

**No. 19-16441**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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JOSE OMAR BELLO-REYES, *Petitioner-Appellant*,

v.

KEVIN MCALEENAN, ET AL., *Respondents-Appellees*,

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On Appeal from the United States District Court  
for the Northern District of California  
Case No. 3:19-cv-03630-SK

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BRIEF OF AMICI CURIAE PEN AMERICA IN SUPPORT OF PETITIONER

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure 26.1(a) and 29(a)(4)(A), amicus curiae certify that they have no parent corporations or any publicly held corporations owning 10% or more of its stock.

Dated: February 25, 2020  
New York, NY

/s/ Alina Das

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fear-being-deported-but-29-million-immigrants-must-check-in-with-ice-  
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## INTEREST OF AMICUS CURIAE

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.<sup>1</sup> 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. PEN

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<sup>1</sup> 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). Counsel for Petitioner-Appellants and counsel for Respondent-Appellees consent to this filing. Fed. R. App. P. 29(a)(2).

America supports the position of the Plaintiff-Appellant in this case and submits this brief to address the specific question of the applicability of *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), to this case.

### **SUMMARY OF ARGUMENT**

The arrests, detention, and deportation of dozens of immigrant rights activists—including journalists, writers, and film protagonists—have raised important questions about the First Amendment’s longstanding protection of protected political speech in the context of immigration enforcement. Most recently, the government has relied on a Supreme Court case, *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), to argue that First Amendment cannot protect individuals who might otherwise be subject to immigration enforcement from retaliatory actions. The government’s reliance on *Nieves* is disturbing and incorrect for several reasons. First, nothing in *Nieves*, a damages cases, changes longstanding First Amendment precedent prohibiting retaliatory arrests by federal government officials. Second, even if *Nieves* applies to actions to stop retaliatory arrests, it is ill-suited to apply in the immigration context. Third, even if *Nieves* applies to the immigration context, the exception relating to prosecutorial discretion would squarely apply here.

## ARGUMENT

### I. *Nieves*, a Damages Case, Does Not Disturb Longstanding First Amendment Precedent Prohibiting Government Officials From Arresting People In Retaliation for Their Protected Speech.

The Government’s attempt to paint *Nieves* as a major sea change presents a deep threat to our most cherished First Amendment protections. The Supreme Court has long recognized that government actors cannot use their arrest power to retaliate against those who criticize the government. As the Justices took great pains to explain in *Nieves*, nothing about the decision alters that course. The decision is about a damages actions, which entails different concerns than those present here. *Nieves* cannot be read to give government actors the greenlight to arrest its critics with impunity.

The freedom to speak freely without risking arrest is “one of the principal characteristics by which we distinguish a free nation.” *Houston v. Hill*, 482 U.S. 451, 463 (1987). “[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out.” *Hartman v. Moore*, 547 U.S. 250, 256 (2006). It does not matter whether the speaker otherwise has an independent “right” to be free from the adverse action taken by the government. Even if the government could lawfully take adverse action against an individual, for “any number of [other] reasons,” the government may not do so “because of his constitutionally protected speech or associations.” *Perry v. Sindermann*, 408 U.S.



593, 597 (1972). Put simply, the government “may not retaliate for exercising First Amendment speech rights.” *Wilkie v. Robbins*, 551 U.S. 537, 555 (2007). Nor may it threaten punishment against an individual as a means of suppressing future speech. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68-72 (1963); see, e.g., *Backpage.com, LLC v. Dart*, 807 F.3d 229, 235 (7th Cir. 2015) (Posner, J.), *cert. denied*, 137 S.Ct. 46 (2016) (“A government entity . . . is not permitted to employ threats to squelch the free speech of private citizens.”).

*Nieves* does not change this. *Nieves* involved an action for damages under 42 U.S.C. § 1983 following an arrest, not a habeas petition seeking declaratory and injunctive relief to stop unconstitutional retaliation from taking place. *Nieves* therefore does nothing to alter First Amendment jurisprudence prohibiting retaliation by government officials, nor did the government take the position in *Nieves* that it would. Justice Gorsuch explained this distinction at length in his concurrence in *Nieves*:

Both sides accept that an officer violates the First Amendment when he arrests an individual in retaliation for his protected speech. They seem to agree, too, that the presence of probable cause does not undo that violation or erase its significance. . . . If the state could use these laws not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties, and little would separate us from the tyrannies of the past or the malignant fiefdoms of our own age. . . . So if probable cause can’t erase a First Amendment violation, the question becomes whether its presence at least forecloses a civil claim for damages as a statutory matter under § 1983.

139 S. Ct. at 1730 (Gorsuch, J., concurring). *Nieves* is thus not a holding that police officers may lawfully retaliate against people for their political speech. By contrast, the Government here is asking this Court to hold that ICE may lawfully retaliate against an immigrant rights activist for his political speech, a holding antithetical to First Amendment precedent—one that would bring us one step closer to “the tyrannies of the past or the malignant fiefdoms of our own age.” *Id.*

## **II. *Nieves* Is Ill-Suited to Apply to Civil Immigration Enforcement Operations.**

### **A. Targeted Civil Immigration Enforcement Operations Do Not Involve the “Split-Second Judgments” Safeguarded By A Probable Cause Standard in the Criminal Context.**

*Nieves* and the cases upon which it relies are steeped in considerations of the probable cause standard for criminal arrests. Unlike police officers, ICE officers are not relying on protected speech to decide whether to take action against someone in “split-second judgments” at the scene of a crime. *Nieves*, 139 S. Ct. at 1723-1724. ICE officers are not enforcing criminal law at all, they are engaging in civil law enforcement. As the Second Circuit held in *Ragbir v. Homan*, it is unlikely that such concerns motivating limitations on retaliatory arrest claims in the criminal context apply to the civil immigration context at all 923 F.3d 53, 67 & n.17 (2d Cir. 2019) (noting that the probable cause requirement for the Fourth Amendment serves a specific purpose for securing an individual and evidence in the process of

investigating a criminal offense, circumstances not readily translatable into the civil immigration context), *cert. filed*, No. 19-1046 (S.Ct. filed Feb. 21, 2020).

The circumstances in *Nieves* underscore this point. In *Nieves*, officers arrested the plaintiff when he behaved belligerently at a 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. Because there was probable cause for the arrest, the Supreme Court held that no basis for a damages action brought after the fact was found.

Immigration enforcement actions, which are civil in nature, are of a different character. ICE routinely engages in home and workplace raids using civil officers from its Enforcement and Removal Operations teams to target individuals based on their status (as an individual subject to deportation), not a reported crime. The assessment immigration officials make is therefore not whether there is probable cause for a criminal arrest, nor is this decision made in a “split second.” Rather, federal officials review immigration paperwork about whether an individual is subject to detention and deportation, and then pursue a civil arrest.

In this case, for example, after Mr. Bello read his poem “Dear America” at local meeting, immigration officials planned a targeted operation to go to his home and arrest him without a judicial warrant or probable cause hearing. The concern

motivating *Nieves*—a desire to safeguard the split-second decisions by police officers to arrest individuals when they see a crime—is not present here or in other cases involving targeted operations.

This is typical of similar enforcement actions that have taken place across the county, where community leaders like Mr. Bello have been targeted for speaking out. For example, in the *Ragbir* case, ICE admitted it had begun planning to target Ravi Ragbir, Executive Director of the New Sanctuary Coalition, and Jean Montrevil, a co-founder of the New Sanctuary Coalition in October 2017, planning an operation to arrest both high profile community leaders on the same day in January 2018, after expressing resentment for the negative media attention about ICE that the leaders had generated. *See Ragbir*, 923 F.3d at 60; *see also* Declaration of Field Office Director Thomas R. Decker, *Ragbir et al. v. Homan*, No. 18-CV-1159 (S.D.N.Y. 2018), ECF Nos. 51, 58. In a separate case involving activist Maru Mora-Villalpando, the evidence similarly demonstrated that ICE had been profiling her for her “Latino advocacy” and participation in “anti-ICE” protests for some time.<sup>2</sup> These are not split-second decisions but targeted operations.

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<sup>2</sup> Nina Shapiro, *Activist groups file First Amendment lawsuit in Seattle over ICE arrests*, SEATTLE TIMES (Oct. 24, 2018), <https://www.seattletimes.com/seattle-news/activist-groups-file-first-amendment-lawsuit-in-seattle-over-ice-arrests/>

**B. *Lozman*, rather than *Nieves*, Better Captures the First Amendment Violations Underlying the Government’s Policy of Targeting Immigrant Activists for Arrest.**

Notably, *Nieves* left undisturbed *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945 (2018), which better captures the First Amendment issues at stake to the extent damages cases apply at all. In *Lozman*, an individual 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, Mr. Lozman was handcuffed and removed for disrupting that meeting. Mr. Lozman sued city officials, claiming that they had targeted him for arrest based on his criticism of the project. The Supreme Court held that 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. The Court distinguished retaliation in the form of “an ad hoc, on-the-spot decision by an individual officer” from a scenario where “the government itself orchestrates the retaliation.” *Id.* at 1954. Such orchestration “elevate[s]” the retaliation to “official government policy” and thus requires “a compelling need for adequate avenues of redress.” *Id.*

Here, the government attempt to shift this Court away from *Lozman* towards *Nieves*, but of the two cases, *Lozman* is clearly more on point. Mr. Bello alleges, and the evidence amply proves, that no split-second decision was made here. To the

contrary, ICE officials chose to pursue an operation to arrest Mr. Bello because of the content of the poem he recited. Having done so in Mr. Bello's case is enough to demonstrate a viable First Amendment claim, but ICE has orchestrated similar acts of retaliation across the country.<sup>3</sup> Federal courts have intervened in several of these cases. *See, e.g., Ragbir*, 923 F.3d at 79; *Rueda Vidal v. U.S. Dep't of Homeland Sec., et al.*, No. CV189276DMGPLAX, 2019 WL 7899948, at \*12-13 (C.D. Cal. Aug. 28, 2019); *Gutierrez-Soto v. Sessions*, 317 F.Supp.3d 917, 933 (W.D. Tex. July 10, 2018); *see also Freedom For Immigrants v. DHS*, No. 2:19-cv-10424-AB (GJSx) (C.D.Cal. Feb. 11, 2020). This is not about one officer or one arrest gone bad, but about a calculated choice by ICE to silence Mr. Bello for his words—the protections of the First Amendment applies in full force.

Proof of ICE's broader policy of calculated retaliation is present across the country. In addition to Mr. Bello's case and the cases of individuals described above, many more individuals and organizations have been targeted. Members of Migrant Justice in Vermont were targeted for several arrests and other forms of retaliation from at least 2014 through 2019 in a series of ICE operations that involved, among

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<sup>3</sup> *See* John Burnett, Meet the 20+ Immigration Activists Arrested Under Trump, NPR (Mar. 16, 2018), <https://www.npr.org/2018/03/16/591879718/see-the-20-immigration-activists-arrested-under-trump>; Maria Sacchetti & David Weigel, ICE Has Detained or Deported Prominent Immigration Activists, Washington Post (Jan. 19, 2018), [https://www.washingtonpost.com/powerpost/ice-has-detained-or-deported-foreigners-who-are-also-immigration-activists/2018/01/19/377af23a-fc95-11e7-a46b-a3614530bd87\\_story.html?utm\\_term=.64d28708d652](https://www.washingtonpost.com/powerpost/ice-has-detained-or-deported-foreigners-who-are-also-immigration-activists/2018/01/19/377af23a-fc95-11e7-a46b-a3614530bd87_story.html?utm_term=.64d28708d652).

other tactics, infiltrating workers' rights meetings. *Migrant Justice v. Nielsen*, No. 5:18-cv-00192-GWC, ECF 22 (D.Vt. filed Feb. 7, 2019). Claudio Rojas, an activist in Miami, was targeted at a routine check-in in February 2018 after the premier of a film featuring his activism at the Sundance Film Festival. *Rojas v. Moore*, 1:19-cv-20855-JLK (S.D.Fl. filed Mar. 14, 2018).<sup>4</sup> Dozens of examples across the country have been documented, and even the Inter-American Commission on Human Rights has expressed concern about this development in U.S. policy.<sup>5</sup>

**III. Even if *Nieves* Generally Applies in the Civil Immigration Enforcement Context, This Case Falls Squarely Within Its Prosecutorial Discretion Exception.**

Even in the context of criminal arrests, *Nieves* by its own terms does not apply “in circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so.” 139 S. Ct. at 1727. “In such cases, an unyielding requirement to show the absence of probable cause could pose a risk that some police officers may exploit the arrest power as a means of suppressing speech.” *Id.* Thus even if the Court concludes the line of damages cases applies

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<sup>4</sup> Monique Madan, *He exposed abuse at a Florida immigrant detention center. Now he's in prison.* Miami Herald (Mar. 3, 2019), <https://www.miamiherald.com/news/local/immigration/article227043044.html>.

<sup>5</sup> Inter-American Commission on Human Rights, IACHR Expresses Concern over Situation of Immigrant Defenders in the United States (Feb. 16, 2018), [https://www.oas.org/en/iachr/media\\_center/PReleases/2018/029.asp](https://www.oas.org/en/iachr/media_center/PReleases/2018/029.asp).

and that *Nieves* rather than *Lozman* controls, it should conclude that Mr. Bello’s case falls into this exception.

An estimated 2.3 to 2.9 million people live in the U.S. under ICE supervision.<sup>6</sup> Only a small number of these individuals are arrested, detained, and deported. It permits millions of people like Mr. Bello to remain at liberty. Mr. Bello was at liberty until his recitation of “Dear America.” A factfinder could easily determine that this is precisely the exception that *Nieves* contemplated: that ICE is “exploit[ing] the arrest power as a means of suppressing speech.” *Id.* This Court should not permit such a blatant violation of the First Amendment.

## CONCLUSION

For the foregoing reasons, this Court should reverse the decision below in light of First Amendment jurisprudence. *Nieves* does nothing to prevent this Court from upholding protections for core political speech in the immigration context.

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<sup>6</sup> See Tiziana Rinaldi, *As immigration detention soars, 2.3 million people are also regularly checking in with immigration agents*, Public Radio International (May 23, 2017), <https://www.pri.org/stories/2017-05-23/immigration-detention-soars-23-million-people-are-also-regularly-checking> (reporting that in 2017 2.3 million people are under ICE supervision); *They Fear Getting Deported. But 2.9 Million People Must Check In Anyway*, Washington Post (Apr. 25, 2019), [https://www.washingtonpost.com/local/they-fear-being-deported-but-29-million-immigrants-must-check-in-with-ice-anyway/2019/04/25/ac74efce-6309-11e9-9ff2-abc984dc9eec\\_story.html](https://www.washingtonpost.com/local/they-fear-being-deported-but-29-million-immigrants-must-check-in-with-ice-anyway/2019/04/25/ac74efce-6309-11e9-9ff2-abc984dc9eec_story.html) (reporting that in 2019 2.9 million people are under ICE supervision).



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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), I hereby certify that the foregoing Brief of Amici Curiae is proportionately spaced, has a typeface of 14 points or more and, according to computerized count on Microsoft Word, contains 2,610 words.

Dated: February 25, 2020  
New York, NY

/s/ Alina Das

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## CERTIFICATE OF SERVICE

I, Alina Das, hereby certify that I electronically filed the foregoing brief 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 February 25, 2020.

I certify that I have served counsel for all participants in the case, and that for registered CM/ECF users, service will be accomplished by the Appellate CM/ECF System:

Dated: February 25, 2020  
New York, NY

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