

# No. 18-1597

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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RAVIDATH LAWRENCE RAGBIR, *et al.*,

*Plaintiffs-Appellants,*

v.

THOMAS D. HOMAN, *et al.*,

*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the Southern District of New York  
The Honorable P. Kevin Castel  
No. 1:18-cv-01159-PKC

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**BRIEF OF *AMICI CURIAE* NEW YORK ELECTED OFFICIALS  
IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL**

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**STATEMENT OF INTEREST OF AMICI**

*Amici* are 8 members of New York’s delegation to the U.S. House of Representatives, 8 New York State Senators, 7 members of the New York State Assembly, 9 members of the New York City Council, the Public Advocate for the City of New York, the New York State Black, Puerto Rican, Hispanic, and Asian Legislative Caucus, and the Progressive Caucus of the New York City Council. *See* Appendix for a list of *amici*.<sup>1</sup>

As elected representatives of the people of New York, *amici* depend on robust public engagement to effectively represent one of the nation’s largest communities. Roughly 1 in every 10 New Yorkers is a noncitizen immigrant.<sup>2</sup> Collectively, New York’s immigrants “form a vital public voice on policy issues affecting not just migrants, but all people living with hardship.”<sup>3</sup> But that voice depends on the right to speak freely on matters of public concern. This case concerns whether *amici*’s

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<sup>1</sup> This brief was neither authored nor funded by any party or person other than *amici* and their counsel. *See* Fed. R. App. 29(a)(4)(E); 2d Cir. Local R. 29.1. All parties to this appeal have consented to the filing of this amicus brief.

<sup>2</sup> *See American FactFinder*, U.S. Census Bureau, <https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited Sept. 6, 2018).

<sup>3</sup> Michelle Chen, *Undocumented Immigrants Can’t Vote, but They’re Still Making Their Voices Heard*, *The Nation* (Aug. 8, 2016), <https://www.thenation.com/article/undocumented-immigrants-cant-vote-but-theyre-still-making-their-voices-heard/>.

noncitizen constituents, and the activists who champion their causes, can exercise this core First Amendment right without fear of official reprisal.

## **INTRODUCTION**

Immigration policy has been at the forefront of our national political debate for years. *Amici* are actively engaged in that debate, working at the federal, state, and local level to build a brighter future for the millions of noncitizen immigrants in our communities. Those efforts depend on robust public input and engagement. It is hard to serve, and to know how to serve, people who cannot express their concerns, views, and opinions. It is harder still for the millions of noncitizens, who cannot vote, to ensure that their voices are heard by the public officials who represent them.

Today, this public engagement is under assault. While the current administration has publicly targeted policies such as the Diversity Immigrant Visa, Temporary Protected Status, and Deferred Action for Childhood Arrivals, it is has also waged a campaign against immigrants behind the scenes.<sup>4</sup> In the past year, the administration has flooded cities, courts, hospitals, churches, trains, and buses with

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<sup>4</sup> The U.S. Citizenship and Immigration Services has even deleted a reference to “America’s promise as a nation of immigrants” from its mission statement. Richard Gonzales, *America No Longer a ‘Nation of Immigrants,’ USCIS Says*, NPR (Feb. 22, 2018), <https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says>.

federal agents. It has drastically increased arrests of noncitizens.<sup>5</sup> And it has tried to coerce state and local governments into joining its immigration crackdown. The result? Millions of noncitizens in our communities now live in constant fear, marginalized by the country of which they have long been a part.<sup>6</sup>

Activists critical of federal immigration enforcement are now chief among the government's targets. This case is a quintessential example. Since his release from custody in 2008, Plaintiff-Appellant Ravidath Ragbir has become a fierce advocate for immigrant rights and “lived a life of a redeemed man,” *see Ragbir v. Sessions*, No. 18-cv-236 (KBF), 2018 WL 623557, at \*3 n.11 (S.D.N.Y. Jan. 29, 2018). Yet Immigration and Customs Enforcement (“ICE”) agents suddenly seized him, unlawfully detained him more than a thousand miles from his home of 20 years, and rushed to expel him from the country before any court could intervene—all because ICE officials resented the public scrutiny his advocacy brought to their work.

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<sup>5</sup> See Tessa Berenson, *Immigration Raids Are Sweeping Up More People Who Weren't Targets*, Time (Aug. 9, 2017), <http://time.com/4893074/immigration-raids-undocumented-targets/>.

<sup>6</sup> See Matt Viser, *Fear of Trump Crackdown Haunts Undocumented Immigrants*, Boston Globe (Nov. 25, 2017), <https://www.bostonglobe.com/news/politics/2017/11/25/fear-trump-crackdown-haunts-daily-life-undocumented-immigrants/LozpzJlIpZS0mxQ34QMVvK/story.html>.

ICE retaliated against Mr. Ragbir, as it has against activists across the country.<sup>7</sup> Yet the District Court held that Mr. Ragbir could not bring, nor could the Court hear, any First Amendment claim challenging ICE's retaliatory actions. That cannot be. The mere existence of a final order of removal is not blanket license for ICE to discriminate against immigrants for exercising core constitutional rights. ICE arrested, detained, and tried to deport Mr. Ragbir because he engaged in protected political speech critical of the agency's policies. That is an "outrageous" violation of Mr. Ragbir's First Amendment rights that demands a remedy, lest ICE be free to transform the threat of deportation into an instrument of political censorship. *See Reno v. Am.-Arab Anti-Discrimination Comm.* ("AADC"), 525 U.S. 471, 491 (1999).

## ARGUMENT

### **I. The District Court Erred In Holding That 8 U.S.C. § 1252(g) Categorically Bars Any First Amendment Retaliation Claim.**

Although the Executive Branch is afforded wide discretion where immigration and law enforcement intersect, that discretion is not limitless. As the Supreme Court and Second Circuit have recognized, when a discriminatory motive

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<sup>7</sup> *See, e.g.,* Liz Robbins, *Activists and ICE Face Off over Detained Immigrant Leader*, N.Y. Times (Jan. 12, 2018), <https://www.nytimes.com/2018/01/12/nyregion/immigration-activist-deportation.html>; Maria Sacchetti & David Weigel, *ICE Has Detained or Deported Prominent Immigration Activists*, Wash. 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](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).

behind an immigration enforcement action rises to the level of “outrageous,” the Executive’s discretion must yield to basic constitutional rights. *AADC*, 525 U.S. at 491; *Rajah v. Mukasey*, 544 F.3d 427, 438 (2d Cir. 2008) (“[A] selective prosecution based on an animus of that kind would call for some remedy.”).

This is one of those times. The District Court held that the mere fact that ICE had a final order of removal against Mr. Ragbir excused the agency’s decision to retaliate against him for his political speech. J.A. 277-79. The Court also opined that any violation of Mr. Ragbir’s rights was not “outrageous” because engaging in protected speech is a “volitional act,” not an “immutable characteristic[],” and thus “easily subject to strategic use” by immigrants claiming retaliation to avoid removal. *Id.* at 280. Both holdings are plainly incorrect. The constitutional right to free speech is no less important than the right to equal protection, and publicly protesting the government’s treatment of immigrants is the sort of political speech that lies at the First Amendment’s core. Indeed, it is hard to imagine a violation of a constitutional right more “outrageous,” or more damaging to our democratic order, than the government’s use of detention and deportation to silence its critics. Section 1252(g) thus cannot bar all claims alleging retaliatory execution of a removal order.

**A. Protecting political speech from government retaliation is a core concern of the First Amendment.**

“[F]ree political discussion” is what keeps government “responsive to the will of the people” and makes change possible through “lawful means.” *Stromberg v.*

*California*, 283 U.S. 359, 369 (1931). For that reason, protecting the “public interest in having free and unhindered debate on matters of public importance” is the very cornerstone of our democracy. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968); *see also CCC Info Servs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 69 (2d Cir. 1994) (“a free democratic society” requires “open public debate”). And protecting the people’s right to freely criticize the government is the principal aim of the First Amendment. *Boos v. Barry*, 485 U.S. 312, 318 (1988) (political protest is “classically political speech” that “operates at the core of the First Amendment”).

Providing breathing room for that free political discussion means “remov[ing] governmental restraints from the arena of public discussion.” *Cohen v. California*, 403 U.S. 15, 24 (1971). To that end, the First Amendment bars the government from discriminating against viewpoints, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995), and from retaliating against people “for speaking out,” *Hartman v. Moore*, 547 U.S. 250, 256 (2006). By “protecting those who wish to enter the marketplace of ideas from government attack,” the right to free speech protects the speaker *and* “the public’s interest in receiving information.” *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 8 (1986). And by granting us “the right and privilege to determine for [ourselves] what speech and speakers are worthy of consideration,” *Citizens United v. FEC*, 558 U.S. 310, 341 (2010), it protects the “choice upon which our political system rests,” *Cohen*, 403 U.S. at 24.



The guarantees of the First Amendment apply with equal force to immigrants residing in this country. *See Bridges v. Wixon*, 326 U.S. 135, 147-48 (1945) (“[f]reedom of speech and of press is accorded aliens residing in this country,” and protects them even in deportation proceedings); *id.* at 161 (Murphy, J.) (noting the First Amendment makes no distinction between citizens and aliens resident in this country); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 817-19, 828 (9th Cir. 2013) (concluding that a law that restricted the commercial speech of undocumented day laborers out of “a desire to eliminate their livelihoods” likely violated the First Amendment). Indeed, protecting noncitizens’ right to engage in public debate is especially critical because it is the primary, if not exclusive, means by which they can communicate with elected officials like *amici*. Citizens can communicate with their representatives through the ballot box, or they can run for office themselves. Noncitizens, by contrast, cannot do either. *See* U.S. Const. art. I, §§ 2-3; N.Y. Const. art. III, § 7; *id.* art. IV, § 2; *id.* art. V, § 1; N.Y. Pub. Off. Law § 3.<sup>8</sup> Instead, they must rely on their rights to assemble and to speak freely to communicate with the officials responsible for serving the communities in which they live.<sup>9</sup>

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<sup>8</sup> Felipe De La Hoz, *Why Don’t We Let Noncitizen Residents Vote?*, Village Voice (Nov. 7, 2017), <https://www.villagevoice.com/2017/11/07/why-dont-we-let-noncitizen-residents-vote/>.

<sup>9</sup> *See, e.g.,* Chen, *supra* note 3.

**B. The District Court’s decision allows ICE to use removal orders to commit outrageous First Amendment violations with impunity.**

The Supreme Court has made clear that construing a federal statute “to deny any judicial forum for a colorable constitutional claim” would raise a “serious constitutional question.” *Webster v. Doe*, 486 U.S. 592, 603 (1988). The District Court’s interpretation of § 1252(g) raises precisely that concern. Because Mr. Ragbir’s First Amendment claim arose from the retaliatory execution of his removal order, he could not have asserted that claim in any judicial forum until now. If his rights are to be vindicated, it must therefore happen in this case. The District Court’s decision to the contrary would deprive Mr. Ragbir—and, by extension, any immigrant against whom ICE retaliates using a final removal order—of any forum in which to bring a serious constitutional claim.

The federal government may have wide discretion in the immigration arena, but that discretion is not *carte blanche* to violate the Constitution. The Supreme Court said as much in *AADC*, when it acknowledged that § 1252(g) would not deprive courts of jurisdiction over selective enforcement claims that raise “outrageous” allegations of discrimination. 525 U.S. at 491. Interpreting that exception, this Court has recognized that claims that the government “selectively enforced” the immigration laws based on “religion, ethnicity, gender, and race” would be “so unjustifiable” as to “call for some remedy.” *Rajah*, 544 F.3d at 438.

Using the threat of detention and deportation to silence protestors and immigrant-rights activists is no less “unjustifiable.” *Id.*

The District Court acknowledged that “[p]olitical speech” is a constitutional right “worthy of the highest protection,” but held that § 1252(g) deprives federal courts of jurisdiction to hear Mr. Ragbir’s claim because speech is a “volitional act,” not an “immutable characteristic,” and therefore “subject to strategic use” as a defense to removal. J.A. 280. This reasoning lacks merit.

The District Court’s determination that claims of retaliation might be “strategic[ally] used” by some immigrants would leave no remedy for any such claims. Under that logic, *no* immigrant could ever bring a First Amendment retaliation claim in the deportation context, regardless of how clear the retaliatory animus behind his or her removal. Moreover, the District Court’s concern bears no resemblance to the facts of this case. The record here contains striking evidence that ICE sought to banish Mr. Ragbir from this country solely because of his political activism and criticism of the administration. *See* J.A. 46-59; *Ragbir*, 2018 WL 623557, at \*1 n.1 (expressing “grave concern” that Mr. Ragbir “has been targeted as a result of his speech and political advocacy on behalf of immigrants’ rights”).

The District Court also cited no precedent for relegating free speech to some lesser tier of constitutional protection than that accorded to “immutable characteristics.” J.A. 280; *see also Lutheran Church-Missouri Synod v. F.C.C.*, 154

F.3d 487, 491 (D.C. Cir. 1998) (rejecting government’s “peculiar notion that some constitutional issues, like those involving the First Amendment, are less important” than equal protection). Nor did it address the consequences of permitting ICE to target immigrants for deportation on the basis of protected speech. Although the Court acknowledged that noncitizens like Mr. Ragbir may “speak and associate on any subject of [their] choosing” so long as they “remain in the United States,” J.A. 280, that speech will not be “free” if the government may deport any noncitizen speaker with impunity. Where, as here, the government has used deportation as a weapon to quash core political speech, *see Boos*, 485 U.S. at 318, the target of that retaliation must have a forum in which to vindicate his First Amendment rights. *Cf. Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (constitutional rights, like the right to due process, apply even in deportation cases, because “to deport” a person may cost them “both property and life, or all that makes life worth living”).

## **II. Defendants’ Efforts to Retaliate Against Mr. Ragbir Constitute An “Outrageous” Violation Of The First Amendment.**

Accepted as true, Plaintiffs’ factual allegations describe an “outrageous” violation of Mr. Ragbir’s First Amendment rights. Mr. Ragbir is just one of many activists targeted by ICE, as part of a broader crackdown on immigration-related

dissent.<sup>10</sup> Viewed against this pattern, Defendants’ treatment of Mr. Ragbir is unmistakably an effort to silence his political voice.

**A. ICE has retaliated against activists around the country.**

Mr. Ragbir, a well-respected New Yorker, award-winning immigrant-rights advocate, and the Executive Director of the New Sanctuary Coalition of New York City, *see* J.A. 47-48, was targeted at a routine check-in after he publicly criticized ICE’s enforcement and detention policies, *see id.* at 51-56. For drawing unwanted attention from the media and elected officials, ICE suddenly arrested Mr. Ragbir, separated him from his wife, and flew him to a detention facility in Florida that same afternoon. *Id.* at 51-58. Noting that “this country allowed [Mr. Ragbir] to become a part of our community fabric . . . [and] to build a life with and among us,” another District Court judge held that ICE exhibited “unnecessary cruelty” and violated Mr. Rabgir’s right to due process. *Id.* at 56-58; *Ragbir*, 2018 WL 623557, at \*2-3.

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<sup>10</sup> Although Plaintiffs will make a more complete showing after discovery, this Court may consider the evidence cited in this brief in considering whether the District Court erred in denying a preliminary injunction. *See Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010) (“It is well established that a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. . . . [H]earsay evidence may be considered by a district court in determining whether to grant a preliminary injunction.” (internal quotations and citations omitted)).

While the Government temporarily stayed Mr. Ragbir's deportation,<sup>11</sup> Jean Montrevil, a co-founder of the New Sanctuary Coalition, was not as fortunate. ICE agents arrested Mr. Montrevil on January 3, while he was on a lunch break outside his home in Queens, and then sent him to a detention center in Florida—all to avoid any “noisy protest.” J.A. 54-55. ICE deported Mr. Montrevil after just thirteen days, ignoring pleas that he had moved to reopen his deportation proceedings. *Id.* at 54.<sup>12</sup>

The cases of Mr. Ragbir and Mr. Montrevil are not unique. ICE has surveilled, harassed, detained, and deported activists across the country.<sup>13</sup> In March 2017, ICE arrested a young DREAMer in Mississippi after she spoke out against ICE raids at a news conference,<sup>14</sup> and three public spokespeople for Migrant Justice after they led

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<sup>11</sup> At present, no stay of deportation is in effect in this action. This Court declined to enter a stay because a stay is in effect in Mr. Ragbir's *coram nobis* proceeding. See ECF No. 77. Briefing on Mr. Ragbir's *coram nobis* petition concludes September 14, and a decision could issue anytime thereafter. See Order, *Ragbir v. United States*, No. 2:17-cv-1256, ECF No. 71 (D.N.J. Aug. 27, 2018).

<sup>12</sup> See Jerry Iannelli, *New York Immigrant Activist Detained by ICE in Miami Might Be Deported Today*, Miami New Times (Jan. 16, 2018), <http://www.miaminewtimes.com/news/new-york-immigrant-activists-ragbir-montrevil-held-in-miamis-krome-processing-center-face-deportation-9996632>.

<sup>13</sup> See, e.g., Julianne Hing, *ICE Is Going After People Who Were Once Off-Limits*, The Nation (Jan. 19, 2018), <https://www.thenation.com/article/ice-is-going-after-people-who-were-once-off-limits/>.

<sup>14</sup> See Jamiel Lynch, *DREAMer Speaks Out on Immigration, Gets Arrested by ICE*, CNN (Mar. 2, 2017), <https://www.cnn.com/2017/03/01/us/dreamer-arrested-jackson-mississippi/index.html>.

public protests on behalf of “undocumented labor in Vermont.”<sup>15</sup> Between November 2017 and January 2018, ICE targeted several more outspoken activists, including: Baltazar Aburto Gutierrez, who spoke to the *Seattle Times* about his partner’s arrest and deportation;<sup>16</sup> Eliseo Jurado, whose wife captured media attention by seeking sanctuary in a Colorado church;<sup>17</sup> and Harry Pangemanan, an award-winning humanitarian who has become “something of a spokesman for undocumented immigrants in New Jersey.”<sup>18</sup> Then there is the case of Maru Mora-Villalpando, who protested conditions at an ICE detention center in Washington and publicized detainee hunger strikes. ICE placed her into removal proceedings last

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<sup>15</sup> Annelise Orleck, *How Migrant Workers Took on Ben & Jerry’s — And Won a Historic Agreement*, *The Guardian* (Feb. 25, 2018), <https://www.theguardian.com/us-news/2018/feb/25/ben-jerrys-migrant-workers-dairy-farms>.

<sup>16</sup> Nina Shapiro, *ICE Tracks Down Immigrant Who Spoke to Media in SW Washington: ‘You Are the One from the Newspaper’*, *Seattle Times* (Dec. 5, 2017), <https://www.seattletimes.com/seattle-news/ice-tracks-down-immigrant-who-spoke-to-media-in-sw-washington-you-are-the-one-from-the-newspaper/>.

<sup>17</sup> Sacchetti & Weigel, *supra* note 7.

<sup>18</sup> Ben Mathis-Lilley, *Immigrant Who Just Won Public Service Award Named for MLK Is Now Hiding from ICE in a New Jersey Church*, *Slate* (Jan. 26, 2018), <https://slate.com/news-and-politics/2018/01/harry-pangemanan-fled-ice-to-new-jersey-church.html>.

December. In a form explaining why, an ICE officer noted Ms. Mora-Villalpando's "extensive involvement with anti-ICE protests and Latino advocacy programs."<sup>19</sup>

ICE's crackdown on political speech continues to this day. Just this month, ICE agents arrested Sergio Salazar, an 18-year-old aspiring filmmaker and "longtime U.S. resident" and "dedicated . . . community activist," after he was quoted "extensively" in news stories about protests in front of an ICE facility in San Antonio. Agents reportedly told Salazar, who had no criminal record, that his application to renew his DACA status had been denied because he was a "bad person." Then they pressured him to inform on his fellow protestors. In response to public outcry, an ICE spokesperson admitted that the agency mines "open source information"—*i.e.*, news coverage of protests—for immigrants to target.<sup>20</sup>

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<sup>19</sup> Gene Johnson, *Deportation Document Described Immigrant Activist's Protests*, Nat'l Post (Feb. 26, 2018), <https://nationalpost.com/pmn/news-pmn/deportation-document-described-immigrant-activists-protests> (emphasis added); *see also* Nina Shapiro, *Activist Maru Mora-Villalpando Says ICE Using Deportation Threat as 'Intimidation Tactic'*, Seattle Times (Jan. 16, 2018) (emphasis added), <https://www.seattletimes.com/seattle-news/activist-maru-mora-villalpando-says-ice-using-her-deportation-as-intimidation-tactic/>.

<sup>20</sup> Cora Currier, *FBI Pressed Detained Anti-ICE Activist For Information on Protests Offering Immigration Help*, The Intercept (Aug. 7, 2018), <https://theintercept.com/2018/08/07/fbi-pressed-detained-anti-ice-activist-for-information-on-protests-offering-immigration-help/>.



These examples illustrate that Mr. Ragbir’s case is part of a pattern of retaliation against activists who have publicly criticized this administration’s immigration policies—conduct that undoubtedly qualifies as an “outrageous” affront to basic First Amendment freedoms. As *amicus* N.Y. State Senator Gustavo Rivera remarked, ICE’s actions are “a clear sign that this administration is targeting folks who are leading efforts to resist attacks on immigrant communities.”<sup>21</sup> Similarly, *amicus* U.S. Congressman Jerrold Nadler has observed that “[ICE is] trying to intimidate people. These are well-known activists who’ve been here for decades, and [ICE is] saying to them: Don’t raise your head.”<sup>22</sup>

**B. ICE’s targeting of activists is one front in a broader campaign against dissent.**

Activists like Mr. Rabgir are not the administration’s only targets. ICE’s pattern of arresting and deporting immigrant-rights activists is part of a broader

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<sup>21</sup> Carey Dunne, *Sanctuary Activists Say Trump Targeting Them After ICE Detains Second Immigrant Leader*, Village Voice (Jan. 12, 2018), <https://www.villagevoice.com/2018/01/12/sanctuary-activists-say-trump-targeting-them-after-ice-detains-second-immigrant-leader/>.

<sup>22</sup> Sacchetti & Weigel, *supra* note 7; (“I have long suspected that very vocal advocates were harshly targeted after they spoke out,” said [U.S. Congressman Luis] Gutierrez. ‘I would go to a hearing, an immigration hearing, and the person who made the biggest impression? I’d find out that they’d been detained. And that started last year.’”); Hing, *supra* note 13 (“ICE seems intent on proving that there is no safety for undocumented immigrants anywhere—not in the shadows and not in the spotlight.”).

campaign to punish any critics of the administration's draconian immigration policies.<sup>23</sup> Together, these actions suggest that this administration is targeting its critics as part of an "official policy motivated by retaliation." *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1954 (2018). In such situations, "there is a compelling need" to ensure courts provide "adequate avenues of redress." *Id.*

1. Federal authorities have begun to retaliate against certain cities, known as "sanctuary cities," for declining to assist federal immigration officers in the detention and deportation of law-abiding noncitizens.<sup>24</sup> The President has threatened to cut off these cities' federal funding,<sup>25</sup> the Justice Department has targeted them with subpoenas,<sup>26</sup> and Thomas Homan, the former Acting Director of ICE, has called

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<sup>23</sup> See Katie Egan, *Federal Crackdown on Immigration Activists Threatens to Chill Free Speech*, ACLU (Jan. 30, 2018), <https://www.aclu.org/blog/free-speech/rights-protesters/federal-crackdown-immigration-activists-threatens-chill-free>.

<sup>24</sup> Roque Planas & Elise Foley, *Deportations of Noncriminals Rise as ICE Casts Wider Net*, HuffPost (Jan. 9, 2018), [https://www.huffingtonpost.com/entry/trump-immigrant-deportation-noncriminals\\_us\\_5a25dfc8e4b07324e8401714](https://www.huffingtonpost.com/entry/trump-immigrant-deportation-noncriminals_us_5a25dfc8e4b07324e8401714).

<sup>25</sup> See Martin Kaste, *Trump Threatens 'Sanctuary' Cities with Loss of Federal Funds*, NPR (Jan. 26, 2017), <https://www.npr.org/sections/thetwo-way/2017/01/26/511899896/trumps-threatens-sanctuary-cities-with-loss-of-federal-funds>.

<sup>26</sup> See Kevin Johnson & Gregory Korte, *DOJ Threatens 'Sanctuary Cities' with Subpoenas, Escalating Trump's Immigration Enforcement Campaign*, USA Today (Jan. 24, 2018), <https://www.usatoday.com/story/news/politics/2018/01/24/justice-department-threatens-sanctuary-cities-subpoenas-escalating-trumps-immigration-enforcement-ca/1061225001/>.

for prosecution of local and state officials.<sup>27</sup> Federal courts have already enjoined some of these efforts as unconstitutional. *See, e.g., City & Cty. of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018); *City of Phila. v. Sessions*, 280 F. Supp. 3d. 579 (E.D. Pa. 2017), *appeal dismissed*, No. 18-1103, 2018 WL 3475491 (3d Cir. July 6, 2018). In response, ICE began to threaten these cities' immigrant communities directly. Former Acting Director Homan warned that he would "flood sanctuary cities with agents."<sup>28</sup> True to his word, ICE arrested nearly 500 people over four days last September in raids targeting sanctuary cities.<sup>29</sup> In February, federal agents swept across the Bay Area, targeting 1,000 people for arrest one month after Oakland barred city officials from assisting ICE.<sup>30</sup>

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<sup>27</sup> *See* Nicole Rodriguez, *Trump Administration Wants to Arrest Mayors of 'Sanctuary Cities'*, Newsweek (Jan. 16, 2018), <http://www.newsweek.com/trump-administration-wants-arrest-mayors-sanctuary-cities-783010>.

<sup>28</sup> Paul Bedard, *ICE Chief: 80% Jump in Illegal Targets, Readies National 'Sanctuary' Crackdown*, Wash. Examiner (July 18, 2017), <http://www.washingtonexaminer.com/ice-chief-80-jump-in-illegal-targets-readies-national-sanctuary-crackdown/article/2629001>.

<sup>29</sup> *See* Eric Westervelt, *ICE Raids Target Sanctuary Cities*, NPR (Sept. 29, 2017), <https://www.npr.org/2017/09/29/554424186/ice-raids-target-sanctuary-cities>.

<sup>30</sup> *See* Carlos Ballesteros, *Sanctuary City Policies Strengthened by Oakland, Bars Any City Employee from Cooperating with ICE*, Newsweek (Jan. 18, 2018), <http://www.newsweek.com/sanctuary-cities-oakland-city-council-ice-california-784398>; Thomas Fuller, *Immigration Agency Rails Against Oakland Mayor's Warning of Raids*, N.Y. Times (Feb. 28, 2018), <https://www.nytimes.com/2018/02/28/us/oakland-mayor-ice-warning.html>.

Federal immigration officials have zeroed in on New York in particular as part of their attempt to punish sanctuary cities. Since 2017, ICE activity has spiked in New York. For example, immigration arrests of New Yorkers without criminal records have more than tripled,<sup>31</sup> and ICE arrested 45 residents of New York City alone as part of its nationwide raids last September.<sup>32</sup> ICE is also surveilling New York courthouses. According to the Immigrant Defense Project, there were 111 successful and attempted ICE arrests in or around New York City courthouses between January 2017 and February 2018, a 1000% increase from the 11 in 2016.<sup>33</sup> Among those ICE has targeted: a father of two U.S. citizen children as he left family court, a Queens woman who had appeared in human trafficking court, and a victim of alleged domestic violence as she left Queens County Criminal Court.<sup>34</sup>

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<sup>31</sup> See Liz Robbins, *In a 'Sanctuary City,' Immigrants Are Still at Risk*, N.Y. Times (Feb. 27, 2018), <https://www.nytimes.com/2018/02/27/nyregion/sanctuary-cities-immigrants-ice.html>.

<sup>32</sup> See Kristin Toussaint, *45 Arrested in NYC as Part of ICE Operation that Targeted Sanctuary Cities*, Metro (Sept. 29, 2017), <https://www.metro.us/news/local-news/new-york/45-arrested-nyc-ice-sanctuary-cities>.

<sup>33</sup> See Noah Manskar, *City Council Members Push Top State Judge to Bar ICE from Courts*, Patch (Feb. 20, 2018), <https://patch.com/new-york/new-york-city/city-council-members-push-top-state-judge-bar-ice-courts>.

<sup>34</sup> See Steve Coll, *When a Day in Court Is a Trap for Immigrants*, The New Yorker (Nov. 8, 2017), <https://www.newyorker.com/news/daily-comment/when-a-day-in-court-is-a-trap-for-immigrants>.

2. As part of its campaign, the federal government has also engaged in tactics intended to sow mistrust and confusion: ICE agents wear “POLICE” insignia when making arrests, exploiting and eroding trust between local police and the immigrant communities they protect and serve.<sup>35</sup> Border Patrol officers are now boarding New York buses and trains, demanding proof of citizenship, and turning immigrants over to ICE.<sup>36</sup> And FBI agents are now leveraging DACA-recipients’ immigration status to get them to inform on anti-ICE protestors.<sup>37</sup>

These actions are not limited to immigrants with criminal records. ICE is targeting people with “clean histories” and “longstanding ties to the country.”<sup>38</sup> In the words of former Acting Director Homan, all undocumented immigrants in the United States “should be concerned” that the agency “[is] looking for [them]”— “[t]here’s no population off the table.”<sup>39</sup> With its newly unfettered discretion to

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<sup>35</sup> See Miranda Green, *New Bill Aims to Block ICE from Identifying as Police Officers*, CNN (Apr. 6, 2017), <https://www.cnn.com/2017/04/06/politics/ice-officers-police-bill/index.html> (discussing a bill introduced by *amicus* Congresswoman Nydia Velázquez to stop the practice).

<sup>36</sup> See Ron Nixon, *Under Trump, Border Patrol Steps Up Searches Far from the Border*, N.Y. Times (Feb. 21, 2018), <https://www.nytimes.com/2018/02/21/us/politics/trump-border-patrol-searches.html>.

<sup>37</sup> See Currier, *supra* note 20.

<sup>38</sup> Planas & Foley, *supra* note 24.

<sup>39</sup> *Id.*

decide whom to arrest,<sup>40</sup> ICE made 37,734 “noncriminal” arrests in fiscal year 2017, more than twice the number in 2016.<sup>41</sup> Even once-routine ICE “check-ins” now often end with immigrants in handcuffs.<sup>42</sup> These tactics have caused immigrants across the country to steer clear of institutions, once viewed as sacrosanct but now commonly targeted by ICE, including courthouses, churches, and hospitals.<sup>43</sup>

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After the District Court issued its opinion, the Supreme Court held that “[a]n 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. ICE’s pattern of retaliation

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<sup>40</sup> See Nicholas Kulish et al., *Immigration Agents Discover New Freedom to Deport Under Trump*, N.Y. Times (Feb. 25, 2017), <https://www.nytimes.com/2017/02/25/us/ice-immigrant-deportations-trump.html>.

<sup>41</sup> Nick Miroff & Maria Sacchetti, *Trump Takes ‘Shackles’ off ICE, Which Is Slapping Them on Immigrants Who Thought They Were Safe*, Wash. Post (Feb. 11, 2018), [https://www.washingtonpost.com/world/national-security/trump-takes-shackles-off-ice-which-is-slapping-them-on-immigrants-who-thought-they-were-safe/2018/02/11/4bd5c164-083a-11e8-b48c-b07fea957bd5\\_story.html](https://www.washingtonpost.com/world/national-security/trump-takes-shackles-off-ice-which-is-slapping-them-on-immigrants-who-thought-they-were-safe/2018/02/11/4bd5c164-083a-11e8-b48c-b07fea957bd5_story.html).

<sup>42</sup> *Id.*

<sup>43</sup> See *id.*; Nick Pinto, *No Sanctuary: As ICE Targets Immigrant Rights Activists for Deportation, Suspicious Vehicles Outside Churches Stoke Surveillance Fears*, The Intercept (Jan. 19, 2018), <https://theintercept.com/2018/01/19/ice-new-sanctuary-movement-ravi-ragbir-deportation/>; John Burnett, *Border Patrol Arrests Parents While Infant Awaits Serious Operation*, NPR (Sept. 20, 2017), <https://www.npr.org/2017/09/20/552339976/border-patrol-arrests-parents-while-infant-awaits-serious-operation>; Coll, *supra* note 34.

against political criticism is a strong indication of such an “official policy.” The administration’s targeting of Mr. Ragbir was not an isolated occurrence—it was consistent with an ongoing campaign of retaliation by the government against those with whom it disagrees on matters of immigration. Where, as here “retaliation against protected speech is elevated to the level of official policy,” the Supreme Court has made clear that “there is a compelling need for adequate avenues of redress.” *Id.* See generally *Turpin v. Mailet*, 619 F.3d 196, 202 (2d Cir. 1980) (“prior pattern or practice” can “prove” existence of “official policy”); *Hous. Works, Inc. v. City of New York*, 72 F. Supp. 2d 402, 426 (S.D.N.Y. 1999) (“Evidence of a pattern of antagonism or of prior retaliatory conduct may serve as circumstantial evidence of retaliation.” (internal quotations and citation omitted)); *Shub v. Westchester Cmty. Coll.*, 556 F. Supp. 2d 227, 246 (S.D.N.Y. 2008) (“evidence of an ongoing pattern of retaliatory conduct and intent can . . . establish a causal connection” between defendant’s adverse action and plaintiff’s protected activities).

### **III. The Public Interest Weighs In Favor of Reversal.**

Although the District Court did not address any of the remaining preliminary injunction factors, it later held that the balance of the equities and the public interest weighed against a stay pending appeal. J.A. 293-95. That holding was erroneous.

Plaintiffs have convincingly alleged that ICE targeted Mr. Ragbir (and other activists) for drawing critical attention to the agency’s operations. These retaliatory

enforcement actions flout, not serve, the public interest. *See N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (explaining the “public interest” diverges from “the interests of the State” when the government suppresses free speech). And left unchecked, they will significantly chill noncitizen speech and compromise *amici*’s ability to effectively represent their constituents. The “public interest” thus requires a remedy—an opportunity for immigrants like Mr. Ragbir to “secur[e] [their] First Amendment rights” from outrageous discrimination at the hands of immigration officers. *Id.*; *see also, e.g., Pac. Gas*, 475 U.S. at 8 (“By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public’s interest in receiving information.”).

**A. ICE’s “outrageous” conduct is having a chilling effect on speech and threatening *amici*’s ability to represent noncitizen constituents.**

ICE’s actions have undermined the willingness of New York’s immigrants to speak out—whether about politics, immigration, or crime. As 31 U.S. Representatives—including the 8 *amici* who represent New York State in Congress—wrote to Secretary of Homeland Security Kirstjen Nielsen and former Acting Director Homan, ICE’s retributive conduct threatens to create “a broader chilling effect within the community, dissuading some immigrants from invoking



their legal rights for fear that doing so will result in retaliation by ICE.”<sup>44</sup> Many noncitizens will not give interviews, attend rallies, speak out in public forums, or even set foot in a courthouse if they fear retaliation, detention, and deportation.<sup>45</sup> Nor will many citizens speak out if they fear that ICE could retaliate against their noncitizen family and friends.<sup>46</sup>

Driving millions of immigrants and their loved ones into hiding can only harm *amici*'s communities. As New York City Mayor Bill de Blasio wrote to the Director of ICE's N.Y. Field Office, ICE's actions have “not only create[d] fear in immigrant communities, but undermine[d] public safety.”<sup>47</sup> “When ICE takes aggressive action against leaders in immigrant communities,” it hollows out the programs and protests

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<sup>44</sup> Letter from Nydia M. Velázquez, Member, U.S. House of Representatives, et al. to Kirstjen M. Nielsen, Sec’y, Dep’t of Homeland Sec., and Thomas D. Homan, Deputy Dir. & Senior Official, ICE, at 2 (Jan. 26, 2018), *available at* [https://velazquez.house.gov/sites/velazquez.house.gov/files/Velazquez\\_Crowley\\_MOC\\_Letter\\_On\\_Immigration\\_Rights\\_Activists\\_PDF.pdf](https://velazquez.house.gov/sites/velazquez.house.gov/files/Velazquez_Crowley_MOC_Letter_On_Immigration_Rights_Activists_PDF.pdf).

<sup>45</sup> See Egan, *supra* note 23.

<sup>46</sup> As a fellow with the American Civil Liberties Union’s Speech, Privacy and Technology Project poignantly observed, ICE’s retaliatory enforcement actions “tell[] everyone else in your community what they can expect to happen to them if they speak out on an issue, and that’s especially chilling when people are already fearful because of their immigration status.” Currier, *supra* note 20.

<sup>47</sup> Letter from Bill de Blasio, Mayor, The City of New York, to Thomas Decker, Director, N.Y. Field Office, ICE (Feb. 7, 2018), *available at* <https://ravidefense.files.wordpress.com/2018/02/ravi-letter-to-ice1.pdf>.

they lead, and “it casts a chilling effect on immigrants’ willingness to engage with government and law enforcement generally, undercutting th[e] trust” officials have worked hard to build.<sup>48</sup> “[Mr. Ragbir] and others like him have played a crucial role in making New York a beacon of diversity and inclusion for so many. Forcing [them]” to leave the country “would adversely impact the larger immigrant community.”<sup>49</sup>

These concerns are not theoretical: the chilling effects are already being felt by other activists and immigrant-rights organizations. ICE’s conduct has forced many groups to rethink how to advocate for immigrants who are constantly under threat. According to Reverend Micah Bucey, whose church in Manhattan hosts the New Sanctuary Coalition, “[a]ll bets are off, and we have no idea what the most effective tactics moving forward will be.”<sup>50</sup> Many immigrants are now too afraid to walk from the nearest subway station to the church without accompaniment.<sup>51</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Dunne, *supra* note 21.

<sup>51</sup> *See id.*; *see also* Pinto, *supra* note 43.

**B. Without judicial intervention, ICE's pattern of unlawful retaliation will continue unchecked.**

*Amici* have worked hard to shield New York's immigrants from ICE's aggressive conduct and to lobby the agency to change its practices. But ICE has refused to implement reasonable measures to respect the rights of noncitizens.

New York State and New York City have taken a variety of steps to minimize the frequency, and consequences, of run-ins between New Yorkers and ICE. For example, New York City has enacted a law that limits the instances in which corrections and police officials can honor "detainer requests" from ICE, which ask officers to hold otherwise-releasable noncitizens so that ICE can take them into custody. *See* N.Y.C. Admin. Code §§ 9-131, 14-154. New York State and New York City have also taken steps to improve immigrants' access to legal services.<sup>52</sup> And bills now pending in the New York State legislature would reduce the maximum sentence for a misdemeanor from 365 to 364 days and thereby avoid triggering federal laws that link deportation to convictions for crimes punishable by a sentence of at least one year. A4881, 240th Sess. (N.Y. 2017); S4294, 240th Sess. (N.Y.

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<sup>52</sup> *See* Press Release, *New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation*, Vera Inst. of Justice (Apr. 7, 2017), available at <https://www.vera.org/newsroom/press-releases/new-york-state-becomes-first-in-the-nation-to-provide-lawyers-for-all-immigrants-detained-and-facing-deportation>; *Liberty Defense Project*, N.Y. State, <https://www.ny.gov/programs/liberty-defense-project> (last visited Sept. 7, 2018).

2017); *see also, e.g.*, 8 U.S.C. § 1227(a)(2)(A).<sup>53</sup> In response, ICE has only “ratcheted up its attacks” against New York and its immigrant communities.<sup>54</sup>

*Amici* have also sought to address Defendants’ efforts to retaliate against New Yorkers who engage in “core” First Amendment speech. *Amicus* Congresswoman Nydia Velázquez has introduced a private bill, H.R. 4937, 115th Cong. (2018), that would grant Mr. Ragbir permanent legal status, and in the case of his deportation, a legal right to return to the United States. The New York City Council has passed a Resolution calling upon Congress to enact H.R. 4397 and denouncing ICE’s unlawful targeting of immigrant-rights activists. N.Y.C. Council Res. 0182-2018 (“The deportation and detention of highly visible advocates not only has a destabilizing effect on immigrant communities, it can also be construed as politically motivated based on the activists’ outspoken positions contrary to current policy[.]”).<sup>55</sup> Mayor de Blasio has urged ICE to stay Mr. Ragbir’s removal, noting that its actions “have raised serious concerns about how ICE is targeting

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<sup>53</sup> *See* New York City Bar, *Report on Legislation by the Criminal Courts Committee and the Criminal Justice Operations Committee* (Mar. 2017), available at [http://s3.amazonaws.com/documents.nycbar.org/files/20073134-One\\_Day\\_to\\_Protect\\_NYers\\_Crim\\_CourtsandCJO\\_Report\\_FINAL\\_7.21.16.pdf](http://s3.amazonaws.com/documents.nycbar.org/files/20073134-One_Day_to_Protect_NYers_Crim_CourtsandCJO_Report_FINAL_7.21.16.pdf).

<sup>54</sup> Robbins, *supra* note 31.

<sup>55</sup> Available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3344956&GUID=949C76BE-6106-4B1A-BB32-80C060BF9116&Options=&Search=> (last visited Sept. 7, 2018).

immigrants.”<sup>56</sup> Finally, 31 Members of Congress, including 8 *amici*, have written to former Acting Director Homan and Secretary Nielsen to express concerns regarding ICE’s targeting of immigrant-rights leaders around the country.<sup>57</sup>

While *amici* have taken these steps to protect their noncitizen constituents, these efforts are insufficient to fully counter Defendants’ persistent and outrageous disregard for the First Amendment. ICE has chosen to ignore the repeated concerns of *amici* and other New York officials. And, as representatives of the people of New York, *amici* lack the direct legal authority to stop ICE’s unlawful conduct. The key to preventing Defendants from continuing to use the immigration laws to silence proponents of immigration reform thus lies elsewhere—in ensuring that Mr. Ragbir, and others in his position, are able to vindicate their First Amendment rights in court.

### CONCLUSION

For the foregoing reasons, and those provided by Plaintiffs-Appellants, *see* ECF No. 82, *amici* respectfully request that this Court reverse the District Court’s order denying in part Plaintiffs’ motion for a preliminary injunction.

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<sup>56</sup> Letter from Mayor de Blasio, *supra* note 47.

<sup>57</sup> *See* Letter from Rep. Velázquez et al., *supra* note 44.

DATED: September 7, 2018

Respectfully submitted,

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New York Elected Officials

**APPENDIX**

**LIST OF AMICI CURIAE**

**Members of the United States House of Representatives**

Yvette D. Clarke  
(NY - 9th)

Joe Crowley  
(NY - 14th)

Adriano Espaillat  
(NY - 13th)

Carolyn B. Maloney  
(NY - 12th)

Grace Meng  
(NY - 6th)

Jerrold Nadler  
(NY - 10th)

José E. Serrano  
(NY - 15th)

Nydia M. Velázquez  
(NY - 7th)

**New York State Senators**

Marisol Alcántara  
(31st Senate District)

Brian A. Benjamin  
(30th Senate District)

Leroy Comrie  
(14th Senate District)

Jesse Hamilton  
(20th Senate District)

Brad Hoylman  
(27th Senate District)

Liz Krueger  
(28th Senate District)

Gustavo Rivera  
(33rd Senate District)

Luis R. Sepúlveda  
(32nd Senate District)

**Members of the New York State Assembly**

Carmen N. De La Rosa  
(Assembly District 72)

Harvey Epstein  
(Assembly District 74)

Patricia Fahy  
(Assembly District 109)

Walter T. Mosley  
(Assembly District 57)

Nick Perry  
(Assembly District 58)

Victor M. Pichardo  
(Assembly District 86)

Jo Anne Simon  
(Assembly District 52)

**The N.Y. State Black, Puerto Rican, Hispanic and Asian Legislative Caucus**

**Public Advocate for the City of New York**  
Letitia James

**Members of the New York City Council**

Diana Ayala (District 8)	Justin Brannan (District 43)	Daniel Dromm (District 25)
Ben Kallos (District 5)	Carlos Menchaca (District 38)	I. Daneek Miller (District 27)
Antonio Reynoso (District 34)	Carlina Rivera (District 2)	Jumaane D. Williams (District 45)

**The Progressive Caucus of the New York City Council**



**CERTIFICATE OF COMPLIANCE**

In compliance with Federal Rules of Appellate Procedure 29(a)(4)(G), 29(a)(5), 32(a)(5)(A), 32(a)(7)(B)(i) and Local Rules 29.1(c) and 32.1(a)(4)(A), this amicus brief uses a proportionally spaced typeface, 14-point Times New Roman font, and contains 6,005 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). As permitted by Federal Rule of Appellate Procedure 32(g)(1), the undersigned relied on the word count feature of Microsoft Word 2016 in preparing this certificate.

Dated: September 7, 2018

/s/ Henry Liu  
Henry Liu

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 7th day of September 2018, I served a true and correct copy of the foregoing BRIEF OF *AMICI CURIAE* NEW YORK ELECTED OFFICIALS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h).

Dated: September 7, 2018

/s/ Henry Liu  
Henry Liu