No. 19-16441

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

v.

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

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

PETITIONER-APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

There are no corporations involved in this case.

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INTRODUCTION

Hours after college student Jose Bello delivered a poem criticizing Immigration and Customs Enforcement ("ICE") before a large audience at a widely publicized forum held by the Kern County Board of Supervisors, ICE revoked the bond on which Mr. Bello had been released by an immigration judge, imprisoned him, and imposed an exorbitant $50,000 bond. The detaining ICE officer taunted Mr. Bello regarding whether he would be able to afford the bond.

Contrary to decades of precedent as well as a recent Second Circuit decision, *Ragbir v. Homan*, 923 F.3d 53 (2d Cir. 2019), ICE asserts that even if it takes action against a person because of the individual's speech, that is lawful so long as it can point to a valid, non-retaliatory basis for the action. The District Court accepted this assertion and dismissed Mr. Bello's claims based on ICE's citation to a months-old DUI—despite ICE's failure to offer any explanation why, if that was the reason for its actions, it sat by and revoked Mr. Bello's bond only once he spoke out. This Court should reverse, join the Second Circuit in rejecting ICE's dangerous position as anathema to the First Amendment protection against retaliation for speech, and reaffirm the longstanding law of this Circuit "that there is a right to be free from retaliation even if a non-retaliatory justification exists for the defendants' action." *O'Brien v. Welty*, 818 F.3d 920, 936 (9th Cir. 2016).

The District Court correctly found that the timing of ICE's actions against Mr. Bello was "highly suggestive of retaliatory intent," but then failed to apply the law of this Circuit. Instead, the District Court formulated a new rule premised on its erroneous conclusion that the Supreme Court's recent decision in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), controls this case. *Nieves* interpreted Section 1983 to require a plaintiff suing police officers for damages for retaliatory arrest to show that no probable cause of a crime existed to support the arrest. *Id.* at 1723-24. Outside that specific cause of action, however, *Nieves* reaffirmed that *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle* continues to govern other First Amendment retaliation claims. *Id.* at 1722 (citing *Mt. Healthy*, 429 U.S. 274, 287 (1977)) (upon finding that speech was "motivating factor" for government action, burden shifts to government to show "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected [speech]"). Thus, *Nieves* governs only damages actions for retaliatory criminal arrest, and as discussed herein, its animating rationales do not translate to the very different context of a habeas corpus challenge to unlawful detention.

This Court has repeatedly rejected the proposition that the mere existence of a valid justification for a government action defeats a claim that the action constituted First Amendment retaliation. Indeed, in an opinion issued two months after the District Court's decision below, this Court again rejected such a rule:

"[W]e conclude that the mere existence of a legitimate motive . . . is insufficient to mandate dismissal. If [the defendant] would not have [taken the action at issue] absent retaliatory animus, there could still be a viable retaliation claim." *Capp v. Cty. of San Diego*, 940 F.3d 1046, 1056 (9th Cir. Oct. 4, 2019) (reinstating claim that child protection agency retaliated against father for criticism of agency despite finding action was partially justified by objectively valid need to protect children).

Beyond its contravention of controlling doctrine, ICE's position is chilling. If upheld, it would confer a license to punish critics upon an agency that has shown a penchant for doing so. Excerpts of Record (hereinafter "ER") 118 (collecting recent examples of ICE's retaliation against individuals who speak out against the agency). To take ICE's actions in this case as one example, bond revocation could become a cudgel to silence dissent by the hundreds of thousands of people who have been released from immigration custody pending the outcomes of their cases. The agency would have carte blanche to re-imprison its critics so long as it could conjure some prior valid basis for doing so, however temporally far removed.

In recognition of this danger, the Second Circuit recently reversed the dismissal of a New York activist's case, finding colorable his claim that ICE targeted him for deportation in retaliation for his activism. *See Ragbir*, 923 F.3d at 67. A contrary ruling, the Second Circuit said, "would be a particularly effective deterrent to other aliens who would also challenge the agency" and "would broadly

chill protected speech." *Id.* at 71. Before the Second Circuit, ICE asserted the same basic defense it advances here, claiming that Ragbir's order of removal was tantamount to probable cause and thus defeated his retaliation claim as a matter of law. *Id.* at 66-67. The Second Circuit rejected that defense, *id.* & n.17, and went on to analyze the case under the *Mt. Healthy* framework. *Id.* at 69-71. The government sought rehearing and rehearing *en banc* in *Ragbir* after *Nieves* was issued, again asserting that a removal order is a "legally sufficient reason" for deportation and should foreclose any First Amendment retaliation claim. Defendants-Appellees' Petition for Panel Rehearing or Rehearing *En Banc* at 9-11, No. 18-1597 (2d Cir. Aug. 22, 2019) ECF No. 207. The panel and Second Circuit denied the request for rehearing. (2d Cir. Sept. 26, 2019) ECF No. 215.

This Court likewise should deny ICE the dangerous power it seeks to claim in this case. It should reverse and hold that a proper application of controlling precedent to the factual findings below—that ICE's actions were (1) "highly suggestive of retaliatory intent" and (2) left completely unaddressed by Respondents—yields the conclusion that ICE's actions constituted retaliation in violation of the First Amendment. This Court should order Respondents to restore Mr. Bello to the custody status he held at the time of his speech criticizing ICE, i.e., immediately prior to the agency's revocation of his bond.

STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 2241 *et seq.*, as protected under Art. I § 9, cl. 2 of the United States Constitution (the "Suspension Clause"). Pursuant to 28 U.S.C. § 2241(c)(1), federal courts have jurisdiction over the habeas petitions of individuals, such as Mr. Bello, who are imprisoned by ICE. The District Court also had jurisdiction pursuant to 28 U.S.C. § 1331 and its inherent equitable authority to remedy constitutional violations, as this case arises under the First Amendment and the Due Process Clause of the Fifth Amendment.

This Court has jurisdiction pursuant to 28 U.S.C. § 2241 as well as under 28 U.S.C. § 1291 to hear this appeal from the District Court's order and final judgment, entered on July 16, 2019, denying Mr. Bello's habeas petition. Mr. Bello timely filed a notice of appeal on July 19, 2019. ER 11. *See* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in eschewing established First Amendment retaliation doctrine and instead ruling that *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), which addresses one specific cause of action for damages under Section 1983, controls this habeas case?

2. Did the District Court err in ruling that a First Amendment retaliation claim fails as a matter of law whenever ICE can point to an "objectively reasonable legal justification" for its actions, even if that justification is temporally removed from the agency's actions and the court finds the actions to be "highly suggestive of retaliatory intent?"

3. Under longstanding First Amendment retaliation doctrine, upon a finding that an individual's speech was a "motivating factor" for a government action, the burden shifts to the government to show "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected [speech]." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). After finding ICE's actions were "highly suggestive of retaliatory intent," did the District Court misapply *Mt. Healthy* by failing to shift the burden to ICE to show that it would have revoked and quintupled Mr. Bello's bond and imprisoned him on May 15, 2019, even if he had not spoken out?

4. Under a proper application of *Mt. Healthy*, given that ICE abstained from offering any explanation for the timing of its actions, has Mr. Bello prevailed on his First Amendment retaliation claim?

STATEMENT OF THE CASE

Petitioner-Appellant Jose Bello is a twenty-three-year-old father of a one-year-old U.S.-citizen son who has lived in California nearly his entire life since entering the United States as a three-year-old child in 2000. This case arose out of ICE's retaliation against Mr. Bello just hours after he spoke out against the agency and called for others to rally to the cause of justice for immigrants. Specifically, ICE revoked and quintupled the $10,000 bond on which Mr. Bello had been released (without any ankle monitor) several months earlier by an immigration judge. These actions disrupted his ongoing college education and abruptly separated him from his one-year-old son for three months.

Even in the months since an obligor posted the $50,000 bond and thereby obtained Mr. Bello's release, ICE has continued to restrain his liberty by forcing him to wear an ankle monitor at all times, charge its battery every several hours, and check in frequently with an ICE contractor. Through this appeal he seeks to protect his First Amendment rights and to be restored to the custody status he held prior to ICE's May 15, 2019 enforcement actions targeting him.

Mr. Bello's August 2018 Release on Bond by an Immigration Judge

Mr. Bello's immigration case began when he was arrested on May 22, 2018 by ICE and detained without bond. ER 111. At the time, he was a farmworker and a popular student among Bakersfield College faculty members. ER 143. In light of

his longstanding presence in the country and the extreme hardship that his removal would cause his U.S.-citizen son, Mr. Bello is eligible for, and through counsel applied for, cancellation of his removal. ER 143. Mr. Bello also pursued a process available to victims of crime to adjust their immigration status and obtain a "U visa" under a statute reflecting lawmakers' recognition that victims' cooperation, assistance, and safety are essential to the effective detection, investigation, and prosecution of crimes. ER 111. *See* 8 U.S.C. § 1101(a)(15)(U). His U visa application is based on his cooperation, as certified by the Delano Police Department, in the investigation of a violent crime in which he was the victim. ER 111.

On July 26, 2018, Mr. Bello made a motion for the immigration judge to redetermine ICE's decision to detain him without bond. ER 112. The motion was supported by glowing letters of support from a wide swath of Mr. Bello's teachers as well as the Dean of Bakersfield College. ER 194. On August 22, 2018, after a bond hearing attended by numerous allies and supporters of Mr. Bello, the immigration judge found that Mr. Bello was not a danger to the community and set bond in the amount of $10,000. ER 230.

Although Mr. Bello could not have afforded the $10,000 bond, community groups rallied in support of him, securing an obligor to post his bond. ER 112. His struggle to be free galvanized fellow community members to become critical of

ICE, and his case drew substantial media attention in Kern County.[1] ER 112.

Upon his release on bond in August 2018, Mr. Bello returned home to his mother, brothers, and infant son. ER 112. He was not required to wear an ankle monitor. He resumed his classes at Bakersfield College—taking four college classes in fall 2018 and three in spring 2019—while also becoming a primary caretaker of his baby, whose custody he shares with the child's mother. ER 112.

Following his release on bond, Mr. Bello continued attending immigration court. On February 14, 2019, Mr. Bello traveled to San Francisco and appeared *pro se* at a scheduled hearing on the "non-detained" immigration court docket. ER 113. The non-detained immigration court often grants repeat adjournments to individuals with applications for visas pending in the backlogged administrative review processes of USCIS. The collection of cases afforded this treatment are commonly referred to as the "Status Docket."[2] ER 113. At his February hearing, based on his pending U visa application, Mr. Bello requested that he be placed on

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[1] *See, e.g.*, *Bakersfield College student released from ICE custody*, The Bakersfield Californian (Aug. 24, 2018), https://www.bakersfield.com/news/bakersfield-college-student-released-from-ice-custody/article_4f1c55d0-a7f5-11e8-87ab-9b332abc6e0b.html.

[2] *See* Catholic Legal Immigration Network, Inc., *Seeking Continuances In Immigration Court In The Wake Of The Attorney General's Decision In Matter OF L-A-B-R-* at 39 (Dec. 6, 2018) ("Generally speaking, cases where a petition or application is pending with USCIS (or where the respondent awaits a current priority date) may be eligible for placement on the status docket . . . ."), available at https://cliniclegal.org/file-download/download/public/611.

the status docket. ER 113. The immigration judge deferred a decision on the request, asking Mr. Bello to return to court with evidence that his application is likely to be granted. ER 113. The immigration court set his next hearing for March 2019 and later issued a notice resetting his next immigration court date to June 25, 2019 in San Francisco. ER 113. Mr. Bello planned to attend court on that date, but the day never came, as his case was transferred to the "detained" immigration court docket following the May 15, 2019 events giving rise to this case.

ICE's May 2019 Revocation and Quintupling of Mr. Bello's Bond

Mr. Bello's experiences in immigration detention led him to become involved in political advocacy to expose the abuses and poor conditions he suffered and experienced while inside Mesa Verde Detention Center and to call for an end to the current administration's regime of mass detention and deportation. He spoke out several times on these issues. ER 113-116.

Most publicly of all, on the evening of May 13, 2019, Mr. Bello spoke in front of a packed audience gathered to witness a widely publicized forum held by the Kern County Board of Supervisors. ER 114. Pursuant to California's Transparent Review of Unjust Transfers and Holds (TRUTH) Act, local governments must hold forums annually to examine their local law enforcement agencies' involvement in ICE enforcement activities. *See* Cal. Gov't Code § 7283.1(d). Mr. Bello delivered an impassioned poem, titled "Dear America," that

was inspired by his first-hand experiences with ICE and his detention in Mesa Verde. ER 114. "Dear America" is an indictment of the current administration's immigration enforcement practices and a call for young people to stand up and unite. ER 115.

Less than 36 hours after Mr. Bello performed his poem, ICE took aggressive enforcement action against him. The following facts appear on page 116 of Petitioner-Appellant's Excerpts of Record: At 6:30 a.m. on May 15, 2019, ICE officers came to his home. As Mr. Bello was leaving his home and approaching his car, a white unmarked vehicle parked behind him. An officer wearing civilian clothes rapidly approached and came between Mr. Bello and the car while pointing a taser at him. As that officer asked Mr. Bello questions, a black, unmarked vehicle parked diagonally in front of Mr. Bello's car. A second officer, wearing a black "ICE/POLICE" vest, exited that vehicle. The first officer placed Mr. Bello in handcuffs. He began to interrogate Mr. Bello, among other things, as to the identity of others residing in his home. Mr. Bello chose to exercise his right to remain silent. Throughout the trip to the Bakersfield ICE processing center, the officer questioned Mr. Bello, demanding that he identify others who reside at his home. The officer became agitated when Mr. Bello refused to respond and threatened him, stating that if anything bad were to happen to his family, it would be Mr. Bello's fault unless he started answering the officer's questions. This officer

pointedly said to Mr. Bello "We know who you are and what you're all about."

The following facts appear on page 117 of Petitioner-Appellant's Excerpts of Record: Mr. Bello was placed in a holding cell at ICE's processing center in Bakersfield until approximately 3:00 p.m. He was forced to remain with handcuffs behind his back. The handcuffs were extremely uncomfortable and began cutting into his wrists. Mr. Bello repeatedly pleaded with the ICE officers to remove the handcuffs; not only were the handcuffs hurting his wrists, but he also desperately needed to use the restroom. The ICE officers continuously ignored Mr. Bello's pleas. Eventually, he had no choice but to wet himself. Mr. Bello was then placed in a different holding cell with individuals awaiting to be transferred to Mesa Verde. Mr. Bello remained in soiled clothing for hours—a dehumanizing experience obviously meant to humiliate him.

Around 7:00 p.m., prior to transferring Mr. Bello from ICE's processing center to Mesa Verde, the ICE officer who had re-detained Mr. Bello informed him that ICE had set his bond at $50,000. ER 232. The officer mocked him, stating "We'll see if you can get your friends to raise the bond money again." ER 117.

Mr. Bello earns at most $20,000 a year and has no significant assets. ER 118. This information was reflected in Mr. Bello's cancellation application and thus was in ICE's possession at the time it chose to set bond at $50,000. ER 150. He plainly could not afford such a high bond. Shortly after Mr. Bello arrived at

Mesa Verde, a guard singled him out, asking "You think you're famous and you're going to get special treatment?" ER 117.

Mr. Bello's Petition for Habeas Corpus

On June 21, Mr. Bello filed a petition for writ of habeas corpus with the District Court, challenging the revocation of his $10,000 bond and his re-detention on $50,000 bond as violative of the First and Fifth Amendments. ER 107. Mr. Bello argued these actions violated the First Amendment's prohibition on government retaliation for protected speech. He also argued that ICE's decision to set bond at $50,000 violated not only the First Amendment but also the Due Process Clause, because the agency plainly failed to consider his financial circumstances in setting that amount. *See Hernandez v. Sessions*, 872 F.3d 976, 990-91 (9th Cir. 2017) (holding that ICE must consider individual financial circumstances to ensure any bond is no greater than reasonably necessary to ensure future appearances).[3]

Pursuant to an order by the District Court, ER 106, Respondents filed their return on July 8.[4] ER 26. Remarkably, Respondents' return did not dispute Mr.

[3] A bond in the amount of $50,000 is highly unusual in immigration court and would be unaffordable for most immigrant detainees; far more commonly, bonds are set at $20,000 or less. ER 236.

[4] No. 19-cv-03630, (N.D. Cal. July 8, 2019) ECF No. 16. Following a stipulation by the parties approved by the district court, ER 93-96, Respondents refiled a superseding return with redactions of references to a sealed juvenile adjudication.

Bello's central claim that ICE had revoked his bond and imprisoned him out of retaliatory animus in response to his speech. ER 26-45. Instead, Respondents claimed that *Nieves* controlled the case and pointed to a January 2019 arrest of Mr. Bello for driving under the influence of alcohol—for which he was released on his recognizance and later sentenced to fines, probation, DUI school, participation in a victim impact panel via MADD, and community service. ER 112. Respondents did not explain why, if this January event were the impetus for Mr. Bello's arrest, ICE did not revoke Mr. Bello's bond or take action against him sooner than May 15—e.g., when he was in immigration court on February 14, 2019. ER 113.

Respondents also did not directly defend the decision to increase the bond to the exorbitant amount of $50,000 or dispute that it was well above what Mr. Bello could afford to pay. Instead, Respondents argued that Mr. Bello must exhaust his claim through the immigration court system. ER 34-36.

Magistrate Judge Sallie Kim heard oral argument on July 15, 2019. ER 22. Regarding Respondents' decision not to dispute Mr. Bello's evidence of retaliatory motive or even disclaim a retaliatory motive, Judge Kim remarked: "there's no evidence before me . . . on what the reason was for the timing . . . It looks pretty suspicious. It's right after [Mr. Bello] gave a speech very critical of ICE, and I

ECF No. 23. Petitioner-Appellant's Excerpts of Record includes the superseding return and the relevant supporting material. ER 26.

don't have an explanation before me as to the timing." ER 23. Respondents' counsel acknowledged the lack of any declaration or other evidence tending to rebut the inference of retaliation and ultimately rested on *Nieves*. ER 23-24.

The District Court denied the petition on July 16, 2019. ER 2. It waived the requirement of prudential exhaustion with respect to Mr. Bello's claim that his re-detention by ICE was unconstitutional, finding the claim was "outside the jurisdiction of the immigration judge" and "[a]dministrative remedies would thus be inadequate."[5] ER 6-7. On the merits, the District Court found that the "timing of ICE's decision to re-arrest Petitioner is highly suggestive of retaliatory intent." ER 8. Nonetheless, it found that *Nieves* controlled the case and that ICE had pointed to an "objectively reasonable legal justification" for revoking Mr. Bello's bond. ER 8. Alternatively, the court found that, under its conception of the *Mt. Healthy* standard, Mr. Bello failed to "demonstrate[] definitively that ICE would not have re-arrested him absent his speech." ER 8 (emphasis added). In this appeal, Mr. Bello challenges both the ruling that *Nieves* controls as well as the failure to apply

[5] The district court did not, however, waive exhaustion as to ICE's quintupling of the bond. ER 9. This was error. The quintupling of bond is both evidence of retaliatory intent and retaliation in itself, and this claim need not be exhausted for the same reasons as his challenge to the revocation of his bond. However, because a ruling for Mr. Bello on First Amendment retaliation grounds would invalidate ICE's revocation of bond and thereby render the later increase in bond a non-event, this Court need not reach the question of exhaustion as to the bond increase.

the proper burden-shifting standard under *Mt. Healthy*.[6]

Events Subsequent to the District Court's Entry of Judgment and the Ongoing Restraints on Mr. Bello's Liberty

On August 12, 2019 after Mr. Bello had suffered nearly three months of separation while imprisoned at Mesa Verde, he was able to be released on the $50,000 bond set by ICE. The Brooklyn Community Bail Fund posted the bond as the obligor, *see* Ex. 1 to Counsel's Declaration in Support of Petitioner's Motion for Judicial Notice, dated Feb. 14, 2020, ECF No. 17-3. The $50,000 was funded in part by contributions from professional football players Josh Norman and Demario Davis who became involved out of concern that ICE had violated the First Amendment,[7] as well as $1,000 from Mr. Bello through his mother. Ex. 2 to Mot. for Judicial Notice, ECF No. 17-3. Mr. Bello returned home to his infant son and has been enrolled in classes at Bakersfield College ever since. Ex. 3 to Mot. for Judicial Notice, ECF No. 17-3.

Despite that ICE's May 15 custody determination indicated the $50,000 bond as the only condition of Mr. Bello's release, ER 232, once the bond was

[6] A motions panel of this Court denied a request from Mr. Bello for his release pending the adjudication of this appeal. Order, dated Aug. 1, 2019, ECF No. 9.

[7] *See* Scott Allen, *Redskins' Josh Norman helps pay bail for immigration activist detained since May*, The Washington Post (Aug. 14, 2019), https://www.washingtonpost.com/sports/2019/08/13/redskins-josh-norman-helps-pay-bail-immigration-activist-detained-since-may/.

posted, ICE forced Mr. Bello to wear an ankle monitor and live under the Intensive Supervision Appearance Program, administered by an ICE contractor. Ex. 4 to Mot. for Judicial Notice, ECF No. 17-3. Under the program, ICE requires Mr. Bello to wear the ankle monitor at all times; charge the ankle monitor battery every eight hours or less (and immediately answer his cell phone if the battery dies); remain in his home for six daytime hours during a specific day each week and permit his home to be inspected during that time; and report to the ISAP office every four weeks. *Id.*

On October 31, 2019, the immigration court ruled that Mr. Bello's case should be moved to the "Status Docket" pending the adjudication of his U visa application. Ex. 5 to Mot. for Judicial Notice, ECF No. 17-3. The immigration court set his next court date for March 26, 2021, with an update on the status of the adjudication of his U visa application due to the court by February 26, 2021. *Id.* According to the United States Citizenship and Immigration Services website, the current processing time for U visa applications by the USCIS Vermont Service Center is 53.5 to 54 months from the date the application is received. Ex. 6 to Mot. for Judicial Notice, ECF No. 17-3. On that timeline, given that Mr. Bello submitted his application in August 2018, he is likely to remain on the immigration court's "status" docket for several years to come while awaiting the processing of his U visa application.

STANDARD OF REVIEW

This Court reviews de novo the decision of a district court to deny a petition for a writ of habeas corpus. *See Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011). This Court reviews for clear error the district court's findings of fact. *Id.*

SUMMARY OF ARGUMENT

The District Court erred in denying Petitioner-Appellant Jose Bello's habeas petition. First, decades of precedent establish the analytical framework governing First Amendment retaliation cases. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (upon finding that individual's speech is "motivating factor" for government's action, shifting to government to show "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected [speech]"). This Court already has published an opinion reaffirming the continuing vitality of that framework in the months since the Supreme Court's *Nieves* decision. *See Capp v. Cty. of San Diego*, 940 F.3d 1046, 1056 (2019) ("[T]he mere existence of a legitimate motive . . . is insufficient . . . . If [the agency] would not have [taken the action] absent retaliatory animus, there could still be a viable retaliation claim."). The *Mt. Healthy* framework controls this case.

Second, the Supreme Court's decision in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), specifically governs the tort of retaliatory criminal arrest—not all First

Amendment retaliation claims against law enforcement. *Nieves* interpreted Section 1983 to require a plaintiff suing police officers for damages for retaliatory arrest to show the absence of probable cause of a crime to support the arrest. *Id.* at 1723-24. Outside that particular cause of action, however, *Nieves* reaffirmed that *Mt. Healthy* continues to govern other First Amendment retaliation claims. *Id.* at 1722. Thus, federal courts may not set *Mt. Healthy* aside and create new rules through analogy to *Nieves*' "probable cause" holding that cut off the factual inquiry into retaliatory intent. Permitting the existence of an "objectively reasonable legal justification" to defeat a First Amendment retaliation claim would do serious violence to the right to be free from government retaliation for speech.

Third, *Nieves*' rationales do not support the rule the District Court adopted. While the *Nieves* Court was concerned that unmeritorious retaliatory arrest tort claims could "land officer[s] in years of litigation" entailing "broad-ranging discovery" and that the prospect of such litigation could deter officers from vigorous law enforcement, *id.* at 1725, those concerns are not implicated in a summary habeas proceeding for injunctive relief against a government agency. Moreover, unlike split-second criminal arrest decisions—in which speech around the moment of arrest indicating uncooperativeness may appropriately be considered in determining whether to effect an arrest, *id.* at 1724—ICE's decision to revoke bond is typically premeditated and cannot be legitimately informed by

the arrestee's temporally removed political speech. Perhaps most saliently, unlike the venerated, bright-line standard of probable cause of criminality, the standard ICE uses when revoking bond is not probable cause but rather whenever, "at any time in the discretion of the district director," ICE finds that changed circumstances warrant revocation. 8 C.F.R. § 236.1(c)(9). ER 103. While probable cause carries "high probative force" as a way to cut through the "complexity of proving causation" in retaliation claims arising from criminal arrests, *Nieves*, 139 S. Ct. at 1723-24, the amorphous discretionary standard that governs ICE's revocation of bond offers no such advantage as a proxy for assessing causation.

Fourth, the District Court misstated and misapplied the *Mt. Healthy* standard in its brief alternative ruling that Mr. Bello's claim would fail under that test. It placed on Mr. Bello the high burden of "demonstrate[ing] definitively that ICE would not have re-arrested him absent his speech." ER 8 (emphasis added). But *Mt. Healthy* does not require a "definitive" demonstration from the claimant; it requires a showing that constitutionally protected expression was a "substantial" or "motivating" factor leading to the government's action. *See, e.g., Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) (citing *Mt. Healthy* and holding claimant's burden is to show "that the protected conduct was a 'substantial' or 'motivating' factor in the defendant's decision."); *Allen v. Scribner*, 812 F.2d 426, 433 (9th Cir.) (same), *amended*, 828 F.2d 1445 (9th Cir. 1987).

Once the District Court found that "the timing of ICE's decision to re-arrest Petitioner is highly suggestive of retaliatory intent," ER 8, the burden should have shifted to ICE to rebut that inference of retaliation—which it failed to do.

Accordingly, this Court should reverse the judgment of the District Court and order Respondents to release Mr. Bello from the ankle monitor and intensive supervision, return the $50,000 bond, and restore Mr. Bello to the custody status he held immediately prior to May 15, 2019.[8] Given that Respondents rested their defense on legal arguments and declined to offer any explanation for the timing of ICE's actions, they should not be permitted a second chance to explain their actions on remand.

[8] The fact that a bond fund (with a contribution from Mr. Bello) obtained Mr. Bello's release by posting the $50,000 bond does not moot this appeal. *See Diouf v. Napolitano*, 634 F.3d 1081, 1092 n.3 (9th Cir. 2011) (holding habeas claims are not moot where government has offered no assurance that petitioner will not be re-detained). Even following his release, the intensive supervision ICE imposed, including the battery-powered ankle monitor, remains as a significant restraint on Mr. Bello's liberty. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1118 (9th Cir. 2010) (holding "strict limitations on Petitioner's freedom" support conclusion that habeas case "present[ed] a live controversy"); *see also Jones v. Cunningham*, 371 U.S. 236, 240 (1963) ("[T]here are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus."). Given that his underlying immigration case is not likely to conclude for several more years, Ex. 6 to Mot. for Judicial Notice, ECF No. 17-3, judicial remedies to address ICE's unconstitutional restraint of Mr. Bello's liberty remain necessary.

ARGUMENT

I. DECADES OF PRECEDENT PROTECT THE RIGHT TO BE FREE FROM RETALIATION FOR SPEECH AND ESTABLISH THE PROPER ANALYSIS TO EVALUATE A FIRST AMENDMENT RETALIATION CLAIM.

It is well-established that the government may not take action against an individual in response to constitutionally protected speech, even if it otherwise could take such action based on lawful reasons. *See Mt. Healthy*, 429 U.S. at 283-84 (holding teacher who lacked tenure and "could have been discharged for no reason whatever" could still bring retaliation action when discharge was retaliatory); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (holding professor's lack of tenure and lack of contractual right to employment did not foreclose his First Amendment retaliation claim). Allowing the government to retaliate against speakers it disfavors would violate the First Amendment's fundamental protection against censorship. *See Perry*, 408 U.S. at 597-98.

Courts have applied this well-worn principle to a wide variety of contexts across many decades. *See, e.g., Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 674 (1996) (public benefits): *Perry*, 408 U.S. 593 (employment); *Capp*, 940 F.3d 1046 (child custody); *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755 (9th Cir. 2006) (student speech); *Rizzo v. Dawson*, 778 F.2d 527 (9th Cir. 1985) (retaliatory transfer of detainee); *Ragbir v. Homan*, 923 F.3d

53 (2d Cir. 2019) (revocation by ICE of stay of removal). Since at least 1995, the Ninth Circuit has recognized that the contours of First Amendment retaliation law are "clearly established" for purposes of qualified immunity. *See Schroeder v. McDonald*, 55 F.3d 454, 461 (9th Cir. 1995); *see also Barnett v. Centoni*, 31 F.3d 813, 815-16 (9th Cir. 1994).

The established analysis governing First Amendment retaliation claims involves a burden-shifting framework. The claimant must show each of the following, only the third of which is contested in this case:

> (1) [H]e was engaged in a constitutionally protected activity, (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant's conduct.

O'Brien v. Welty, 818 F.3d 920, 932 (9th Cir. 2016). Once the claimant makes this showing, "the burden shifts to the government to show that it would have taken the same action even in the absence of the protected conduct." *Id.* (internal quotation marks omitted) (citing *Mt. Healthy*). To carry its burden, it is not enough for government defendants to point to the existence of a valid, non-retaliatory reason. *See id.* at 936 ("We have previously made it clear that there is a right to be free from retaliation even if a non-retaliatory justification exists for the defendants' action."). They "must show more than that they '*could* have' punished the plaintiffs in the absence of the protected speech; instead, 'the burden is on the

defendants to show' through evidence that they '*would* have' punished the plaintiffs under those circumstances." *Pinard*, 467 F.3d at 770 (emphasis in original) (quoting *Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503 (9th Cir. 2004)).

The Second Circuit recently applied this well-established analysis to a habeas appeal arising from ICE enforcement actions targeting an immigrant activist in New York. *See Ragbir*, 923 F.3d at 66-71 (rejecting ICE's claim that Ragbir's outstanding order of removal—a valid basis for his deportation—defeated his retaliation claim as a matter of law and proceeding to analyze case under *Mt. Healthy* framework), *reh'g denied*, No. 18-1597 (2d Cir. Sept. 26, 2019) ECF No. 215. The District Court in this case failed to apply this governing framework. As explained *infra*, Part III, a proper application of the framework to the facts yields the inescapable conclusion that ICE violated Mr. Bello's First Amendment right to be free from retaliation for his constitutionally protected criticism of the agency.

II. *NIEVES*' LIMITED HOLDING DOES NOT GOVERN THE CLAIMS IN THIS CASE.

The Supreme Court in *Nieves* did not purport to modify the established analysis governing First Amendment retaliation claims that arise outside the specific context of the tort of retaliatory arrest under Section 1983. Because the Court otherwise reaffirmed the *Mr. Healthy* framework, that continues to bind the

lower courts; they are not free to derive new rules in lieu of that analysis based on an analogy to the "probable cause" rule of *Nieves*. Moreover, the rationales animating *Nieves* do not justify the creation of an analogous "probable cause" exception in the wholly separate context of habeas corpus.

A. *Nieves* Does Not Govern First Amendment Retaliation Claims Other Than Damages Claims for Retaliatory Arrest.

The District Court's decision fundamentally misapprehends the scope of *Nieves*, in which a plaintiff arrested for disorderly conduct at a sports festival brought a claim for damages for retaliatory arrest under Section 1983. *See* 139 S. Ct. at 1720. The Supreme Court's analysis in *Nieves* addresses a narrow issue: whether to impose on plaintiffs an additional proof requirement in the specific context of the tort of retaliatory criminal arrest under Section 1983. *See id.* at 1722-23. In setting up its analysis, the Court states that "[f]or a number of retaliation claims, establishing the causal connection between a defendant's animus and a plaintiff's injury is straightforward" but explains that for the tort of retaliatory prosecution, the Court has adopted the requirement that plaintiffs show the absence of probable cause of a crime. *Id.* at 1723 (discussing *Hartman v. Moore*, 547 U.S. 250, 265-66 (2006)). The Court then states the question at issue: whether to extend the rule in *Hartman* to First Amendment retaliatory arrest claims. *Id.*; *see also id.* at 1730 (Gorsuch, J. concurring) (explaining that "the question" is whether

probable cause of a crime "forecloses a civil claim for damages as a statutory matter under § 1983"). At no point in the *Nieves* opinion does the Court indicate that the rule it adopts should apply outside the specific context of the tort of retaliatory arrest.

That the Court's ruling did not sweep more broadly is understandable. The parties and the United States as *amicus curiae* all approached the case as a presenting the narrow question of how to construct a specific cause of action for retaliatory arrest under Section 1983. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondents, *Nieves v. Bartlett*, No. 17-1174 (S. Ct. Aug. 2018) (stating question as "[w]hether a claim for damages based on an alleged retaliatory arrest in violation of the First Amendment, brought under 42 U.S.C. 1983, is foreclosed when the arrest was supported by probable cause"). Indeed, the United States highlighted that the universe of First Amendment violations is greater than the subset for which a damages remedy is available under Section 1983:

> Although the First Amendment confers a general right to be free from retaliation for one's speech, not every violation of that right necessitates the particular remedy of a tort action for damages . . . . [T]he elements of, and rules associated with, an action seeking damages . . . under Section 1983 may reflect practical considerations and limitations that preclude monetary recovery even if the specific constitutional right at issue has been violated."

Id. at 28-29 (quotation marks and citation omitted).

The Supreme Court has "repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability," *Heck v. Humphrey*, 512 U.S. 477, 483 (1994), with specific rules, the "contours and prerequisites" for which courts are to look first to the common law of torts. *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017). The Court has "consistently" construed Section 1983 "as not intending wholesale revocation of the common-law immunity [from damages liability] afforded government officials." *Procunier v. Navarette*, 434 U.S. 555, 561 (1978). The contours of Section 1983 causes of action and associated immunities thus "ha[ve] been predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976). This has led the Court to adopt rules, such as qualified immunity, that foreclose a damages remedy under Section 1983 for certain claims despite a constitutional violation—especially when the damages suit would turn on an examination of the subjective motivation of the officer. *Compare Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982) (eliminating subjective prong of qualified immunity), *with Baker v. McCollan*, 443 U.S. 137, 140 n.1 (1979) ("Of course, the state of mind of the defendant may be relevant on the issue of whether a constitutional violation has occurred in the first place, quite apart from the issue of whether § 1983 contains some additional qualification of that nature before a defendant may be held to respond in damages under its provisions.").

Nieves discusses and relies upon the foregoing line of cases extensively to explain its adoption of specific requirements for damages claims for retaliatory arrests, *see* 139 S. Ct. at 1723-27. For example, the Court highlights its concern that "policing certain events like an unruly protest . . . could land an officer in years of litigation" entailing "broad-ranging discovery." *Id.* at 1725 (quoting *Harlow*, 457 U.S. at 817). The Court proceeds to construct the elements of a Section 1983 tort claim for retaliatory arrest in such a way as to limit individual police officers' personal exposure to damages liability. Given the frequent "split-second judgments" officers must make when deciding whether to conduct thousands of arrests that may legitimately be informed by whether a suspect's speech indicates "he is ready to cooperate or rather presents a continuing threat," *id.* at 1724-25, the Court holds that a plaintiff must prove the absence of probable cause as an element of a retaliatory arrest tort claim. *Id.* at 1723.

Nieves does not, however, anywhere imply that its holding governs First Amendment retaliation claims outside the context of a retaliatory arrest damages suit against officers in their individual capacity. *Cf. Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*."). To the contrary, outside this specific context, *Nieves* reaffirms the continuing vitality of *Mt. Healthy*. *See* 139 S. Ct. at 1722 (discussing general First Amendment retaliation framework and citing

Mt. Healthy, 429 U.S. at 283-84). Moreover, *Nieves* cites with approval a case in which the Court specifically rejected the proposition asserted adopted by the District Court in this case: that an "objectively valid" justification constitutes a defense to a First Amendment retaliation claim. *Id.* (citing *Crawford-El v. Britton*, 523 U.S. 574, 593-94 (1998) (rejecting "unprecedented proposal to immunize all officials whose conduct is 'objectively valid,' regardless of improper intent")).

Because the Supreme Court in *Nieves* reaffirmed the well-established framework for evaluating First Amendment retaliation claims, lower courts are duty-bound to continue applying that framework in cases not involving the tort of retaliatory criminal arrest. *See Hohn v. United States*, 524 U.S. 236, 252-53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.") (internal quotation marks omitted) (quoting *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 484 (1989)). Lower courts may not, as the District Court did here, extend *Nieves* by analogy to cover First Amendment retaliation cases governed by *Mt. Healthy*, *O'Brien*, 818 F.3d at 936, *Soranno's Gasco*, 874 F.2d at

1315, and other binding appellate precedents. In sum, because *Nieves* reaffirms rather than replaces existing precedents establishing the default First Amendment framework, those precedents—not *Nieves*—control this case.

B. The Rationales Supporting *Nieves*' Holding Do Not Support the Rule the District Court Adopted in This Case.

Even if binding precedent did not require the application of *Mt. Healthy* to this case, it still would have been error for the District Court to apply a version of the *Nieves* "probable cause" in the very different context of a habeas corpus petition challenging bond revocation. The rationales animating the *Nieves* decision either do not apply here or apply with far less force.

First, Mr. Bello sought relief from his unlawful detention under the federal habeas statute. Because Congress intended the federal habeas statute to provide swift and effective protection from unconstitutional confinement, it was error for the District Court to impose the heightened standards applicable to damages claims under Section 1983. Habeas corpus has its own statutory and common law mandate, quite apart from that of Section 1983. *See Heck*, 512 U.S. at 480 (noting the two "differ in their scope and operation"). Whereas Section 1983 may deny a damages remedy despite a deprivation of rights, habeas corpus has "evolved as a remedy available to effect discharge from any confinement contrary to the Constitution." *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973) (emphasis added).

Unlike a plenary civil action under Section 1983 "with its discovery rules and other procedural formalities," the federal habeas statute provides "for a swift, flexible, and summary determination" of claims. *Id.* at 487, 495-96. Where courts withhold a damages remedy, they often note that habeas is nonetheless available to ensure fairness to one whom the government has imprisoned. *See, e.g.*, *Imbler*, 424 U.S. at 427 (granting prosecutors immunity from damages but observing that "collateral remedies" are available to test propriety of one's detention); *Cronn v. Buffington*, 150 F.3d 538, 541 (5th Cir. 1998) (holding, after plaintiff had obtained habeas relief based on constitutional violations, defendants were entitled to qualified immunity in Section 1983 action for same violations). [9]

Congress, moreover, has instructed that the writ of habeas corpus be made available to a prisoner "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). This clear statutory mandate tells courts to issue the writ whenever a person is detained in violation of the Constitution; it does not admit of exceptions for cases where ICE can point to an

[9] In contrast to damages suits against officers in their individual capacities, "different considerations come into play when governmental rather than personal liability is threatened." *Owen v. City of Indep.*, 445 U.S. 622, 653 n.37 (1980) (citing, *inter alia*, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) ("[T]he justifications for immunizing officials from personal liability have little force when suit is brought against the governmental entity itself")). Thus, for example, there is no immunity for governmental entities based on their officers' objective good faith. *See id.* at 638.

alternative, "objectively reasonable" basis to justify the imprisonment. Moreover, the habeas statute instructs that a district court "shall summarily hear and determine the facts" involved in a habeas case. 28 U.S.C. § 2243. This command distinguishes the habeas context from the Section 1983 context in two ways: (1) The instruction to decide cases "summarily" (and the limited timeline and very limited, if any, discovery that entails) mitigates the concern that individual officers will be tied up with "years of litigation" and "broad-ranging discovery." *Nieves*, 139 S. Ct. at 1725; and (2) The specific instruction to "determine the facts" militates against using *per se* legal rules, such as the one the District Court adopted, that artificially cut off the inquiry into retaliatory motive merely because ICE points to an "objectively reasonable" basis for the imprisonment.

In contrast to Section 1983, a broad statute under which courts must derive rules from clues originating in common law precedents, the INA is explicit in its statutory commands and provides a relevant consideration here. Congress severely curtailed three specific selective enforcement claims in the immigration context: those where an agency acts to "commence proceedings, adjudicate cases, or execute removal orders." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (interpreting 8 U.S.C. § 1252(g)). The Supreme Court has held that a petitioner may sustain one of these three claims only by meeting the high burden of showing the government's conduct is outrageous. *Id.* at 491.

Section 1252(g) does not cover the "many other decisions or actions that may be part of the deportation process," *id.* at 482, and this Court repeatedly has read the statute narrowly so as not to sweep in other claims. *See, e.g.*, *Arce v. United States*, 899 F.3d 796, 800 (9th Cir. 2018). The heightened burden does not apply to revoking or increasing bond, and the District Court should not impose one in an area where Congress has legislated and not done so.

The other policy rationales justifying the *Nieves* "probable cause" rule simply have little or no application to this different context. While the bright line standard of probable cause carries "high probative force" as a way to cut through the "complexity of proving causation" in retaliation claims arising from criminal arrests, 139 S. Ct. at 1723-24; *see also Hartman*, 547 U.S. at 261 (citing probable cause's uniquely "powerful evidentiary significance"), no similar bright line exists in this context. There is no "probable cause" standard for revoking and resetting the bond of an immigrant previously released by an Immigration Judge. Rather, ICE claims broad discretion to revoke bond under the amorphous justification of "changed circumstances." *Matter of Sugay*, 17 I. & N. Dec. 637, 637 (BIA 1981) (permitting ICE's predecessor agency to revoke bond upon sufficient changed circumstances); *see also* 8 C.F.R. § 236.1(c)(9) (giving ICE discretion to revoke

bond "at any time in the discretion of the district director"); ER 103; (explaining that ICE has revoked bond in wide range of circumstances in recent years).[10]

Moreover, a premeditated ICE enforcement action in response to political speech is a far cry from the typical arrest for disorderly conduct with which the *Nieves* Court was primarily concerned, in which an individual's speech could legitimately inform the "split-second judgment[]" to arrest. 139 S. Ct. at 1724-25. ICE's revocation of Mr. Bello's bond pursuant to a "Targeted Enforcement Operation," ER 48, could not possibly have been legitimately informed by the content of his political speech.

Perhaps most importantly, as numerous appellate courts have recognized, allowing an "objectively reasonable legal justification" to cut off habeas relief would cut a gaping hole in the First Amendment's protections against retaliation and create a dangerous license to punish disfavored speakers. *Cf. Skoog v. Cty. of Clackamas*, 469 F.3d 1221, 1233 (9th Cir. 2006) (noting this approach was rejected in *Crawford–El*); *Hoard v. Sizemore*, 198 F.3d 205, 218–19 (6th Cir. 1999) (same) ("[T]ransform[ing] the factual issue of motivation into the legal question of objective reasonableness . . . would immunize all defendants in cases

[10] While Petitioner does not agree with ICE's claim of broad discretion, the salient point for this case is that the amorphous "change circumstances" standard does not have the same pedigree or carry the same "high probative force," *Nieves*, 139 S. Ct. at 1723-24, as the probable cause standard.

involving motive-based constitutional torts, so long as they could point to objective evidence showing that a reasonable official could have acted on legitimate grounds."); *Kimberlin v. Quinlan*, 199 F.3d 496, 502 (D.C. Cir. 1999) (same). In recognition of this danger, the Second Circuit recently rejected the government's argument that a removal order—an undeniably valid basis for ICE enforcement action—should be treated as equivalent to probable cause. *See Ragbir*, 923 F.3d at 66-67 & n.17.

In sum, while Mr. Bello's habeas petition challenging his re-detention on an extremely high bond shares a superficial similarity with *Nieves*, in fact the doctrinal underpinnings of the two cases have almost nothing in common. This Court therefore should join the Second Circuit in applying the default *Mt. Healthy* framework for analyzing First Amendment retaliation to the immigration enforcement context, not the unsupported rule the District Court adopted.[11]

[11] If *Nieves* were applicable here, the "no probable cause" requirement would still not bar Mr. Bello's claim, because ICE has engaged in a pattern of retaliatory conduct against immigrant activists. ER 118-133. *See Nieves*, 139 S. Ct. at 1722 (reaffirming prior decision that proof of absence of probable cause is not required where governmental decisionmakers consciously choose to retaliate against outspoken critic of their policy decisions). The District Court failed to address this argument, even though Respondents' return offered no serious response to the petition's extensive account of this pattern and practice. ER 43. If this Court holds that *Nieves* controls this case, it should remand with an instruction for the District Court to proceed with Mr. Bello's claim under this branch of the *Nieves* rule.

III. UNDER A PROPER APPLICATION OF *MT. HEALTHY* TO THE DISTRICT COURT'S FACTUAL FINDINGS, ICE'S ACTIONS CONSTITUTED UNLAWFUL RETALIATION.

Once Mr. Bello met his burden to show that his constitutionally protected speech was a "motivating factor" in ICE's actions, the District Court erred in failing to determine whether ICE would have taken those same actions absent the speech. *See Mt. Healthy*, 429 U.S. at 287. Instead of shifting the burden to Respondents, however, the District Court improperly required Mr. Bello to "demonstrate[] definitively" that ICE would not have revoked his bond absent his speech. ER 8. This Court should properly allocate the standard of proof and hold, based on the District Court's finding that "Respondents have not addressed the timing of Petitioner's re-arrest," that Respondents have failed to meet their burden to demonstrate that ICE would have revoked and quintupled Mr. Bello's bond on May 15, 2019 absent his May 13 public criticism of the agency.

Mr. Bello met his burden under *Mt. Healthy* to show that his constitutionally protected speech was a motivating factor in ICE's decision to revoke and increase his bond. On May 15, 2019, less than thirty-six hours after Mr. Bello delivered a poem criticizing ICE, ER 114, the agency issued an administrative warrant for his arrest, ER 241, revoked his bond previously set by an Immigration Judge and reset his bond at $50,000, ER 232, and imprisoned him. ER 117. ICE's declarant stated that ICE officers "encountered Petitioner" on January 29, 2019, immediately after

the DUI. ER 48. Mr. Bello again was in the presence of ICE when he attended his February 14 immigration hearing in San Francisco. ER 113. At all other times, ICE knew his home address. *Cf.* 8 U.S.C. § 1229(a)(1)(F) (requiring immigrants in removal proceedings to provide their address). Yet for months it did not see fit to revoke Mr. Bello's bond. It acted only in the immediate aftermath of his speech criticizing the agency, almost four months after the DUI. The ICE officer who detained Mr. Bello told him "we know who you are and what you're all about," ER 116 and later taunted Mr. Bello about whether he would be able to "get [his] friends to raise the bond money again," ER 117.

That sequence of events amply supports the District Court's finding that "the timing of ICE's decision to re-arrest Petitioner is highly suggestive of retaliatory intent." ER 8. At the very least, that finding is not clearly erroneous and thus should be credited by this Court in this appeal. Indeed, this Court has often cited timing as a basis for drawing an inference of retaliation. *See Lacey v. Maricopa Cty.*, 693 F.3d 896, 917 (9th Cir. 2012) (holding that proof of retaliatory enforcement was "clearly found in . . . efforts to have [individuals] arrested the same day [they] published an article critical of [the arresting agency]" and citing *Bruce v. Ylst*, 351 F.3d 1283, 1288-89 (9th Cir. 2003) ("[P]roximity in time supports an inference that the motive was unconstitutional retaliation.")).

But the District Court then failed to state or apply the *Mt. Healthy* standard correctly. *Compare Mt. Healthy*, 429 U.S. at 287 (holding that if individual shows speech was "motivating factor" for government action, burden shifts to government to show "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected [speech]."), *with* ER 8 ("Even if Petitioner's criticism of the government played a 'substantial part' in ICE's decision to re-arrest him, Petitioner has not demonstrated definitively that ICE would not have re-arrested him absent his speech.") (emphasis added). While ostensibly applying *Mt. Healthy*, the District Court ruled for Respondents on the very same "objectively reasonable justification" theory that it cited for its ruling under the *Nieves* standard. ER 8.

Respondents made no attempt to rebut Mr. Bello's proof of retaliatory motive or otherwise carry its burden. ER 26-45. *Cf. Bland v. California Dept. of Corrections* 20 F.3d 1469 (1999) (holding failure to dispute factual allegations contained in petition means that respondent essentially admits those allegations). Indeed, the ICE deportation office declarant did not even squarely address the central claim in this case: that Mr. Bello's speech caused ICE to retaliate against him. ER 46. Respondents rested completely on the existence of the DUI as a basis

for bond revocation.[12] That, however, only serves as an explanation of what ICE could do, not what it would do, absent Mr. Bello's speech, and the latter is the issue here. *See Soranno's Gasco*, 874 F.2d at 1315 ("The defendants here have merely established that they *could* have suspended the permits. This court has clearly stated that this is insufficient to [carry their burden]."") (citing *Allen*, 812 F.2d at 435 (emphasizing that government's burden is to show it "would" have done the same thing absent protected speech, not that it "could" have done so)).

Respondents gave no explanation for why, months after the DUI, ICE suddenly revoked and quintupled Mr. Bello's bond. ER 26. On ICE's own view of its authority, it could have revoked the bond immediately after Mr. Bello's arrest. ER 103; *see also* 8 C.F.R. § 236.1(c)(9) (affording ICE authority to revoke bond "at any time in the discretion of the district director"); ER 72 (Respondents' exhibit, stating that 21% of ICE arrestees in 2018 were "immigration violators with pending criminal charges"). Respondents had ample opportunity to provide an innocent explanation for the delay if one existed, such as that there was no available prison cell for Mr. Bello until May 15; that the paperwork became lost

[12] Respondents attached a report showing DUI is common to the arrest histories of many ICE detainees. The report, however, does not purport to provide the reason for ICE arrests; it merely "tallies all pending criminal charges and convictions by category for those aliens administratively arrested." ER 73. It thus does not provide adequate support for the District Court's finding that "DUI is one of the most common reasons for ICE arrest." ER 8.

for four months and coincidentally appeared just after Mr. Bello's speech; or any other reason that would tend to explain the timing of ICE's actions. But Respondents failed to offer any explanation at all.

Having found "the timing of ICE's decision to re-arrest Petitioner is highly suggestive of retaliatory intent," ER 8, the District Court then came to the perplexing conclusion that the timing did not matter under: "Though Respondents have not addressed the timing of Petitioner's re-arrest, the controlling fact here is that Respondents had an objectively reasonable legal justification to re-arrest Petitioner regardless of when they did it." ER 8 (emphasis added). That conclusion is irreconcilable with this Circuit's frequent references to timing as an indicator of retaliatory intent in First Amendment retaliation cases. *See, e.g.*, *Lacey*, 693 F.3d at 917; *Bruce*, 351 F.3d at 1288-89 ("[P]roximity in time supports an inference that the motive was unconstitutional retaliation."). The District Court essentially treated the *Mt. Healthy* and *Nieves* frameworks as interchangeable. But as set forth above, the presence of a temporally removed "objectively reasonable legal justification" does not shield Respondents from scrutiny under the well-established *Mt. Healthy* framework.

In sum, the record is devoid of any evidence—but for Mr. Bello's speech—for why ICE would have suddenly changed course after months of permitting him to remain free on bond. The District Court correctly found this timing "highly

suggestive of retaliatory intent," ER 8, but failed to shift the burden to Respondents, who in turn failed completely to submit any evidence to rebut the inference of retaliation. *Id.*

This Court should reverse the decision below. Under a proper application of the *Mt. Healthy* framework, it should hold that Mr. Bello has prevailed on his First Amendment retaliation claim and order Respondents to release Mr. Bello from the ankle monitor and intensive supervision, return the $50,000 bond, and restore Mr. Bello to the custody status he held immediately prior to May 15, 2019. No further proceedings are necessary on remand, because Respondents have rested their defense solely on their legal arguments and have declined to offer any explanation for the timing of ICE's actions. Having elected this litigation strategy, Respondents should not be permitted a second chance to explain their actions to the district court. *Cf. Granberry v. Greer*, 481 U.S. 129, 132 (1987) (explaining that in habeas appeals the Supreme Court is "reluctan[t] to adopt rules that allow a party to withhold raising a defense until after the 'main event'—in this case, the proceeding in the District Court—is over").

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the District Court and order Respondents-Appellees to release Petitioner-Appellant Jose Bello from the ankle monitor and intensive supervision, return the $50,000

bond, and restore Mr. Bello to the custody status he held immediately prior to May 15, 2019. In the alternative, the Court should vacate the judgment of the District Court and remand for the District Court to order relief consistent with this Court's opinion.

Dated: February 18, 2020

Respectfully submitted,

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CERTIFICATE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND NINTH CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 10,179 words.

/s/ Jordan Wells
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Attorney for Jose Omar Bello Reyes

STATEMENT OF RELATED CASES PURSUANT TO NINTH CIRCUIT RULE 28-2.6

Petitioner-Appellant is not aware of any cases currently pending before this Court related to this appeal.

/s/ Jordan Wells
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