No. 19-16441

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE OMAR BELLO-REYES,

Petitioner-Appellant,

v.

CHAD F. WOLF,[1] et al.,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NO. 19-CV-03630-SK

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INTRODUCTION

This Court should affirm the district court's order holding that the presence of probable cause successfully defeated the claim that enforcement of the immigration laws constituted retaliation in violation of the First Amendment. The district court's order tracks the Supreme Court's long history of holding that claims alleging selective enforcement of the immigration laws are not cognizable. The facts here warrant no exception.

Jose Omar Bello Reyes ("Petitioner") is in this country unlawfully. He is subject to removal and immigration detention on his immigration status alone. But last year he also pleaded no contest to driving under the influence of alcohol. He committed that crime while released from immigration detention on a $10,000 bond set by an Immigration Judge ("IJ"), who considered him a flight risk. The next month, U.S. Immigration and Customs Enforcement ("ICE") executed a warrant and arrested Petitioner near his home in the driver's seat of a Toyota Camry. Petitioner admitted to the arresting officers that he had used marijuana that same morning before trying to drive.

ICE then re-detained Petitioner and set a new bond at $50,000. That happened because Petitioner violated his first immigration bond when he drove under the influence. Although he specified he would request a hearing to have his bond reassessed, Petitioner refused to schedule one. Instead, he sought a writ of habeas corpus in federal district court claiming ICE's re-arrest was in retaliation for his

exercise of the First Amendment.

The district court denied his petition for habeas relief, concluding that his First Amendment claims could not survive the Supreme Court's recent decision in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), which clarified that retaliatory arrest claims fail if the officer had probable cause. The district court held that Petitioner's claims would also fail under the Court's prior test, set forth in *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977). This Court should affirm for at least two reasons:

First, Petitioner does not have a cognizable First Amendment retaliation claim because the Immigration and Nationality Act ("INA") bars this type of selective enforcement challenge. As the Supreme Court held *Reno v. Arab Anti-Discrimination Comm.* ("*AADC*")*,* in general, "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." 525 U.S. 471, 488 (1999). As the *AADC* Court recognized, the government's discretion when it comes to immigration enforcement is ill-suited to judicial review. Moreover, the Court concluded that selective-enforcement claims, like Petitioner's here, have the perverse "consequence [of] permit[ting] and prolong[ing] a continuing violation" of the immigration laws. *Id.* at 490. As a result, the "additional obstacle of selective-enforcement suits" could leave the government "hard pressed" to enforce the country's laws. *Id.* As the district court recognized, such is the case here. Finally, while the *AADC* Court recognized there might come a "rare" exception with "outrageous" circumstances, that is not this case.

Second, even if Petitioner's First Amendment claims were cognizable, his claims fail because ICE had probable cause to arrest him. The Supreme Court's decision in *Nieves* makes this clear: "[t]he presence of probable cause should generally defeat a First Amendment retaliatory arrest claim." *Nieves*, 139 S. Ct. at 1726. *Nieves* articulates the governing standard for claims, like Petitioner's here, where the claimant cannot meet their burden of showing "the *absence of probable cause*" in order to establish the causal link between alleged animus and injury. *Id.* (emphasis added). Under *Nieves*, Petitioner's failure to demonstrate the "absence of probable cause" is game, set and match for his claims, and they "fail[ ] as a matter of law." *Id.* ("Because there was probable cause to arrest Bartlett, his retaliatory arrest claim fails as a matter of law.").

The district court's correctly held that *Nieves*' no-probable cause standard applies here. *Nieves*' application here is sound, given, as the Supreme Court explained, that "[t]he causal inquiry" between a plaintiff's protected speech and a law enforcement officer's determination to arrest "is complex" and that "probable cause speaks to the objective reasonableness of an arrest." *Id.* at 1723–1724. The Court also explained that, particularly given the workload and competing considerations that officers face, it "generally review[s] their conduct under objective standards of reasonableness" rather than delving into "allegations about an arresting officer's mental state." *Id.* at 1725.

In reaching its holding, the district court applied *Nieves*, and correctly concluded "there is no dispute that ICE has an objectively reasonable legal

justification to re-arrest an immigrant already on bond who then is *convicted* of misdemeanor DUI." *Id.* (emphasis in original). Moreover, since "[t]he decision to re-arrest Petitioner falls squarely within ICE's power to enforce the INA and aligns directly with its enforcement priorities," ER 7, the district court correctly reasoned that the rationales underpinning *Nieves* align directly here. Indeed, the district court's analysis of ICE's "power to enforce the INA," ER 7, and its "enforcement priorities," *id.*, flow seamlessly from the rationales underpinning *AADC*'s prohibition on claims of selective-enforcement of the immigration laws. *See AADC*, 525 U.S. at 489–492. As a result, the district court correctly determined that, under *Nieves*, the presence of probable cause defeats Petitioner's claims, and thus precludes any inquiry into ICE's discretionary actions in enforcing the immigration laws.

For these reasons, this Court should affirm.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 2241 *et seq*. Under 28 U.S.C. § 2241(c)(1), federal courts have jurisdiction over the habeas corpus petitions of individuals, such as Petitioner, who are in executive custody. The district court also had jurisdiction under 28 U.S.C. § 1331 and its inherent equitable authority to remedy constitutional violations, because this case arises under the First Amendment and the Due Process Clause of the Fifth Amendment.

This Court has jurisdiction under 28 U.S.C. §§ 224, 1291 to hear this appeal from the district court's order and final judgment, entered on July 16, 2019, denying

Petitioner's habeas petition. Petitioner 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

Whether Petitioner stated a cognizable constitutional claim of alleged selective enforcement of the immigration laws in violation of the First Amendment.

LEGAL FRAMEWORK

The INA provides procedures for determining whether an alien who is present in the United States is removable from the country and whether a removable alien is eligible for relief from removal. *See* 8 U.S.C. § 1229a (procedures governing removal proceedings). In general, aliens who are subject to removal after lawful admission to the United States, as well as certain aliens present in the country without having been admitted, are entitled to these removal procedures. *Id.* The Department of Homeland Security ("DHS"), exercises its prosecutorial discretion in deciding whether to start removal proceedings against an alien and (with some statutory exceptions not applicable here) whether to detain a person for such proceedings. *See* 8 U.S.C. § 1226(a). After removal proceedings begin, an immigration judge determines whether an alien is removable and, if he is, whether to order him removed or to grant him relief or protection from removal. A removal order becomes final "upon the earlier of—(i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals." *Id.* § 1101(47)(B).

The INA authorizes the government to detain an alien who falls into one of the categories described above, both during removal proceedings and after a final removal order is entered. Several statutes authorize that detention. The procedures governing an alien's detention depend on (among other things) whether the alien is subject to a final removal order and whether the alien has committed certain crimes.

One source of detention authority is central to this appeal: 8 U.S.C. § 1226(a). Section 1226(a) states that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). Section 1226(a) further provides that while removal proceedings are pending, an immigration officer "may continue to detain the arrested alien" or "may release" the detained alien on bond. *Id.* As applicable here, an alien may be released on bond if he "demonstrate[s] to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding," 8 C.F.R. § 236.1(c)(8). "The burden is on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond." *In re Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006); *see In re Adeniji*, 22 I. & N. Dec. 1102, 1111-13 (B.I.A. 1999). Detention under section 1226(a) is thus discretionary. That discretionary authority extends further under section 1226(b), which states that "*at any time*," an immigration officer "may revoke a bond" and "rearrest . . . and detain the alien." 8 U.SC. § 1226(b) (emphasis added). An alien who denied bond (or who believes it was set too high) may, "at any time" during removal proceedings, ask an

immigration judge for a redetermination of the officer's decision. *Reno v. Flores*, 507 U.S. 292, 309 (1993); *see* 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1).

STATEMENT OF THE CASE

A. Factual Background

Petitioner's immigration status, criminal conviction, and arrest history.

Petitioner is a native and citizen of Mexico. *See* ER 47. He entered the United States unlawfully on an unknown date and at an unknown place. *Id.* Petitioner's immigration case began over eight years ago when he was released from custody at the Kern County Jail.[1] *See* ER 47. Shortly after, ICE issued him a voluntary departure order, *id.*, which allows an alien to leave the United States on their own accord within a certain timeframe, rather than under a formal removal order.

But Petitioner refused to honor the order to leave the country. Instead, five years after Petitioner was supposed to have returned to Mexico, ICE encountered him in Bakersfield, California. ER 47. That same day, ICE arrested and took him into custody. *Id.* ICE then issued Petitioner a Notice to Appear, which formally charged him as an alien present in the United States without admission or parole, and started removal proceedings against him. *Id.* Three months later, after Petitioner challenged

[1] In its Order, the district court noted that Petitioner continues to rely on "letters of support includ[ing] one from his professors at the California Youth Correctional Facility." *See* ER 3; *see also* ER 179 (noting Petitioner's intent to leave his "old life.").

his detention without bond, an IJ determined Petitioner to be a flight risk, but ordered that he could be released from ICE custody on a $10,000 bond. ER 47.

While released on bond, Petitioner often publicly read poems to criticize U.S. immigration policy. *See* ER 113–116. His habeas corpus petition itself listed several instances, including one before the Kern County Board of Supervisors, in which Petitioner "gave comments describing his 2018 arrest and coercive interrogation by ICE, mentioned his inhumane treatment inside MVDC and the lack of access to telephones in the facility, and read a poem." ER 114. Predictably, nothing in the petition suggests law enforcement acted on Petitioner's bond during this time. In fact, Petitioner continued to exercise his First Amendment rights after that[2]—again, to no effect on his release on bond.

Just over five months after his release on bond, however, Kern County police arrested Petitioner for driving under the influence of alcohol. ER 48. Petitioner skipped his arraignment, however, and the superior court issued a bench warrant. ER 52–53. Finally, on April 11, 2019, Petitioner pleaded nolo contendere and was convicted of driving under the influence of alcohol in violation of California Vehicle Code § 23152(a). ER 48, 53–56. At the time, the superior court warned Petitioner

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[2] *See* ER 114 (reflecting exercise of speech on immigration enforcement at the following events: April 5, 2019 Bakersfield College Student Leadership development workshop; April 25, 2019 panel discussion at the annual Jess Nieto Conference for Chicano Studies at Bakersfield College).

about impaired driving and its dangers, advising that "being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a motor vehicle." ER 54. The superior court also stressed that if Petitioner "continue[s] to drive while under the influence of alcohol or drugs, or both, and, as a result, someone is killed, you can be charged with murder." *Id.*

The superior court sentenced Petitioner to five days in jail for his nolo contendere plea, but he received a stay of the sentence until May 13, 2019. ER 55 (reflecting a stay of jail sentence until "05/13/2019 at 1:00 P.M."). Although Petitioner later wrote to the superior court claiming that he planned to attend a work program starting "5.15.2019," RE 238, but as of that day, there was no proof in the docket of either a timely registration or a completed sentence.[3] ER 56.

DHS issued a warrant for Petitioner's arrest two days after Petitioner's sentence was set to begin. ER 241. The warrant "determined that there is *probable cause* to believe that [Jose] BELLO-REYES is removable from the United States," and commanded an immigration officer "to arrest [Petitioner] and take [him] into custody for removal proceedings." *Id.* (emphasis added). The warrant also articulated that the probable cause determination was "based upon: "reliable evidence that affirmatively

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[3] In his traverse, Petitioner claimed that the superior court's record showed that "the stayed sentence would only have been triggered if Mr. Bello had failed to enroll in community service by the specified date…" SER 14. Although the superior court's order speaks for itself, the traverse never addressed when—if ever—Petitioner did register. In any event, that registration was not evident in the superior court's docket.

indicate [Petitioner] either lacks immigration status or notwithstanding such status is removable under U.S. immigration law." *Id.*

Later that day, ICE Officers Hernandez and Armstrong served Petitioner with the warrant for his arrest. ER 48, 60. The two ICE officers arrested Petitioner outside his home as he entered the driver's seat of a Toyota Camry. ER 60. Officer Armstrong approached the vehicle and confirmed Petitioner's identity. *Id.* Officer Armstrong then informed Petitioner that ICE had a warrant for his arrest and instructed him to exit the vehicle. *Id.* Petitioner ignored the command and resisted arrest. *Id.* As a result, Officer Armstrong had to "reach[] into the vehicle and physically extract[]" Petitioner to take him into custody. *Id.*

After the arrest, the officers transported Petitioner to a local ICE field office. *Id.* On their way, Officer Armstrong detected a strong marijuana odor and asked Petitioner if he could explain the marijuana smell. ER 60. Petitioner replied that he had smoked marijuana earlier that day.[4] *Id.* Upon arrival at ICE's Bakersfield field office, the officers searched the backseat of the vehicle in which Petitioner was transported and found a small container with marijuana residue. *Id.*

ICE then set a new bond at $50,000. ER 48, 61. Agency records establish that Petitioner's DUI conviction served as the basis for their discretionary determination

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[4] In his habeas petition, Petitioner claims he did not "possess" marijuana at the time of his arrest, but takes care to say nothing about whether he *used* marijuana before trying to drive. *See* ER 117. [Dkt. No. 1, 11:1-3]. Respondents raised the issue in their return, but Petitioner never denied it in his traverse or at the hearing.

in establishing Petitioner's bond amount. *See* ER 60–61 ("[Bello-Reyes] was previously released from custody on bond and subsequently violated the terms of his release . . . [he] will be granted a $50,000 bond to *ensure compliance with the terms of release*.") (emphasis added).

B. Procedural History

A month after his re-arrest and detention, Petitioner applied for a writ of habeas corpus alleging that his re-arrest was unlawful retaliation in violation of his First Amendment rights. *See* ER 107–141. Petitioner sought a declaratory judgment that his arrest "in response to his political speech about United States immigration enforcement and detention practices violates the First Amendment protection against government retaliation against protected speech." ER 140. His petition also requested that the court "[o]rder the respondents to release [him] immediately and refrain from taking any further action against him in retaliation for his protected speech." *Id.*

The district court held a hearing and, the next day, denied Petitioner's habeas petition. ER 2–10. One element of the district court's opinion is central to this appeal: "the constitutionality of Petitioner's re-arrest and detention by ICE." ER 7.

To start, the court laid out the applicable legal standards governing Petitioner's immigration detention while his removal proceedings remain pending. The court recognized that an immigrant subject to removal proceedings "may be arrested and detained pending a decision on whether" that person "is to be removed from the

United States." ER 6 (quoting 8 U.S.C. § 1226). Next, the court noted that the government "may continue to detain the arrested" individual and "may issue or revoke a related bond *at any time*." *Id.* (emphasis added). Additionally, the court acknowledged that "ICE regards impaired driving as a 'significant misdemeanor' and has long held the policy that impaired driving triggers administrative arrest." ER 6.

Next, the court turned to "the constitutionality of Petitioner's re-arrest and detention by ICE," concluding that "*Nieves* [*v. Bartlett*] controls." ER 7. The court held that "[u]nder the standard for retaliatory arrest articulated in *Nieves*, Petitioner's First Amendment retaliation claim fails because ICE had an objectively reasonable justification for re-arresting him and detaining him." *Id.* The court continued, pointing out that "[h]ere, there is no dispute that, absent the retaliatory motive, ICE had an objectively reasonable legal justification to re-arrest Petitioner – even simply for his *arrest* for DUI." *Id.* (emphasis in original). The court continued, however, holding "there is no dispute that ICE has an objectively reasonable legal justification to re-arrest an immigrant already on bond who then is *convicted* of misdemeanor DUI." *Id.* (emphasis in original). The court thus concluded that "[t]he decision to re-arrest Petitioner falls squarely within ICE's power to enforce the INA and aligns directly with its enforcement priorities." *Id.* Analyzing the statutory authority governing Petitioner's detention, the court held that "Section 1226 of the INA grants *blanket discretion to arrest* immigrants subject to removal and to continue their detention pending removal proceedings." ER 7 (citing 8 U.S.C. § 1226(a)) (emphasis added).

Additionally, the court recognized that ICE "frequently exercises its enforcement discretion to arrest individuals arrested for DUI." *Id.*

Although the Court acknowledged that the timing of ICE's decision to re-arrest Petitioner is "highly suggestive of retaliatory intent," it noted that "this is not sufficient to overcome *Nieves*' holding that, where probable cause exists, a claim for retaliatory arrest is not viable." ER 8. Moreover, "even under the *Mt. Healthy* standard, which Petitioner contends applies even after *Nieves*," the court held "Petitioner's retaliation claim fails." ER 8. It reasoned that "[e]ven 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." *Id.* The court articulated that "the controlling fact here is that Respondents had an objectively reasonable legal justification to re-arrest Petitioner regardless of when they did it." *Id.* It also reasoned that "Petitioner has shown neither that ICE would have refrained from re-arresting him absent his criticism nor that a DUI falls within the category of crimes for which a similarly situated individual who had not spoken out wound not have been re-arrested." *Id.* In sum, the court held that "[u]nder both *Nieves* and *Mt. Healthy* [*City School Dist. Bd. of Ed. v. Doyle*], Petitioner's claim for retaliatory arrest fails." *Id.*

The court also unequivocally held that *Nieves* governed retaliatory arrest claims in the immigration context, concluding that it was "not convinced that *Nieves'* holding is limited to the issue of whether probable cause vitiates only a claim for § 1983

damages as opposed to a claim in a habeas petition." *Id.* To be sure though, while the court held that "*Nieves* makes clear that a First Amendment retaliatory arrest claim fails when probable cause – an objectively reasonable legal justification for the arrest – is evident," the court noted that "[h]ad Petitioner not been arrested for DUI, this would be a different case." ER 8. But as the court concluded, "*such facts are not before this Court.*" ER 8. (emphasis added).

This timely appeal followed.

<u>SUMMARY OF THE ARGUMENT</u>

The district court correctly denied Petitioner's habeas petition. This Court should affirm that decision.

I. Petitioner has no cognizable constitutional claim to assert. The Supreme Court in *AADC* held that "[a]s a general matter . . . an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." 525 U.S. 471, 487–88 (1999). Under *AADC*, an alien like Petitioner has no constitutional right to assert selective enforcement of the immigration laws to prevent his arrest and detention in accordance with the government's statutory detention authority, *see* 8 U.S.C. § 1226(a). Nor does this case, which presents facts strikingly similar to those in *AADC*, and where the re-arrest and detention stemmed from Petitioner's DUI conviction while released on bond, present circumstances so "outrageous" that any possible exception to *AADC* would apply. To the contrary, permitting even more litigation would implicate the very potential for delay in

enforcement of the immigration laws that the *AADC* Court noted motivated Congress to revise the judicial review scheme to challenge the government's discretionary decisions in removal proceedings.

II. Even if Petitioner's claims were cognizable, his claim fails because ICE had probable cause to arrest him and take him into custody for removal proceedings. This Court should affirm the district court's holding that Petitioner's claim for retaliatory arrest fails for at least three reasons.

First, the Supreme Court's decision in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019) provides the appropriate governing standard for Petitioner's retaliatory arrest claim because Petitioner has not, and cannot, meet his burden of showing the absence of probable cause. Under *Nieves*, that ends the inquiry, and Petitioner's claims thus fail. In applying *Nieves*, the district court correctly held that Petitioner's "First Amendment retaliation claim fails because ICE had an objectively reasonable justification for re-arresting him and detaining him." ER 7. The Supreme Court has repeatedly held that a court need not examine an official's motive when they take an otherwise legally valid enforcement action, such as an arrest or prosecution—a principle that applies with equal force in the removal context here. Thus, just as the existence of probable cause defeats a retaliatory arrest or prosecution claim, the existence of ICE's objectively reasonable justification for re-arresting and detaining Petitioner—his conviction of driving under the influence—defeats his First Amendment retaliation claim.

Second, the rationales underlying *Nieves* establish that its holding is not limited to claims for damages. The district court correctly held that *Nieves* is not limited "to the issue of whether probable cause vitiates only a claim for § 1983 damages." ER 8. Indeed, "[n]othing in *Nieves* limits the holding to a claim for § 1983 damages, and precedent does not distinguish between claims based on immigration detention and those based on claims for § 1983." *Id.*

Third, even if *Mt. Healthy* were to govern here, Petitioner's claims for retaliatory arrest still fail. As the district court correctly concluded, "there is no dispute that ICE has an objectively reasonable legal justification to re-arrest an immigrant already on bond who then is *convicted* of misdemeanor DUI." ER 7 (emphasis in original). The court thus correctly concluded that ICE's "[t]he decision to re-arrest Petitioner falls squarely" within its authority to enforce the immigration laws. Moreover, as the court recognized, Petitioner's arrest "aligns directly with its enforcement priorities." *Id.*

What is more, the statutory authority governing Petitioner's detention "grants *blanket discretion to arrest* immigrants subject to removal" like Petitioner, and "to continue their detention pending removal proceedings." ER 7(emphasis added); *see also* 8 U.S.C. §§ 1226(a), (b). Finally, since ICE "frequently exercises its enforcement discretion to arrest individuals arrested for DUI," the district court was correct to conclude that "Petitioner's claim for retaliatory arrest fails" under "both *Nieves* and *Mt. Healthy*." *Id.*

ARGUMENT

I. Petitioner Lacks a Cognizable Constitutional Claim.

By holding that an alien unlawfully in the United States—as Petitioner is—may not assert selective enforcement as a defense to removal, the Supreme Court has foreclosed Petitioner's present lawsuit. Even if there were some exception to that rule for particular government conduct—an exception the Court did not affirmatively endorse—Petitioner's claims are much like those the Supreme Court has already rejected. Because the re-arrest here was lawful, it provided a valid basis for the nation's immigration authorities to detain Petitioner, and under the case law of the Supreme Court, those authorities' motives may not be questioned.

A. *AADC* forecloses Petitioner's claim.

The Supreme Court in *AADC* held that "[a]s a general matter . . . an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." *AADC,* 525 U.S. at 487–88. The unavoidable effect of that holding is that Petitioner has no constitutional claim here.

The *AADC* Court rested its holding on separation-of-powers principles. The Court observed that selective prosecution claims "invade a special province of the Executive—its prosecutorial discretion." *Id.* at 489. And, as this Court recognized, *AADC*'s "general rule" against selective prosecution claims as a defense against deportation, stemmed from the Court's "concerns about judicial interference with the [government's] prosecutorial discretion and the need to prevent obstruction and

prolongation of the execution of removal orders." *Kwai Fun Wong v. United States*, 373 F.3d 952, 970 (9th Cir. 2004). Likewise, selective prosecution claims are "ill-suited to judicial review," and as a result, "[j]udicial supervision in this area . . . entails systemic costs of particular concern," including delayed proceedings and diminished prosecutorial effectiveness. *AADC*, 525 U.S. at 490 (quotation marks omitted).

The Supreme Court emphasized that these concerns, which weigh heavily in the field of criminal prosecutions, are "greatly magnified" in the deportation context. *Id.* For example, the Court explained that while delays in criminal proceedings merely "postpone the criminal's receipt of his just deserts, in deportation proceedings the consequence is to permit and prolong a continuing violation of United States law." *Id.* Indeed, "[p]ostponing justifiable deportation (in the hope that the alien's status will change—by, for example, marriage to an American citizen—or simply with the object of extending the alien's unlawful stay) is often the principal object of resistance to a deportation proceeding." *Id.* And so, on that basis, "the additional obstacle of selective-enforcement suits" could inhibit the government's ability to execute the law. *Id.* Moreover, subjecting the Executive Branch's motives and decision making to outside inquiry in deportation cases could chill law enforcement and impede both foreign policy and foreign-intelligence operations. *Id.* at 490–91. The Court emphasized that "in all cases, deportation is necessary in order to bring to an end *an ongoing violation* of United States law." *Id.* "The contention that a violation must be

allowed to continue because it has been improperly selected is not powerfully appealing." *Id.* at 491. So too here.

AADC thus forecloses Petitioner's claims. Indeed, this Court has already recognized as much. In the same was as in *AADC*, Petitioners' selective prosecution claims directly "implicate the [Secretary of Homeland Security's] prosecutorial discretion—that is, in this context, his discretion to choose to deport one person rather than another among those who are illegally in the country." *Kwai Fun Wong*, 373 F.3d at 970. As a result, the administrative actions Petitioner challenges involve the removal process itself, and thus pose "the threat of *obstruction of the institution of removal proceedings*" about which *AADC* was concerned. *Id.* (emphasis added).

Nor does any exception to *AADC*'s rule apply here. In concluding its opinion, the *AADC* Court noted that "[t]o resolve the present controversy, [it] need not rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome." *AADC*, 525 U.S. at 491. Even if such an exception exists, *see AADC*, 525 U.S. at 491 ("Whether or not there be such exceptions . . . ."), this is not the "rare case." Because nothing remotely resembling egregious governmental misconduct is alleged, this Court need not decide whether an exception might lie here.

Moreover, far from overcoming the considerations behind *AADC*'s holding, the facts of Petitioner's case prove prescient the *AADC* Court's concerns about "potential for delay"—and indeed that "[p]ostponing justifiable deportation . . . is

often the principal object of resistance to a deportation proceeding." 525 U.S. at 490. In addition, enforcing the immigration laws is critical to DHS—and even more so for DUI convictions. *See* ER 7. Petitioner's case tracks those practices, and is not "outrageous" when there are such strong, valid reasons for the government to exercise its discretion to re-detain Petitioner while his removal proceedings are pending.

The wider facts alleged also show that it does not come close to the threshold of the "outrageous" "rare case," *AADC*, 525 U.S. at 491. Contrary to Petitioner's insinuation, he has not alleged that the government retaliated against him under an official policy. *See* Opening Br. 35 n.11. Rather, Petitioner falsely alleges that "ICE has engaged in a pattern of retaliatory conduct against immigrant activists." *Id.* But even if true, this sparse and limited allegation differs from an "official policy" and is not "so outrageous" as to overcome the considerations enunciated by the Supreme Court. *AADC*, 525 U.S. at 491. Instead, the actions alleged here flow from ICE's valid enforcement policies. ER 7; *see AADC*, 525 U.S. at 487–92.

And even read liberally, Petitioner has alleged nothing more "outrageous" than what occurred in *AADC*, a remarkably similar case that involved "an admission by the Government that the alleged First Amendment activity was the basis for selecting the individuals" for removal. 525 U.S. at 488 n.10. Indeed, in that case, the immigration authorities held a press conference to announce they were seeking the aliens' deportation "because of" their expressive affiliation with a disfavored

organization. *Id.* at 474. On the other hand, Petitioner's allegation that a few immigrant activists were targeted based on expressive activities are hardly different from what the *AADC* Court found "assuredly" did not violate the Constitution. *Id.* at 488.

And of course, as a factual matter, ICE has not forbid Petitioner from speaking or compelled his speech: it simply exercised its discretion to "*at any time*" "revoke a bond" and "rearrest the alien." 8 U.S.C. § 1226(b) (emphasis added). And while constitutionally protected, Petitioner's speech cannot be used to shield him from ICE's exercise of its statutory detention authority. That logic resonates with the Supreme Court's expressed concern for aliens who use judicial proceedings and selective-enforcement allegations to prolong their unlawful stays in the United States. *See AADC*, 525 U.S. at 490. In fact, whenever an alien's speech challenges enforcing the immigration laws, ICE's actions enforcing the immigration laws could be alleged to be retaliatory, particularly by those who stand to gain by a delay in removal. This further shows why this Court should not consider Petitioner's case to be "rare": every alien could thus criticize ICE's enforcement of the immigration laws, including the revocation of bond and lawful re-detention against that same alien, and then allege that ICE acted in response to the protected speech when it seeks to enforce the immigration laws against the speaker.

Petitioner's own complaint highlights this dynamic: he alleges that ICE revoked his release on bond and re-detained him in retaliation for his immigration advocacy

against ICE. But this proves that an alien can create the basis for his own retaliation claim through volitional speech or other acts. An immutable characteristic, on the other hand, could not be used similarly. That cannot stand. Indeed, the *Mt. Healthy* Court recognized the absurdity of such a result, noting that a plaintiff could be "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Mt. Healthy*, 429 U.S. at 285.

To be sure, Petitioner may protest the government's immigration policies, but his choice to speak cannot shield him from enforcement of an otherwise valid aspect of the removal process, see 8 U.S.C. §§ 1226(a), (b). *AADC* thus disposes of Petitioner's ability to assert selective enforcement as a defense against his re-arrest and detention. *AADC*, 525 U.S. at 488. Consequently, this Court should hold that Petitioner's selective enforcement claim does not constitute a cognizable constitutional claim.

II. Even if Petitioner's claims were cognizable, they fail because ICE had probable cause to arrest him.

This Court should affirm the district court's holding that Petitioner's claim for retaliatory arrest fails. The district court correctly held that the Supreme Court's decision in *Nieves v. Bartlett* forecloses a First Amendment retaliation challenge against Petitioner's re-arrest and detention. The Supreme Court has long held that the existence of probable cause defeats a First Amendment retaliatory arrest or prosecution claim. *See, e.g.*, *Reichle v. Howards*, 566 U.S. 658, 664–65 (2012) ("This

Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause."); *see also AADC*, 525 U.S. at 940–41 (examining authorities' motives and decision making about deportation could chill law enforcement, foreign policy, and intelligence). This Court should affirm on these same bases.

A. *Nieves* governs Petitioner's First Amendment retaliatory arrest claims because ICE had probable cause to arrest him.

The district court correctly held that *Nieves* governs Petitioner's retaliatory arrest claims. In *Nieves*, the Supreme Court answered the precise question Petitioner poses here: "whether probable cause to make an arrest defeats a claim that the arrest was in retaliation for speech protected by the First Amendment." 139 S. Ct. at 1721. Despite the plain scope of *Nieves*, however, Petitioner rests his First Amendment claims on a case from 42 years ago, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). Petitioner argues that "decades of precedent establish" *Mt. Healthy* as "the analytical framework governing First Amendment retaliation cases." Opening Br. 18. But this argument ignores the 43 years of intervening Supreme Court precedent on the issue. Petitioner makes four arguments in support of his claim. Each lacks merit.

First, Petitioner contends that "[t]he established analysis governing First Amendment retaliation claims involves a burden-shifting framework." Opening Br. 23. Citing this Court's decision in *O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016),

Petitioner argues that once the claimant establishes that "the protected activity was a substantial or motivating factor in the defendant's conduct," the "burden shifts to the government to show that it would have taken the same action even in the absence of the protected conduct." Opening Br. 23 (quoting *O'Brien*, 818 F.3d at 932). But this purported "governing framework," Opening Br. 24, conflicts with the Supreme Court's holding in *Nieves*. Instead, *Nieves* held that "probable cause to make an arrest" sufficiently "defeats a claim that the arrest was in retaliation for speech protected by the First Amendment." *Nieves,* 139 S. Ct. at 1721; *see also id.* at 1728 ("Because there was probable cause to arrest Bartlett, his retaliatory arrest claim fails as a matter of law."). Moreover, in *Nieves*, the Supreme Court determined that "the *Mt. Healthy* test governs" only "if the plaintiff establishes the *absence* of probable cause." *Id.* at 1725 (emphasis added) (acknowledging that under *Mt. Healthy*, "[t]he plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation.") (internal citations omitted).

Rather than affirming *Mt. Healthy* as the appropriate "governing framework" Petitioner characterizes it as, Opening Br. 24, *Nieves* clarified that *Mt. Healthy* only applies in the no-probable cause context, *see Nieves*, 139 S. Ct. at 1725. *Nieves* explained that applying *Mt. Healthy* only where the no-probable-cause standard is met makes sense, because in those cases "establishing the causal connection between a defendant's animus and a plaintiff's injury is *straightforward*." *Nieves*, 139 S. Ct. at 1722

(emphasis added). But as the Court noted, "the consideration of causation is *not so straightforward* in other types of retaliation cases." *Id.* at 1723 (emphasis added). For cases in which "proving the link between the defendant's retaliatory animus and the plaintiff's injury . . . is more complex than . . . in other retaliation cases," *id.* at 1723 (quoting *Lozman v. Riviera Beach*, 138 S. Ct. 1945, 1952-53 (2018)), the Court looked to the standard it established in *Hartman v. Moore*, 547 U.S. 250 (2006), which requires a plaintiff to first "plead and prove the absence of probable cause," to state a First Amendment retaliatory prosecution claim, *Nieves*, 139 S. Ct. at 1723 (citing *Hartman*, 547 U.S. at 265–266). The Court articulated that *Hartman*'s no-probable cause requirement was "[t]o account for this 'problem of causation' in retaliatory prosecution claims." *Id.* And as the *Nieves* Court explained, "*Hartman* requires plaintiffs in retaliatory prosecution cases to show more than the subjective animus of an officer and a subsequent injury": it "must also prove *as a threshold matter*" that the officer's action "was objectively unreasonable *because it was not supported by probable cause*." *Nieves* at 1723 (emphasis added).

The Court next explained that "retaliatory arrest claims, face some of the same challenges" as those in the retaliatory prosecution context: "'a tenuous causal connection between the defendant's alleged animus and the Plaintiff's injury.'" *Nieves* at 1723 (quoting *Reichle*, 566 U.S. at 668). It therefore reasoned that "because probable cause speaks to the objective reasonableness of an arrest," *id.* at 1724 (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011)), its absence will "generally provide

weighty evidence that the officer's animus caused the arrest, whereas the presence of probable cause will suggest the opposite." *Nieves* at 1724. Finally, the Court determined that both retaliatory arrest and retaliatory prosecution claims "give rise to complex causal inquiries" in which "the ultimate problem remains the same." *Id.* That problem, the Court explained, is that in both types of claims "it is particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct." *Nieves* at 1724. In sum, the Court thus held that when the "causal inquiry is complex," *Nieves* at 1723, the solution is that "[t]he plaintiff pressing a retaliatory arrest claim *must plead and prove* the *absence of probable cause for the arrest.*" *Nieves* at 1724 (emphasis added).

By confirming that probable cause bars a First Amendment retaliatory arrest action, the Supreme Court's decision in *Nieves* undercuts Petitioner's claims. As with the challenges identified in *Hartman*—and affirmed in *Nieves*—Petitioner's retaliatory re-arrest and re-detention claims "present a tenuous causal connection," between the government's alleged animus and petitioner's injury. *Id.* (quoting *Reichle*, 566 U.S. at 668). For these reasons, "the consideration of causation" here is not as "straightforward" as in other retaliation cases, such as *Mt. Healthy*—Petitioner's preferred standard, *see* Opening Br. 22–35. *Nieves* at 1724. (citing *Mt. Healthy* as an example of "straightforward" retaliation cases in which evidence of motive and injury are taken as "sufficient for a circumstantial demonstration that one caused the other.") (internal citations omitted). Rather, just as in *Nieves*, Petitioner's claims

"involve causal complexities," and thus warrant the same requirement that Petitioner "plead and prove the absence of probable cause." *Nieves*, 139 S. Ct. at 1723.

As a result, the district court correctly held that "*Nieves* controls" here. ER 7. Applying "the standard for retaliatory arrest articulated in *Nieves*," the district court correctly held that Petitioner's "First Amendment retaliation claim fails because ICE had an objectively reasonable justification for re-arresting him and detaining him." *Id.* As the district court accurately concluded, "there is no dispute that ICE has an objectively reasonable legal justification to re-arrest" Petitioner, particularly given his status as "an immigrant on bond who then is convicted of misdemeanor DUI." *Id.* The district court was therefore correct to apply *Nieves* and to discern that ICE's objectively reasonable justification for Petitioner's re-arrest precluded his claim of retaliation.

Second, Petitioner argues that, rather than *Nieves*, the Supreme Court's test from *Mt. Healthy* should be applied here. *See* Opening Br. at 22–35. But *Mt. Healthy*'s 43-year-old test adopts a more general *subjective* inquiry into whether the plaintiff's exercise of a First Amendment right motivated or substantially caused a defendant's actions—the very sort of subjective inquiry the Supreme Court cautioned against in *Nieves*, 139 S. Ct. at 1724–1725. Indeed, *Nieves* held that "[a] particular officer's state of mind is simply 'irrelevant,' and it provides 'no basis for invalidating an arrest.'" *Id.* at 1725 (internal citations omitted). In short, under *Nieves*, the probable cause test does not consider the officer's statements or state of mind. *Id.* This tracks the

Court's precedent, where it has "almost uniformly rejected invitations to probe subjective intent." *Ashcroft v. al-Kidd*, 563 U.S. 731, 737 (2011). And such an approach rationally follows from the Fourth Amendment assessment of reasonableness, which "is predominantly an objective inquiry." *Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000). A similar approach is therefore warranted here, where "the circumstances, viewed objectively, justify [the challenged] action," *Scott v. United States*, 436 U.S. 128, 138 (1978). In conclusion, ICE's re-arrest and detention were reasonable "whatever the subjective intent" motivating the relevant officials. *Whren v. United States*, 517 U.S. 806, 814 (1996).

Third, contrary to Petitioner's contention, *see* Opening Br. at 30–35, it is of no moment that this case involves the asserted selective enforcement of immigration laws rather than, as in *Nieves*, the asserted selective enforcement of criminal laws. If anything, the rule that a sufficient basis for an action in the criminal context precludes a selective-enforcement claim should apply with even more force in the immigration context, where "the interest of the target in avoiding 'selective' treatment . . . is less compelling than in criminal prosecutions." *AADC*, 525 U.S. at 491. That is especially so when, as here, Petitioner is subject to removal proceedings, was afforded discretionary release on bond, and was then convicted of driving under the influence during his release. Indeed, much like how criminal arrests ensure a suspect is present to answer charges and avoid crime, an immigration arrest during removal proceedings likewise serves comparable purposes, *see Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019)

(benefits of detention during removal proceedings include "protecting others against crime and ensuring that aliens will appear at their removal proceedings"); *Demore v. Kim*, 538 U.S. 510, 518-21, 528 (2003) (detention serves to "ensure [criminal aliens'] successful removal"); *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (post-removal-order detention statute's purpose is to "assur[e] the alien's presence at the moment of removal").

In any event, the Supreme Court has already dispelled any potential doubts, analogizing selective-immigration-enforcement claims to "the criminal-law field," and concluding the concerns animating the "particularly demanding" "standard[s] for proving [criminal selective-prosecution claims]" are "greatly magnified in the deportation context." *AADC*, 525 U.S. at 489–90. Indeed, *AADC*'s holding prevents the perverse result of the First Amendment offering less protection to a U.S. citizen arrestee or defendant than to an undocumented alien convicted of driving under the influence while released on bond. Thus, just as *Nieves* bars a First Amendment retaliation claim for an arrest supported by probable cause, the same principle bars a First Amendment retaliation claim for re-arrest and re-detention supported by an "objectively reasonable legal justification" where "an immigrant already on bond" is then "convicted" of driving under the influence. ER 7.

To be sure, *Nieves* recognized a "narrow" exception for "endemic" offenses like jaywalking that "rarely" lead to arrest. *Id.* at 1727. The no-probable cause rule did not apply, the Court said, in the type of circumstance where a claimant "presents objective

evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.* But it is Petitioner's burden to present "*objective evidence*" that he was arrested when otherwise "similarly situated" individuals who had not engaged in protected speech were not. *Id.* This narrow exception therefore implies that Petitioner would have to present objective evidence that ICE rarely, if ever, revokes bond and re-arrests aliens who violate the terms of their release on bond when they are *arrested* for driving under the influence, let alone being *convicted* for driving under the influence. But Petitioner has not met this burden. In fact, he has not tried to supply any "objective evidence" that "similarly situated individuals not engaged in the same sort of protected speech," *Nieves*, 139 S. Ct. at 1727, have not been, and would not be, arrested and re-detained following a conviction for driving under the influence while released on bond. "Although we might all agree that jaywalking" is the "type of law-breaking toward which most officers would turn a blind eye," it is not at all clear that ICE officers routinely give a pass to persons released on bond who are then convicted for driving under the influence—"an action that could have fatal consequences." *Lund v. City of Rockford, Illinois*, 956 F.3d 938, 947–48 (7th Cir. 2020). It is much the opposite, in fact: enforcing the immigration laws is a top priority for the government, and impaired driving has been a longstanding staple of that enforcement priority. *See, e.g.*, ER 66–67 ("Resources should be dedicated accordingly to the removal of the following: . . . aliens convicted of a 'significant misdemeanor,' which for these purposes is an offense

of . . . driving under the influence."); *see also* ER 74 (citing 2018 ICE arrest statistics highlighting impaired driving as the most common offense to trigger administrative arrest).

Finally, Petitioner argues that *Nieves* is unworkable in the civil context without a "bright line standard of probable cause." Opening Br. 33; *see also id.* at 33–34. But such a test already exists.[5] In fact, in *Tejeda–Mata v. I.N.S.*, this Court held that an immigration officer can arrest a person if the "officer has reason to believe that the person to be arrested . . . is an alien illegally in the United States," a requirement which this Court "equated with the *constitutional requirement of probable cause*." *Tejeda–Mata v. I.N.S.*, 626 F.2d 721, 725 (9th Cir.1980) (emphasis added); 8 C.F.R. § 287.8(c)(2); *see also* 8 U.S.C. § 1357(a)(1), (2) (authorizing immigration officers to "interrogate any . . . person believed to be an alien as to his right to be or to remain in the United States," as well as to "arrest any alien . . . if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation").

Moreover, while local law enforcement officers must find probable cause of criminal activity before making an arrest, immigration officers may arrest based solely on unlawful presence in the United States. *See Tejeda–Mata*, 626 F.2d at 725; 8 U.S.C.

[5] Petitioner's contention is undermined even more by *Nieves*' application to retaliation claims in other civil contexts, holding that the test for probable cause to institute a civil proceeding requires "no more than a 'reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication.'" *DeMartini*, 942 F.3d at 1300-01 (citing *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 62–63 (1993)).

§ 1357(a)(1), (2); *Melendres v. Arpaio*, 695 F.3d 990, 1000–01 (9th Cir. 2012); *United States v. Garcia–Rivas*, 520 Fed. Appx. 507, 508–09 n.1 (9th Cir. 2013). Additionally, under section 1226(b), an immigration officer may "*at any time*" decide to "revoke a bond," or "rearrest" and detain" an alien in Petitioner's circumstances—regardless of any bond violation. 8 U.S. C. § 1226(b) (emphasis added).[6] Even still, Petitioner concedes a violation of his bond terms: he pleaded no contest to a dangerous crime, driving under the influence of alcohol.

In the end, *Nieves* fits the facts here better than its own. The district court was therefore correct to hold that it governs Petitioner's claims.

B. The rationales underlying *Nieves* establish that its holding is not limited to claims for damages.

This Court should affirm the district court's holding that *Nieves* is not limited "to the issue of whether probable cause vitiates only a claim for § 1983 damages." ER 7. As the district court correctly held, "[n]othing in *Nieves* limits the holding to a claim for § 1983 damages, and precedent does not distinguish between claims based on immigration detention and those based on claims for § 1983." *Id.*

[6] At the hearing, Petitioner conceded that he is not challenging the scope of section 1226(a). *See* SER 31 ("**The Court**: … [A]re you saying it's impermissible for the government to redetain someone who has been released on bond in the immigration context if he or she gets a conviction, a misdemeanor conviction for DUI? **Mr. Wells**: We're not saying that. No, we're not saying that….").

Petitioner makes seven claims in support of his contention that *Nieves*' holding "does not govern the claims in this case." Opening Br. 24; *see also id.* at 24–35. Again, each lacks merit.

First, Petitioner argues that "*Nieves* does not govern First Amendment Retaliation Claims other than damages claims for retaliatory arrest." Op. Br. 25; *see also id.* at 25–30. Petitioner also contends that *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." Opening Br. 24. Petitioner's narrow interpretation of *Nieves* is wrong. That *Nieves* was a claim for retaliatory arrest damages under Section 1983 does not affect whether its fundamental holding applies to other First Amendment retaliation actions. In *Nieves*, the Court reiterated the basic concern that it enunciated in *Hartman*—that proving causation in a retaliation case is difficult when the defendant can point to a possible legitimate reason for the decision. *See* Nieves, 139 S. Ct. at 1723–25. And the Supreme Court has recognized that this same concern is not unique to retaliatory prosecution cases. *See Crawford-El v. Britton*, 523 U.S. 574, 584-85 (1998) (stating that "official's state of mind is easy to allege and hard to disprove" in context of retaliation claim against prison official). Indeed, other Circuits have applied *Nieves* outside the § 1983 context. *See DeMartini v. Town of Gulf Stream*, *et al.*, 942 F.3d 1277 (11th Cir. 2019) (applying *Nieves* to speech retaliation claims stemming from a civil RICO action); *see also Trump,*

et al. v. Deutsche Bank AG, *et al.*, 943 F.3d 627 (2d Cir. 2019) (recognizing that *Nieves*'s "guiding principle" applies to allegations of retaliatory Congressional inquiries).

Moreover, *Nieves*'s Fourth Amendment jurisprudence can be equally applied to the removal proceeding context at issue. Indeed, as the Supreme Court observed in *AADC*, "[e]ven in the criminal-law field, a selective prosecution claim is a *rara avis*," in part because courts are reluctant to intervene because "the decision to prosecute is particularly ill-suited to judicial review," "entails systemic costs of particular concern," "threatens to chill law enforcement," and "may undermine prosecutorial effectiveness." *AADC*, 525 U.S. at 489–90 (alteration in original) (quoting *Wayte v. United States*, 470 U.S. 598, 607–08 (1985)). "These concerns," the Supreme Court observed, "are greatly magnified in the deportation context." *Id.* at 490. "Whereas in criminal proceedings the consequence of delay is merely to postpone the criminal's receipt of his just deserts, in deportation proceedings the consequence is to permit and prolong a continuing violation of United States law." *Id.* The Supreme Court also recognized that because removal is imposed to hold the alien "to the terms under which he was admitted," rather than "as a punishment," the interest in avoiding selective treatment in removal proceedings is "less compelling than in criminal prosecutions." *Id.* at 491.

Second, Petitioner argues that "[t]he rationales animating the *Nieves* decision either do not apply here or apply with far less force." Opening Br. 30; *see also id.* at 24–35. Petitioner also contends that "the rationales animating *Nieves* do not justify

the creation of an analogous 'probable cause' exception" in the immigration context here. *Id.* at 25. Not so. The rationales underpinning *Nieves* apply equally here. To start, in holding that "[t]he presence of probable cause should generally defeat a First Amendment retaliatory arrest claim," *Nieves*, at 1726, the Court explained that "[t]he causal inquiry" between a plaintiff's protected speech and a law enforcement officer's determination to arrest "is complex" and that "probable cause speaks to the objective reasonableness of an arrest." *Id.* at 1723–1724. The Court also explained that, particularly given the workload and competing considerations that officers face, it "generally review[s] their conduct under objective standards of reasonableness" rather than delving into "allegations about an arresting officer's mental state." *Id.* at 1725. Finally, the Court noted that "[a]lthough probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so," such as jaywalking. *Id.* at 1727. For example, the Supreme Court explained that looking to "the subjective intent of the arresting officer" would lead to a reduction in officers' communications during arrests to "avoid having their words scrutinized for hints of improper motive – a result that would leave everyone worse off." *Nieves*, 139 S. Ct. at 1725.

These same concerns apply here. Much like criminal arrests, immigration arrests remain subject to a host of legal challenges, ranging from administrative appeals to habeas corpus petitions—as evidenced by this litigation. The district court

correctly echoed these same concerns, recognizing that "[t]hose risks occur even in this context if the Court scrutinizes subjective intent before analyzing the objectively reasonable legal justification for the arrest." ER 7–8. Indeed, this litigation exemplifies the very sort of subjective inquiry that the Supreme Court found problematic and unwarranted in *Nieves*. As a result, this lawsuit is one of its own worst arguments.

Moreover, the Supreme Court's decision in *Hartman*—which required a plaintiff to plead and prove the absence of probable cause to state a First Amendment retaliatory prosecution claim—exemplifies how these concerns are not unique to the section 1983 damages context. *Hartman* stressed three factors that supported the no-probable cause heightened pleading standard: complex causation, evidentiary concerns, and the presumption of prosecutorial regularity. *See Nieves*, 139 S. Ct. at 1723–24 (citing *Hartman*, 547 U.S. at 261–66). These factors apply with equal force here when, as the district court correctly noted, the threat of litigation may lead to "the decrease in communication and effect on officers to carry out their duties" because of concerns "that their words will be subject to subjective intent." ER 7–8.

Third, Petitioner dwells on the "frequent 'split-second judgments'" police officers make when deciding to carry out an arrest as a basis for his contention that *Nieves*' holding is limited to section 1983 tort claims. Opening Br. 28 (quoting *Nieves*, 139 S. Ct. at 1724–25. But while criminal arrests sometimes occur after a "split-second judgment," many times they do not. Still, even in those premediated cases,

there is no sensible reading of *Nieves* that would so limit its holding. *See Nieves*, 139 S. Ct. at 1721 ("We are asked to resolve whether probable cause to make an arrest defeats a claim that the arrest was in retaliation for speech protected by the First Amendment.").

And the same is true of arrests in the immigration context: while some result from "split-second judgments," others may be more contemplated. The district court correctly agreed on this point, noting that it was "not convinced that *Nieves* distinguishes between premeditated and spontaneous arrests, or that that distinction maps onto the relationship between the speech at issue and the probable cause for the arrest." ER 8. In any event, it is a distinction without a difference, and thus bears no emphasis on whether the district court correctly applied *Nieves*.

Fourth, Petitioner argues that "[i]f *Nieves* were applicable here, the 'no probable cause' requirement would still not bar Petitioner's claim," because ICE has purportedly "engaged in a pattern of retaliatory conduct against immigrant activists." Opening Br. 35, n.11. That is wrong. To be sure, in *Lozman v. City of Riviera Beach, Fla.*, the Supreme Court held that in the "unique" facts of that case alone, the claimant could (existence of probable cause notwithstanding) proceed on a First Amendment retaliation claim on the theory that his arrest followed an "official" municipal policy crafted by "high-level city policymakers" that uniquely targeted the individual, and for which the claimant had objective evidence. 138 S. Ct. 1945, 1954 (2018). But *Lozman* was sui generis. And even if *Lozman*'s holding were not strictly limited to the

"unique" facts at issue there, Petitioner has not, and cannot, allege anything that approaches the sort of "official" policies from "high-level" policymakers that targeted him specifically, or for which he has objective evidence. At most, Petitioner argues that ICE has engaged in a "pattern of retaliatory conduct." Opening Br.35, n.11. But such sparse allegations fail to establish such a pattern or practice—let alone one that amounts to an official policy. *See Connick v. Thompson*, 563 U.S. 51, 61 (2011) (official policies are those that are so "persistent and widespread as to practically have the force of law"). Moreover, the government's actions have aligned with DHS's official, non-retaliatory guidance on enforcing the immigration laws and prioritizing impaired driving as an enforcement matter. *See* ER 7–8; *see also* ER 66–67; ER, 74

Fifth, Petitioner argues that the timing of his re-arrest infers retaliatory motive, because "for months" ICE "did not see fit to revoke [his] bond." Opening Br. 37. But that would lead to absurd results. To illustrate, under this theory, Petitioner can now wield his discretionary release on bond against ICE to shield himself from the execution of a valid—and statutorily authorized—warrant for his re-arrest and detention. That cannot stand. It is undisputed that ICE released Petitioner from custody in accordance with his compliance to the terms of his bond order. ICE never agreed to allow Petitioner to remain free from detention indefinitely, and its previous exercise of discretion in Petitioner's favor does not compel the agency to permit him to stay free from detention any longer—no less after his conviction for driving under the influence (in violation of the terms of his release). *Cf. AADC*, 525 U.S. at 484

("Since no generous act goes unpunished . . . the [government's] exercise of this discretion opened the door to litigation in instances where [it] chose *not* to exercise it.").

Additionally, Petitioner's contends that "this Court has often cited timing as a basis for drawing an inference of retaliation." Opening Br. 37 (citing *Lacey v. Maricopa Cty.*, 693 F.3d 896, 917 (9th Cir. 2012)). But this too misses the mark. *Lacey* is inapplicable here because, unlike the circumstances here, the prosecutor in that case "lack[ed] probable cause" to arrest the claimants. *Lacey*, 693 F.3d at 917. As a result, this Court made clear that the prosecutor's timing of arrest, "along with [his] lacking probable cause to have [claimants] arrested" is what led to its inference of retaliatory motive. *Id.* *Lacey* is therefore inapposite here because ICE had probable cause to re-arrest Petitioner.

Sixth, Petitioner claims that "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." Opening Br. 34. Not so. Petitioner's contention ignores the fact that *Nieves* not only blessed "objective validity" as a consideration, but based its holding on decades of precedent. *See. e.g.*, *Nieves*, 139 S. Ct. at 1724-25 ("Legal tests based on reasonableness are generally objective, and this Court has long taken the view that evenhanded law enforcement is best achieved by the application of objective

standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.") (citing *Kentucky v. King*, 563 U.S. 452, 464 (2011)).

And the district court's application of *Nieves* was appropriate here to balance the needs of law enforcement as well as the free speech rights of Petitioner. *See al-Kidd*, 563 U.S. at 736 (recognizing that the since the Fourth Amendment regulates conduct rather than thoughts, it "promotes evenhanded, uniform enforcement of the law."); *see also Bond v. United States*, 529 U.S. 334, 338, n. 2 (2000) (same). But that balance goes out the window if this Court were to accept Petitioner's theory of First Amendment retaliation claims, which would impose differing substantive requirements based on whether a claimant is in a criminal or civil posture.

Petitioner's novel approach would also diverge from the *AADC* Court's observation that the concerns limiting selective prosecution claims in the "criminal-law field" are "greatly magnified in the deportation context." *AADC*, 525 U.S. at 489, 490. As the *AADC* Court recognized, imposing different standards "in deportation proceedings" consequently will "permit and prolong a continuing violation of United States law." *Id.* And since removal proceedings are imposed to hold the alien "to the terms under which he was admitted," rather than "as a punishment," the interest in avoiding selective treatment in removal proceedings is "less compelling than in criminal prosecutions." *Id.* at 491. As a result, if Petitioner's view were adopted, an alien subject to otherwise-valid—and statutorily-authorized, see 8 U.S.C. §§ 1226(a), (b)—re-arrest and detention pending removal proceedings could raise a First

Amendment retaliation claim, even though a U.S. citizen subject to an otherwise valid arrest or prosecution could not. That absurd result would turn the Supreme Court's First Amendment retaliation precedent on its head.

In any event, since Petitioner has not, and cannot, establish the lack of probable cause—let alone the lack of an objectively reasonable legal justification—for his re-arrest and detention, the district court correctly held that his "claim for retaliatory arrest is not viable." ER 7.

Lastly, Petitioner relies on post-*Nieves* authority off point. That includes *Capp v. City of San Diego*, 940 F.3d 1046 (2019). There, plaintiffs brought section 1983 and *Monnell* claims against a child protection agency for placing one of the plaintiffs—a father—on its "Child Abuse Central Index." *Id.* at 1051. In that case, the father claimed this was retaliation for his criticism of the agency during a welfare investigation. *Id.* at 1052. In assessing those claims, this Court applied the three-part test from *O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016).[7] *Id.* at 1053. But *Capp* lacks a critical component present in *Nieves*: an arrest. As a result, it makes sense that *Capp* would not track *Nieves* in every respect. That, however, cannot be said here.

[7] If Petitioner argues that the district court should have applied this three-part test, or any test other than those set forth in *Nieves* or *Mt. Healthy*, that argument is waived because it was never raised below. *See Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 543 (9th Cir. 2016) (requiring that an "argument must be raised sufficiently for the trial court to rule on it.").

Since this case turns on an arrest and bond revocation following a criminal conviction, *Capp* is inapposite.

This is the same reason why the Eleventh Circuit recently applied the *Nieves* test to allegations of a retaliatory RICO civil lawsuit. *See DeMartini*, 942 F.3d 1277, 1304 (11th Cir. 2019) ("[W]e conclude that, as with § 1983 First Amendment retaliation claims arising in the criminal prosecution and arrest context, the presence of probable cause will generally defeat a § 1983 First Amendment retaliation claim based on a civil lawsuit as a matter of law."). Before deciding on that test, the Eleventh Circuit conducted a deep analysis of the Court's case law. The court of appeals stressed that—even before *Nieves*—there existed "two general approaches to retaliation claims against governmental actors," with the applicable test "dependent on the type of alleged retaliation at issue." *Id.* at 1289. The first approach exists under the *Mt. Healthy* standard, where in the employment context, for example, the court "looks to whether the defendant governmental employer's retaliatory motivation was the but-for cause of the adverse employment decision." *Id.* The second approach exists where "the *governmental defendant* has *utilized the legal system* to arrest or prosecute the plaintiff." *Id.* (emphasis added). The standard for this second approach "require[s] the plaintiff to plead and prove an absence of probable cause as to the challenged retaliatory arrest or prosecution in order to establish the causation link between the defendant's retaliatory animus and the plaintiff's injury." *Id.* (emphasis

added).[8] And as the court of appeals noted, the distinction between the two approaches long existed before *Nieves*: its genesis lies in the Court's 2006 *Hartman* decision. *Id.* (citing *Hartman*, 547 U.S. at 265-66).

In short, in the law enforcement context, which exists here, the Supreme Court has long employed its no-probable cause test. As a result, the district court correctly held that *Mt. Healthy* does not control Petitioner's claims.

C. Even if *Mt. Healthy* were to govern here, Petitioner's claim for retaliatory arrest still fails.

Petitioner claims that *Mt. Healthy* controls and, under "a proper application" of that test, "ICE's actions constituted unlawful retaliation." Opening Br. 36; *see also* 36–41. Petitioner contends that since he "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," Opening Br. 36, "the District Court erred in failing to determine whether ICE would have taken [its] same actions absent the speech," *id.* (citing *Mt. Healthy*, 429 U.S. at 287). Petitioner makes four arguments in support of this claim. Each is baseless.

First, Petitioner contends that "[i]nstead of shifting the burden to [the government]," the district court "improperly required Petitioner to 'demonstrate

[8] Although the Eleventh Circuit contemplated this test may be subject to the same "jaywalking" exception from *Nieves*, and possibly the five-factor exception test in *Lozman*, neither was at issue in that case, let alone settled by the Supreme Court. *Id.* at 1306. In any event, neither are of concern here.

definitively' that ICE would not have revoked his bond absent his speech." Opening Br. 36 (quoting ER 8). But Petitioner muddles the test from *Mt. Healthy*.

To quash all doubt, in *Nieves*, the Supreme Court restated its test from *Mt. Healthy*—and modified it. The *Nieves* Court articulated that "the *Mt. Healthy* test governs" only if the plaintiff "establishes the *absence* of probable cause." *Nieves*, 139 S. Ct. at 1725 (emphasis added). *Nieves* clarified that, under *Mt. Healthy*'s test, "[t]he plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation." *Id.* (internal citations omitted). *Mt. Healthy*'s test would thus apply only if Petitioner had established "the *absence of probable cause*." *Id.* (emphasis added). He has not, and cannot. *See*, *e.g.*, RE 241. As the record establishes here, Petitioner's re-arrest was not the product of improper motive or retaliation: it was based of his violation of the terms of his release on bond. *See* ER 7. As a result, the district court correctly held that "*Nieves* controls," and that since "probable cause exists," Petitioner's "claim for retaliatory arrest is not viable." ER 7.

Third, Petitioner's claims fail under *Mt. Healthy* because, even presuming an alleged motive, which ICE categorically denies, the agency would have still made the arrest given its longstanding policies on impaired driving. Indeed, that fact has been reflected in official documents going back to 2014. *See* ER 66–67 ("Resources should be dedicated accordingly to the removal of the following:" "aliens convicted of a

'significant misdemeanor,' which for these purposes is an offense of . . . driving under the influence"). It is also reflected in ICE's arrest statistics. *See* ER 72 (highlighting impaired driving as the most common offense to trigger administrative arrest).

What is more, the district court agreed: "[e]ven under the *Mt. Healthy* standard, which Petitioner contends applies even after *Nieves*, Petitioner's retaliation claim fails." ER 7. As the district court correctly recognized, "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." *Id.* The court then confirmed that its conclusion was well grounded in the record, recognizing that "conviction for DUI is one of the most common reasons for ICE arrest." *Id.* The district court correctly concluded that, rather than unconstitutional retaliation, the basis for Petitioner's re-arrest and detention was because of his commission of a dangerous crime while released on bond: driving under the influence of alcohol. *See* ER 60–61 ("Bello-Reyes was previously released from custody on bond and subsequently violated the terms of his release….Bello-Reyes will be granted a $50,000 bond to *ensure compliance with the terms of release*.") (emphasis added). Petitioner's violation of the terms of his release on bond thus justified his re-detention, and ICE was statutorily authorized to act "at any time" to re-arrest and detain him. 8 U.S.C. § 1226(b). As a result, the district court correctly held that ICE's actions were lawful and justified.

Finally, Petitioner alleges that the government "made no attempt to rebut [his] proof of retaliatory motive or otherwise carry its burden." Opening Br. 38. But that statement is false. Rather, government counsel denied the retaliatory arrest claim twice on the record before the district court. *See* SER 44 ("First and foremost, although Respondents believe that the facts in their brief more than justify their position, they do, in fact, deny every count in the petition, including the allegations therein. Those are denied."); *id.* at 44–45 ("[S]ince it was raised in the traverse, I want to put on the record that Respondents do, in fact, deny those counts."). This also misses the critical point: under both the controlling test (set forth in *Nieves*) and the prior test (set forth in *Mt. Healthy*), the government is not asked to prove or disprove motive.

In any event, Petitioner's allegations of causation would fail because he cannot establish that retaliation was the but-for cause of his re-arrest and detention. In particular, Petitioner's discretionary release from detention pending his removal proceedings hinged on his compliance with the terms of his release on bond. His discretionary release is thus in itself a sufficient cause for ICE to rescind its discretion and re-arrest Petitioner for detention pending his removal proceedings. *See* 8 U.S.C. §§ 1226(a), (b). Moreover, considering DHS's valid, official policy to prioritize the enforcement of DUI convictions, Petitioner's re-arrest and detention is *a fortiori* objectively reasonable and legally justified. ER 7. Given these sufficient reasons, any

alleged retaliatory motive cannot be considered a but-for cause of Petitioner's re-arrest and detention.

At bottom, even if *Mt. Healthy* were to control here, Petitioner cannot carry his burden—as he must—of establishing the lack of probable cause. As a result, the district court correctly held that "[u]nder both *Nieves* and *Mt. Healthy*, Petitioner's claim for retaliatory arrest fails." ER 7.

D. Petitioner's *Mt. Healthy* argument is barred by the invited error doctrine.

Petitioner contends that the district court "failed to state or apply the *Mt. Healthy* standard correctly." Opening Br. 38. Instead, as Petitioner argues, "[t]he District Court essentially treated the *Mt. Healthy* and *Nieves* frameworks as interchangeable." *Id.* at 40. But even if the district court had misapplied the burden, Petitioner invited the error when his habeas petition muddled the applicable standards. The result was to misstate the test itself and each party's burden. Under the invited error doctrine, he cannot now benefit on review from his mistake.

The invited error doctrine holds that "[o]ne may not complain on review of errors below for which he is responsible." *Deland v. Old Republic Life Ins. Co.,* 758 F.2d 1331, 1336–37 (9th Cir.1985) (internal quotation marks omitted); *see also In re Oracle Sec. Litig.*, 627 F.3d 376, 386 (9th Cir. 2010). As a result, the invited error doctrine precludes any right to correct an issue stemming from Petitioner's own error. Indeed, as this Court has held, "an error that is caused by the actions of the complaining party

will cause reversal only in the most exceptional situation." *United States v. Schaff*, 948 F.2d 501, 506 (9th Cir. 1991) (internal quotations omitted). This makes sense, since, as this Court recognized, Petitioner "cannot have it both ways." *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1187 (9th Cir. 1992), *as amended* (June 15, 1992).

To begin, Petitioner muddled the test from *Mt. Healthy* in his petition. That case involved a teacher who claimed he was let go after appearing on the radio to criticize his school's dress policy. *Mt. Healthy*, 429 U.S. at 274. The *Mt. Healthy* Court articulated that under its test, "the burden was properly placed upon respondent [the teacher] to show that his conduct was constitutionally protected," and this conduct was a "substantial" or "motivating factor" in the school board's decision not to rehire him. *Id.* at 287. The Court held that since the teacher had carried that burden, the district court should have "determine[d] whether the [School] Board had shown by a preponderance of the evidence that it would have reached the same decision" as to the teacher's reemployment "even in the absence of the protected conduct." *Id.*

But the petition here misstated that standard. Petitioner claimed that "[p]ursuant to this doctrine, if Petitioner's speech was a factor motivating his arrest, then the arrest violated the First Amendment notwithstanding any claim respondents may make that Petitioner's January DUI incident would have served as a sufficient basis to re-detain him." ER 134. In fact, *Mt. Healthy* said the opposite. There, the Court held that the school board could prevail against the teacher's retaliatory firing claims if it "show[ed] by a preponderance of the evidence that it would have reached

the same decision" about the teacher's reemployment "even in the absence of the protected conduct." *Mt. Healthy*, 429 U.S. at 287. So it appears what happened is this: Petitioner confused the term "respondent" as used in *Mt. Healthy* (a reference to the teacher as appellee) with the term "respondents" as used in a habeas action (a reference to government officials). Worse, Petitioner never corrected this error in his traverse. Although he hinted at the proper standard at the hearing, he never fully articulated it to the district court. Worse still, Petitioner never alerted the district court to the fact that his papers contained an error.[9]

Since "this was invited error," it "therefore [is] not grounds for reversal." *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1187 (9th Cir. 1992), *as amended* (June 15, 1992).

CONCLUSION

This court should affirm the district court's decision.

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[9] Petitioner confused *Mt. Healthy* again—though, in a different way—in his motion for emergency relief before this Court. That brief claimed that *Mt. Healthy* required ICE to explain its timing. *See* Petitioner's Mot. for Emergency Relief, ECF No. 2-1 at 20 ("Under *Mt. Healthy*, it was incumbent upon ICE to explain why…[ICE] acted only once [Petitioner] publicly criticized the agency."). Again, that is incorrect. The opening brief corrected the error and clarified—this time, accurately—that the question is simply whether the arrest would have been made anyway. *See* Opening Br. 10 (noting that the *Mt. Healthy* test asks whether, without the speech at issue, ICE "would have reached the same decision.").

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 26, 2020 the above brief was served on all counsel of record through the Court's CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I certify that the above brief contains 12,663 words, excluding the portions exempted by Rule 32(f) of the Federal Rules of Appellate Procedure. I further certify that the above brief complies with the type size and typeface requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1: it was prepared in a proportionally spaced typeface using Microsoft Word in Garamond, 14-point typeface.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Respondents-Appellees are not aware of any cases currently pending before this Court related to this appeal.

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