UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Ravidath Lawrence RAGBIR, Petitioner, vs. Jefferson SESSIONS III, in his official capacity as the Attorney General of the United States; Kirstjen NIELSEN, in her official capacity as Secretary of Homeland Security; Thomas DECKER, in his official capacity as New York Field Office Director for U.S. Immigration and Customs Enforcement; Scott MECHKOWSKI, in his official capacity as Assistant New York Field Office Director for U.S. Immigration and Customs Enforcement; and the U.S. DEPARTMENT OF HOMELAND SECURITY, Respondents.	18-CV-00236 (KBF)

BRIEF OF AMICI CURIAE NEW YORK CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RAVIDATH RAGBIR'S PETITION FOR A WRIT OF HABEAS CORPUS

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INTRODUCTION

This case arises from United States Immigration and Customs Enforcement's ("ICE") abrupt re-detention of prominent immigrant rights activist Ravidath Ragbir. The stakes here are significant not only for Mr. Ragbir but also for thousands of people currently complying with orders of supervision. Notably, ICE effectuates many removals without suddenly jailing deportees before they have a chance to put their affairs in order. Increasingly, however, it has detained previously released individuals either without explanation or solely because it claims their removal is imminent. In this brief, *amici curiae* argue that under a constitutional construction of the governing regulations, even imminent removal cannot form the sole basis for detaining an individual previously released on an order of supervision. Where civil detention does not serve to prevent a risk of flight or danger to the community, it bears no reasonable relationship to the government's legitimate regulatory purposes and is impermissibly punitive.

It is incumbent upon ICE to adhere to its regulations, constitutionally construed, when it seeks to re-detain a previously released individual. The Court should not tolerate its failure to do so here for the reasons Mr. Ragbir presents and for reasons that *amici curiae* describe below: *First*, especially where fundamental rights are at stake, agencies must follow their own regulations. *Second*, scrupulous adherence to regulations is especially crucial in this specific regulatory context, where detention is uniquely devoid of neutral judicial oversight. *Third*, the Court should be especially wary of ICE's failure to follow proper procedures here, given the potential *in terrorem* effect on First Amendment rights caused by a recent pattern of enforcement activity aimed at immigrant rights activists like Mr. Ragbir.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") and New York Civil Liberties Union ("NYCLU") have a longstanding interest in enforcing constitutional, statutory, and regulatory

constraints on the federal government's power to detain noncitizens. The ACLU has been counsel of record or *amicus* in all of the leading cases in this area. *See, e.g., Zadvydas v. Davis,* 533 U.S. 678 (2001) (*amicus*); *Demore v. Kim,* 538 U.S. 510 (2003) (counsel of record); *Jennings v. Rodriguez,* 136 S. Ct. 2489 (U.S. June 20, 2016) (No. 15-1204) (counsel of record); *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015) (*amicus*). The NYCLU is the New York State affiliate of the American Civil Liberties Union and is a non-profit, non-partisan membership organization committed to the defense and protection of the fundamental rights and values embodied in the New York and United States Constitutions. Because this case implicates the fundamental liberty interests of many thousands of individuals previously released on orders of supervision, it is of great interest to *amici* and their members.

ARGUMENT

Both in procedure and substance, ICE failed in this case to comply with the regulations governing its authority to re-detain an individual previously released on an order of supervision. ICE acknowledges that 8 C.F.R. § 241.4 controls here but has failed to comply with the procedures set forth in that regulation. Crucially, ICE does not disclaim its prior determination that Mr. Ragbir presents neither a flight risk nor a risk to public safety, yet a reversal of that determination is necessary to any revocation decision, as those are the only constitutionally permissible purposes for immigration detention. ICE's only stated justification for re-detaining Mr. Ragbir is that his removal is imminent. It does not claim that this converts him into a flight risk *per se*, nor could it sustain that claim given its previous determination that he is not a flight risk and his history of compliance with the terms of his order of supervision. Because ICE has disregarded the modest regulations guarding against wrongful deprivation of Mr. Ragbir's protected liberty interest in freedom from bodily restrain, the Court should grant his petition.

I. HUNDREDS OF THOUSANDS OF PEOPLE ARE RELEASED ON ORDERS OF SUPERVISION IRRESPECTIVE OF WHETHER THEIR REMOVAL IS FORESEEABLE; THEIR SUDDEN RE-DETENTION WITHOUT ADEQUATE PROCESS OFTEN LEADS TO DEVASTATING RESULTS.

Across the United States, hundreds of thousands of individuals with final orders of removal are subject to OSUPs. Geoffrey Heeren, *The Status of Nonstatus*, 64 Am. U. L. Rev. 1115, 1149 (2015) (as of 2015, there were 613,578 individuals on orders of supervision).[1] While the use of OSUPs dates from at least the 1980s,[2] the number of individuals placed on OSUPs each year expanded dramatically in the last decade. *Id*. at 1150. In New York City alone, dozens of people on OSUPs report each day to the federal building at 26 Federal Plaza.[3] Most of them have neither a judicial nor an administrative stay of removal. *Id.* at 1147.[4]

These individuals are not exclusively given orders of supervision due to their removal not being foreseeable. *See* 8 C.F.R. § 241.4(e) (requiring either that "[t]ravel documents for the alien are not available *or*, in the opinion of the Service, immediate removal, while proper is otherwise not practicable or not in the public interest") (emphasis added). In fact, only a quarter of individuals on orders of supervision are reported to be from countries that refuse to issue travel

[1] In 2016, ICE reported there were 939,056 individuals subject to final orders of removal in the United States. *See Under Obama, They Were Check-ins. Under Trump, They Could Mean Deportation*, WNYC News (Mar. 15, 2017), https://www.wnyc.org/story/when-checking-ice-could-mean-deportation.

[2] *See, e.g.*, *DonMartin v. Lowe*, No. 1:17-CV-01766, 2017 WL 5990114 (M.D. Pa. Dec. 4, 2017) (OSUP issued in 1987).

[3] Emma Whitford, *Colombian Immigrant Who Fled Political Violence Released After Weeks in Detention*, Gothamist (Apr. 6, 2017), http://gothamist.com/2017/04/06/immigrant_colombia_ice.php.

[4] In 2014, for example, ICE granted 81,085 individuals OSUPs but only 13,611 stays of removal. *Id.*

documents.[5] More frequently, release on OSUP was the result of government officials' conclusion that their removal was not in the public interest.[6] Many individuals on OSUP have lived in the United States for decades and have spouses, children or parents here. *See e.g. Devitri v. Cronen*, No. CV 17-11842-PBS, 2017 WL 5707528, at *2 (D. Mass. Nov. 27, 2017) (among large group with final orders of removal, those with U.S.-born family members were placed on orders of supervision while those without U.S. family ties were removed).

The hundreds of thousands of men and women released on these orders have been subject to extensive requirements, including reporting in person at specified times; assisting the government in obtaining a travel document; and obtaining advance approval to leave the state. *See* 8 C.F.R. § 241.5; 8 U.S.C. § 1231(a)(3). Some are placed on even more intensive monitoring programs with home visits and GPS ankle monitors. *See* Ragbir Notification of Release, ECF No. 1-14. In exchange for their compliance, immigrants on OSUPs can apply for employment authorization, and with it obtain social security numbers and state identification. 8 CFR § 241.5; *see also* 8 U.S.C. § 1231(a)(7).

The extension of this kind of formal "nonstatus" has expanded as a "means to authorize the presence of undocumented immigrants without providing them the panoply of benefits and rights that go with full status." Heeren, *The Status of Nonstatus*, at 1166. In addition to keeping American children in the custody of their parents, this system has facilitated payment of taxes

[5] Vivian Yee, *Migrants Confront Judgment Day Over Old Deportation Orders*, N.Y. Times (March 4, 2017), https://www.nytimes.com/2017/03/04/us/migrants-facing-old-deportation-orders.html.

[6] "Under Barack Obama, immigration agents were ordered to target high-priority immigrants like violent criminals, and for the most part left everyone else alone. They often gave low-priority immigrants who didn't have criminal histories more time, especially those with U.S.-born children, attorneys said." Marwa Eltagouri, *More Immigrants Afraid to Show Up for ICE Check-Ins*, Chicago Tribune (April 4, 2017), http://www.chicagotribune.com/news/immigration/ct-immigration-check-ins-met-20170404-story.html.

and easier identification and monitoring of hundreds of thousands of people. *Id.* New Yorkers and other United States residents granted release on orders of supervision in the last three decades have relied on these orders to continue building their lives here: they marry, have children, purchase homes, and own and run businesses. *See, e.g.*, *Filippi v. President of United States*, No. 17-CV-459-PB, 2017 WL 4675744, at *1 (D.N.H. Oct. 16, 2017) (observing that after petitioner's release on OSUP in 2003, he obtained employment, bought a house, had a daughter, and assisted law enforcement in anti-trafficking work).

In the last year, the frequency of sudden and arbitrary detention of individuals on orders of supervision has increased.[7] Many of the individuals detained are given no explanation for their sudden re-detention, which in addition to the harm of detention itself has devastating second-order effects in terms of loss of access to legal relief, family, jobs and medical care.

For example, two weeks ago, ICE detained a forty-year resident of the United States with no criminal record who had been on an order of supervision since 2009. In late 2017, Amr Othman Adi was given a deadline of January 7, 2018, to depart the United States. He and his wife sold their house, arranged for new management of his businesses, and even had purchased plane tickets, when in early January ICE officials told them that the deadline had been extended. But a few days later, without warning, ICE took Mr. Adi into custody at a routine check-in. His family's Congressman denounced the sudden reversal, arguing that because Mr. Adi had been fully compliant with ICE he deserved the "opportunity to say goodbye to his wife and four daughters" and calling his detention a waste of taxpayer money. His wife wondered aloud about ICE "Are they deliberately trying to be cruel?" No explanation was provided. According to Mr.

[7] Yee, *Migrants Confront Judgment Day*, *supra* n. 5.

Adi's attorney, an ICE official "just kept repeating that ICE made a decision to take him into custody . . . He would not elaborate on what changed."[8]

Other individuals' re-detention experiences speak to devastating immigration consequences. In June 2017, J.S.K., a single father of two with a final order of removal from 2011, was detained at a routine check-in at 26 Federal Plaza while his children, including an 8 year-old daughter suffering from epilepsy and chronic migraines, were at school. He had been in full compliance with his OSUP for several years and planned to marry his U.S.-citizen partner, which would have provided him a path to reopen his case and obtain permanent status. Because he was detained before he was able to marry his partner, however, the Immigration Judge refused to reopen his case, finding that his marriage plans were only speculative.[9] As two federal courts recently observed in class actions involving challenges to the sudden re-detention of large groups of individuals on OSUPs, many such individuals have foregone the investigation or pursuit of other legal relief from removal while at liberty on OSUPs. *See Devitri v. Cronen*, No. CV 17-11842, 2017 WL 5707528 (D. Mass. Nov. 27, 2017); *see also Hamama v. Adducci*, 261 F. Supp. 3d 820 (E.D. Mich. 2017). In rejecting the Government's argument that these individuals should have tried to reopen their immigration cases while at liberty, one court held that "Petitioners were reasonable in relying on their protected status as long as they complied with the terms of their OSUPs." *Devitri*, 2017 WL 5707528, at *2; *see also Hamama*, 261 F. Supp. 3d at 837–38 (E.D. Mich. 2017) ("Petitioners had little reason to suspect that the effort and cost of preparing a

[8] Michael Sangiacomo, *Youngstown Man, Spared Deportation Recently, Arrested Pending Deportation*, Cleveland Plain Dealer (Jan. 16, 2018), http://www.cleveland.com/metro/index.ssf/2018/01/youngstown_man_spared_deportat.html.

[9] Affidavit of David K.S. Kim, dated Jan. 24, 2018, on file with the NYCLU.

motion to reopen—up to $80,000 in a case of this nature—was necessary, given that they had been living peaceably for long periods of time under limited supervision.").

For some, the consequences of ICE disregarding regulations—including the requirement that a re-detention order come from a high-level official—are life-threatening. On September 13, 2018, a 71 year-old Cuban retiree and nearly forty-year resident of the United States, who was ordered removed as the result of a minor drug offense in 1984, was detained at his OSUP check-in despite his protestations that he had a biopsy scheduled the next week for a cancerous tumor. ICE provided no explanation for his sudden re-detention and failed to provide a biopsy or adequate medical care while the man remained detained for over four months. After his lawyer was able to escalate his case to officials in Washington D.C., ICE released the man on Dec. 15, 2018. He was immediately hospitalized and learned that his cancer had metastasized and progressed from stage I to stage IV during his four-month detention.[10]

II. CONSTITUTIONALLY CONSTRUED, 8 C.F.R. § 241.4 DOES NOT PERMIT RE-DETENTION SOLELY BECAUSE REMOVAL IS IMMINENT.

ICE's sole justification for revoking Mr. Ragbir's order of supervision was that his removal was imminent.[11] If that alone were a proper basis for revocation and re-detention under the applicable regulations, it would apply to the hundreds of thousands of people mentioned above who have no stay of removal and for whom there is no obstacle to obtaining travel

[10] Affidavit of Robert Birach, dated Jan. 25, 2018, on file with the NYCLU.

[11] Not only has ICE failed to provide a valid basis for Mr. Ragbir's re-detention under the regulation, as explained *infra*, but it also has failed to follow several other procedures. *See* 8 C.F.R. § 241.4(l). To wit: The revocation decision must be made by the Executive Associate Commissioner unless an exception applies, but here it was made by the Deputy Field Office Director without any explanation or even claim that the exception applies; the noncitizen must be "notified of the reasons for revocation" and afforded a prompt "informal interview" at which he or she has "the opportunity to respond to the reasons for revocation stated in the notification," but it appears from Mr. Ragbir's submissions that no such interview has taken place. *Id.*

documents. But the text of the regulations and the necessity that they be construed constitutionally do not permit the mere fact that removal is imminent as a basis to detain someone with an order of supervision.

The reasons that ICE grants release on OSUPs in the first instance help inform the question of the proper bases for revocation. Pursuant to 8 U.S.C. § 1231(a)(3), which grants ICE authority to release an individuals "subject to supervision," ICE regulations require an individual released on an OSUP following the expiration of the removal period to "demonstrate[] to the satisfaction of the Attorney General . . . that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien's removal." 8 C.F.R. § 241.4(d); *see also id.* § 241.4(e)(6) ("Before making any recommendation or decision to release a detainee, [ICE officials] must conclude that . . . "[t]he detainee does not pose a significant flight risk if released."); *id.* § 241.4(f)(7) (directing consideration of, *inter alia*, "likelihood that the alien is a significant flight risk or may abscond to avoid removal" in considering whether to release).

Unlike the requirement that an individual pose no flight risk, there is no requirement under 8 C.F.R. § 214.4 that removal be impracticable or unforeseeable.[12] *See* 8 C.F.R. § 241.4(e) (requiring either that "[t]ravel documents for the alien are not available *or*, in the opinion of the

[12] Indeed, Mr. Ragbir's ultimate removal was both practicable and foreseeable at the time he was granted release. *See* Post Order Custody Review Worksheet, ECF No. 1-12, at 4 (noting that ICE had Mr. Ragbir's expired Trinidadian passport and that on March 21, 2007 "[t]he consulate stated they were ready to issue once ICE provides itinerary for subject's departure" and that Once all appeals are exhausted/resolved, ICE will set removal date & obtain temporary travel document from consulate"), 7 (Ragbir "does not appear to be a flight risk and he is fully aware that he will have to report to ICE custody when required"). Mr. Ragbir's Petition for Review and motion for a stay were denied by the Second Circuit in 2010; he continued to report to ICE regularly thereafter. Mechkowski Decl. ECF No. 32.

Service, immediate removal, while proper is otherwise not practicable or not in the public interest") (emphasis added). In fact, the regulations explicitly provide that "[t]he Service may release an alien under an order of supervision under § 241.4 if it determines that the alien would not pose a danger to the public or a risk of flight, *without regard to the likelihood of the alien's removal in the reasonably foreseeable future*." 8 C.F.R. § 241.13(b)(1) (emphasis added). By contrast, release pursuant to a separate provision, not applicable to Mr. Ragbir, explicitly requires a determination "that there is no significant likelihood of removal in the reasonably foreseeable future." 8 C.F.R. § 241.13(b)(1).

Turning to re-detention, the bases for re-detention provided under these two regulatory sections are distinct. For individuals, unlike Mr. Ragbir, originally released under 8 C.F.R. § 241.13, the regulation permits revocation of release based on a "determin[ation] that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future." 8 C.F.R. § 241.13(i)(2). By contrast, for individuals like Mr. Ragbir released under § 241.4, imminent or even foreseeable removal is not among the grounds for revocation, instead limiting re-detention to situations where:

> (i) The purposes of release have been served;
> (ii) The alien violates any condition of release;
> (iii) It is appropriate to enforce a removal order or to commence removal proceedings against an alien; or
> (iv) The conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate.

8 C.F.R. §§ 241.4(l)(2)(i)-(iv). The omission of foreseeable removal from § 241.4(l) is significant in light of its use in a nearby section of the regulations. Indeed, "[w]here an agency includes particular language in one section of a regulation but omits it in another, it is generally presumed that the agency acts intentionally and purposely in the disparate inclusion or exclusion." *Yonek v. Shinseki*, 722 F.3d 1355, 1359 (Fed. Cir. 2013) (quotation marks and

alterations omitted) (quoting *Keene Corp. v. United States,* 508 U.S. 200, 208 (1993)). Thus, for those previously released under 8 C.F.R. § 241.4, like Mr. Ragbir, imminent removal cannot serve as the sole basis for revocation of their release.

This construction not only is permissible but is essential in order to give § 241.4 a saving interpretation. Permitting revocation and re-detention on the sole basis of imminent removal, without an individualized finding that an individual now poses a flight risk or danger, would run afoul of the Due Process Clause, as the Supreme Court has held that preventing flight risk and danger alone are the two legitimate purposes of immigration detention. *See Zadvydas*, 533 U.S. at 690 (permissible regulatory goals of civil detention are "ensuring the appearance of aliens at future immigration proceedings" and "preventing danger to the community"); *cf. Diouf v. Napolitano*, 634 F.3d 1081, 1090 (9th Cir. 2011) ("We may not defer to DHS regulations interpreting § 1231(a)(6), however, if they raise grave constitutional doubts."). Detention which serves neither purpose is punitive—an impermissible basis for civil confinement. Thus, even if removal *is* reasonably foreseeable, detention beyond the removal period is unconstitutional if not required to ensure a person's presence or prevent risk to the community. *Zadvydas*, 533 U.S. at 700; *cf. Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015) (permissible purposes of immigration detention are to counter flight risk or danger).[13]

[13] In the context of pre-removal detention under 8 U.S.C. § 1226(c), the Supreme Court has upheld brief mandatory detention for some individuals given Congress's specific findings as to their presumptive danger and flight risk. *Demore v. Kim*, 538 U.S. 510, 518 (2003). For individuals with a final order of removal, the statute imposes 90 days of mandatory detention once the order becomes administratively final. *See* 8 U.S.C. § 1231(a)(1). Once 90 days have elapsed after that point, Congress has not mandated further detention. *See Guerra v. Shanahan*, 831 F.3d 59, 62 (2d Cir. 2016) (explaining that "[a]fter the removal period has expired, detention is discretionary").

The Government has provided no permissible basis under 8 C.F.R. § 241.4(l) for the revocation of Mr. Ragbir's release. But to the extent the Government would suggest that imminent removal creates a *per se* risk of flight, such a blanket assertion and policy would run afoul both of the regulations and the minimum requirements of due process. The regulations contemplate an interview as well as an individualized "evaluation" of "contested facts" by high-level ICE officials, 8 C.F.R. §§ 241.4(l)(2)-(3), processes that would be largely gratuitous if imminent removal alone could justify detention. Moreover, *Zadvydas* requires that assessment of flight risk be individualized. *See D'Alessandro v. Mukasey*, 628 F. Supp. 2d 368, 401–02 (W.D.N.Y. 2009) (finding detention beyond removal period violated petitioner's due process rights because it was based on generalized rationale of "Government's general interest in preventing aliens from disappearing" and holding such rationale "is contrary to *Zadvydas* and to 8 C.F.R. § 241.4, which require an individualized determination"). As the court in *D'Alessandro* found, a policy of inferring flight risk from foreseeable removal is not individualized and thus impermissible. *See also Chi Thon Ngo v. I.N.S.*, 192 F.3d 390, 399 (3d Cir. 1999) (to comport with requirement of due process, post-custody review rules must entail "individualized analysis of the alien's eligibility for parole, present danger to society and willingness to comply with the removal order"); *Bonitto v. Bureau of Immigration & Customs Enf't*, 547 F. Supp. 2d 747, 757–58 (S.D. Tex. 2008) (holding, pursuant to *Zadvydas*, that post-custody review process must provide "meaningful individualized review"); *Nguyen v. I.N.S.*, 108 F. Supp. 2d 1259, 1262 (W.D. Okla. 1999) (holding that procedural due process right of petitioner with final removal order requires "individualized assessment or consideration of the petitioner's situation").

In the case of individuals who previously have been released, the constitutional requirement of an individualized assessment is coupled with the necessity that the government

show changed circumstances demonstrating why a person now poses a flight risk despite previously being found not to pose such a risk. Individuals released on OSUPs necessarily have been found not to pose a risk of flight despite their removal being potentially foreseeable. 8 CFR § 241.4 (d)-(f). To comport with due process, the regulations governing revocation of release must be construed to require an individualized showing as to why that earlier assessment has changed, such that detention now serves a purpose. *See Saravia v. Sessions*, ---F.Supp.3d.---, 2017 WL 5569838, at *17 (N.D. Cal. Nov. 20, 2017) (where unaccompanied minor was previously found not to be dangerous or flight risk, due process requires that he or she "cannot reasonably be rearrested absent a material change in circumstances" and "a prompt hearing in which the government must show that these changed circumstances exist"); *Rombot v. Souza*, --- F.Supp.3d ---, No. CV 17-11577 (PBS), 2017 WL 5178789, at *5 (D. Mass. Nov. 8, 2017) (despite wide latitude to detain aliens with final orders of removal, ICE does not have "carte blanche to re-incarcerate someone without basic due process protection"); *see also Matter of Sugay*, 17 I. & N. Dec. 637, 640 (BIA 1981) (requiring changed circumstance to justify re-detention of individual previously released on bond by immigration judge).

The initial decision to release Mr. Ragbir necessarily involved a finding that he was unlikely to abscond to avoid removal if and when the time came. 8 C.F.R. § 214.4(d)(1), (e)(6); *see supra* n. 12. Thus, the revocation of his release based solely on his removal now being foreseeable would not satisfy the minimum requirements of due process, because that revocation is not the product of any individualized review and alleges no relevant change in circumstances altering the original assessment of his risk of flight. *See D'Alessandro*, 628 F. Supp. 2d at 401–02; *cf. Noorani v. Smith*, 810 F. Supp. 280, 282 (W.D. Wash. 1993) (holding that "facially

legitimate and bona fide" parole denial must "state the reasons for denial in terms of the criteria enunciated in the policy").

III. THE COURT SHOULD NOT TOLERATE ICE'S FAILURE TO COMPLY WITH REGULATIONS DESIGNED TO PROTECT FUNDAMENTAL LIBERTY INTERESTS.

The Court must require strict adherence to the regulations governing revocation of supervised release, constitutionally construed.[14] First, adherence is required under long-established Supreme Court and Second Circuit precedent requiring that agencies adhere to their own regulations, where those regulations concern individual rights. Second, adherence is particularly significant here, where the regulatory scheme does not provide for review by a neutral official. Third, adherence to procedures is an especially important safeguard when viewed in the context of a pattern of enforcement actions targeting activists like Mr. Ragbir.

A. Due Process requires adherence to ICE regulations.

It has long been settled in the Second Circuit that immigration authorities are required to adhere to their own regulations. *See Montilla v. I.N.S.*, 926 F.2d 162, 169 (2d Cir. 1991). Drawing on the doctrine set forth by the Supreme Court in another immigration case, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–67 (1954), the Second Circuit held that where an agency has promulgated a regulation impacting individual rights, "fundamental notions of fair play underlying the concept of due process" require that the agency adhere to that regulation. *Montilla*, 926 F.2d at 167. The due process right in this context is rooted in individuals' "legitimate expectation" that an agency's stated processes and rules will be followed. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974); *see Montilla* at 235 ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.").

[14] As noted *supra* n. 11, ICE has failed to meet several requirements under § 241.4(l) in Mr. Ragbir's case.

The requirement of adherence to regulations is particularly significant where a regulation "is promulgated to protect a fundamental right derived from the Constitution or a federal statute." *Waldron v. I.N.S.*, 17 F.3d 511, 518 (2d Cir. 1993). The regulations providing for the right to be heard upon the revocation of an order of supervision and prohibiting removal within 72 hours except on consent protect such fundamental rights. *Rombot v. Souza*, 2017 WL 5178789, at *5 (interpreting 8 C.F.R. § 241.4); *Ying Fong v. Ashcroft*, 317 F. Supp. 2d 398, 403 (S.D.N.Y. 2004) (interpreting 8 C.F.R. § 241.22), *amended on reconsideration in part sub nom. Fong v. Ashcroft*, No. 03 CIV. 7261, 2004 WL 1348994 (S.D.N.Y. June 15, 2004). Because of the fundamental rights at issue, a violation of these regulations requires reversal of the agency action, even absent a showing of prejudice. *Waldron*, 17 F.3d at 518.

While ICE has significant discretion over detention decisions, under the *Accardi* doctrine it is constrained to follow its own regulations in making such decisions. *See Smith v. Resor*, 406 F.2d 141, 145 (2d Cir. 1969) ("[W]here the agencies have laid down their own procedures and regulations, those procedures and regulations cannot be ignored by the agencies themselves even where discretionary decisions are involved"). Considering a similar situation to Mr. Ragbir's, a district court in Massachusetts recently ordered the release of a man with a final order of removal after ICE revoked his order of supervision without adhering to numerous requirements under 8 C.F.R. § 241.4(l). *Rombot v. Souza*, 2017 WL 5178789, at *5. And in several cases involving arriving aliens—whose claim to due process protection is considerably weaker than that of a longtime U.S. resident, *see Zadvydas*, 533 U.S. at 693—courts have found that immigration officials' violations of established policies violate due process. *See, e.g.*, *Abdi v. Duke*, ---F.Supp.3d.---, 2017 WL 5599521, at *27 (W.D.N.Y. Nov. 17, 2017); *Zhang v. Slattery*, 840 F. Supp. 292, 295 (S.D.N.Y. 1994). Contrary to the Government's assertion in this case, the

ultimately discretionary nature of the decision cannot undo the binding nature of the regulations and constitutionally-mandated criteria that ICE must follow in exercising that discretion. *Hernandez v. Sessions*, 872 F.3d 976, 988 (9th Cir. 2017) (a claim the "discretionary process itself was constitutionally flawed" is cognizable on habeas and not barred by 8 U.SC. § 1252(a)(2)(B) or § 1226(e)); *Abdi*, 2017 WL 5599521, at *27.

B. Fidelity to regulations takes on greater importance here, in the context of an arrest and detention regime that is uniquely devoid of neutral judicial oversight.

For most arrestees in the United States legal system, statutes and judicial decisions require prompt judicial review of the propriety of their arrest. *See, e.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975) ("To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible."); *see also id.* at 114 (observing that "[a]t common law, it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest" and that this became a model for a "reasonable" seizure under the Fourth Amendment). Whereas an arresting officer is predisposed to believe that an arrest he has made is justified, a neutral magistrate's sober assessment of the propriety of that arrest is uncolored by such bias. *See, e.g., Gerstein*, 420 U.S. at 118; *see also United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 316–17 (1972) ("[E]xecutive officers of Government['s] duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks."). In the somewhat analogous context of parole revocation, the Supreme Court has held that "due process requires that after the arrest, the determination that reasonable ground exists for revocation of parole" should be made by an "independent officer" who is "not directly involved in the case."

Morrissey v. Brewer, 408 U.S. 471, 485 (1972); *see also United States v. Sanchez*, 225 F.3d 172, 175 (2d Cir. 2000) (in context of revocation of supervised released, requiring notice and opportunity to be heard by neutral hearing body).

Here, ICE has no process for bringing individuals re-detained following release on an OSUP before a neutral magistrate for an assessment of the propriety of their detention. Instead such detainees generally remain at the mercy of ICE, the law enforcement agency charged with carrying out their detention and removal. Given this obvious conflict of interest, OSUP revocation decisions must not be left to ICE officials' unconstrained discretion. Instead, unlike here, both the procedures—including the requirement of approval by ICE's Executive Associate Director of Enforcement and Removal Operations (the successor to the former-INS Executive Associate Commissioner for Field Operations) absent special circumstances, 8 C.F.R. § 241.4(l)(2)—and the substantive criteria used to make those decisions, must scrupulously conform to the governing regulations, constitutionally construed.

C. The recent pattern of federal immigration enforcement actions targeting activists calls for greater scrutiny of ICE's compliance with its regulations.

Finally, ICE's failure to follow required procedures in detaining Mr. Ragbir should be viewed in the context of indications that the arrest may be part of a pattern of enforcement actions seeking to stifle both his dissenting voice in particular and immigrant rights activism more broadly. The timing of the arrest of Mr. Ragbir on January 11, 2018 on the heels of the detention of another longtime New York resident and immigration activist, Jean Montrevil, on January 4, 2018, is striking.[15] The New York metro area is home to approximately 1.2 million

[15] Julianne Hing, *ICE Is Going After People Who Were Once Off-Limits*, The Nation (January 19, 2018), https://www.thenation.com/article/ice-is-going-after-people-who-were-once-off-limits.

undocumented immigrants, thousands of whom have final orders of removal.[16] Out of this population, in the span of one week ICE singled out for deportation a founding member (Mr. Montrevil) and the current executive director (Mr. Ragbir) of one of New York's most prominent immigrants' rights group, the New Sanctuary Coalition. Moreover, each arrest occurred abruptly with unusual attendant circumstances: ICE detained Mr. Montrevil outside his home in Queens two months before his next scheduled check-in, and apparently surveilled Mr. Ragbir's home and the church where he works and prays in the days leading up to his detention.[17] ICE officials are aware of Mr. Montrevil's and Mr. Ragbir's importance to the New York immigrants' rights community, with the Deputy Field Office Director who signed Mr. Ragbir's revocation commenting that they were "the two highest-profile cases in New York City."[18]

Their detentions come against the backdrop of numerous recent detentions of immigrants' rights advocates across the country. In the last several weeks alone, a renowned immigrants' rights activist in Washington State with no criminal record was served with an ICE Notice to Appear for removal proceedings;[19] an undocumented immigrant who spoke to a newspaper about his girlfriend's immigration detention was promptly detained, with an ICE agent explicitly linking the detention to the man's newspaper comments;[20] the husband of an

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[16] Jeffrey S. Passel & D'Vera Cohn, *20 Metro Areas Are Home to Six-in-Ten Unauthorized Immigrants in U.S.*, Pew Research Center (Feb. 9, 2017), http://www.pewresearch.org/fact-tank/2017/02/09/us-metro-areas-unauthorized-immigrants.

[17] Nick Pinto, *No Sanctuary*, The Intercept (Jan. 19, 2018), https://theintercept.com/2018/01/19/ice-new-sanctuary-movement-ravi-ragbir-deportation.

[18] *Id.*

[19] Maria Sacchetti & David Weigel, *ICE Has Detained or Deported Prominent Immigration Activists*, The 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.

[20] Nina Shapiro, *ICE Tracks Down Immigrants Who Spoke to Media in SW Washington: 'You Are the One from the Newspaper'*, The Seattle Times (Dec. 3, 2017),

undocumented Peruvian woman who publicized her decision to take sanctuary in a Denver church was detained for deportation;[21] and an activist with the prominent Arizona humanitarian group No More Deaths was arrested after the group issued a report and publicized videos revealing that Border Patrol agents have destroyed food and water that the group has left for individuals crossing the desert.[22] And in March, a 22-year-old activist and DACA recipient was detained by ICE agents as she left a news conference where she had spoken alongside other immigration advocacy groups.[23]

Mr. Ragbir's detention fits into this wave of enforcement actions targeting those who publicly support the rights of undocumented immigrants. Mr. Ragbir has spoken openly and frequently of the need to fight ICE deportations.[24] This criticism of government conduct is political speech that occupies the "highest rung on the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware*, 458 U.S. 886, 913 (1982); *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open, . . . [and] may well include vehement, caustic, and sometimes unpleasantly sharp attacks

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https://www.seattletimes.com/seattle-news/ice-tracks-down-immigrant-who-spoke-to-media-in-sw-washington-you-are-the-one-from-the-newspaper.

[21] John Bear & Jenn Fields, *Husband of Peruvian Woman Taking Sanctuary at Boulder Church Detained by ICE*, The Denver Post (Jan. 11, 2018), https://www.denverpost.com/2018/01/11/ingrid-encalada-latorre-husband-detained-immigration-boulder-sanctuary.

[22] Paul Ingram, *No More Deaths Volunteer Arrested, Charged with Harboring Immigrants*, Tucson Sentinel (Jan. 22, 2018), http://www.tucsonsentinel.com/local/report/012218_no_more_deaths/no-more-deaths-volunteer-arrested-charged-with-harboring-immigrants.

[23] Phil Helsel, *'Dreamer' Applicant Arrested After Calling for Immigrant Protection*, NBC News (Mar. 2, 2018), https://www.nbcnews.com/news/us-news/dreamer-applicant-arrested-after-calling-immigrant-protections-n727961.

[24] Amy Gottlieb, *ICE Detained My Husband for Being an Activist*, N.Y. Times (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/opinion/ravi-ragbir-immigration-ice.html.

on government and public officials."). Because this context suggests the possibility of an impermissible motive for ICE's rush to re-detain Mr. Ragbir, it is all the more crucial to scrutinize and correct the agency's failure to adhere to the regulations governing re-detention. *Cf. Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("Official reprisal for protected speech offends the Constitution because it threatens to inhibit exercise of the protected right. The law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out.") (citation and alterations omitted); *see also* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 415 (1996) (describing governmental motive as "a hugely important—indeed, the most important—explanatory factor in First Amendment law"). If ICE's improper re-detention of Ravi is permitted to stand, it could have an *in terrorem* effect on other would-be activists, who may remain quiet lest they, too, become targets for summary arrest. In sum, the important First Amendment concerns lurking beneath the surface of this case further support the need for the Court to address ICE's failure to follow its regulations.

CONCLUSION

For all of these reasons and those provided by Mr. Ragbir, *amici* respectfully urge the Court to grant his petition for a writ of habeas corpus.

Respectfully submitted,

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