No. 19-1046

In the Supreme Court of the United States

MATTHEW T. ALBENCE, ET AL., PETITIONERS

v.

RAVIDATH LAWRENCE RAGBIR, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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In 8 U.S.C. 1252, Congress channeled into a defined administrative procedure all legal and factual questions that may arise from the removal of an alien, with judicial review of those decisions vested exclusively in the courts of appeals. See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (*AADC*). And in Section 1252(g), Congress provided that, "notwithstanding any other provision of law (statutory or nonstatutory)," "no court"—except a federal court of appeals in that statutorily-defined process—"shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the [Secretary of Homeland Security] to commence proceedings, adjudicate cases, or execute removal orders against any alien." 8 U.S.C. 1252(g). Section 1252(g) thus protects the government's authority to make "discretionary determinations" over whether and when to

execute a removal order, "providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed." *AADC*, 525 U.S. at 485.

In the decision below, the court of appeals held unconstitutional the application of Section 1252(g) to respondent Ravidath Ragbir. The court grounded its decision on two premises: first, that application of Section 1252(g) potentially implicates the Suspension Clause, U.S. Const. Art. I, § 9, Cl. 2, because it bars Ragbir from raising a viable constitutional claim; and second, that the Suspension Clause guarantees Ragbir the ability to raise such a claim in a habeas corpus proceeding. See Pet. App. 22a-47a. Both premises are incorrect, as the intervening decisions of this Court in *Nieves* v. *Bartlett*, 139 S. Ct. 1715 (2019), and *Department of Homeland Security* v. *Thuraissigiam*, 140 S. Ct. 1959 (2020), have made clear. Accordingly, the Court should grant certiorari, vacate the decision below, and remand to the court of appeals for further consideration in light of *Nieves* and *Thuraissigiam*.

A. This Court Should Grant, Vacate, And Remand In Light Of Its Intervening Decision In *Nieves*

This Court's intervening decision in *Nieves* undermines the court of appeals' first conclusion that Ragbir raised a viable constitutional claim.

The court of appeals determined that Section 1252(g) deprived Ragbir of a forum for a viable First Amendment claim of selective enforcement of the immigration laws. Pet. App. 22a-36a. That determination is incorrect under *AADC*. See 525 U.S. at 488 ("As a general matter * * * an alien unlawfully in this country has no constitutional right to assert selective enforcement as a

defense against his deportation."). But even beyond its misapplication of *AADC*, the court further erred in rejecting the government's alternative argument that, at a minimum, "the existence of probable cause to arrest an individual defeats a plaintiff's First Amendment retaliation claim." Pet. App. 23a. Shortly after the court of appeals' decision, this Court endorsed that very proposition in *Nieves*, explaining that "[t]he presence of probable cause should generally defeat a First Amendment retaliatory arrest claim." 139 S. Ct. at 1726.

1. Respondents err (Br. in Opp. 15) in attempting to limit *Nieves* to "section 1983 damages actions based on criminal arrests" and in contending that a supposed "exception in *Nieves* for discretionary actions applies." As an initial matter, the court of appeals did not adopt either argument. Instead, it viewed the existence of probable cause as relevant only if an arrest did not have "the effect of actually deterring or silencing the individual," Pet. App. 24a (citation and emphasis omitted)—a limitation nowhere in *Nieves*. See 139 S. Ct. at 1723-1727. That alone is reason for vacatur. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (emphasizing that this Court is "a court of review, not of first view"). In any event, even if this Court were to consider in the first instance respondents' two proposed distinctions, neither withstands scrutiny.

a. Although *Nieves* arose in the criminal context, its reasoning applies *a fortiori* in the immigration context. Both raise the same concerns about "complex causal inquiries" between a plaintiff's protected speech and a law-enforcement officer's decision to arrest, and both implicate this Court's same preference for "objective standards of reasonableness" rather than "allegations about an arresting officer's mental state." *Nieves*,

139 S. Ct. at 1724-1725. But in addition, as this Court has previously explained, "the interest of the target in avoiding 'selective' treatment" under the immigration laws "is less compelling than in criminal prosecutions." *AADC*, 525 U.S. at 491; see *id.* at 489-490 (explaining that the concerns animating the "particularly demanding" standard for criminal selective-prosecution claims are "greatly magnified in the deportation context").

Respondents nonetheless attempt (Br. in Opp. 15-18) to limit *Nieves* in several ways. First, they contend (*id.* at 15-16) that *Nieves* applies only to the recovery of damages under 42 U.S.C. 1983. But respondents rely (Br. in Opp. 16) solely on the partial concurrence and partial dissent of a single Justice. The Court itself did not limit its reasoning to Section 1983; it explained that the question presented was "whether probable cause to make an arrest defeats a claim that the arrest was in retaliation for speech protected by the First Amendment." *Nieves*, 139 S. Ct. at 1721; see *id.* at 1721-1725.

Next, respondents assert (Br. in Opp. 16-17) that selective-enforcement claims in the immigration context will neither embroil law-enforcement officers in years of litigation nor implicate split-second decisions. But respondents offer no support for those assertions. This Court has previously cautioned that delay in the immigration context "is often the principal object of resistance to a deportation proceeding" and that "the consequence is to permit and prolong a continuing violation of United States law." *AADC*, 525 U.S. at 490. And no sound reason exists to believe that officers making arrests for immigration violations are categorically exempt from the need to make the complex judgments involved in other arrests. Moreover, because this Court has all but foreclosed *any* selective-enforcement claims

in the immigration context, see *AADC*, 525 U.S. at 488, it is implausible that such claims should be subject to a more easily satisfied standard than their criminal-law counterparts.

Finally, respondents contend (Br. in Opp. 17-18) that their allegations of a policy of targeting immigration activists align this case not with *Nieves* but with *Lozman* v. *City of Riviera Beach*, 138 S. Ct. 1945 (2018). That contention is incorrect. This Court cabined its decision in *Lozman* to a "unique class of retaliatory arrest claims." *Id.* at 1954. And the facts of *Lozman* were indeed "unique": The plaintiff alleged the existence of an official municipal policy crafted by high-level decisionmakers who had targeted a specific individual; that individual had objective evidence of the policy; and the retaliation scheme both extended beyond arrest and bore little relationship to the protected speech. *Id.* at 1954-1955. Respondents here, by contrast, have not alleged or presented objective evidence of that sort of high-level official policy. See C.A. App. 46 (generally alleging that "federal immigration authorities across the country have engaged in a pattern and practice of targeting outspoken immigration-rights activists"). To the contrary, a written policy instructs that immigration laws should be enforced against aliens like Ragbir, who have been convicted of criminal offenses. See *id.* at 211.

b. Nor does this case fall within the "narrow qualification" mentioned in *Nieves* "for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." 139 S. Ct. at 1727. Respondents suggest (Br. in Opp. 18) that *Nieves* endorsed a sweeping exception for any discretionary decisions. But the Court made clear that its

"narrow qualification" was far more constrained: It applies to "endemic" offenses like jaywalking that "rarely result[] in arrest," for which the plaintiff could present "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." 139 S. Ct. at 1727.

Respondents have not made, and could not make, such a showing here. Ragbir was convicted of an aggravated felony; is subject to a final order of removal; and was previously granted a series of discretionary stays of removal, which afforded him the opportunity to pursue multiple rounds of judicial review. See, *e.g.*, 389 Fed. Appx. 80 (denying petition for review of removal decision); 640 Fed. Appx. 105 (denying petition for review of reconsideration decision). Enforcing the immigration laws is a top priority for the federal government, especially with respect to aliens like Ragbir who have been ordered removed after committing an aggravated felony and have been granted significant lenience to contest their removal. See C.A. App. 153, 202, 211. Respondents offer no reason to believe that removal orders are "rarely" enforced against other similarly situated aliens, and they have never offered any "objective evidence" to that effect. *Nieves*, 139 S. Ct. at 1727.

2. Respondents separately assert (Br. in Opp. 14-15) that the court of appeals sufficiently considered this Court's *Nieves* decision in denying a petition for panel rehearing or rehearing en banc. That assertion is unsupported. The court of appeals indeed denied rehearing after this Court's decision in *Nieves*, as the government noted in its petition for a writ of certiorari. Pet. 13 n.3; see Pet. App. 79a-80a. But courts can deny re-

hearing for a variety of reasons, none of which necessarily indicates disagreement with the merits of a party's arguments. See Fed. R. App. P. 35, 40(a)(2). The government has not yet had the opportunity to present its arguments about *Nieves* in an ordinary appeal posture, free from any prudential considerations that may weigh against rehearing, and the court of appeals has never been required to consider *Nieves* in such a posture or to issue an opinion explaining its reasoning about the application of *Nieves* here.

Respondents contend (Br. in Opp. 2) that, because *Nieves* was raised in a rehearing petition, the government's request for vacatur is "unorthodox." It is not. This Court has "GVR'd in light of a wide range of developments," including even some that pre-date a court of appeals decision, if there is "reason to believe the court below did not *fully consider*" the development. *Lawrence* v. *Chater*, 516 U.S. 163, 166-167 (1996) (per curiam) (emphasis added). Indeed, this Court has "never held lower court briefing to bar [its] review and vacatur where the lower court's order shows no sign of having applied the precedents that were briefed." *Id.* at 170; see *id.* at 169 (approving of vacatur where "the Court of Appeals wrote no opinion to show whether or how it considered a precedent of ours that the District Court had had no opportunity to consider"). Regardless of whether an intervening development was raised in a denied rehearing petition, the practice of vacating for reconsideration "conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, [and] assists this Court by procuring the benefit of the lower court's insight." *Id.* at 167.

B. This Court Should Grant, Vacate, And Remand In Light Of Its Intervening Decision In *Thuraissigiam*

This Court's recent decision in *Thuraissigiam* undermines the court of appeals' second conclusion that Ragbir is entitled to challenge by habeas corpus a decision to execute a final order of removal.

The court of appeals determined that the Suspension Clause guarantees Ragbir the ability to bring his First Amendment claim in federal court, and that Section 1252(g) is therefore unconstitutional as applied here. Pet. App. 36a-47a. The court broadly reasoned that the Suspension Clause's protections extend to "aliens subject to an order of removal." *Id.* at 37a. It acknowledged the government's argument that Ragbir does not "seek release from custody since he does not challenge his final order of removal." *Id.* at 38a. But the court nevertheless believed that the Suspension Clause required a forum for Ragbir's First Amendment claim because, absent judicial intervention, "Ragbir faces imminent deportation, which necessarily involves a period of detention." *Id.* at 42a.

The court of appeals' reasoning cannot be reconciled with this Court's decision in *Thuraissigiam*. *Thuraissigiam* makes clear that aliens may not invoke the Suspension Clause to demand judicial review of all determinations relating to admission or removal, simply because at some point the act of removal may involve physical custody. This Court explained that, at the Founding, the writ of habeas corpus "simply provided a means of contesting the lawfulness of restraint and securing release." 140 S. Ct. at 1969. The Court then upheld the statutory provision at issue there, 8 U.S.C. 1252(e)(2), against a Suspension Clause challenge because the habeas petitioner "did not ask to be released"

but rather "sought entirely different relief: vacatur of his 'removal order' and 'an order directing the Department [of Homeland Security] to provide him with a new opportunity to apply for asylum and other relief from removal." 140 S. Ct. at 1969-1970 (brackets, citation, and ellipsis omitted). That is, the habeas petitioner did "not want 'simple release' but, ultimately, the opportunity to remain lawfully in the United States." *Id.* at 1971. The Court explained that such requested "relief falls outside the scope of the common-law habeas writ." *Id.* at 1970.

The reasoning in *Thuraissigiam* applies equally to respondents' Suspension Clause challenge. Ragbir's habeas petition does not challenge the lawfulness of his detention itself; indeed, Ragbir is not presently detained. Pet. App. 10a-11a. Nor does it challenge even the validity of his final order of removal, which Ragbir contested in other proceedings. *Id.* at 48a; see C.A. App. 50-51; see also 950 F.3d 54. Instead, respondents allege that the execution of a removal order that has been judicially determined to be valid—and that conclusively establishes that Ragbir has no more of a right or protected interest to be in the United States than an alien seeking initial admission—violates the First Amendment. Pet. App. 11a; see C.A. App. 38-41. Even if such a constitutional claim were viable, but see pp. 2-7, *supra*, *Thuraissigiam* makes clear that the Suspension Clause does not guarantee a judicial forum if the habeas petitioner seeks only to change his immigration status—let alone if, as here, he does not seek a change in legal status and any delay in removal would be temporary, see Pet. App. 48a-49a. 140 S. Ct. at 1968-1971. At a bare minimum, "a reasonable probability" exists, *Lawrence*, 516 U.S. at 167, that the court of appeals

would reconsider its Suspension Clause holding in light of *Thuraissigiam*.

Respondents contend (Br. in Opp. 21) that *Thuraissigiam* is inapposite because Ragbir challenges "the constitutionality of the restraint on his liberty inherent in the government's imminent threat to deport him unconstitutionally." But although respondents characterize their habeas petition as a challenge to a "restraint," they simultaneously confirm (*ibid.*) that Ragbir "has not challenged his final removal order, asked for any change in his immigration status, or disputed that the government ultimately may deport him—so long as it does not do so in retaliation for his protected speech." In other words, they seek to use the Suspension Clause to demand a forum for a First Amendment claim, even though that claim would not change the legal or physical "restraints" that operate on Ragbir: He would remain subject to a final order of removal and would be at liberty in the United States until that removal order is executed. Ragbir's First Amendment claim thus does not amount to a challenge to "the lawfulness of restraint" within the meaning of *Thuraissigiam*. 140 S. Ct. at 1969.[*]

Respondents also contend (Br. in Opp. 22) that if the Suspension Clause does not guarantee a forum for their

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[*] This Court recently denied a petition for a writ of certiorari in *Hamama* v. *Adducci*, 912 F.3d 869 (6th Cir. 2018), No. 19-294 (July 2, 2020). In that case, the Sixth Circuit reached the opposite conclusion from the Second Circuit here: It determined that Section 1252(g) did *not* implicate the Suspension Clause because the habeas petitioners there "did not challenge any detention and did not seek release from custody." *Id.* at 875. Presumably because that decision was consistent with *Thuraissigiam*, this Court allowed it to stand. But because the Second Circuit reached the opposite conclusion here, vacatur is appropriate.

First Amendment claim, then "the First Amendment itself and * * * Article III" would render Section 1252(g) unconstitutional. But the court of appeals did not adopt that argument; it held that Section 1252(g) was unconstitutional, as applied here, under the Suspension Clause. See Pet. App. 36a. And respondents do not cite any support—other than their own briefs (Br. in Opp. 22-23) and two law review articles (*id.* at 27)—for the proposition that the First Amendment or Article III guarantees that federal courts have jurisdiction over all colorable First Amendment claims. Such a proposition would be especially unsound for an alien like Ragbir, against whom a final removal order has been entered and sustained by an Article III court and who invokes the First Amendment in an attempt to thwart its lawful execution.

In all events, any other attacks on Section 1252(g)'s constitutionality should be considered by the court of appeals in the first instance—if at all, given the absence of a viable First Amendment claim in this context. See *AADC*, 525 U.S. at 488; pp. 2-7, *supra*. Even if respondents believe (Br. in Opp. 29) that "multiple independent grounds for federal jurisdiction" exist in this case, the court of appeals held Section 1252(g) unconstitutional only on Suspension Clause grounds. See Pet. App. 47a. Because that holding is irreconcilable with this Court's intervening decision in *Thuraissigiam*, vacatur is appropriate.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted, the judgment below vacated, and the case remanded for further proceedings in light of *Nieves* v. *Bartlett*, 139 S. Ct. 1715 (2019), and *Department of Homeland Security* v. *Thuraissigiam*, 140 S. Ct. 1959 (2020).

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

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