19-16441

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Jose Omar Bello Reyes,

Plaintiff-Appellant,

v.

KEVIN MCALEENAN, Acting Secretary of Homeland Security; MARK MORGAN, Acting Director, United States Immigration and Customs Enforcement; ERIK BONNAR, Field Office Director, San Francisco Field Office, United States Immigration and Customs Enforcement; and WILLIAM BARR, Attorney General,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF OF PEN AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT'S MOTION FOR RELEASE PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, PEN America, by and through its undersigned counsel, hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST[1]

PEN America is a nonprofit organization that represents and advocates for the interests of writers, both in the United States and abroad. Its membership includes over 7,200 novelists, poets, journalists, essayists, and other professionals, and it is affiliated with over 100 centers worldwide that comprise the PEN International network.

PEN America stands at the intersection of literature and human rights to protect free expression and individual writers facing threats for their speech. PEN America has a particular interest in opposing censorship schemes in all forms that inhibit creative expression. PEN America champions the freedom of people everywhere to write, create literature, convey information and ideas, and express their views, recognizing the power of the word to transform the world. Its mission and mandate include fighting for the right to speak critically of a governmental body without retaliation and regardless of citizenship status, a core element of free expression. PEN America supports the First Amendment right of immigrants in the United States to speech that is critical of federal immigration policy and practices.

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[1] No counsel for a party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus* or its counsel has made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E). All parties have been notified to this brief's filing; counsel for Plaintiff-Appellant consent to the brief and counsel for Defendant-Appellee do not oppose the filing. Fed. R. App. P. 29(a)(2).

BACKGROUND

Mr. Bello was arrested on May 15, 2019, a mere 36 hours after reading a protest poem in a public forum. He spoke at a forum held by the Kern County Board of Supervisors, reading his poem "Dear America" and expressing his criticisms of current federal immigration policy and the actions of U.S. Immigrations and Customs Enforcement ("ICE"). Dkt. No. 1, ¶ 26.[2] In so doing, Mr. Bello participated in the longstanding American tradition of artistic expression as political speech.

From Langston Hughes to Audre Lorde, poetry in the United States has long been a vital way to participate in democratic debate and express personal political views. *See, e.g.*, *Poems of Resistance: A Primer*, The New York Times (Apr. 21, 2017), https://www.nytimes.com/2017/04/21/books/review/poltical-poetry-sampler.html; Edwidge Danticat, *Poetry in a Time of Protest*, The New Yorker (Jan. 31, 2017), https://www.newyorker.com/culture/cultural-comment/poetry-in-a-time-of-protest. As the Supreme Court recognized in 1952, art "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

The retaliation that Mr. Bello has faced for his poetic articulation of his political views has garnered the attention of academic, legal, and artistic communities. He has

[2] Citations to "Dkt. No." in this brief refer to the docket in the Northern District of California in the case below, *Bello v. McAleenan*, *et al.*, No. 19-cv-03630-SK.

received strong support from his community of Bakersfield, California, including glowing letters of support from his teachers. *See* Dkt. No. 1 ¶¶ 19–21. Outside of Bakersfield, over 250 university faculty members, students, staff, and writers from New York, California, Kansas, Wisconsin, and several other places in the United States have signed a statement in solidarity with Mr. Bello, included in this brief as Exhibit 1.

ARGUMENT

As a legal matter, Mr. Bello enjoys a constitutional right to speak freely, to be free from retaliation for that speech, and to be free from efforts to restrain his ongoing speech on matters of public concern. Moreover, listeners and participants in the ongoing immigration debate have a concomitant right to receive his expressed viewpoints, without government officials deliberately interfering with the flow of that information with a censorial and retaliatory motive and effect. Despite these protections, ICE acted in retaliation for protected speech that was critical of them, striking at the very heart of the First Amendment. Given the paramount constitutional rights and interests implicated in this case, this Court should grant Mr. Bello's emergency motion for release.

I. The First Amendment protects Mr. Bello's reading of his poem "Dear America."

The First Amendment provides protection for free speech in the United States for citizens and noncitizens alike. *See, e.g.*, *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) ("Freedom of speech and of press is accorded aliens residing in this country."). It is a well-established principle of constitutional analysis that "the First Amendment begins by

focusing upon the activity of the government," not upon the identity of the speaker. *Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412, 1418 (2016). The text of the First Amendment imposes limits on government action in addition to conferring individual rights by articulating the scope of the right in terms of potential legislative infringement: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Government figures act unconstitutionally whenever they suppress or restrict free speech, regardless of the speaker's identity. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340–41 (2010) ("[T]he Government may commit a constitutional wrong when by law it identifies certain preferred speakers."). Noncitizens residing in the United States, like Mr. Bello, thus enjoy free speech protections equal to those of citizens, as the Ninth Circuit and other courts have explicitly held. *See, e.g.*, *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1066 (9th Cir. 1995) ("We reject the government's contention that we apply gradations of First Amendment protection . . . in determining which citizens and aliens may receive particular government benefits."); *Massignani v. Immigration and Naturalization Serv.*, 438 F.2d 1276, 1278 (7th Cir. 1971) (per curiam) ("[A]liens fully enjoy our primary rights of free speech guaranteed by the First Amendment.").

Even if the First Amendment were applied to a narrower group of speakers, Mr. Bello would plainly belong in the protected group. When the Constitution refers to "the people," it is employing a term of art that is not limited to American citizens, but rather

extends to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). The text of the First Amendment limits the right to free assembly to "the people" while framing the right to free speech in broad, abstract terms, suggesting that free speech applies to an even larger class. *See, e.g.*, Donald L. Doernberg, *We the People: John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52, 102–05 (1985) (noting judicial recognition of First Amendment collective rights).

But even if free speech were a right held only by "the people," Mr. Bello would certainly be included in this class. The record attests to his substantial and meaningful connections to the United States and his local community in Bakersfield, California: Mr. Bello is a student at Bakersfield College and the father and primary caretaker of his one-year-old U.S.-citizen son, works as a farmworker, and has resided in California nearly his entire life. Dkt. No. 1, ¶ 14. His lengthy residence, family ties, education, and employment in the United States are more than enough to endow him with the full constitutional right to free speech. *Cf. Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012) (finding noncitizen's doctoral studies established a sufficient voluntary connection to assert constitutional claims).

Additionally, Mr. Bello's right to free speech is not the only First Amendment consideration at issue. The First Amendment operates structurally, protecting the right of listeners to receive the information communicated in addition to the right to speak. *See, e.g.*, *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) ("[T]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom."); *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972) ("It is now well established that the Constitution protects the right to receive information and ideas.") (internal marks and citations omitted); *Martin v. Struthers*, 319 U.S. 141, 143 (1943) ("This right [to receive information and ideas] is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution."). American citizens have a constitutionally protected right to listen to Mr. Bello's views when he chooses to express them. This exchange of ideas benefits the populace at large and ultimately serves our systemic ability to govern ourselves. *See, e.g.*, *Walker v. Tex. Div., "Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015) ("[T]he Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate.").

Mr. Bello's poem "Dear America" addresses matters of public concern and is therefore a prototypical example of speech that falls within the ambit of First Amendment protection. The poem's central focus is the current crisis around the federal immigration

policy and related human rights violations occurring as a result of the U.S. government's detention of immigrants. The poem further discusses contemporary American political issues including "private prisons, political funding, [and] mass incarceration." Dkt. No. 1, ¶ 26. The allowance for this kind of speech is essential to our democracy and the values underlying the First Amendment. *See, e.g.*, *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)) ("The First . . . Amendment[] embod[ies] our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'"). As the Supreme Court has consistently held, speech bearing on public issues "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal marks omitted). When Mr. Bello read his poem before an audience at a public forum, he was thus entitled to full protections under the First Amendment.

II. ICE impermissibly carried out a retaliatory enforcement action, motivated by Mr. Bello's exercise of his First Amendment rights.

The functions of a police force to arrest may not be "used as a medium to thwart or intrude upon First Amendment rights otherwise being validly asserted" by individuals engaged in peaceful First Amendment expression. *Kelly v. Page*, 335 F.2d 114, 119 (5th Cir. 1964). This mandate has been upheld by the Supreme Court in the recent decisions *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), and *Lozman v. City of Riviera Beach, Fla.*, 138

S. Ct. 1945 (2018). At the core of these rulings, the Supreme Court has held that government retaliation for speech protected under the First Amendment is a grave constitutional violation. In *Nieves*, the Court reiterated that "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech." *Nieves*, 139 S. Ct. at 1722 (internal marks omitted) (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). The core of the First Amendment – and the protection that distinguishes our Nation from large swaths of the world – is that it forbids government actors from censoring speech critical of them. *See, e.g.*, *Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003) ("In suppressing criticism of their official conduct . . . , defendants did more than compromise some attenuated or penumbral First Amendment right; they struck at its heart.").

The mere specter of reprisal is anathema to free and open debate, as it "threatens to inhibit exercise of the protected right." *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998). The chilling effect caused by retaliation, whether actual or threatened, directly harms our democracy by inhibiting the realm of available information and viewpoints. *See, e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571–72 (1968) ("[F]ree and open debate is vital to informed decision-making by the electorate. . . . Accordingly it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.").

A. Mr. Bello asserts a legitimate claim for ICE's retaliatory enforcement action.

ICE's actions toward Mr. Bello present a clear example of officers "exploit[ing] the arrest power as a means of suppressing speech." *Lozman*, 138 S. Ct. at 1953. The enforcement action was planned and deliberately executed in the immediate wake of Mr. Bello's public criticisms.

The instant case thus presents a very different circumstance than the one at issue in *Nieves v. Bartlett*, in which officers chose to arrest the plaintiff because he behaved belligerently at a rowdy winter sports festival. 139 S. Ct. at 1720. The officers in *Nieves* made a "split-second judgment[]" to arrest after the plaintiff appeared to be intoxicated, yelled with slurred speech, and approached the officers aggressively. *Id.* at 1724 (quoting *Lozman*, 138 S. Ct. at 1953).

Rather, enforcement action taken against Bello more closely resembles the deep First Amendment issues the Supreme Court grappled with in *Lozman v. City of Riviera Beach, Fla*. Lozman claimed that he was arrested in retaliation for his criticism of a local development project and for having been vocal about his opposition to various council members. While speaking at a city council meeting and expressing his critical views of the project, Lozman was handcuffed and removed for disrupting that meeting. The Supreme Court overruled the Eleventh Circuit's lower ruling and found that at least in those circumstances where there is more than a "tenuous causal connection between a defendant's alleged animus and the plaintiff's injury," that a retaliation claim may proceed. *Lozman*, 138 S. Ct. at 1953. Here, the close temporal connection between

Bello's reading of and subsequent arrest echo the retaliatory context in which Lozman's arrest occurred and similarly presents a clear case of law enforcement officers wielding their power to censor speech that is critical of them.

B. This is the latest instance of ICE's ongoing pattern of retaliatory enforcement actions against those critical of the agency, including against Petitioner-Appellant.

The circumstances surrounding Mr. Bello's arrest strongly suggest that it was motivated by reading his poem "Dear America," a speech act protected under the First Amendment. Mr. Bello participated in the public forum held by the Kern County Board of Supervisors on May 13, 2019, and ICE prepared a warrant for his arrest on the morning of May 15, a mere 36 hours later. Dkt. No. 1, ¶¶ 26, 102. Mr. Bello attests that the arresting officers told him, "We know who you are and what you're all about," and a guard later singled him out and asked, "You think you're famous and you're going to get special treatment?" *Id.* at ¶¶ 32, 38. These encounters show that the government agents were familiar with his activist record and suggest that they were in fact motivated by the desire to suppress his lawful, protected speech criticizing their work. By detaining Mr. Bello, ICE agents have already prevented him from speaking at a public event on June 22, where he was scheduled to be the featured speaker. *Id.* at ¶ 119.

Further, the enforcement action is part of an emerging and disturbing pattern. As Mr. Bello's petition for habeas corpus notes, ICE agents have been repeatedly targeting immigrant activists who speak out publicly and critically against them. *See generally id.* at ¶¶ 42–94. The Supreme Court has recognized the gravity of the First Amendment

interests at stake in cases involving ongoing instances of retaliation: "An official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer." *Lozman*, 138 S. Ct. at 1954.

The repeated investigations, detentions, and deportations of immigrant activists are alarming, suggesting a concerted effort by ICE rather than isolated choices made by officers responding case-by-case. Sister circuit courts have ruled that various activists may not be detained while there exists the possibility that ICE is holding them as a means of silencing, retaliating against, or otherwise uniquely targeting these individuals for their expressive political speech.

This past April, the Second Circuit ordered a lower court to reconsider whether ICE violated an activist's First Amendment rights by taking him into custody for deportation in 2018. The petitioner, Ravi Ragbir, is a well-known New York-based immigrant and a leading voice on the need for immigration reform in the United States. He was eligible for deportation due to a pending criminal matter from over a decade prior to his being taken into custody, but was targeted for his speech criticizing ICE. The Second Circuit wrote of the possible retaliatory nature of his detention: "A plausible, clear inference is drawn that Ragbir's public expression of his criticisms, and its prominence, played a significant role in the recent attempts to remove him." *Ragbir v. Homan*, 923 F.3d 53, 71 (2d Cir. 2019).

In the Eleventh Circuit, the Board of Immigration Appeals recently ordered the release of Memphis journalist Manuel Duran Ortega, who had been detained for nearly 15 months. Duran Ortega was first arrested by Memphis police on April 3, 2018, while he was reporting on an immigration-related protest. In the intervening months while Duran Ortega remained in custody in Tennessee, civil society organizations came to his defense, noting that Duran Ortega's arrest and subsequent deportation proceedings appear inextricably linked to the subject of his longstanding reporting and professional track record of producing investigative stories critical of the immigration system in the United States. As the Eleventh Circuit briefings noted, "the First Amendment concerns presented by the Government's arrest, detention, and threatened removal of Mr. Duran Ortega merit re-opening of his case. He has presented substantial evidence establishing . . . that government actors retaliated against him for his reporting on matters of public concern and/or attempted to silence such reporting." Brief of Amici Curiae Journalist Organizations, *Duran Ortega v. U.S. Attorney General*, No. 18-14563 (11th Cir. Jan. 14, 2019). In releasing Duran Ortega from custody and granting his appeal for asylum to be reheard, the Eleventh Circuit understood that law enforcement action like that taken against Duran Ortega threatens the First Amendment.

The problem is systematic, and the enforcement actions taken against Mr. Bello are yet another instance of an immigrant activist targeted for exercising his First Amendment right to criticize government action. The impermissible retaliation must stop. As sister

circuits have upheld the fundamental due process rights of immigrant appellants seeking relief for violations of their First Amendment rights, this Court must release Mr. Bello from custody pending review of his appeal.

III. Relief must be granted to prevent officials from using the threat of enforcement to chill protected speech, both here and in future cases.

The circumstances of Mr. Bello's arrest raise profound First Amendment concerns. ICE's conduct, if ratified by this Court, provides a roadmap for officials to censor and retaliate against speech critical of them in a manner that subverts the values enshrined in the First Amendment. *See Rossignol*, 316 F.3d at 528 ("If we were to sanction this conduct, we would point the way for other state officials to stifle public criticism of their policies and their performance."). If deportation is allowed to be wielded as a tool to silence key voices who speak out regarding the treatment of immigrants and the actions of government officials, our society as a whole suffers.

The importance of diverse viewpoints on a pressing matter of public interest lies at the very core of the constitutional protection for free speech. It is what separates the United States from oppressive regimes. As Judge Learned Hand wrote, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 362, 372 (1943). *See also Bridges v. California*, 314 U.S. 252, 270 (1941) ("[I]t is a prized American privilege to speak one's mind, although not always

with perfect good taste, on all public institutions."). Dissension, activism, and debate is a time-honored American tradition, one that is necessary to ensure a responsive democratic government and an informed populace. *See, e.g.*, *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."). By arresting Mr. Bello in response to his lawful poetry reading criticizing ICE, the officials impermissibly suppressed protected speech, directly harmed the ongoing political debate over immigration, and chilled future lawful speech.

The ultimate message from government officials who wield power in this way is for critics to think twice about their own words lest they suffer the consequences. The message that critics will pay for expressing their views is amplified every time ICE targets an immigrant who chooses to exercise his or her First Amendment right to speak critically of them, with the aim of censoring this type of speech completely. The dangerous precedent that ICE is attempting to establish must end.

IV. Conclusion

At bottom, the question presented is whether Mr. Bello's arrest and ongoing detention are constitutional. Where, as here, the arrest took place mere hours after public and protected speech, even the District Court recognized the timing of his arrest was

highly suggestive of the government's effort to retaliate against Mr. Bello's speech and to keep him from speaking out further against immigration policies and enforcement. Such official conduct is unconstitutional, as it both squelches Mr. Bello's speech and interrupts the debate about matters of indisputable public concern. For the foregoing reasons, PEN America urges this Court to grant Mr. Bello's emergency motion for release.

Dated: July 29, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rules of Appellate Procedure 29(a)(4)(G), 32(a)(5), and Ninth Circuit Rule 32-1, that the foregoing *amicus curiae* brief is proportionally spaced, has a typeface of 14 point Times New Roman, and contains 3,686 words, excluding those sections identified in Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 29, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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