to go, and continued detaining members despite the fact that they were not enforcement priorities under the government's internal policies.²⁵³

Federal immigration officials were clearly retaliating against Migrant Justice members for their political organizing. With each arrest and revealed instance of surveillance, Migrant Justice members developed "a ubiquitous sentiment of being watched."²⁵⁴ ICE's unlawful targeting exerted a considerable chilling effect on Migrant Justice's ability to organize. Concerned that ICE had infiltrated private meetings, as well as public marches and protests, Migrant Justice had to limit its programming.²⁵⁵ Many Migrant Justice members began to hesitate whether to join rallies; others developed "anxiety, difficulty sleeping . . . , and a sense of dread and paranoia."²⁵⁶ Strikingly, Migrant Justice organizers observed that "[t]he closer in time to a recent arrest or detention an assembly or event was planned, the lower the attendance."²⁵⁷

In February 2019, Migrant Justice filed suit against federal immigration officials, alleging violations of their First Amendment rights, and against the state Department of Motor Vehicles ("DMV"), alleging a violation of the Equal Protection Clause.²⁵⁸ Days before the November 2020 election, the Trump Administration agreed to settle Migrant Justice's lawsuit.²⁵⁹ Per the agreement, DHS agreed to pay \$100,000 in monetary damages, grant deferred action to

²⁵¹ *Id.* at 9.

²⁵² *Id.* at 10.

²⁵³ *Id.* at 11–12.

²⁵⁴ *Id.* at 21.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 22.

²⁵⁷ *Id.* at 23.

²⁵⁸ *Id.* at 35–37. Migrant Justice also alleged that DHS and the state DMV committed several tort violations, including invasion of privacy, intentional infliction of emotional distress, and false imprisonment. *Id.* at 37–39.

²⁵⁹ Stipulation for Compromise Settlement and Release and Dismissal with Prejudice of All Claims in this Action at 2, *Migrant Just. v. Wolf*, No. 5:18-cv-192 (D. Vt. Oct. 28, 2020); *see also* *Migrant Justice Settles Lawsuit*, *infra* note 261.

named plaintiffs including Zully and Enrique for five years, and terminate their immigration proceedings.²⁶⁰

This settlement was an important victory for not only Migrant Justice, but immigrants' rights groups across the country that had faced targeting. It signaled a path forward. "We want this to become a precedent so that other groups and community leaders can organize without fear of retaliation," as Enrique expressed, "[b]ecause fear is not an option for our communities."²⁶¹

Despite the settlement and the absence of overt retaliation, members of Migrant Justice continue to face detention and deportation.²⁶² Ten Migrant Justice members who were instrumental in the development of Milk with Dignity and other Migrant Justice-led campaigns have filed a petition with ICE to close their deportation cases and allow them to remain in the country.²⁶³ In circumstances similar to previously targeted Migrant Justice members, the Migrant Justice Ten ended up in immigration detention after being subjected to a traffic stop or running routine errands.²⁶⁴ Despite being released on bond, the members remain under ICE supervision and face imminent deportation.²⁶⁵ As Migrant Justice spokesperson Thelma Gomez noted at the time of the settlement, "ICE's abuses did not start under th[e] [Trump] administration and they won't end next week, whoever wins the election," referring to the November 2020 election.²⁶⁶

3. *Maru Mora Villalpando and Members of La Resistancia*

Maru Mora Villalpando organized hunger strikes outside of the Northwest Detention Center ("NWDC") in Tacoma, Washington, for many years.²⁶⁷ Maru

²⁶⁰ Stipulation for Compromise Settlement and Release and Dismissal with Prejudice of All Claims in this Action at 3, *Migrant Just. v. Wolf*, No. 5:18-cv-192 (D. Vt. Oct. 28, 2020).

²⁶¹ Press Release, Migrant Just., *Migrant Justice Settles Federal Lawsuit on ICE Retaliation* (Oct. 27, 2020, 4:04 PM) [hereinafter *Migrant Justice Settles Lawsuit*], <https://migrantjustice.net/MJ-v-ICE-Settlement-PR>.

²⁶² See Press Release, Migrant Just., *Stop the Deportation of the "Migrant Justice 10"* (June 21, 2022, 2:59 PM), <https://migrantjustice.net/news/press-release-stop-the-deportations-of-the-migrant-justice-10/>.

²⁶³ *Id.*

²⁶⁴ *See id.*

²⁶⁵ *Id.*

²⁶⁶ *Migrant Justice Settles Lawsuit*, *supra* note 261.

²⁶⁷ Joel Rose, *Immigrant Activists Say ICE Is Purposefully Targeting Them. They're Urging Biden to Help*, NPR (Aug. 4, 2021, 4:20 PM), <https://www.npr.org/2021/08/04/1024348198/immigrant-activists-ask-biden-administration-to-ban-ice-from-retaliating-against>. NWDC, a for-profit prison run by GEO Group, was renamed Northwest ICE Processing Center in 2019. See, e.g., Maru Mora Villalpando & Megan Ybarra, *ICE Rebranded the Tacoma Detention Center. It's Still Inhumane*, CROSSCUT (Sept. 24, 2019, 9:43 AM), <https://crosscut.com/2019/09/ice-rebranded-tacoma-detention-center-its-still-inhumane/>; Paula Cornell, *In*

was one of the co-founders of La Resistancia, a grassroots collective in Washington state that has worked to end the detention of immigrants and to stop deportations.²⁶⁸ Under her stewardship and the collective organizing of its members, La Resistancia achieved significant protections for immigrant communities, including the passage of House Bill 1090, which is expected to lead to the closure of NWDC.²⁶⁹ However, by 2017, Maru had come to the attention of ICE and was issued a Notice to Appear.²⁷⁰

Maru's targeting was a coordinated plot.²⁷¹ Various records—including those obtained through the Freedom of Information Act (“FOIA”), produced through litigation, and even forms entered in Maru's immigration file—revealed that ICE's decision to place Maru in removal proceedings was an act of retaliation for her organizing against NWDC.²⁷² One internal email between Bryan Wilcox, Deputy Field Director of ICE's Enforcement and Removal Operations in Seattle, and Marc J. Moore contained links to Maru's work and described her and others as “instigators of all the turmoil surrounding the NWDC for the past several years.”²⁷³ Wilcox went on to suggest that “[placing Maru] into proceedings might actually take away some of her ‘clout.’”²⁷⁴ The Form I-213 prepared as part of Maru's removal proceedings referenced her “involvement in anti-ICE protests.”²⁷⁵ Documents obtained through FOIA further revealed that ICE had “sought sensitive personal information about Maru from the Washington State Department of Licensing in violation of state law.”²⁷⁶ ICE had also “bought additional data about Maru from data brokers” to aid in their surveillance operation.²⁷⁷ The explicit targeting of Maru was part of a wider pattern of ICE retaliating against individuals organizing with La Resistancia, particularly immigrants detained at NWDC.²⁷⁸

Tacoma, an ICE Detainee's Hunger Strike Tops 100 Days, S. SEATTLE EMERALD (Mar. 26, 2021), <https://southseattleemerald.com/2021/03/26/in-tacoma-an-ice-detainees-hunger-strike-tops-100-days/>.

²⁶⁸ Rose, *supra* note 267.

²⁶⁹ Adriana Hernandez, *Governor Inslee Signs Bill Banning For-Profit Detention into Law*, COLUM. L. SERVS. (Apr. 14, 2021), <https://columbialegal.org/governor-inslee-signs-bill-banning-for-profit-detention-into-law/>.

²⁷⁰ TAKE BACK TECH FELLOWS ET AL., *supra* note 27, at 11.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* (alteration in original).

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *See id.* at 12.

In October 2018, La Resistancia and the Coalition of Anti-Racist Whites filed a federal complaint, claiming violations of the First Amendment, Due Process Clause, the Equal Protection Clause, and the Administrative Procedure Act.²⁷⁹ They alleged ICE had been engaged in a “pattern and practice of selectively enforcing immigration laws against outspoken immigrant rights activists who publicly criticize U.S. immigration law, policy, and enforcement.”²⁸⁰ ICE had harassed, surveilled, and detained organizers “immediately following press appearances and news conferences,” “detained spokespeople and directors of immigrant advocacy organizations,” and “surveilled the organizations’ headquarters and targeted their members.”²⁸¹

Since taking office, the Biden Administration has sought to prevent the fair adjudication of La Resistancia’s claims and insisted that retaliation against its organizers is moot.²⁸² Although the government dropped its deportation case against Maru and granted her lawful permanent residency in September 2021,²⁸³ the government has insisted in court that retaliation against La Resistancia organizers cannot reasonably be expected to recur because of revised enforcement guidelines that “expressly prohibited” its officers from using “a noncitizen’s exercise of their First Amendment rights as a factor in deciding to take enforcement actions.”²⁸⁴ Since First Amendment rights are “entrenched,” the government insisted that there is “no indication that any Secretary would ever rescind the prohibition on initiating enforcement action based on the exercise of free speech.”²⁸⁵

In a June 2022 decision, the district court denied the government’s motion, questioning whether the Mayorkas guidelines even amount to a new policy at all.²⁸⁶ As La Resistancia highlighted in court, DHS under the Trump Administration had previously issued guidance in May 2019, claiming that the

²⁷⁹ NWDC Resistance v. Immigr. & Customs Enf’t, No. C18–5860JLR, 2022 U.S. Dist. LEXIS 103397, at *2–3 (W.D. Wash. June 9, 2022).

²⁸⁰ *Id.* at *2.

²⁸¹ *Id.* at *2–3.

²⁸² See Alyssa Aquino, *Biden’s ICE Curbs Can’t Moot Immigrant Activists’ Speech Suit*, LAW360 (June 9, 2022, 8:01 PM), <https://www.law360.com/articles/1501431/biden-s-ice-curbs-can-t-moot-immigrant-activists-speech-suit>.

²⁸³ Nina Shapiro, *Government Drops Deportation Case Against Washington State Immigration Activist*, SEATTLE TIMES (Sept. 21, 2021, 6:17 PM), <https://www.seattletimes.com/seattle-news/government-drops-deportation-case-against-immigration-activist-maru-mora-villalpando/>.

²⁸⁴ NWDC Resistance, 2022 U.S. Dist. LEXIS at *10 (quoting the new Mayorkas Guidelines); see also Mayorkas Memo, *supra* note 21, at 5.

²⁸⁵ NWDC Resistance, 2022 U.S. Dist. LEXIS at *15.

²⁸⁶ *Id.* at *15, *17.

agency “does not profile, target, or discriminate against any individual for exercising his or her First Amendment rights.”²⁸⁷ Yet the pronouncement of enforcement priorities had no meaningful change on the ground.²⁸⁸ The court found it “questionable whether the [Mayorkas] guidelines set a new policy governing the use of noncitizens’ protected speech in making immigration enforcement positions.”²⁸⁹

Even assuming the Mayorkas guidelines amounted to a change in policy, the court further recognized that the government had not met its “heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again.”²⁹⁰ A defendant’s voluntary cessation of the challenged conduct can moot a case “if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.”²⁹¹ Where a government entity is arguing that a voluntary policy change that is not reflected in statute or regulation meets this standard, it must persuade the court that a change in its behavior is “‘entrenched’ or ‘permanent.’”²⁹²

To evaluate whether this heavy burden was met, the court applied a “loose framework” of non-exhaustive considerations under controlling Ninth Circuit precedent.²⁹³ Under these factors, the court first concluded that the government’s purported policy change was “not ‘evidenced by language that is broad in scope and unequivocal in tone.’”²⁹⁴ In fact, the sole reference to First Amendment rights was a “sentence within a paragraph.”²⁹⁵ Second, the Mayorkas guidelines

²⁸⁷ *Id.* at *12.

²⁸⁸ See John Burnett, *Immigration Advocates Warn ICE Is Retaliating for Activism*, NPR (Mar. 16, 2018, 10:29 AM), <https://www.npr.org/2018/03/16/593884181/immigration-advocates-warn-ice-is-retaliating-for-activism>.

²⁸⁹ *NWDC Resistance*, 2022 U.S. Dist. LEXIS at *12.

²⁹⁰ *Id.* at *17 (quoting *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014)).

²⁹¹ *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Exp. Ass’n, Inc.*, 393 U.S. 199, 203 (1968)).

²⁹² *NWDC Resistance*, 2022 U.S. Dist. LEXIS at *9 (quoting *Am. Diabetes Ass’n v. U.S. Dep’t of the Army*, 938 F.3d 1147, 1153 (9th Cir. 2019)).

²⁹³ *Id.* at *9 (quoting *Am. Diabetes Ass’n*, 938 F.3d at 1153). These considerations include:

- (1) whether “the policy change is evidenced by language that is ‘broad in scope and unequivocal in tone’”; (2) whether the new policy “addresses all of the objectionable measures that [agency] officials took against the plaintiffs” under the old policy; (3) whether the case at issue “was the catalyst for the agency’s adoption of the new policy”; (4) whether “the policy has been in place for a long time”; and (5) whether, “since the [new policy’s] implementation[,] the agency’s officials have not engaged in conduct similar to that challenged by the plaintiff.”

Id. at *9–10 (alterations in original) (quoting *Rosebrock*, 745 F.3d at 972).

²⁹⁴ *Id.* at *13 (quoting *Rosebrock*, 745 F.3d at 972).

²⁹⁵ *Id.*

“do not mention, much less ‘address[.]’” the retaliatory conduct that the government undertook against La Resistancia’s members under its prior policies.²⁹⁶ Third, the government conceded that La Resistancia’s case “was not ‘the catalyst for the agency’s adoption of the new policy.’”²⁹⁷ Fourth, the Mayorkas guidelines had been in effect for only six months, whereas, in contrast, mootness has been favored where the changed policy had been in effect “for a period of years.”²⁹⁸ Lastly, and most notably, the government had failed to show that ICE officials have not engaged in retaliatory conduct since the Mayorkas guidelines were implemented.²⁹⁹ The court’s ruling was an important public acknowledgement that, in spite of a change in administration and shift in policymaking, retaliation against the immigrants’ rights movement remains a present danger to the movement and to democracy at large.

C. *Immigrants in Detention*

“It was six officers against one unarmed man. . . . But we couldn’t do anything. We thought that if we said anything more, they would torture us as well. . . . We didn’t feel safe before, but we knew we weren’t safe after that. The officers have so much control over us. I am fearful of my life.”

- *Andres*³⁰⁰

Immigration detention in the United States was born out of an anti-Black³⁰¹ response to the mass migration of Afro-Indigenous Haitians who were fleeing destabilization and violence perpetrated by the authoritarian, U.S.-backed

²⁹⁶ *Id.* at *14 (alteration in original) (citing *Rosebrock*, 745 F.3d at 972).

²⁹⁷ *Id.* at *15.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ Letter from Catholic Charities Cmty. Servs., Envision Freedom Fund, For the Many, Freedom for Immigrants, Immigrants Rts. Clinic & N.Y. Laws. for the Pub. Int., to Katherine Culliton-González, Officer, Office of C.R. & C.L., U.S. Dep’t of Homeland Sec., Joseph V. Cuffari, Inspector Gen., U.S. Dep’t of Homeland Sec. & David Gersten, Ombudsman, U.S. Dep’t of Homeland Sec., on Racist and Retaliatory Abuse, Violence, and Medical Neglect Endured by Individuals Detained at Orange County Correctional Facility 6 (Feb. 17, 2022) [hereinafter Letter on Racist and Retaliatory Abuse, Violence, and Medical Neglect] (second alteration in original), https://www.law.nyu.edu/sites/default/files/OCCF%20Multi-Organization%20DHS%20CRCL%20Complaint%20and%20Index_2%2017%202022.pdf.

³⁰¹ Anti-Blackness is defined as “[b]ehaviors, attitudes and practices of people and institutions that work to dehumanize black people in order to maintain white supremacy.” *Terms and Definitions*, AMHERST COLL., <https://www.amherst.edu/campuslife/our-community/multicultural-resource-center/additional-resources/terms-and-definitions>.

Duvalier regime.³⁰² Under the Carter administration's Haitian Program, Haitians were cast as "criminals, unskilled, diseased, and poor."³⁰³ They were detained indefinitely, denied asylum, and deported in expedited removal proceedings.³⁰⁴ Then, beginning with the H.W. Bush administration, the federal government implemented an interdiction policy, in which the U.S. Coast Guard was weaponized to intercept boats of fleeing Haitians in international waters, and in the 1990s, transport them to a makeshift internment camp at Guantanamo Bay, Cuba.³⁰⁵ Those who made it to the United States were subject to mandatory detention upon arrival.³⁰⁶ Of the thousands of Haitians held at Guantanamo, the immigration authority at the time determined that only three hundred were "bona fide" refugees who must be granted asylum.³⁰⁷ These anti-Black immigration policies served as a "forewarning [for] today's detention center expansion."³⁰⁸ Much like the prevention-through-deterrence policies at the border, the mass detention and deportation of Haitians was justified as, in the words of then-Attorney General William French Smith, "necessary to discourage people like the Haitians from setting sail in the first place."³⁰⁹

Beginning with the Clinton Administration, enforcement of immigration laws became inextricably linked to the criminal legal system through political rhetoric, which stressed the moral purity of productive and "legal" immigrants against the "criminal" and "illegal" immigrants.³¹⁰ Motivated by this contrived dichotomy, the federal government passed a series of laws in 1996 that expanded

³⁰² See WALIA, *supra* note 86, at 47 (noting that while Vietnamese refugees and mostly white, anti-Castro Cubans were characterized as fleeing despotic regimes and openly welcomed, Haitians seeking refuge in the United States were vilified and rejected).

³⁰³ Fabiola Cineas, *Why America Keeps Turning Its Back on Haitian Migrants*, VOX (Sept. 24, 2021, 2:40 PM), <https://www.vox.com/22689472/haitian-migrants-asylum-history-violence>.

³⁰⁴ See Carl Linskoog, *Violence and Racism Against Haitian Migrants Was Never Limited to Agents on Horseback*, WASH. POST (Sept. 30, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/10/02/violence-racism-against-haitian-migrants-was-never-limited-horseback-riders/>.

³⁰⁵ A. Naomi Paik, *U.S. Turned Away Thousands of Haitian Asylum-Seekers and Detained Hundreds More in the 90s*, CONVERSATION (June 28, 2018, 6:39 AM), <https://theconversation.com/us-turned-away-thousands-of-haitian-asylum-seekers-and-detained-hundreds-more-in-the-90s-98611> (noting that at its peak, Guantanamo held more than 12,000 Haitians).

³⁰⁶ WALIA, *supra* note 86, at 48.

³⁰⁷ Paik, *supra* note 305.

³⁰⁸ WALIA, *supra* note 86, at 48.

³⁰⁹ MARK DOW, *AMERICAN GULAG INSIDE U.S. IMMIGRATION PRISONS 7* (Univ. of Cal. Press 2004) (quoting William French Smith).

³¹⁰ See Dara Lind, *The Disastrous, Forgotten 1996 Law that Created Today's Immigration Problem*, VOX (Apr. 28, 2016, 8:40 AM), <https://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration> (discussing "felons, not families" political rhetoric).

the category of criminal convictions that carried immigration consequences.³¹¹ Under the new laws, the government allowed for the detention and deportation of permanent residents with minor convictions resulting from the government's racially motivated "war on drugs" and stop-and-frisk policing.³¹² It also implemented expedited removal with limited due process and judicial oversight, imposed criminal penalties for unauthorized entry, and made detention mandatory for certain convictions.³¹³ In 1996, the number of noncitizens that were forcibly removed increased by 37%, and between 1996 and 2007, deportations more than quadrupled.³¹⁴ Mass detention and deportation had become normalized.³¹⁵

Since its inception, the immigration detention apparatus has been the locus of human degradation.³¹⁶ With the unchecked growth of immigration detention in the past two decades, this abuse has proliferated with impunity.³¹⁷ Today, immigration detention centers are notorious for medical neglect, unsanitary conditions, and physical abuse, among other civil and human rights violations,

³¹¹ *Id.* The Antiterrorism and Effective Death Penalty Act ("AEDPA") and Illegal Immigration Reform and Immigration Responsibility Act ("IIRIRA"), passed in 1996, invented modern immigration enforcement, with deportation being wielded as "a constant and plausible threat to millions of immigrants." *See id.*

³¹² *See Stop Criminalizing Communities of Color in the United States*, CHURCH & SOC'Y, <https://www.umcjustice.org/who-we-are/social-principles-and-resolutions/stop-criminalizing-communities-of-color-in-the-united-states-3379> (last visited Jan. 16, 2023). *See generally* German Lopez, *Nixon Official: Real Reason for the Drug War Was to Criminalize Black People and Hippies*, VOX, <https://www.vox.com/2016/3/22/11278760/war-on-drugs-racism-nixon> (Mar. 23, 2016, 6:05 PM) (describing how the disproportionate arrests and convictions of Black Americans during the war on drugs was a goal and "not an unintended consequence"); Ashley Southhall & Michael Gold, *Why 'Stop and Frisk' Policing Inflamed Black and Hispanic Neighborhoods*, N.Y. TIMES (Nov. 17, 2019), <https://www.nytimes.com/2019/11/17/nyregion/bloomberg-stop-and-frisk-new-york.html> (explaining that broad police discretion under stop-and-frisk policies resulted in officers "targeting mostly black and Latino boys and men").

³¹³ *See* LOREN SIEGEL, REPORT: THE WAR ON DRUGS MEETS IMMIGRATION 3 (2021), https://uprootingthedrugwar.org/wp-content/uploads/2021/02/uprooting_report_PDF_immigration_02.11.21.pdf.

³¹⁴ Susan Bibler Coutin, *Exiled by Law: Deportation and the Inviability of Life*, in *THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT* 351, 357–58, 358 tbl.1 (Nicholas De Genova & Nathalie Peutz eds., 2010).

³¹⁵ The United States has the largest civil immigration detention system in the world. *See* Emily Kassie, *How the U.S. Built the World's Largest Immigration Detention System*, GUARDIAN (Sept. 24, 2019, 6:39 PM), <https://www.theguardian.com/us-news/2019/sep/24/detained-us-largest-immigrant-detention-trump>; *see also* Gretchen Gavett, *Map: The U.S. Immigration Detention Boom*, FRONTLINE (Oct. 18, 2011), <https://www.pbs.org/wgbh/frontline/article/map-the-u-s-immigration-detention-boom/>.

³¹⁶ At the Haitian camps at Guantanamo, for example, the medical clinic—staffed by only two doctors and five nurses—could just barely provide basic care, leaving refugees with AIDS in fatal risk. Paik, *supra* note 305.

³¹⁷ *See id.*

in contravention of domestic and international law.³¹⁸ ICE has a set of minimum detention standards that are, in theory, intended to promote the safety of people forced into ICE custody.³¹⁹ In reality, the standards are often unclear, inconsistently applied, and altogether ignored.³²⁰ An investigative report uncovered that in at least 175 cases, detention centers received waivers to ignore ICE's standards.³²¹

From the early days of mass immigration detention, immigrants faced with the depravity of human caging have collectively organized in resistance.³²² In the tradition of Black people organizing against mass criminal incarceration, immigrants have put their bodies on the line to forge well-being, participating in hunger strikes, sit-ins, and other forms of collective demonstration.³²³ In 1993,

³¹⁸ See generally EUNICE HYUNYE CHO, TARA TIDWELL CULLEN & CLARA LONG, JUSTICE FREE ZONES: U.S. IMMIGRATION DETENTION UNDER THE TRUMP ADMINISTRATION 51, 56–57, https://www.hrw.org/sites/default/files/supporting_resources/justice_free_zones_immigrant_detention.pdf (last visited Jan. 16, 2023) (describing how detainees suffer abuse and racist speech by staff and often wait months for medical attention and subsequent check-ups for injuries); *Praying for Hand Soap and Masks*, PHR (Jan. 12, 2021), <https://phr.org/our-work/resources/praying-for-hand-soap-and-masks/> (detainee-interviewees described how ICE failed to mitigate the spread of COVID-19 within detention camps); *UN Rights Chief 'Appalled' by US Border Detention Conditions, Says Holding Migrant Children May Violate International Law*, UN NEWS (July 8, 2019), <https://news.un.org/en/story/2019/07/1041991> (describing how children's lack of access to adequate food and healthcare affects their development).

³¹⁹ See *ICE Detention Standards*, ICE (Nov. 9, 2021), <https://www.ice.gov/factsheets/facilities-pbnds>.

³²⁰ See Special to Boderzine, *ICE Not Following Its Own Rules in Care and Feeding of Detainees, Lawsuit Says*, BORDERZINE (Aug. 23, 2018), <https://borderzine.com/2018/08/ice-not-following-its-own-rules-in-care-and-feeding-of-detainees-lawsuit-says/> (ICE standards require that hot meals are served hot, and that staff accommodate religious and dietary requirements, but detainees are served spoiled foods and denied alternative meals).

³²¹ Monsy Alvarado, Ashley Balcerzak, Stacey Barchenger, Jon Campbell, Rafael Carranza, Maria Clark, Alan Gomez, Daniel Gonzalez, Trevor Hughes, Rick Jervis et al., *Death in Custody. Sexual Violence. Hunger Strikes. What We Uncovered Inside ICE Facilities Across the US*, USA TODAY NEWS (Dec. 19, 2018, 9:45 PM), <https://www.usatoday.com/in-depth/news/nation/2019/12/19/ice-asylum-under-trump-exclusive-look-us-immigration-detention/4381404002/>.

³²² Cf. Subhash Kateel, *Winning the Fight of Our Lives*, in BEYOND WALLS AND CAGES: PRISONS, BORDERS, AND GLOBAL CRISIS 337, 343 (Jenna M. Loyd et al. eds., 2012) (describing the immigration rights movement as “by far the biggest and most organized social movement in the country”).

³²³ See generally Zoe Hammer, *Community, Identity, and Political Struggle: Challenging Immigrant Prisons in Arizona*, in BEYOND WALLS AND CAGES: PRISONS, BORDERS, AND GLOBAL CRISIS 215, 226 (Jenna M. Loyd et al. eds., 2012) (describing how immigrant justice and prison abolition work can be facilitated by learning from the strategies of experienced activists); DAN BERGER, CAPTIVE NATION: BLACK PRISON ORGANIZING IN THE CIVIL RIGHTS ERA 41, 43 (Heather Ann Thompson & Rhonda Y. Williams eds., 2014) (providing that sit-ins and hunger strikes spread through the South as Black activists risked arrest and their lives); CHO ET AL., *supra* note 318, at 5 (“A detained person’s refusal to eat may be the last option available to voice complaint, after all other methods of petition have failed. Detained and imprisoned people worldwide have engaged in hunger strikes to plead for humane conditions of confinement or release from captivity and to bring attention to broader calls for justice.”).

Haitians detained at Guantanamo and Krome Detention Center went on hunger strike to demand their release as political refugees.³²⁴

Today, as the mass detention of immigrants reaches new levels, the silencing of immigrants in detention has become essential to its maintenance.³²⁵ In the context of hunger strikes, a June 2021 report by the American Civil Liberties Union and Physicians for Human Rights revealed that at detention centers across the country, ICE has used involuntary medical procedures on detained hunger strikers during both the Trump and Obama administrations.³²⁶ ICE also routinely placed dissenting immigrants in solitary confinement or segregation and engaged in other forms of day-to-day psychological coercion to chill critical speech, such as the loss of privileges, threats of prosecution, and the use of dehumanizing language.³²⁷ The report further revealed a pattern of secrecy, with ICE officials frequently recommending the omission of key facts to meet reporting requirements.³²⁸

DHS continues to violate the First Amendment rights of immigrants in detention.³²⁹ As illustrated by the recent accounts of individuals detained at the Orange County Jail in upstate New York and the Stewart Detention Center in Georgia, both discussed below, retaliation against immigrants in detention is part of a viscous climate of fear, intimidation, and control over immigrants that has remained essential to the detention apparatus across the country.

1. *Immigrants Detained at the Orange County Jail*

Orange County Jail, located in Goshen, New York, stands out as an example of modern-day immigration detention wherein ICE contracts with local rural

³²⁴ See Mike Clary, *Haitians Fasting to Protest Hero's Welcome for Cubans*, L.A. TIMES (Jan. 4, 1993, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1993-01-04-mn-906-story.html>; Philip J. Hiltz, *7 Haitians Held at Guantanamo Unconscious in a Hunger Strike*, N.Y. TIMES (Feb. 15, 1993), <https://www.nytimes.com/1993/02/15/world/7-haitians-held-at-guantanamo-unconscious-in-a-hunger-strike.html>; Reuters, *Haitians Detained in Cuba Begin Second Hunger Strike*, N.Y. TIMES (May 13, 1993), <https://www.nytimes.com/1993/05/13/us/haitians-detained-in-cuba-begin-second-hunger-strike.html>.

³²⁵ See generally CHO ET AL., *supra* note 318, at 49 (discussing how ICE hides detainees' resistance from public view and threatens family separation to detainees who continue to participate in hunger strikes).

³²⁶ *Id.* at 28.

³²⁷ *Id.* at 29.

³²⁸ *Id.*

³²⁹ See, e.g., Alexandra Martinez, *An Immigrant in Detention Says ICE Has Retaliated Against Him for Exposing Inhumane Conditions*, PRISM (Apr. 15, 2022), <https://prismreports.org/2022/04/15/erik-mercado-ice-detention-retaliation/> (detailing the story of Erik Mercado, a young Mexican immigrant who was placed in solitary confinement and transferred to a remote ICE prison after filing numerous complaints regarding his mistreatment).

counties to hold immigrants in local jails.³³⁰ Orange County is also the site of unchecked rights violations against detained immigrants, according to a February 2022 administrative complaint filed on behalf of individuals detained at the detention center.³³¹

Immigrants alleged widespread violations of their First Amendment rights. Detained people reported that jail staff repeatedly wielded solitary confinement to silence those attempting to “collectively express[] their grievances.”³³² On at least two occasions, large groups of jail staff used excessive force to silence immigrants demanding that their grievances against the ICE prison be heard.³³³ On February 5, 2022, one individual with mental and cognitive disabilities “was thrown to the ground, kicked, beaten, and handcuffed.”³³⁴ Earlier in the year, on January 1, 2022, as many as twenty officers responded to a group seeking to file a complaint with jail staff.³³⁵ The guards yelled insults at the group and then attacked one of the men without provocation.³³⁶ They tackled him to the ground and pepper sprayed and handcuffed him, before dragging him off to solitary confinement.³³⁷

As a result of mounting public scrutiny, Orange County plans to end its contract with ICE.³³⁸ Yet, these plans have not resulted in the release of immigrants detained at this detention center.³³⁹ Instead, ICE has slowly been transferring immigrants to its detention operations elsewhere in the country.³⁴⁰ More than half were moved to ICE’s remote prisons in Mississippi, hundreds of miles away from family and community in the tri-state area.³⁴¹ Such mass

³³⁰ Cf. Letter on Racist and Retaliatory Abuse, Violence, and Medical Neglect, *supra* note 300, at 3 (discussing how the Sheriff’s office runs the prison).

³³¹ *Id.* at 2.

³³² *Id.* at 7–8.

³³³ *Id.*

³³⁴ *Id.* at 6.

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ Matt Katz, *NY Area’s ICE Detention Facilities Are Emptying, with Local Immigrants Moved Across Country*, GOTHAMIST, <https://gothamist.com/news/new-york-areas-ice-detention-facilities-are-emptying-with-local-immigrants-moved-across-the-country> (July 27, 2022).

³³⁹ *Id.*

³⁴⁰ Chris McKenna, *ICE Moved 65 Detained Immigrants from Orange County Jail to Mississippi and Buffalo*, TIMES HERALD-RECORD (Aug. 3, 2022, 5:04 AM), <https://www.recordonline.com/story/news/local/2022/08/03/ice-moves-detained-immigrants-orange-county-correctional-facility-to-mississippi-buffalo/65389710007/>.

³⁴¹ *Id.*

transfers of immigrants to remote locations regularly leaves people without legal recourse, and often puts immigrants with health needs at serious risk.

2. *Immigrants Detained at the Stewart Detention Center*

“The South is a leader in immigration detention”³⁴² Already accounting for the highest rates of criminal incarceration in the country, the South is also the “bargain basement of immigration detention,” with municipalities in the South charging the federal government among the lowest per diem rates in the country.³⁴³ As the Southern Poverty Law Center and its organizational partners noted in their 2016 report, *Shadow Prisons*, the situating of immigration detention in the South “flows from the [region’s] long history of looking to prisons filled mostly with people of color as a way to build local economies.”³⁴⁴

In the locus of a prison economy, immigrants in detention have been viewed as disposable commodities, not as human beings. Since opening in 2006, Stewart in Georgia—operated by the private corporation CoreCivic as one of the largest immigration detention centers in the country—has been the site of pervasive human rights abuses against immigrants.³⁴⁵ It has been the subject of numerous lawsuits, administrative complaints, and media coverage—for the wrongful death of people in its care,³⁴⁶ the inability for people detained to access

³⁴² See S. POVERTY L. CTR., NAT’L IMMIGR. PROJECT OF THE NAT’L LAWS. GUILD & ADELANTE ALA. WORKER CTR., *SHADOW PRISONS: IMMIGRANT DETENTION IN THE SOUTH* 4–5 (2016), <https://www.splcenter.org/20161121/shadow-prisons-immigrant-detention-south> (noting that one out of every six individuals in immigration custody is detained in the South).

³⁴³ *Id.* at 5.

³⁴⁴ *Id.*

³⁴⁵ See PENN STATE LAW & PROJECT SOUTH, *IMPRISONED JUSTICE: INSIDE TWO GEORGIA IMMIGRANT DETENTION CENTERS* 5, 52 (2017), https://projectsouth.org/wp-content/uploads/2017/06/Imprisoned_Justice_Report-1.pdf; José Olivares, *ICE Review of Immigrant’s Suicide Finds Falsified Documents, Neglect, and Improper Confinement*, INTERCEPT (Oct. 23, 2021, 6:00 AM), <https://theintercept.com/2021/10/23/ice-review-neglect-stewart-suicide-corecivic/>.

³⁴⁶ Olivares, *supra* note 345. An administrative complaint filed by several organizations noted that since May 2022, several individuals detained at Stewart reported waiting several weeks, and in some cases months, to be evaluated by mental health professionals. E-mail from Erin Argueta, SIFI Lead Att’y, S. Poverty L. Ctr., Priyanka Bhatt, Senior Staff Att’y, Project S. & Michael Khoury, Co-Dir. Ga. Hum. Rts. & Clinic Assistant Professor of Neurology, Emory Univ. Sch. of Med. et al., to Katherine Culliton-González, Officer, Office of C.R. & C.L., U.S. Dep’t of Homeland Sec., Joseph V. Cuffari, Inspector Gen., U.S. Dep’t of Homeland Sec. & Peter Mina, Acting Dir., Off. of C.R. & C.L., U.S. Dep’t of Homeland Sec. et al., on Sexual Assault of Detained Immigrants by a Nurse at Stewart Detention Center, a U.S. Department of Homeland Security Immigration Detention Facility Operated by CoreCivic 5 (July 12, 2022) [hereinafter Stewart Sexual Assault Complaint], <https://projectsouth.org/wp-content/uploads/2016/04/REDACTED-Stewart-Nurse-Complaint-7.12.20221-1.pdf>.

counsel,³⁴⁷ insufficient medical care,³⁴⁸ and its involuntary and abusive forced labor practices.³⁴⁹ The COVID-19 pandemic further exacerbated medical neglect at Stewart,³⁵⁰ leading one journalist to label it the “[d]eadliest [i]mmigration [j]ail.”³⁵¹

Facing dangerous conditions, mistreatment, and prolonged detention, immigrants detained at Stewart, like many immigrants detained across the country, protested their plight through acts of resistance. As described in Part I, Stewart responded by deploying a tactical unit to suppress their speech.³⁵² Officers pepper sprayed and assaulted immigrants, and later bragged about their exploits on social media.³⁵³ Despite the detention center placing eight officers on administrative leave and ultimately firing four, advocates continued to receive reports of aggressive use of force by jail staff at Stewart.³⁵⁴

More recently, prison staff at Stewart sought to suppress evidence of sexual assault.³⁵⁵ When two women reported their assaults at the hands of a male nurse, Stewart’s internal investigations turned into “interrogations with victim-blaming, accusations of false reporting, and threats of prison sentences.”³⁵⁶ Instead of acting upon the reports, the detention center briefly reassigned the

³⁴⁷ See *S. Poverty L. Ctr. v. Dep’t Homeland Sec.*, No. 18-cv-00760, slip op. at 3, 38, 62, 69–70 (D.D.C. June 17, 2020).

³⁴⁸ See Olivares, *supra* note 345.

³⁴⁹ Lautaro Grinspan, *ICE Detainees Say They Were Forced into Labor in Ga., File Lawsuit*, ATLANTA J.-CONST. (Aug. 26, 2022), <https://www.ajc.com/news/georgia-news/ice-detainees-say-they-were-forced-into-labor-in-ga-file-lawsuit/ECLTIVQNMVE6LKOFKXQBWCCVUA/>.

³⁵⁰ See Complaint for Declaratory and Injunctive Relief and Damages, *Barrientos v. Corecivic, Inc.*, No. 18-cv-00070-CDL (M.D. Ga. Apr. 17, 2018); see also EL REFUGIO, CAGE OF FEAR: MEDICAL NEGLECT AND ABUSE IN STEWART DETENTION CENTER DURING THE COVID-19 PANDEMIC, https://www.elrefugiostewart.org/wp-content/uploads/2021/05/CageOfFear_FINAL_English.pdf (last visited Jan. 17, 2023). As of December 26, 2022, there have been 1,825 confirmed COVID-19 cases at Stewart since reporting began. *ICE Guidance on COVID-19*, ICE, <https://www.ice.gov/coronavirus#detStat> (last visited Jan. 10, 2023). Alarming, four people in ICE’s custody at Stewart have died due to complications of COVID-19, the most of any immigrant detention center in the country. Jeremy Redmon, *Fourth ICE Detainee Dies from COVID-19 in Southwest Georgia*, ATLANTA J.-CONST. (Jan. 31, 2021), <https://www.ajc.com/news/fourth-ice-detainee-dies-from-covid-19-in-southwestgeorgia/TNPDEQCTD5AJNEJG3AB5UODNGQ/>; Lautaro Grinspan, *ICE Detention Center in Southwest Georgia Passes 1,000 COVID-19 Cases*, ATLANTA J.-CONST. (Sept. 27, 2021), <https://www.ajc.com/news/ice-detention-center-in-southwest-georgia-passes-1000-covid-19-cases/PC3OWSFB4JG2BDZP25Q7ZAA7QE/>.

³⁵¹ Olivares, *supra* note 345.

³⁵² See *supra* Part I.

³⁵³ See *supra* Part I.

³⁵⁴ Stewart Sexual Assault Complaint, *supra* note 346, at 6.

³⁵⁵ See *id.*

³⁵⁶ *Id.*

nurse.³⁵⁷ Following internal reports, three additional women came forward with reports of sexual assault and filed an administrative complaint against Stewart.³⁵⁸ The women similarly reported being confronted with dismissiveness and cover up by jail staff.³⁵⁹ One of the women, who was interrogated regularly for a week by ICE officers and CoreCivic employees, was told that her story was a lie and that if she continued with her report, she would be given seven years in prison.³⁶⁰ “Officers also withheld food during interviews, causing her to miss multiple meals.”³⁶¹ Journalists further reported that CoreCivic gave incorrect information to news organizations by failing to disclose a third official sexual assault complaint against Stewart.³⁶²

The use of intimidation tactics to silence immigrants in detention and to cover up abuse is not unique to Stewart, but, in fact, consistent with widespread abuse of force, repression, and retaliatory use of segregation at detention centers across the South.³⁶³ At the Baker County Detention Facility in Florida, a young Haitian immigrant reported being brutally assaulted and racially abused by a guard after requesting that the air conditioning be adjusted on behalf of a group.³⁶⁴ After the assault, he was told to keep quiet and “not to report what had happened ‘if he knew what was good for him.’”³⁶⁵ In August 2019, more than 100 immigrants who had been hunger striking in protest of conditions at the ICE Processing Center in Pine Prairie, Louisiana, were pepper sprayed, “tear gassed, shot at with rubber pellets, . . . placed in solitary confinement, and blocked from contacting their families or attorneys.”³⁶⁶

³⁵⁷ *Id.* at 7.

³⁵⁸ *Id.* at 2.

³⁵⁹ *See id.* at 8.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *See* José Olivares & John Washington, *Fifth Migrant Woman Alleges Sexual Assault Against Nurse at ICE Jail*, INTERCEPT (July 18, 2022, 6:47 PM), <https://theintercept.com/2022/07/18/ice-sexual-assault-nurse-stewart-corecivic/>.

³⁶³ *See* S. POVERTY L. CTR. ET AL., *supra* note 342, at 14–17.

³⁶⁴ *Id.* at 15 (“As Stanley recalled, he and other men in his unit wanted the air conditioning to be adjusted, so he asked on their behalf. A guard became enraged at the request, slammed Stanley’s head on the floor and pinned him down as he handcuffed him. Another guard moved Stanley into the hallway, where he was held down as a guard twisted his testicles. The guards reportedly began shouting racial slurs, calling Stanley a ‘porch monkey.’”).

³⁶⁵ *Id.*

³⁶⁶ Hamed Aleaziz, *More Than 100 Immigrants Were Pepper-Sprayed at an ICE Facility*, BUZZFEED NEWS, <https://www.buzzfeednews.com/article/hamedaleaziz/ice-immigrants-pepper-sprayed-louisiana-pine-prairie> (Aug. 6, 2019, 2:50 AM).

Just days prior to that incident, dozens of immigrants who had staged a sit-in to protest their indefinite detention were pepper sprayed at a municipal Louisianan jail contracting with ICE.³⁶⁷ At T. Don Hutto in Taylor, Texas, more than 150 Cameroonian asylum seekers were transferred to another remote immigration center in retaliation for protesting dangerous conditions and their indefinite detention.³⁶⁸ In June 2020, a day after the *Miami Herald* exposed unsafe conditions at the Glades County Detention Center, based on the accounts from individuals in custody, at least three detained immigrants reported facing retaliation from jail staff, including being harassed, pepper sprayed, denied visitation privileges, and deprived access to hot water.³⁶⁹ At the Krome Detention Center in Florida, Black immigrants alleged several instances of First Amendment retaliation in an October 2021 administrative complaint: One reported that that he was transferred after filing internal grievances and reporting abuses to advocates through the Freedom for Immigrants hotline; another described how individuals who had gone on hunger strike were “handcuffed, taken to solitary confinement, and denied access to phones” in retaliation for their protest.³⁷⁰

DHS Secretary Mayorkas has claimed that his agency is committed to holding itself internally accountable. Yet, at Stewart, the agency’s internal oversight methods failed to protect immigrants from constant threats of harm. The DHS Office of Immigration Detention Ombudsman (“OIDO”) had selected

³⁶⁷ Fernanda Echavarrí, *Dozens of ICE Detainees Were Pepper Sprayed by Guards Protesting at Louisiana Jail*, MOTHER JONES (Aug. 2, 2019), <https://www.motherjones.com/politics/2019/08/immigrant-detention-ice-bossier-louisiana-pepper-spray/>.

³⁶⁸ *Cameroonian Asylum Seekers Transferred After Protesting Conditions in ICE Custody*, DEMOCRACY NOW! (Mar. 6, 2020), https://www.democracynow.org/2020/3/6/headlines/cameroonian_asylum_seekers_transferred_after_protesting_conditions_in_ice_custody.

³⁶⁹ E-mail from Rebecca Talbot, Glades Lead, Immigrant Action Alliance, Sofia Casini, Dir. for Advoc. & Visitation Strats., Freedom for Immigrants, Jonah Eaton, Dir. of Legal Servs., Nationalities Serv. Ctr., to Katherine Culliton-Gonzalez, Officer, Off. of C.R. & C.L., U.S. Dep’t of Homeland Sec. & Joseph V. Cuffari, Inspector Gen., U.S. Dep’t of Homeland Sec., on Complaint and Request for Investigation Life-Threatening Violence Against 7 African Men at Glades County Detention Center 1 (Sept. 22, 2021), https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/614c88126cf1d170216b2207/1632405523043/Redacted_CRCL+Complaint_Glades+County+Detention+Center_Sept+22_2021+copy.pdf.

³⁷⁰ Letter from Breanne J. Palmer, Interim Pol’y & Advoc. Dir., UndocuBlack Network, Amanda Diaz, Nat’l Hotline Manager, Freedom for Immigrants, & Cristina Velez, Senior Staff Att’y, Nat’l Immigr. Project of the Nat’l Laws. Guild et al., to Matthew Majeski, Assistant Project Manager, Akima Glob. Servs., Katherine Culliton-Gonzalez, Officer, Off. of C.R. & C.L., U.S. Dep’t of Homeland Sec., & David Gersten, Acting Ombudsman, U.S. Dep’t of Homeland Sec. et al., on COVID-19 Negligence, Sexual Assault, Retaliation, Verbal Abuse, Religious Discrimination, Anti-Blackness, and Deplorable Conditions at Krome North Services Processing Center in Miami, Florida 6 (Oct. 6, 2021), <https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/615defe5e76a986c1af29d7a/1633546214397/Multi-Individual+CRCL+Anti-Blackness+and+Other+Abuse+of+Black+immigrants+at+Krome+Oct+2021.pdf>.

Stewart as part of a pilot program at which to implement on-sight oversight.³⁷¹ As part of the program, an OIDO case manager made weekly unannounced visits to Stewart since late 2021.³⁷² Yet, despite this and other purported oversight measures, a climate of fear and abuse was allowed to flourish with impunity.³⁷³

This worrying lack of internal oversight is endemic to the detention system writ large. As Professor Alina Das highlighted in an August 2021 article, the agencies tasked with providing this oversight—the Office of Civil Rights and Civil Liberties (“CRCL”) and the DHS Office of Inspector General (“OIG”)—have wide discretion to avoid scrutinizing DHS activity, or, in many cases, “extremely limited” power to meaningfully redress rights violations.³⁷⁴ OIG, for example, has limitless discretion over whether it investigates or remedies any rights violations—so much so that “of twelve hundred sexual misconduct complaints [filed] against the DHS,” OIG only investigated forty-three.³⁷⁵ Moreover, OIG considers a complaint “resolved” when the violating agency submits an acceptable corrective action plan—“not necessarily its successful implementation.”³⁷⁶ The supposed corrective actions are also shrouded in secrecy, leaving the public in the dark as to what measures the agency has taken and which remain outstanding.³⁷⁷

Likewise, CRCL holds “extremely limited” power.³⁷⁸ While individuals and organizations can file complaints with CRCL, CRCL is not an independent agency like OIG, and therefore primarily serves at the whim of the DHS Secretary.³⁷⁹ As a result, after Trump entered office, CRCL became “increasingly marginalized” as DHS implemented anti-immigrant policies, such as the family separation policy, over CRCL’s objection.³⁸⁰ Secretary Mayorkas has publicly committed to upholding civil rights, and CRCL will have a role to play in upholding that pledge. At the same time, CRCL remains plagued by structural deficiencies.³⁸¹ CRCL cannot provide a remedy to individuals whose

³⁷¹ Stewart Sexual Assault Complaint, *supra* note 346, at 6.

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ Das, *supra* note 16, at 247–49.

³⁷⁵ See *id.* at 247 (citing Alice Speri, *Detained, Then Violated*, INTERCEPT (Apr. 11, 2018), <https://theintercept.com/2018/04/11/immigration-detention-sexual-abuse-ice-dhs/>).

³⁷⁶ *Id.* at 248.

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 247.

³⁷⁹ *Id.* at 248–40.

³⁸⁰ *Id.* at 249.

³⁸¹ Scott Shuchart, Building Meaningful Civil Rights and Liberties Oversight at the U.S. Department of Homeland Security, CTR. FOR AM. PROGRESS (Apr. 2, 2019),

rights have been violated, nor can advocates expect transparent, timely responses to their CRCL complaints.³⁸²

Meanwhile, the Biden administration has continued to stand behind a regime of mass detention that perpetrates violence against immigrants. The Biden DHS has announced plans to close or scale back detention at certain detention centers.³⁸³ Yet the number of immigrants in detention has in fact skyrocketed under the administration's watch.³⁸⁴ In 2021, it opened and later expanded its use of "emergency intake sites" to confine unaccompanied migrant children—in a sense, "child detention by another name."³⁸⁵ Moreover, contradicting its campaign promise to end privately-run immigration detention centers, the administration excluded immigration detention in President Biden's executive order phasing out the use of private prisons in other areas of the federal carceral system.³⁸⁶ This was a calculated omission considering private prisons detained 79% of people in immigration detention, compared to only 10% of people in federal criminal custody.³⁸⁷ As the Department of Justice phased out its private

<https://www.americanprogress.org/article/building-meaningful-civil-rights-liberties-oversight-u-s-department-homeland-security/>.

³⁸² *Id.* ("Across the board, however, complainants generally receive little information on the outcome of their complaints. . . . If history is any guide, however, the DHS will continue to shield meaningful information about complaint outcomes behind claims of deliberative-process and attorney-client privilege notwithstanding this provision.")

³⁸³ The Biden administration has ended its contract with the Irwin County Detention Center and C. Carlos Carreiro Immigration Detention Center in Bristol County, Massachusetts, which were both under investigation for medical neglect and poor conditions—in the case of Irwin, several women had also suffered medical abuse. Priscilla Alvarez, *Biden Administration to Close Two Immigration Detention Centers that Came Under Scrutiny*, CNN, [https://www.cnn.com/2021/05/20/politics/ice-detention-center/index.html#:~:text=Washington%20\(CNN\)%20The%20Biden%20administration,medical%20care%20and%20poor%20conditions](https://www.cnn.com/2021/05/20/politics/ice-detention-center/index.html#:~:text=Washington%20(CNN)%20The%20Biden%20administration,medical%20care%20and%20poor%20conditions) (May 20, 2021, 12:31 PM). It also announced plans to scale back detention at four ICE prisons in the South. Ted Hesson & Mica Rosenberg, *U.S. to Close, Scale Back Four Immigration Detention Centers*, REUTERS, <https://www.reuters.com/world/us/us-plans-close-scale-back-four-immigrant-detention-centers-document-shows-2022-03-25/> (Mar. 25, 2022); see also Eileen Sullivan, *Biden to Ask Congress for 9,000 Fewer Immigration Detention Beds*, N.Y. TIMES (Mar. 25, 2022), <https://www.nytimes.com/2022/03/25/us/politics/biden-immigration-detention-beds.html?smid=url-share>.

³⁸⁴ Silky Shah, *Number of Immigrants Detained by ICE Has Increased 70 Percent Under Biden*, TRUTHOUT (Sept. 22, 2021), <https://truthout.org/articles/number-of-immigrants-detained-by-ice-has-increased-70-percent-under-biden/>.

³⁸⁵ Press Release, Detention Watch Network, Biden Administration Doubles Down on Harmful Child Detention as ORR Looks to Expand Network of Sites (Mar. 17, 2022), <https://www.detentionwatchnetwork.org/pressroom/releases/2022/biden-administration-doubles-down-harmful-child-detention-orr-looks-expand>.

³⁸⁶ SETAREH GHANDEHARI, BOB LIBAL & PRIYA SREENIVASAN, BROKEN PROMISES: LIMITS OF BIDEN'S EXECUTIVE ORDER ON PRIVATE PRISONS 4 (2021), <https://search.issuelab.org/resources/39223/39223.pdf>; see also Exec. Order No. 14,006, 86 Fed. Reg. 7483 (Jan. 29, 2021).

³⁸⁷ GHANDEHARI ET AL., *supra* note 386, at 4.

prison contracts, ICE promptly stepped in to acquire the newly vacant bed space to imprison immigrants.³⁸⁸ It also negotiated extensions on its existing contracts with prisons, many with longstanding track records for abuse.³⁸⁹ In the shadows of this commitment to mass detention lies the rampant violations of the rights and dignity of people, including the silencing of its dissenters with impunity.

D. 'Dreamers' and Youth Leaders

Young immigrants have been the face of the immigrant rights' movement. Yet they face acute risks in the detention and deportation system. A decade has passed since DHS first announced the Deferred Action for Childhood Arrivals ("DACA") policy.³⁹⁰ Originally intended as a stopgap measure to protect vulnerable young immigrants until Congress could agree on comprehensive pathways to citizenship, DACA has become the sole means by which many young undocumented immigrants can remain in the country.³⁹¹ Following the Trump administration's attempts to quash the program, DACA has been mired in legal battles.³⁹² In October 2022, the Fifth Circuit upheld a lower court ruling that DACA was unconstitutional.³⁹³ The lower court's injunction immediately prevented the U.S. Citizenship and Immigration Services ("USCIS") from considering first-time applications.³⁹⁴

³⁸⁸ In September 2021, ICE entered into a contract with the GEO Group-operated Moshannon Valley Correctional Center in Pennsylvania to detain 1,845 immigrants, as a replacement for the prison's contract with the Bureau of Prisons. Jeff Corcino, *Commissioners Move Forward to Reopen the Mo Valley Correctional Facility*, PROGRESS (Sept. 28, 2021), https://www.theprogressnews.com/news/local/commissioners-move-forward-to-reopen-mo-valley-correctional-facility/article_ed6c141e-3996-524d-b708-7a8504629d5e.html. Similar moves have been contemplated at the Leavenworth Detention Center in Kansas and West Tennessee Detention Facility. Carrie Johnson, *Biden Ended Contract with Private Prisons. So One May Turn to House Immigrants*, NPR, <https://www.npr.org/2021/09/13/1036576308/biden-ended-contracts-with-private-prisons-so-one-may-turn-to-house-immigrants> (Sept. 15, 2021, 4:49 PM); *CoreCivic Provides Update on U.S. Marshals Service Contract for the West Tennessee Detention Facility*, YAHOO! FINANCE (Sept. 17, 2021), https://finance.yahoo.com/news/corecivic-provides-u-marshals-contract-120000933.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLnNvbS8&guce_referrer_sig=AQAAANTb4M9kyM7KgZLMu7jjK7KH0D59-TryLC7Vv3u7T90EAMH7zZLH2XTTrjafTEKWoam4nH-uSnBfP160xnnIgL4184kboJfR9OTZPAN8Y5WIPtXD0ITF0PP575IAAnoBSC3EzL882UHs6_9jDAI89v0JtixZK64AZTJc2IvTZcu3u.

³⁸⁹ See GHANDEHARI ET AL., *supra* note 386, at 5.

³⁹⁰ See generally *Deferred Action for Childhood Arrivals (DACA)*, U.S. DEP'T OF HOMELAND Sec., <https://www.dhs.gov/deferred-action-childhood-arrivals-daca> (last visited Jan. 16, 2023).

³⁹¹ Miriam Jordan, *A Decade After DACA, the Rise of a New Generation of Undocumented Students*, N.Y. TIMES, <https://www.nytimes.com/2022/06/15/us/daca-dreamers-immigration-reform.html> (June 16, 2022).

³⁹² *Id.*

³⁹³ *Texas v. United States*, 50 F.4th 498, 511–12 (5th Cir. 2022).

³⁹⁴ *Id.* at 511.

The Biden administration has insisted that it has “worked vigorously to defend DACA in court and is working expeditiously on a rule to codify and preserve the policy.”³⁹⁵ Yet, in the first five months of 2021, USCIS approved only 3% of first-time applicants.³⁹⁶ Despite the Biden administration issuing a final rule on DACA, which went into effect in October 31, 2022,³⁹⁷ it has conceded in court that the current injunction also applies to the final rule.³⁹⁸ Elsewhere, the Biden Justice Department has stood in the shoes of the Trump administration to defend the government’s past retaliatory conduct against youth organizers—many of whom are DACA-eligible.

1. *Claudia Rueda Vidal*

Immigrant youth organizer Claudia Rueda was described by her professors at California State University as “the face of immigration enforcement under the Trump administration.”³⁹⁹ When her mother was arrested and later detained by ICE in April 2017, Claudia led protests for her release.⁴⁰⁰ Just six days after Claudia secured her mother’s release, Claudia stepped outside her aunt’s home to move her mother’s car for street cleaning, but never returned.⁴⁰¹ Her family later learned that she had been surrounded by three unmarked cars carrying an

³⁹⁵ Betsy Lawrence, *The Biden-Harris Administration Celebrates the Contributions of Dreamers on Ten-Year Anniversary of DACA*, WHITE HOUSE (June 15, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/15/the-biden-harris-administration-celebrates-the-contributions-of-dreamers-on-ten-year-anniversary-of-daca/>.

³⁹⁶ Alice Hickson and Diana Roy, *How Is Biden Handling DACA?*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/in-brief/how-biden-handling-daca> (June 14, 2022).

³⁹⁷ *DHS Begins Limited Implementation of DACA Under Final Rule*, UNITED CITIZENSHIP & IMMIGR. SERVS. (Nov. 3, 2022), <https://www.uscis.gov/newsroom/news-releases/dhs-begins-limited-implementation-of-daca-under-final-rule>.

³⁹⁸ *See DACA Update: Judge Hanen’s Response*, UNITED WE DREAM, <https://unitedwedream.org/resources/daca-update-judge-hanen-s-response/> (Oct. 14, 2022).

³⁹⁹ *See* Beth Baker & Alejandra Marchevsky, *Op-Ed: Immigration Agents Came for Our Student*, L.A. TIMES (June 8, 2017, 4:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-baker-marchevsky-rueda-deportation-20170608-story.html> (noting that Claudia is “one of several youth activists since Trump’s inauguration who have been targeted by immigration agencies in what seems to be an attempt to silence them”).

⁴⁰⁰ *See* Matt Hamilton & Richard Winton, *Woman Swept Up in Massive Cocaine Bust in L.A. Now Faces Deportation, Spurring Protests and Anger*, L.A. TIMES (Apr. 26, 2017, 2:45 PM), <https://www.latimes.com/local/lanow/la-me-ln-immigration-arrest-20170425-story.html> (noting that Claudia Rueda joined community organizers through the L.A. Immigrant Youth Coalition to protest her mother’s detention in ICE custody).

⁴⁰¹ *See* James Queally, *Immigration Activist Who Says She Was a Victim of Retaliation by Border Patrol Applies for ‘Dreamer’ Protections*, L.A. TIMES (June 19, 2017, 2:10 PM), <https://www.latimes.com/local/lanow/la-me-ln-claudia-rueda-20170619-story.html>; Baker & Marchevsky, *supra* note 399 (noting that Claudia’s mother was released by an immigration court on \$2,000 bond due “in part to a high-profile campaign led by the Los Angeles Immigrant Youth Coalition, of which Claudia is a member” and describing the circumstances of Claudia’s arrest by CBP agents).

estimated nine plainclothes CBP officers who arrested her and transferred her to ICE for deportation.⁴⁰² Claudia was released on bond following three weeks in ICE detention after an immigration judge indicated that ICE's decision to hold her without bond was "unduly severe."⁴⁰³ Soon after her release, Claudia filed for DACA, which would have deferred action in her deportation proceedings and permitted her to obtain work authorization.⁴⁰⁴ USCIS rejected Claudia's DACA application on the vague grounds that she lived with her parents who had recently been criminally charged.⁴⁰⁵ Internal emails later revealed that a CBP officer involved in Claudia's arrest and detention had emailed USCIS to request that Claudia's DACA application be terminated because she had become "an enforcement priority."⁴⁰⁶

Claudia filed suit, alleging that USCIS violated her First Amendment rights by rejecting her application based on her protected speech.⁴⁰⁷ The government argued in a motion for summary judgment that Claudia had no constitutionally protected interest in receiving DACA, and, even if she did, she could not show that retaliatory animus was an actual cause of her DACA rejection.⁴⁰⁸ In an April 30, 2021 decision, the district court denied the government's motion: the court concluded that although Claudia did not have a constitutionally protected interest, entitlement, or vested right to receive DACA, she nonetheless could not be denied a benefit "on a basis that infringes [upon] [her] constitutionally protected interests—especially, [her] interest in freedom of speech."⁴⁰⁹ As to the elements of her retaliation claim, the court found not only that Claudia's advocacy is "constitutionally protected speech activity," but also that USCIS's denial of DACA was an "adverse action."⁴¹⁰

Moreover, rejecting the government's arguments as to causation, the district court found that Claudia had sufficiently shown that USCIS was aware of her

⁴⁰² See Baker & Marchevsky, *supra* note 399.

⁴⁰³ Julia Wick, *Boyle Heights Immigrant Rights Activist Released on Bond*, LAIST (June 8, 2017), <https://laist.com/news/claudia-rueda-released-on-bond>; see also Queally, *supra* note 401 (noting Claudia's description of her time in immigration detention as a "nightmare" and "very dehumanizing").

⁴⁰⁴ See Queally, *supra* note 401.

⁴⁰⁵ *Rueda-Vidal v. Dep't of Homeland Sec.*, 536 F. Supp. 3d 604, 621 (C.D. Cal. 2021).

⁴⁰⁶ *Id.*

⁴⁰⁷ See James Queally, *L.A. Immigration Activist Files Suit Claiming DACA Application Was Rejected as 'Political Retaliation'*, L.A. TIMES (Oct. 30, 2018, 6:45 PM), <https://www.latimes.com/local/lanow/la-me-ln-claudia-rueda-lawsuit-dreamer-20181029-story.html>.

⁴⁰⁸ *Rueda-Vidal*, 536 F. Supp. 3d at 620–21.

⁴⁰⁹ *Id.* at 621 (second and third alterations in original) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

⁴¹⁰ *Id.*

protected activity⁴¹¹ and that there was a genuine dispute of material facts as to retaliatory motive.⁴¹² With Claudia having met her burden to show that there were triable issues of fact, the court then considered the government's fallback defense that even if there was retaliatory animus, it was still "'eminently reasonable' for USCIS to exercise its discretion to deny [Claudia's] DACA application because she chose, as an adult, to live in her parents' home," where drugs had been recovered.⁴¹³ As the court noted, if "taken at face value," this alternative explanation admits to an intentional violation of Claudia's First and Fifth Amendment rights to familial association.⁴¹⁴

2. Daniela Vargas

Like Claudia, Daniela Vargas experienced retaliation for defending her family and criticizing immigration enforcement in her community. During an early-morning raid at her family home, ICE arrested her father and brother and questioned Daniela about her status.⁴¹⁵ Following her brother and father's arrests, Daniela spoke to multiple media outlets about her harrowing experience. On March 1, 2017, she participated at a press conference at City Hall in Jackson, Mississippi—minutes after leaving the press conference, ICE agents in two

⁴¹¹ *Id.* at 621–22. (noting that the record contained "direct evidence that USCIS was aware that Rueda engaged in advocacy for undocumented immigrants" and circumstantial evidence that the aforementioned CBP officer was aware of her protected speech "[v]ia the judicially noticed #FreeClaudia tweets and news articles about her advocacy" as well as media attention "indicat[ing] a high level of publicity around her case").

⁴¹² *Id.* at 622 (finding that the "proximity in time between [Claudia's] outspoken advocacy on behalf of her mother's release in April 2017, her arrest in May 2017, and the [CBP agent's] email exchange with USCIS . . . seeking to terminate [Claudia's] DACA application in June and July 2017," when combined with circumstantial evidence of the government's knowledge of her protected activity, "gives rise to an inference of retaliatory motive that precludes summary judgment").

⁴¹³ *Id.*

⁴¹⁴ *Id.* at 623–24 (acknowledging that the right to familial association springs from various constitutional provisions, including the First Amendment, which "protects those relationships, including family relationships, that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life'" (quoting *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987))).

⁴¹⁵ Samantha Schmidt, *ICE Nabs Young 'Dreamer' Applicant After She Speaks Out at a News Conference*, WASH. POST (Mar. 2, 2017, 5:25 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2017/03/02/ice-nabs-young-dreamer-applicant-after-she-speaks-out-at-a-news-conference/> (noting that Daniela disclosed her undocumented status at the news conference by stating, "[t]oday my father and brother await deportation . . . while I continue to fight this battle as a dreamer to help contribute to this country which I feel that is very much my country"); Arielle Dreher, *After ICE Raid, Immigration Limbo in Mississippi for a Jackson Family*, JACKSON FREE PRESS (Feb. 22, 2017, 9:53 AM), <https://www.jacksonfreepress.com/news/2017/feb/22/after-ice-raid-immigration-limbo-mississippi/> (quoting Daniela about the early-morning ICE raid that led to the immigration arrest of her brother and father).

vehicles pulled her over and told her: “[Y]ou know who we are and you know why we’re here.”⁴¹⁶

Daniela once had access to immigration protection. She had been granted DACA when it was first launched in 2012, and then was able to renew it again in 2014—but given her financial situation, she was not able to cover the 495-dollar application fee when she had to renew once more in 2016.⁴¹⁷ She was in the DACA application process for a third time when ICE agents picked her up. ICE described her arrest as “a targeted immigration enforcement action.”⁴¹⁸

ICE immediately sought to deport Daniela without a hearing. Daniela was taken to an ICE holding facility, where she was ankle shackled and placed in a cell for several hours, and then driven to LaSalle Detention Facility in Louisiana.⁴¹⁹ The cell was cold, and the lights were left on at night.⁴²⁰ Meanwhile, ICE attorneys contended that Daniela was immediately removable because she had entered the country when she was seven years old through the Visa Waiver Program, which, by statute, requires that individuals waive the right to contest a deportation action.⁴²¹

Daniela’s attorneys expeditiously filed a habeas petition alleging that Daniela, as a seven-year-old, could never have knowingly and voluntarily waived her right to seek a hearing to remain in the country at the time she entered.⁴²² The removal action against Daniela was thus a violation of her Fifth Amendment due process rights.⁴²³ Moreover, given the nature of her arrest coming soon after she made public comments at a press conference, she alleged that ICE’s detention and attempted deportation were illegitimate efforts to

⁴¹⁶ Schmidt, *supra* note 415 (citing Melvin Felix, *Una Dreamer Es Detenida por ICE tras Dar una Conferencia de Prensa en Mississippi*, UNIVISION (Mar. 1, 2017), <https://www.univision.com/noticias/inmigracion/una-dreamer-es-detenida-por-ice-tras-dar-una-conferencia-de-prensa-en-mississippi?hootPostID=3b8e4737272586e4a5826fa58078fbb7>); accord Arielle Dreher, *Updated: DACA Immigrant Detained in Jackson After Speaking Out, ICE Responds*, JACKSON FREE PRESS (Mar. 1, 2017), <https://www.jacksonfreepress.com/news/2017/mar/01/daca-immigrant-detained-after-speaking-out/> (variation in quote).

⁴¹⁷ Schmidt, *supra* note 415.

⁴¹⁸ Dreher, *supra* note 416.

⁴¹⁹ Sarah Fowler, *Exclusive: Detained Mississippi Immigrant Speaks Out*, CLARION-LEDGER (Mar. 13, 2017), <https://www.clarionledger.com/story/news/local/2017/03/13/exclusive-daniela-vargas-speaks-out/99125196/>.

⁴²⁰ *Id.*

⁴²¹ Petition for Writ of Habeas Corpus at 3, *Vargas v. U.S. Dep’t of Homeland Sec.*, No. 1:17-CV-00356 (W.D. La. Mar. 6, 2017).

⁴²² *Id.*

⁴²³ *Id.*

silence her in violation of her Fifth and First Amendment rights.⁴²⁴ Daniela was released on an order of supervision soon after the petition was filed.⁴²⁵

III. LOOKING BEYOND THE COURTROOM: GUIDANCE FOR THE MOVEMENT

Despite significant and important developments in the courts, the First Amendment rights of immigrants' rights organizers remain under threat. Scholars have urged the federal government to adopt robust policies that prevent and redress First Amendment violations of immigrants' rights organizers.⁴²⁶ This has included pleas for DHS to exercise its broad prosecutorial discretion to remedy First Amendment rights violations, undertake regulatory reforms to provide for greater investigation and enforcement of the First Amendment, and for Congress to pass legislation that ensures more robust judicial review of civil rights violations, including claims of First Amendment retaliation.⁴²⁷

Less attention, however, has been given to aligning the redress of First Amendment retaliation within the framework of abolition—that is, the fundamental belief that immigration detention and deportation, as well as parts of the carceral system in other areas of the law, must be eliminated.⁴²⁸

A. *Demanding Policy Interventions as Reparations*

“Abolition calls on us to not only destabilize, deconstruct, and demolish oppressive systems, institutions, and practices,” writes Patrisse Cullors, scholar and founder of the Black Lives Matter Movement, in an April 2019 *Harvard Law Review* essay, “but also to repair histories of harm across the board.”⁴²⁹

1. *Humanitarian Parole*

In the aftermath of the Trump administration's family separation policy, migrant families sued the federal government seeking million in damages for

⁴²⁴ *Id.* at 4, 10, 12–14.

⁴²⁵ Christine Hauser, *Woman Detained After Speaking About Deportation Fears Is Released*, N.Y. TIMES (Mar. 10, 2017), <https://www.nytimes.com/2017/03/10/us/daniela-vargas-detained-daca-released.html>.

⁴²⁶ Das, *supra* note 16, at 254.

⁴²⁷ *See id.* at 254–55.

⁴²⁸ *See generally* *Why Freedom for Immigrants Believes in Abolishing Immigration Detention*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/why-abolition> (last visited Jan. 17, 2023).

⁴²⁹ Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1686 (2019).

their forced separation and resulting trauma.⁴³⁰ While the demand for money damages were characterized by some in the media as reparations, the demand for reunification and passage to the United States could equally be seen as a reparation for egregious government wrongdoing.

Under immigration law, the DHS Secretary has broad discretion to parole in immigrants for “urgent humanitarian reasons or significant public benefit.”⁴³¹ Under this authority, DHS has already paroled in several deported organizers, including Claudio Rojas and Jean Montrevil.⁴³² Contextualizing this ask for targeted organizers to be brought home as part of a broader demand for reparations is essential.

B. Facilitating Transparency and Accountability for Abolitionist Ends

Transparency and accountability alone are not sufficient to realizing a future without mass detention and deportation. Instead, the ever-mounting calls for accountability and transparency underscore how detention centers fundamentally operate and violate the legal rights of people in secrecy, shrouded from public scrutiny.

To this end, movement actors must utilize FOIA to expose the government’s retaliatory tactics and reinforce calls for an end to detention and deportation. As highlighted in Part III, numerous individuals and organizers learned the extent of the government’s retaliation and surveillance through Freedom of Information Act requests and other public records laws. The Center for Constitutional Rights’ Open Records Project published a guide on public records laws for organizers.⁴³³ DHS also recently announced changes to its FOIA processing, which are purported to result in quicker processing times.⁴³⁴

In the context of immigration detention, state-level actors must also be engaged and urged to enforce First Amendment rights. Many states and local municipalities have investigative arms to investigate civil rights and liberties violations. In New York, the State Attorney General’s Office, led by Attorney

⁴³⁰ Camilo Montoya-Galvez, *Migrant Families Separated Under Trump Face Elusive Quests for Reparations Under Biden*, CBS NEWS (May 11, 2022, 8:54 AM), <https://www.cbsnews.com/news/immigration-family-separations-reparations-lawsuits/>.

⁴³¹ Immigration and Nationality Act of 1965, 8 U.S.C. § 1182(d)(5)(A).

⁴³² Rose, *supra* note 226.

⁴³³ See CTR. FOR CONST. RTS., FOIA BASICS FOR ACTIVISTS 1 (2020), <https://www.foiabasics.org/sites/default/files/foia-basics-for-activists-september-2020.pdf>.

⁴³⁴ *Change Is Underway at DHS Freedom of Information Act (FOIA)*, U.S. DEP’T OF HOMELAND SEC. (Sept. 26, 2022), <https://www.dhs.gov/change-underway-dhs-foia>.

General Leticia James, opened units to investigate hate crimes and prison abuse that could be tapped to investigate local counties that are contracting with ICE to imprison immigrants.⁴³⁵ The California Department of Justice published a report in January 2021 on immigration detention in California.⁴³⁶ In Massachusetts, the state attorney general released findings that the Bristol County Sheriff's Office, contracting with ICE, violated the rights of immigrants in ICE custody by using excessive of force and showing deliberate indifference to their well-being.⁴³⁷ The report ultimately led ICE to end its contract with the prison.⁴³⁸ Such state-led investigations may be essential to not only exposing rampant abuses inside of prisons and shutting down the detention system, but also ensuring lasting protections for immigrants. It may also open pathways to status because immigrants serving as witnesses in such investigations and civil lawsuits could be made eligible for S visas.⁴³⁹

C. Bridging Cross-Movement Solidarity

The federal government's retaliation against organizers within the immigrants' rights movement speaks to a growing threat to bedrock democratic principles—one that is felt globally and across social justice movements as authoritarian governance takes hold. Amplifying global, cross-movement solidarity is thus essential to realizing a future without cages, borders, and other forms of state violence.

Freedoms of speech, press, and dissent are under assault around the world. In the Middle East, the Saudi regime's reprehensible assassination of journalist Jamal Khashoggi in October 2018 was a gruesome example of a “vast, vicious, and systemic suppression of free speech,” in which state violence has been

⁴³⁵ *AG James Issues Additional Legal Guidance for ICE Civil Detention Requests*, N.Y. STATE OFF. OF THE ATT'Y GEN. (Apr. 8, 2020), <https://ag.ny.gov/press-release/2020/ag-james-issues-additional-legal-guidance-ice-civil-detention-requests>.

⁴³⁶ *See generally* CAL. DEP'T OF JUST., IMMIGRATION DETENTION IN CALIFORNIA (Jan. 2021), <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/immigration-detention-2021.pdf>.

⁴³⁷ OFF. OF THE MASS. ATT'Y GEN., C.R. DIV., INVESTIGATION INTO THE EVENTS OF MAY 1, 2020 AT THE C. CARLOS CARREIRO IMMIGRATION DETENTION CENTER, UNIT B, BRISTOL COUNTY SHERIFF'S OFFICE 1 (2020), <https://www.mass.gov/doc/ago-report-into-bcso-response-to-may-1-disturbance/download>.

⁴³⁸ Shannon Dooling, *ICE Terminates Contract with Bristol County Sheriff*, WBUR (May 20, 2021), <https://www.wbur.org/news/2021/05/20/ice-terminates-contracts-bristol-county-sheriff-hodgson>.

⁴³⁹ *S Visa Program—Eligibility*, U.S. DEP'T OF JUST. ARCHIVES, <https://www.justice.gov/archives/jm/criminal-resource-manual-1862-s-visa-program-eligibility> (Jan. 17, 2020).

wielded to crack down on political dissent.⁴⁴⁰ In May 2022, occupying Israeli forces killed Palestinian-American Al Jazeera journalist Shireen Abu Aqleh while she was covering an Israeli military raid of a refugee camp in Jenin.⁴⁴¹

In the United States, citizens and noncitizens alike are losing the right to speak freely and express dissent without facing retaliation, censorship, or repression.⁴⁴² In schools, state legislatures are tamping down on freedom of expression.⁴⁴³ In March of 2022, Governor Rob DeSantis signed the “Don’t Say Gay” bill in Florida, which gives parents a right to sue to enforce restrictions on the free discussion of gender and sexuality.⁴⁴⁴ In a June 2022 ruling, the Court of Appeals for the Eighth Circuit upheld an Arkansas law prohibiting private individuals from boycotting the apartheid state of Israel, holding that boycotts are not protected speech under the First Amendment.⁴⁴⁵ By giving states leave to dictate how individuals can express their political concerns, the unprecedented ruling has lasting ramifications for free expression moving forward.⁴⁴⁶ In the wake of the 2020 elections, a January 6, 2022 Knight Institute study found that Americans did not have full confidence in their right to engage

⁴⁴⁰ Sarah Aziza, *Don't Lose Sight of the Real Stakes: Jamal Khashoggi's Murder Is About Repression of Free Speech in the Middle East*, INTERCEPT (Oct. 25, 2018, 1:28 PM), <https://theintercept.com/2018/10/25/jamal-khashoggi-death-freedom-of-speech/>.

⁴⁴¹ Bill Chappell, *Israeli Gunfire Killed Journalist Shireen Abu Akleh, U.N. Says*, NPR, <https://www.npr.org/2022/06/24/1107254898/israeli-gunfire-shireen-abu-akleh-un-human-rights> (June 24, 2022, 10:01 AM).

⁴⁴² See Ed. Bd., *America Has a Free Speech Problem*, N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/opinion/cancel-culture-free-speech-poll.html?action=click&module=RelatedLinks&pgtype=Article>.

⁴⁴³ Ed. Bd., *Censorship Is the Refuge of the Weak*, N.Y. TIMES (Sept. 10, 2022), <https://www.nytimes.com/2022/09/10/opinion/schools-banned-books.html>.

⁴⁴⁴ Will Larkins, *Florida's 'Don't Say Gay' Bill Will Hurt Teens Like Me*, N.Y. TIMES (Mar. 12, 2022), <https://www.nytimes.com/2022/03/12/opinion/florida-dont-say-gay-bill.html>; Jaclyn Diaz, *Florida's Governor Signs Controversial Law Opponents Dubbed 'Don't Say Gay'*, NPR, <https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis> (Mar. 28, 2022, 2:33 PM).

⁴⁴⁵ *Statement from Palestine Legal on Arkansas Anti-Boycott Ruling*, PALESTINE LEGAL (June 22, 2022), <https://palestinelegal.org/news/2022/6/22/statement-from-palestine-legal-on-arkansas-anti-boycott-ruling?rq=arkansas>. In a February 2022 report, Amnesty International condemned Israel as an apartheid state, with an “intent to create and maintain a system of oppression and domination over Palestinians.” AMNESTY INT’L, *ISRAEL’S APARTHEID AGAINST PALESTINIANS: CRUEL SYSTEM OF DOMINATION AND CRIME AGAINST HUMANITY* (2022), <https://www.amnesty.org/en/documents/mde15/5141/2022/en/>.

⁴⁴⁶ The right to boycott is “a form of political resistance wielded by people against their oppressors.” See Azadeh Shahshahani & Assal Rad, *Will the US Supreme Court Make It Illegal to Boycott Israel?*, MIDDLE E. EYE, <https://www.middleeasteye.net/opinion/us-israel-palestine-bds-resistance-grassroots-movements-justice> (July 17, 2022); see also Elizabeth Nolan Brown, *Boycotts Aren’t Protected Speech, Rules Appeals Court*, REASON (June 23, 2022, 9:33 AM), <https://reason.com/2022/06/23/boycotts-arent-protected-speech-rules-appeals-court/>.

in First Amendment activity.⁴⁴⁷ Black, Latinx, and Asian people in particular were much less likely to feel protected by the First Amendment than white Americans.⁴⁴⁸

The First Amendment is unquestionably under threat, but under the principles of cross-movement solidarity, we must also recognize that state repression today is tethered to a longer history of state violence against colonized people. As described in Part II, retaliation emerged with the enslavement of Black people, persisted with their exclusion—and the exclusion of other colonized people—from the constitutional framework, and underwent renewed threat with the targeting of freedom movements from the Black-led civil rights movement to student organizing against the Vietnam War to prison organizing in the era of mass incarceration. Retaliation against immigrants' rights organizers is thus part of a legacy of colonialism, imperialism, and white supremacy. Just as retaliation has been a pervasive aspect of systems of oppression, so too have grassroots-led movements of resistance. Protecting the organizers, youth leaders, and people who are being directly harmed by these systems must remain a priority.

⁴⁴⁷ KNIGHT FOUND.-IPSOS, FREE EXPRESSION IN AMERICA POST-2020, at 6 (2022), https://knightfoundation.org/wp-content/uploads/2022/01/KF_Free_Expression_2022.pdf.

⁴⁴⁸ *Id.*