No. 12-71363

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner,

v.

Eric H. HOLDER, Jr.,
Respondent

Petition for Review from the Board of Immigration Appeals

PETITIONER'S BRIEF

NICHOLAS NAPOLITAN
JASON R. BARTLETT
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105
Telephone: 415.268.7000
Facsimile: 415.268.7522

KATHERINE DESORMEAU
CECILLIA D. WANG
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, California 94111
Telephone: 415.343.0778
Facsimile: 415.395.0950

AHILAN ARULANANTHAM
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
1313 West 8th Street
Los Angeles, California 90017
Telephone: 213.977.5211
Facsimile: 213.977.5297

CORPORATE DISCLOSURE STATEMENT

There are no corporations involved in this case.

DETENTION STATUS

Petitioner is not detained. He has not moved the Board of Immigration Appeals to reopen or applied to the district director for an adjustment of status.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i
DETENTION STATUS i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
I. JURISDICTIONAL STATEMENT 1
II. STATEMENT OF THE ISSUES 2
III. STATEMENT OF THE CASE 3
IV. STATEMENT OF FACTS AND PROCEDURAL HISTORY 5
A. Facts 5
B. Procedural History 12
V. SUMMARY OF ARGUMENT 14
VI. STANDARD OF REVIEW 17
VII. ARGUMENT 22
A. The ICE agents' suspicionless seizure of Mr. [redacted] was an egregious violation of his Fourth Amendment rights. 22
1. ICE agents seized Mr. [redacted] without individualized suspicion, thereby committing a clear violation of the Fourth Amendment. 24
2. The IJ and BIA erred in holding that the existence of a warrant to search the restaurant for documents justified Mr. [redacted]'s suspicionless seizure. 30
3. The violations of Mr. [redacted]'s Fourth Amendment rights also require suppression because they were part of a widespread pattern of violations. 42
B. ICE agents violated governing federal regulations by detaining Mr. [redacted] without reasonable suspicion, arresting him without a warrant, and refusing to explain to him why he had been arrested. 45
1. Agents violated 8 C.F.R. § 287.8(b) by detaining and interrogating Mr. [redacted] without "reasonable suspicion, based on specific articulable facts." 46

2. Agents violated 8 C.F.R. § 287.8(c)(2)(ii) by arresting Mr. [REDACTED] without a warrant. 47

3. Agents violated 8 C.F.R. § 287.8(c)(2)(iii) by failing to advise Mr. [REDACTED] of the reason for his arrest. 50

VIII. CONCLUSION 52

TABLE OF AUTHORITIES

Cases

Aguilar Gonzalez v. Mukasey, 534 F.3d 1204 (9th Cir. 2008) 18

Ali v. Holder, 637 F.3d 1025 (9th Cir. 2011) 18

Aparicio Zavala v. Holder, No. 12-70225
(9th Cir. docketed Jan. 23, 2012) 44

Arizona v. United States, 132 S.Ct. 2492 (2012).................................. 32, 48

Benitez-Mendez v. INS, 760 F.2d 907 (9th Cir. 1983)................................. 26

Chawla v. Holder, 599 F.3d 998 (9th Cir. 2010)... 18

Dawson v. City of Seattle, 435 F.3d 1054 (9th Cir. 2007) 41

Franklin v. Foxworth, 31 F.3d 873 (9th Cir. 1994)............................... 24, 38

Ganwich v. Knapp, 319 F.3d 1115 (9th Cir. 2003) .... passim

Herring v. United States, 555 U.S. 135 (2009) 43

Hong v. Mukasey, 518 F.3d 1030 (9th Cir. 2008) 17, 45, 49

INS v. Delgado, 466 U.S. 210 (1984) 25

INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) 16, 42, 52

LaDuke v. Nelson, 762 F.2d 1318 (9th Cir. 1985)...................................... 26

Leslie v. Attorney General, 611 F.3d 171 (3d Cir. 2010)............................ 46

Leveto v. Lapina, 258 F.3d 156 (3d Cir. 2001) 41

Lopez-Rodriguez v. Mukasey, 536 F.3d 1012 (9th Cir. 2008)................ 15, 52

Los Angeles Cnty. v. Rettele, 550 U.S. 609 (2007)................................ 31, 35

Martinez v. Nygaard, 831 F.2d 822 (9th Cir. 1987)......................... 26, 29, 30

Matter of Au, Yim and Lam, 13 I. & N. Dec. 294 (BIA 1969) 49

Matter of Barcenas, 19 I. & N. Dec. 503 (BIA 1980)................................. 13

Matter of Burbano, 20 I. & N. Dec. 872 (BIA 1994)............................ 14, 17

Matter of Garcia-Flores, 17 I. & N. Dec. 325 (BIA 1980).................... 45, 46

Mendoza Manimbao v. Ashcroft, 329 F.3d 655 (9th Cir. 2002)................... 21

Mendoza-Pablo v. Holder, 667 F.3d 1308 (9th Cir. 2012) 18

Meredith v. Erath, 342 F.3d 1057 (9th Cir. 2003)........................... 37, 38, 39

Michigan v. Summers, 452 U.S. 692 (1981) .... passim
Miranda v. Arizona, 384 U.S. 436 (1966) 51
Montes-Lopez v. Holder, 694 F.3d 1085 (9th Cir. Sept. 18, 2012) 45, 50
Muehler v. Mena, 544 U.S. 93 (2005) .... passim
Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977) 51
Oliva-Ramos v. Holder, 694 F.3d 259 (3d Cir. 2012) 42, 45
Orhorhaghe v. INS, 38 F.3d 488 (9th Cir. 1994)............................. 14, 22, 34
Sagaydak v. Gonzales, 405 F.3d 1035 (9th Cir. 2005)................................ 51
Samayoa-Martinez v. Holder, 558 F.3d 897 (9th Cir. 2009) 51
Tejeda-Mata v. INS, 626 F.2d 721 (9th Cir.1980)....................................... 48
Tekle v. U.S., 511 F.3d 839 (9th Cir. 2012).. 38
Terry v. Ohio, 392 U.S. 1 (1968).. 40
United States v. Brignoni-Ponce, 422 U.S. 873 (1975)............................... 47
United States v. Cantu, 519 F.2d 494 (7th Cir. 1975) 49
United States v. Davis, 530 F.3d 1069 (9th Cir. 2008) 40
United States v. Manzo-Jurado, 457 F.3d 928 (9th Cir. 2006) 18, 25, 26
United States v. Mendenhall, 446 U.S. 544 (1980) 24
United States v. Robinson, 414 U.S. 218 (1973) 40
Ybarra v. Illinois, 444 U.S. 85 (1979) 25, 27

Statutes

8 C.F.R. § 287.8(b) 16, 17, 45, 46
8 C.F.R. § 287.8(b)(1)... 46
8 C.F.R. § 287.8(b)(2)... 29
8 C.F.R. § 287.8(c)(2)(ii) 16, 45, 47, 49
8 C.F.R. § 287.8(c)(2)(iii)... 16, 17, 45, 50
8 U.S.C. § 1252(b)(1) 1
8 U.S.C. § 1252(b)(2) 1
8 U.S.C. § 1357... 47
8 U.S.C. § 1357(a)(2).. 48

I. JURISDICTIONAL STATEMENT

This is a petition for review of a decision by the Board of Immigration Appeals ("BIA") affirming decisions by an Immigration Judge ("IJ") denying Petitioner's motion to suppress evidence and ordering him removed.

The IJ denied Petitioner's motion to suppress on January 31, 2011, and found him removable as a non-citizen present in the United States without having been admitted or paroled. *See* Administrative Record ("AR") at 831-48. She ordered him removed on February 10, 2011. *Id*. at 319-20. The BIA issued a decision affirming the IJ's order on April 5, 2012. *See id.* at 3-5. Petitioner filed his timely petition for review with this Court on May 1, 2012. *See* 8 U.S.C. § 1252(b)(1).

This Court has jurisdiction over the petition for review pursuant to 8 U.S.C. § 1252(a)(1), which governs judicial review of final orders of removal. The BIA's denial of Petitioner's appeal constitutes a final order. Venue is proper because the IJ completed the proceedings within this Circuit. *See* 8 U.S.C. § 1252(b)(2).

II. STATEMENT OF THE ISSUES

1. Whether the IJ and the BIA erred in concluding that Immigration and Customs Enforcement ("ICE") agents did not commit egregious Fourth Amendment violations when they seized Petitioner without reasonable suspicion during a raid of the restaurant where he was working, searched him without consent, and subjected him to an intrusive and prolonged detention.
2. Whether the IJ and the BIA erred in rejecting Petitioner's motion to suppress based on the ICE agents' violations of three controlling federal regulations (prohibiting detention without reasonable suspicion, requiring that agents inform detainees of the reason for their arrest, and requiring that agents procure a warrant for arrest unless they have probable cause to believe the detainee would escape before a warrant could be issued).

III. STATEMENT OF THE CASE

This case arises from a deliberate, organized plan by ICE agents to detain and interrogate a number of individuals about whom they had no individualized suspicion. ICE agents arrested Petitioner [redacted] [redacted], a cook at a Bay Area taco restaurant with no criminal or prior immigration history, during a raid on his workplace on May 2, 2008. On that day, approximately a dozen armed ICE agents burst into the restaurant, seized Mr. [redacted] and his coworkers without asking him any questions, handcuffed him, and then blocked and locked the doors to the restaurant so that no one could leave. The agents then forced Mr. [redacted] to sit isolated from his coworkers, searched his person and his wallet without consent, and interrogated him about his citizenship and immigration status.

The agents did not have any individualized suspicion to seize Mr. [redacted]. They knew absolutely nothing about him in advance, and gave him no explanation for why he was being detained.

Based on statements Mr. [redacted] allegedly made while seized, ICE placed him in removal proceedings. These alleged statements are the sole basis for the government's charge that he is a non-citizen; the government had no other information about him.

In Immigration Court, Mr. [redacted] moved to suppress all evidence obtained from the raid and to terminate his removal proceedings, arguing that the agents' actions violated multiple federal regulations and egregiously violated his Fourth Amendment rights.

In response, ICE argued during the removal hearing that they had detained Mr. [redacted] and his colleagues pursuant to their authority to execute a search warrant that they had obtained for the taco restaurant. But the warrant authorized ICE agents to search for *documentary evidence* of the *restaurant owners'* allegedly criminal activities. ICE nevertheless planned the raid to center around the interrogation of the workers, not the ostensible search for documents. They brought "interviewer" agents whose sole purpose was to interrogate the workers, and they brought a "detention van" to transport those they expected to arrest. Meanwhile, the agents released other workers who satisfied the agents as to their immigration status while the raid continued.

Although this information was presented (in the form of testimony as well as documentary evidence) to the Immigration Judge, she denied the motion to suppress and ordered Mr. [redacted] removed. AR at 848, 319-20. The BIA adopted and affirmed the IJ's decision. *See id.* at 3.

As explained below, the IJ and the BIA erred in denying Mr. [redacted] [redacted]'s suppression motion. In so doing, the IJ permitted ICE to deliberately circumvent basic Fourth Amendment protections and detain, search, and interrogate individuals for whom they had no reasonable suspicion. For the reasons discussed below, the Court should grant the petition for review and remand with instructions to vacate the removal order, suppress the tainted evidence of Mr. [redacted]'s alleged alienage, and terminate the proceedings. Alternatively, at a minimum, the Court should clarify the applicable legal standards and remand to the agency so that it can correct its errors in the first instance.

IV. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Facts[1]

[1] For purposes of this facts section, Petitioner's brief adheres to the IJ's express findings of fact where she made them. Where the IJ did not expressly make factual findings, Petitioner relies on (1) the testimony of DHS's witness, ICE Special Agent Carol Webster, whom the IJ found credible, *see* AR at 844, and (2) Mr. [redacted]'s statements in his testimony and declaration, where not contradicted by Agent Webster. Petitioner also relies on the IJ's characterizations of the testimony. The status of Mr. [redacted]'s statements under the IJ's ruling is somewhat unclear. The IJ "decline[d] to afford . . . full evidentiary weight" to his testimony, but she also "note[d]" his statements "to the extent they are not inconsistent with Agent Webster's testimony." *Id.* Petitioner discusses the IJ's factual findings and credibility determinations in more detail in Section VI, below. For clarity, the facts section of this brief notes the source for each citation in a parenthetical.

On the morning of May 2, 2008, over 100 ICE agents executed a coordinated workplace raid of eleven different taco restaurants throughout the Bay Area called "El Balazo," including the restaurant in Pleasanton, California, where Mr. [REDACTED] and six to eight other people worked. *See* AR at 392 ([REDACTED] Testimony), 722 (Webster Testimony), 832-33 (IJ Dec.), 1053 ([REDACTED] Decl.). A few minutes after the restaurant opened at 10:00 a.m., four undercover ICE agents posing as customers entered the restaurant, ordered food, and took seats near the two exits—the front door and the emergency exit at the rear. *Id.* at 393, 397 ([REDACTED] Testimony), 833 (IJ Dec.), 1053 ([REDACTED] Decl.). Minutes later, between eight and ten additional armed, uniformed ICE agents flooded into the restaurant, yelling and running. *Id.* at 394 ([REDACTED] Testimony), 833 (IJ Dec.), 1053 ([REDACTED] Decl.); *accord id.* at 725 (Webster Testimony) (testifying that "about 12 or more" agents total participated in the raid). The undercover agents also took off their jackets, revealing themselves as ICE agents. *Id.* at 397 ([REDACTED] Testimony), 833 (IJ Dec.), 1053 ([REDACTED] Decl.). Mr. [REDACTED] saw that at least one of the agents had his gun drawn. *Id.* at 394 ([REDACTED] Testimony), 833 (IJ Dec.), 1053 ([REDACTED] Decl.).[2]

---

[2] Agent Webster confirmed that all the agents were armed. *See* AR at 837 (IJ Dec.), 751 (Webster Testimony). She "did not recall if any agent drew a weapon" and opined that she "did not think anyone did," *id.* at 838

The agents seized Mr. ████████ and his co-workers, and handcuffed him and the others without asking any questions. *Id.* at 395 (████ Testimony), 833 (IJ Dec.). Mr. ████████ did not attempt to run or move; when he asked the agents what was happening, they refused to answer and told him to be quiet. *Id.* at 395 (████ Testimony), 833 (IJ Dec.). An agent took the restaurant keys from Mr. ████████'s pocket without consent and locked the doors. *Id.* at 397-98 (████ Testimony), 833 (IJ Dec), 1054 (████ Decl.). In addition, at least one local police officer was stationed outside the restaurant, guarding the front door. *Id.* at 740 (Webster Testimony), 837 (IJ Dec.), 1053 (████ Decl.).

The agents then moved Mr. ████████ and the other handcuffed workers into the partitioned seating area of the restaurant and made them sit at separate tables, facing the wall, to await interrogation. *Id.* at 401-03 (████ Testimony), 833 (IJ Dec.), 1054 (████ Decl.). The workers were instructed not to speak to or look at one another. *Id.* at 514 (████ Testimony), 833 (IJ Dec.). It is undisputed that, up to this point, the agents had not asked Mr. ████████ any questions and did not know his identity. *See id.* at 395 (████ Testimony), 833 (IJ Dec.), 1053-54 (████ Decl.).

(IJ Dec.), 781 (Webster Testimony), but she also admitted she "was one of the last agents to enter the restaurant." *Id.* at 838 (IJ Dec.), 709 (Webster Testimony). She therefore did not see everything that occurred, and did not dispute Mr. ████████'s testimony that one of the agents drew a gun.

Two of Mr. [redacted]'s coworkers, however, were treated differently after the raid commenced: They were not detained. *Id.* at 756, 833. One was the restaurant manager, who showed the agents papers indicating that she was a U.S. citizen. *Id.* at 396 ([redacted] Testimony), 757, 833 (IJ Dec.). The other was the bartender; the record does not reflect why she was released. *Id.* at 757, 833. Agent Webster testified that she did not know their ethnicity, but that the manager "looked Caucasian," and the bartender "maybe . . . was Caucasian and maybe some other ethnicity mixed in with it." *Id.* at 757-58 (Webster Testimony). No other workers were freed.

While Mr. [redacted] was sitting in handcuffs in the seating area, an ICE agent photographed him. *Id.* at 833 (IJ Dec.); 404 ([redacted] Testimony); 1054 ([redacted] Decl.); *see also id.* at 725 (Webster Testimony) (discussing ICE's general search warrant protocol). Two ICE agents then took his arms, forced him into a standing position, and searched his person. *Id.* at 407 ([redacted] Testimony), 833 (IJ Dec.), 1054 ([redacted] Decl.). The record contains no suggestion that the agents' search revealed any weapons or any other evidence that Mr. [redacted], who remained handcuffed throughout the entire raid, posed any threat to anyone.

The agents removed Mr. ’s wallet from his pocket and searched it without his consent. Inside, they found money (which they counted and eventually returned) and an identification document that listed Mr. ’s name, birth date, and place of birth. *Id.* at 407, 409, 573-74 (Testimony), 1054 (Decl.).

ICE Agent Carol Webster was the government’s only witness who was present at the raid. Although she had not interacted with or observed Mr. up to this point, she confirmed that Mr. ’s wallet was sitting on the table in front of him by the time she approached him. *Id.* at 845 (IJ Dec.); *see also id.* at 710 (Webster Testimony) (she “first encounter[ed]” Mr. after he had been moved to the seating area). Nor did she contradict Mr. ’s testimony that he remained handcuffed throughout the raid. Indeed, she testified that it was “standard” procedure to handcuff and search someone when making an “arrest,” *id.* at 736 (Webster Testimony), and that the agents handcuffed “everybody” at the outset of the raid. *Id.* at 738 (Webster Testimony), *see also id.* at 838 (IJ Dec.). Mr. ’s testimony about the events of the raid up to this point remains undisputed. *Id.* at 735-38, 765.

“[A]pproximately thirty minutes after the [raid] began,” *id.* at 844 (IJ Dec.), Agent Webster approached Mr. and began to interrogate

him about his citizenship and immigration status. *Id.* at 711, 766-67 (Webster Testimony). She did not advise him of his rights. During the interrogation, Agent Webster made handwritten notes on a Form I-213, a "Record of Deportable Alien." *Id.* at 711-12 (Webster Testimony); *see also id.* at 813 (the "scratch I-213"). Later on, a different ICE agent typed up the final I-213, using "standard language" to describe the encounter. *Id.* at 768, 775 (Webster Testimony); *see also id.* at 825-26 (the "final I-213").

Agent Webster also testified about the broader context of this raid. She stated that the raid was part of a large-scale, coordinated operation involving over 100 ICE agents who executed simultaneous raids at eleven different "El Balazo" locations across the Bay Area. *Id.* at 705, 722-25 (Webster Testimony), 822 (warrant). In total, ICE arrested more than sixty El Balazo employees that day and placed them in removal proceedings. *See id.* at 1045 (Petitioner's motion to suppress).

Agent Webster's testimony makes clear that ICE planned and intended to interrogate and arrest large numbers of workers during the El Balazo raids. Prior to the raid, the ICE agents attended two "briefing[s]" at which they discussed the operations plan. *Id.* at 705 (Webster Testimony). Several agents, including Agent Webster, were assigned the role of "interviewers" who would be responsible for interrogating the workers

found onsite. *Id.* at 704-05, 724-25 (Webster Testimony). The agents also brought a designated "detention van" to the raid for the purpose of transporting the workers they arrested. *Id.* at 752-53 (Webster Testimony).

ICE had a warrant to search for documents in the El Balazo restaurants. *See id.* at 815-22 (warrant). The warrant had been issued in connection with a criminal investigation of the restaurants' owner, who was suspected of unlawful hiring and harboring of undocumented immigrants. *Id.* at 706 (Webster Testimony), 986. The warrant permitted agents to search the "premises" for "personnel records," "[p]ayroll records," and other documentary evidence. *Id.* at 815 (authorizing a search of "the premises"), 818 (listing "items to be seized"). The warrant did not name any workers, and it did not by its terms authorize the agents to search or seize any persons found on site. *See id*. None of the agents presented the warrant (or even mentioned it) to Mr. [redacted]; nor did they ask him any questions about the evidence for which the warrant authorized them to search. *See id.* at 409 ([redacted] Testimony), 779 (Webster Testimony), 1053 ([redacted] Decl.). Agent Webster, for her part, admitted that she did not take part in any search for documents "[a]t any time during this whole operation." *Id.* at 779 (Webster Testimony).

One to two hours after the raid began, the agents took Mr. ███ ███ to a detention van waiting outside. *See id.* at 412-13 (███ Testimony, 750 (Webster Testimony), 1054-55 (███ Decl.). When he asked an ICE agent what was happening, the agent answered that "they were taking [him] to San Francisco," but did not say anything else. *Id.* at 1055 (███ Decl.). The agents then transported Mr. ██████ and the other arrested workers to the ICE Enforcement and Removal Operations ("ERO") office in San Francisco, where they detained him for several more hours, further interrogated him, fitted him with a GPS monitoring ankle bracelet, and finally released him at approximately 11:00 that night. *Id.* at 1055-56 (███ Decl.).

B. Procedural History

On May 12, 2008, DHS initiated Mr. ██████'s removal proceedings by filing a Notice to Appear ("NTA"), alleging that Mr. ███ ███ was a citizen of Mexico who had entered the United States without inspection. AR at 831, 1156. The only basis for this charge was the I-213, which was filled out with information obtained from Mr. ██████'s interrogation during the raid. *Id.* at 837. Mr. ██████ moved to suppress the I-213 on the ground that it contained information gathered in clear violation of the Constitution and also in violation of federal regulations.

Id. at 1026 (Motion to Suppress); *see also id*. at 1052 (Decl. in Support of Motion).

On June 10, 2009, the IJ determined that Mr. ██████'s declaration, if taken as true, set forth a *prima facie* case for suppression. *Id.* at 1130-31. She therefore scheduled an evidentiary hearing pursuant to *Matter of Barcenas*, 19 I. & N. Dec. 503, 505 (BIA 1980). *Id.* at 1131. Mr. ██████ testified in support of his motion on August 19, 2009, *see id.* at 385-417 (direct testimony and cross-examination), and on November 3, 2009, *see id.* at 491-598 (continued cross-examination). The IJ found Mr. ██████ credible and shifted the burden to DHS to justify the manner in which it obtained the evidence. *Id.* at 233.

DHS argued that although the warrant authorized ICE only to search the *premises* for *business documents*, it also implicitly authorized the agents to detain all of the workers there and interrogate them about their citizenship and immigration status. *Id.* at 974. In opposing Mr. ██████'s motion to suppress, DHS produced a copy of the warrant, *id.* at 815, but it refused to produce the underlying affidavit or operations plan. *See id.* at 370, 815-22. DHS also produced a witness, ICE Agent Webster, who testified on November 4, 2010. *See id.* at 701-82.

In a decision issued January 31, 2011, the IJ credited Agent Webster's version of events and denied Ms. [redacted]'s motion to suppress. *Id.* at 831-48. Mr. [redacted] appealed to the BIA. On April 5, 2012, the BIA adopted and affirmed the IJ's decision under *Matter of Burbano*, 20 I. & N. Dec. 872 (BIA 1994). AR at 3. On May 1, 2012, Mr. [redacted] filed a timely petition for review.

V. SUMMARY OF ARGUMENT

The Court should reverse the IJ and BIA's decisions and order the suppression of Mr. [redacted]'s alleged statements for several independent reasons.

First, any statements made by Mr. [redacted] during his interrogation were the fruit of the ICE agents' egregious violation of the Fourth Amendment. *See Orhorhaghe v. INS*, 38 F.3d 488, 493, 501 (9th Cir. 1994) (holding that "egregious" violations merit suppression, and defining "egregious" to include deliberate violations and violations of clearly established law). ICE agents seized Mr. [redacted] at the outset of the raid, before asking him any questions; they unquestionably had no individualized suspicion to believe he was a non-citizen at the time they detained him. The IJ and BIA held that his seizure was nevertheless permissible because ICE had a warrant to search the restaurant for documents. That conclusion,

however, rests on a serious misreading of Supreme Court and Ninth Circuit law. As explained below, the mere existence of a search warrant did not give the agents a blank check to subject the workers on site to intrusive seizures, searches, and prolonged interrogation without individualized suspicion. While the government may argue that the agents had authority to detain all the workers to ensure the safe execution of the warrant, the record makes clear that the agents did not detain Mr. ██████ to protect officer safety; indeed, they released two workers at the start of the raid.

If the Court finds that the agents subjected Mr. ██████ to an egregious Fourth Amendment violation, it should suppress the evidence. The Court need not remand to the agency because the questions presented here are legal, not factual; the Court may apply the law to the undisputed facts in the record and order both suppression and termination. *See Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1019 (9th Cir. 2008) (concluding that ICE agents committed egregious Fourth Amendment violations, reversing the BIA's decision, and ordering suppression and termination). At a minimum, if the Court concludes that further fact-finding is needed to resolve the Fourth Amendment question, it should grant the petition for review, clarify the applicable legal standards, and remand the case to the agency for further proceedings.

Even if the agents' Fourth Amendment violation were not egregious, it would still merit suppression because it was part of a "widespread" pattern of such abuses by ICE. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984). Mr. [REDACTED] presented evidence of the widespread nature of ICE abuses in Immigration Court, but the IJ, having found no Fourth Amendment violation, did not consider it. If the Court concludes that the ICE agents violated the Fourth Amendment, but does not decide that the violation was egregious, it should remand to the agency to consider Mr. [REDACTED]'s evidence of widespread violations.

Second, the Court should order suppression because the ICE agents violated multiple federal regulations. They detained Mr. [REDACTED] without reasonable suspicion in violation of 8 C.F.R. § 287.8(b); they arrested him without an arrest warrant despite the fact that there was no reason to believe he would flee before a warrant could issue, in violation of 8 C.F.R. § 287.8(c)(2)(ii); and they failed to advise him of the reason for his arrest, in violation of 8 C.F.R. § 287.8(c)(2)(iii). The IJ rejected Mr. [REDACTED]'s argument regarding § 287.8(c)(2)(ii) based on a misreading of the legal standard, *see* AR at 846, and failed altogether to consider the other regulatory violations, despite their having been clearly presented for decision. The BIA adopted and affirmed the IJ, adding that the agents also

did not violate § 287.8(b). *See* AR at 4. This holding, too, rests on a misunderstanding of the law. This Court has repeatedly made clear that reasonable suspicion must be individualized; it is not enough that Mr. ████ ████ was found on the premises where someone else was suspected of engaging in criminal activity. Finally, neither the BIA nor the IJ mentioned § 287.8(c)(2)(iii) at all.

ICE's regulatory violations present three independent bases for suppression. *See Hong v. Mukasey*, 518 F.3d 1030, 1035 (9th Cir. 2008) (discussing the "exclusion of evidence obtained through a violation of agency regulations"). Because the relevant facts are undisputed, the Court can apply the law to the facts and order suppression based on the agents' violations of 8 C.F.R. § 287.8(b) and § 287.8(c)(2)(ii). Alternatively, at a minimum, the Court should remand for the agency to consider Mr. ████ ████'s claim under § 287.8(c)(2)(iii), which both the IJ and the BIA failed to address.

The Court can grant the petition for review based on any one of the grounds identified above.

VI. STANDARD OF REVIEW

The BIA adopted and affirmed the IJ's decision, citing *Matter of Burbano*, 20 I. & N. Dec. 872 (BIA 1994), but it also provided its own

additional analysis. Therefore, this Court "review[s] both the IJ's and the BIA's decisions." *Ali v. Holder*, 637 F.3d 1025, 1028 (9th Cir. 2011). The Court reviews questions of law *de novo*. *See Aguilar Gonzalez v. Mukasey*, 534 F.3d 1204, 1208 (9th Cir. 2008). Mixed questions of law and fact, including the existence of reasonable suspicion and the reasonableness of a seizure, are also reviewed *de novo*. *See Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1312 (9th Cir. 2012); *United States v. Manzo-Jurado*, 457 F.3d 928, 934 (9th Cir. 2006).

This Court reviews the agency's factual findings, including credibility determinations, for substantial evidence. *See Chawla v. Holder*, 599 F.3d 998, 1001 (9th Cir. 2010). Here, that analysis presents some complexity, because the IJ's credibility findings with respect to Petitioner's testimony are somewhat ambiguous. Initially, after hearing Mr. [redacted]'s testimony, the IJ found him "credible." AR at 233. She noted that "although [he] had some inconsistencies in his testimony, none of these inconsistencies was so severe as to call his full testimony into question," and she found that he was able to describe the events "with consistency and detail." *Id.*

Approximately a year later, the IJ heard the testimony of DHS's witness, ICE Agent Webster, and found that she, too, "testified credibly." *Id.*

at 843-44. At that point, the IJ noted a point of disagreement between the two witnesses: Agent Webster testified that she questioned Mr. [redacted] about his citizenship and immigration status at the restaurant, whereas Mr. [redacted] testified that he was not questioned until after he was transported to ICE's office, where the agents detained him. *Id.* at 834-35, 844.[3] On this point, "[i]n light of the record as a whole," the IJ credited Agent Webster's account over Mr. [redacted]'s. *See id.* at 844. She then made the following statement, approximately one year after having heard Mr. [redacted]'s testimony:

> Because this assertion is directly relevant to the admissibility of the I-213, the Court finds that Respondent's testimony is not credible, and declines to afford it full evidentiary weight. . . . Having concluded that Agent Webster's testimony is credible and Respondent's testimony is not, the Court evaluates the ICE agents' actions according to Agent Webster's account of events. The Court also notes Respondent's assertions to the extent that they are not inconsistent with Agent Webster's testimony.

Id. at 844. It is unclear whether this passage refers only to Mr. [redacted]'s testimony *about the interrogation*, or whether it is meant to indicate

---

[3] Mr. [redacted] testified consistently with his declaration that no agents asked him questions at the restaurant, and that the first time he was questioned was at ERO. AR at 408-09, 414, 1054-55. When the IJ asked him specifically whether the agents at the restaurant "ever ask[ed] what country [he was] a citizen of," he confirmed that they did not, adding that the agents had already obtained that information by searching his wallet and finding his ID card. *See id.* at 409 ("Well, they took out the wallet and they saw in it the identification.").

that the IJ retroactively revised her assessment of his credibility more generally. While the quoted language is concededly ambiguous, the most rational reading is that the IJ credited Mr. [REDACTED]'s statements "to the extent that they are not inconsistent with Agent Webster's testimony." *Id.*

The IJ's analysis bears this reading out. Although the IJ's opinion lacks a designated section laying out her "factual findings," her analysis cites to and apparently credits various statements by Mr. [REDACTED] regarding facts that Agent Webster did not witness. *See, e.g., id.* at 844 (finding that agents "placed Respondent in handcuffs."); *id.* (finding that "an agent removed Respondent's wallet from his pocket, and, according to Respondent, searched the contents of the wallet"). Further, the IJ would have had no reason to "note[]" Mr. [REDACTED]'s testimony, *id.* at 844, if she considered all of his statements to be not credible. Indeed, nowhere did the IJ make affirmative findings that any of the events about which Mr. [REDACTED] testified did *not* happen, or that she otherwise did not believe his testimony, other than with respect to his statements about the timing of the interrogation.[4]

---

[4] If the Court concludes that the IJ meant to find Mr. [REDACTED] *generally* not credible, however, the IJ's credibility assessment would not be supported by substantial evidence. At the time of his testimony, when she observed his demeanor, the IJ found Mr. [REDACTED]'s statements to be credible, detailed, and consistent with his declaration. AR at 233. He stood

Mr. ███ disagrees with the IJ's decision to credit Agent Webster's testimony about the timing of the interrogation over his own, but, recognizing the level of deference that is accorded to such findings on appeal, he does not press that argument here. Even assuming that Mr. ███ *was* interrogated about his citizenship and immigration status at the restaurant, the Court should still order suppression of the evidence against him based on the undisputed facts concerning what transpired during the raid.

As Agent Webster conceded, she did not see or interact with Mr. ███ until she approached him at the table—*after* he had been seized, handcuffed, moved to the seating area, and searched. *See id.* at 710. His testimony up until that point therefore stands undisputed. As for all the events thereafter, the petition relies on (1) the testimony of ICE Agent Carol Webster, which the IJ found credible, and (2) facts from Mr. ███'s declaration and testimony that were "not inconsistent with Agent Webster's testimony." *Id.* at 844. On these undisputed facts, it is clear that Mr. ███

---

up to lengthy cross-examination by the government, and any inconsistencies or gaps in his memory were minor—particularly considering that over a year had passed since the raid, that he has only two years of formal schooling, and that he was simply confused by the questioning at various points. *See id.* at 239 n.2, 554. An IJ's adverse credibility finding merits deference only when the IJ offers a "specific, cogent reason for any stated disbelief." *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 658-59 (9th Cir. 2002). Here, the IJ's decision provides no cogent explanation to discredit Mr. ███'s testimony generally—particularly where Agent Webster's testimony largely corroborated Mr. ███'s account of what happened at the raid.

[REDACTED] was seized, searched, and interrogated in clear violation of the Fourth Amendment and the applicable regulations.[5]

VII. ARGUMENT

A. The ICE agents' suspicionless seizure of Mr. [REDACTED] was an egregious violation of his Fourth Amendment rights.

Under long-established Ninth Circuit law, this Court must suppress evidence in removal proceedings if ICE agents obtained the evidence through an "egregious" violation of the Fourth Amendment. *Orhorhaghe v. INS*, 38 F.3d 488, 493 (9th Cir. 1994). A violation is "egregious" if it was either "deliberate" or involved "conduct a reasonable officer should know is in violation of the Constitution." *Id.* at 501 (internal citation and quotation marks omitted). Here, the undisputed facts in the record establish that the agents' suspicionless detention and interrogation of Mr. [REDACTED] constituted an egregious violation of his Fourth Amendment rights under both prongs of this Court's egregiousness test.

There can be no serious dispute that ICE agents deliberately planned to detain and interrogate a large number of individuals working at the El Balazo taco restaurants without any prior individualized suspicion as to any of them. Uncontested record evidence establishes that the agents planned in

---

[5] If the Court concludes that more fact-finding is needed to decide the case, it should clarify the relevant legal standards and remand to the agency for further proceedings.

advance to detain and interrogate all the workers found on site, to extract information from them regarding their immigration status, and then to arrest those whom they could charge with removability. They discussed this plan in pre-operation meetings, tasked agents to execute it, and even brought detention vans to transport the individuals whom they anticipated arresting.

The IJ and BIA decided that, even if the agents lacked individualized suspicion as to Mr. [redacted], his detention was nevertheless justified because it was implicitly authorized by the existence of a search warrant pursuant to *Michigan v. Summers*, 452 U.S. 692 (1981), and *Muehler v. Mena*, 544 U.S. 93 (2005). *See* AR at 4, 846. However, *Mena* and *Summers* obviously do not authorize the agents' conduct here, particularly in light of this Court's decision in *Ganwich v. Knapp,* 319 F.3d 1115, 1123 (9th Cir. 2003)—published several years before this raid—holding that the Fourth Amendment does not permit the unreasonably intrusive detention and suspicionless interrogation of workers during execution of a search warrant.

Summers and *Mena*, as well as this Court's decisions, make clear that the Supreme Court has recognized only a narrow exception to the "general rule," *Summers*, 452 U.S. at 700, that seizures must be supported by individualized suspicion: Officers have "*limited* authority to detain the occupants of [a] premises" while executing a search warrant for contraband,

id. at 705 (emphasis added), so long as that detention involves no greater force than is reasonable to execute the search and ensure officer safety and does not prolong the detention at issue. *See Mena*, 544 U.S. at 98-99, 101; *Summers*, 452 U.S. at 701 n.14. This Court has repeatedly emphasized that *Summers*-type seizures must be reviewed for reasonableness, and in doing so has specifically rejected deliberate mass interrogation conducted under the guise of a warrant authorizing the search for objects, rather than people. *See, e.g.*, *Ganwich*, 319 F.3d at 1122; *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994). The BIA and IJ's decisions fundamentally misapplied this governing law and must be reversed.

1. ICE agents seized Mr. [redacted] without individualized suspicion, thereby committing a clear violation of the Fourth Amendment.

The government has never disputed that Mr. [redacted] was seized for Fourth Amendment purposes the moment the raid began. Nor could it. No reasonable person in Mr. [redacted]'s shoes—surrounded and outnumbered by armed ICE agents, handcuffed, and locked inside the restaurant—would have felt "free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *see also* AR at 709-10 (Agent Webster testified that the workers were "detained" and not "free to leave" when the agents

handcuffed them and moved them into the partitioned dining area for questioning).[6]

The Fourth Amendment requires that even limited, temporary seizures be based on "reasonable suspicion"—that is, "particularized and objective" facts supporting an inference that the particular individual has engaged in unlawful conduct. *United States v. Manzo-Jurado*, 457 F.3d 928, 934 (9th Cir. 2006); *see also Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).[7] Here, prior to the raid, the agents knew nothing whatsoever about Mr. ██████. They had no warrant for his arrest. Yet, immediately upon entering the restaurant and before asking him a single question, they seized and handcuffed him. *See* AR at 709-10. This seizure was not supported by reasonable suspicion, let alone probable cause, and was therefore a clear violation of the Fourth Amendment.

The law here is clear. More than twenty years before the El Balazo raids, this Court invalidated the suspicionless detention of a worker during a

---

[6] Mr. ██████'s detention thus stands in sharp contrast to the "factory surveys" in *INS v. Delgado*, where INS agents "approached employees" at their workstations "and, after identifying themselves, asked them from one to three questions relating to their citizenship" while allowing the "employees [to] continue[] with their work and . . . free[ly] . . . walk around within the factory." 466 U.S. 210, 212-13 (1984); *see also id*. at 220.

[7] Indeed, given the totality of the circumstances, Mr. ██████'s seizure amounted to a full-scale arrest, and as such, it should have been supported by probable cause. But even assuming it was merely a temporary detention, it was unjustified, as explained below.

factory raid where the agents had no basis for believing the worker was undocumented; the Court made clear that "INS officer[s]" may not "detain a worker short of an arrest" during a worksite raid without having "an objectively reasonable suspicion that the *particular* worker is an illegal alien." *Martinez v. Nygaard*, 831 F.2d 822, 827 (9th Cir. 1987) (emphasis added); *see also LaDuke v. Nelson*, 762 F.2d 1318, 1326-27 (9th Cir. 1985) (finding Fourth Amendment violation and entering injunction against unlawful immigration raids because the Fourth Amendment requires ICE agents to have "articulable suspicion of both alienage and unlawful presence prior to the initiation of detentive stops"); *Benitez-Mendez v. INS*, 760 F.2d 907, 909 (9th Cir. 1983) ("INS investigators may not detain workers for citizenship status questioning unless the investigators are able to articulate objective facts providing them with a reasonable suspicion that *each questioned person*, so detained, is an alien illegally in this country.") (emphasis added); *cf. Manzo-Jurado*, 457 F.3d at 936, 940 (holding that ICE agents lacked reasonable suspicion to detain member of Hispanic and Spanish-speaking work crew near the Canadian border).

Thus, for more than two decades before the El Balazo raids, this Court repeatedly applied *in the context of immigration worksite raids* the basic constitutional principle that reasonable suspicion cannot be generalized; it

must be "*particularized* with respect to *that person*" being seized. *Ybarra*, 444 U.S. at 91 (emphasis added). It is not enough for officers to "point[] to the fact that coincidentally there exists [suspicion] to search or seize another or to search the premises where the person may happen to be." *Id.* A person's "mere propinquity to others independently suspected of criminal activity does not, without more," give rise to the requisite suspicion to search or seize that person. *Id.*

Applying this law to the facts in this case, the agents plainly lacked reasonable suspicion to detain Mr. ██████. The agents knew nothing about him prior to the raid, and they did not have an arrest warrant. They seized him and his co-workers immediately upon entering the restaurant, searched and interrogated them, and only *then* allegedly obtained information to charge them with removability. Agent Webster's testimony makes clear that the agents seized Mr. ██████ and his coworkers *en masse*, without individualized justification, as part of their "standard" practice:

> Q. Do you know if he had been searched already [by the time you began questioning him]? . . . .
> A. Yes. He was patted down.
> Q. Did you see that process?
> A. No.
> Q. But that was a standard thing that would have been done prior to his handcuffing, is that right?
> A. After handcuffing, yes.

> Q. . . . . [W]hy is that a standard process?
> A. That's how we're trained to arrest people, to handcuff them first.

AR at 736. There is literally no evidence in the record to support the conclusion that the agents had any individualized basis for seizing and handcuffing Mr. [redacted].

In dicta, the IJ opined that the agents "may well have had reasonable suspicion" to seize Mr. [redacted] because they had a warrant to search for evidence of the *restaurant owner's* hiring violations, and because Mr. [redacted] appeared to be an employee of the restaurant. *Id.* at 846. The BIA reiterated this reasoning as an alternative holding. *Id.* at 4. But this proposition is plainly at odds with *Ybarra*, the standard for reasonable suspicion discussed above, and nearly thirty years of this Court's case-law. The existence of a warrant to search the El Balazo restaurants does not give rise to reasonable suspicion that *all* El Balazo employees were undocumented, or that Mr. [redacted] *himself* was an undocumented non-citizen. In fact, the record contains no evidence that there was probable cause to believe that unauthorized hiring had occurred at all eleven of the El Balazo locations, or even that the suspected violations were still occurring at the time of the raid.

Indeed, the Court considered and rejected this proposition in *Ganwich v. Knapp*, 319 F.3d 1115 (9th Cir. 2003), a worksite raid case (though not involving immigration). *Ganwich* noted that where "the record shows that the officers suspected that *some* . . . employees had committed crimes," it "does not bear out" the argument that the "officers possessed individualized suspicion" as to *each* employee. *Id.* at 1122 n.2 (emphasis added). The same is true here. And of course, the warrant itself did not name any workers; it expressly authorized a search for *documents* (not people) located "on the premises" (not "on [anyone's] person"). AR at 815. It did not give the agents authority to seize *people* and extract evidence from *them*, and it did not give rise to any individualized suspicion about Mr. [REDACTED] himself.

In sum, applying the settled law of this Circuit and the Supreme Court, there was clearly no reasonable suspicion to seize Mr. [REDACTED] here. No reasonable agent in 2008 would have believed that Mr. [REDACTED] could be detained without reasonable suspicion. *See*, *e.g.*, *Nygaard*, 831 F.2d at 827. Indeed, ICE's own regulations incorporate this constitutional norm. *See* 8 C.F.R. § 287.8(b)(2) (permitting "brief[] det[entions] . . . for questioning" only upon "reasonable suspicion, based on specific articulable facts," that the person may be removable). The ICE agents' actions here were an

egregious violation of the Fourth Amendment, and the resulting evidence must be suppressed.

2. The IJ and BIA erred in holding that the existence of a warrant to search the restaurant for documents justified Mr. [redacted]'s suspicionless seizure.

Despite this Court's clear and longstanding authority rejecting suspicionless detentions and interrogations in the context of worksite raids, the IJ and BIA held that Mr. [redacted]'s detention was justified under *Mena* and *Summers*. AR at 4, 846. As explained below, the IJ and BIA's holdings rest on serious misunderstandings of controlling Supreme Court and Ninth Circuit law.

As a threshold matter, this Court found a Fourth Amendment violation during an immigration worksite raid in *Nygaard* even though the INS agents in that case had a search warrant for the factory itself. *Nygaard*, 831 F.2d at 824 ("The INS obtained a search warrant for Murakami's plant, and on January 25, 1984, nine INS agents conducted a 'survey' of the factory."). *Nygaard* was decided six years after *Summers*. Thus, no reasonable ICE agent would have believed that a suspicionless detention and interrogation even more intrusive than that found unconstitutional in *Nygaard* could be justified by *Summers*.

Even if an ICE agent were inclined to ignore this Court's precedent in *Nygaard* and examine *Summers* and *Mena* for some source of authority, no reasonable officer would have concluded that those cases authorized Mr. [redacted]'s detention, which went far beyond what the cases allow. *Summers* established "limited authority to detain the occupants of the premises while a proper search is conducted," but it also established the Court's expectation that such detentions will not be "exploited by the officer or unduly prolonged in order to gain more information," because officers should obtain the information they seek "through the search and not through the detention." *Summers*, 452 U.S. at 701, 705. Further, the Supreme Court emphasized that agents may use only "*reasonable* force to effectuate the detention," *Mena*, 544 U.S. at 98-99 (emphasis added), and may not impose a greater intrusion on liberty than necessary to execute the search warrant. *See also Los Angeles Cnty. v. Rettele*, 550 U.S. 609, 614 (2007) ("In executing a search warrant officers may take *reasonable* action to secure the premises and to ensure their own safety and the efficacy of the search.") (citation omitted; emphasis added). And they may not "prolong[]" the detention "beyond the time *reasonably required* to complete" the search. *Mena*, 544 U.S. at 101 (emphasis added).

Summers and *Mena* cannot justify the agents' conduct in detaining, searching, and interrogating Mr. [REDACTED] for at least three reasons.

First, as *Summers* established and *Mena* clearly emphasized, agents may not exploit a *Summers*-type detention in order to gather evidence from the detainees where doing so serves to "prolong[]" the detention beyond the time "reasonably required" to execute the warrant. *Mena*, 544 U.S. at 101; *accord Summers*, 452 U.S. at 701 n.14 (noting with approval the principle that "the reasonableness of a detention may be determined in part by 'whether the police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon.'") (internal citation omitted); *see also Arizona v. United States*, 132 S.Ct. 2492, 2509 (2012) ("[D]elay[ing] the release of detainees . . . solely to verify their immigration status would raise constitutional concerns."). This Court, similarly, found a constitutional violation in *Ganwich* where law enforcement "exploited the detention, prolonging it to gain information from the detainees, rather than from the search." *Ganwich*, 319 F.3d at 1124 (citing *Summers*, 452 U.S. at 701). As *Ganwich* emphasized, "[q]uestioning witnesses is not a legitimate justification for a *Summers*-type detention." *Ganwich*, 319 F.3d at 1121 n.10.

Here, the agents obviously exploited the search warrant to conduct suspicionless interrogations of all the workers. Indeed, to read the limited exception set forth in *Summers* and *Mena* to allow the extensive detention and interrogation operation here on the basis of a search warrant would destroy the general rule and permit circumvention of important constitutional protections. The record shows that the ICE agents deliberately exploited the search warrant, using it as a pretext to round up the workers and circumvent the Fourth Amendment. They raided the restaurant minutes after it opened, at a time when they knew workers would be present. They were "expecting" to encounter workers during the raid, AR at 780, and they brought enough agents and "detention vans" to arrest and transport those workers back to their offices, knowing that they did not have warrants for their arrest. *Id*. at 752-53.

Moreover, in two planning meetings before the raid, the agents decided in advance to assign Agent Webster and four other agents the role of "interviewers" whose job was to interrogate workers and fill out I-213s; those interviewers were not involved in searching for the documentary evidence listed in the warrant. *Id* at 704-05, 724-25. Agent Webster acknowledged that her interrogation did not further the search for documents. Instead, "when [she] w[as] interviewing [Mr. [REDACTED]], that was just to

determine [his] aliena[ge].” *Id.* at 779. These facts show that the premeditated purpose of the raid was to detain *workers*, not to find documents, and to use that detention to develop evidence with which to charge them with removability. This deliberate attempt to circumvent well-established Fourth Amendment protections is precisely the sort of intentional official misconduct that the exclusionary rule is meant to deter in the immigration context. *See Orhorhaghe*, 38 F.3d at 493 (“deliberate” Fourth Amendment violations merit suppression).

Nor could ICE argue that its exploitation of the warrant was permissible because it did not prolong the detention at issue, as Mr. [redacted] [redacted]’s detention was undeniably prolonged by that interrogation. Had the ICE agents focused on the search for documents authorized by the warrant, rather than rounding up and interrogating the workers, they would have “reasonably required” far less time to complete the search. *Mena*, 544 U.S. at 101. When Agent Webster was asked how long it took for her and the other agents to interrogate all the workers, she said it took “[p]robably over an hour for all of them.” AR at 750. With approximately a dozen ICE agents, they could have located any business documents onsite much more quickly. Instead, Agent Webster and the four other agents who had been assigned the role of “interviewers” devoted their attention solely to interrogating Mr.

[REDACTED] and his co-workers. In doing so, the agents unreasonably extended his detention.

Summers authorized officers to detain occupants of a property "while a *proper* search is conducted." *Summers*, 452 U.S. at 705 (emphasis added). A "proper" search, importantly, assumes that officers are "diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon.'" *Id*. at 701 n.14 (citation omitted). The agents here were anything but diligent in the execution of the search warrant. Instead, they did exactly what the Supreme Court and this Court expressly warned against in *Summers* and *Ganwich*: they deliberately "exploited the detention, prolonging it to gain information from the detainees, rather than from the search." *Ganwich*, 319 F.3d at 1124; *see also id*. at 1122 ("The interrogations did not deter the plaintiffs' flight, did not reduce the risk of harm to officers, and did not assist the officers in the orderly completion of the search.").

Second, Mr. [REDACTED]'s detention was far more intrusive than necessary "to secure the premises and to ensure [the agents'] own safety and the efficacy of the search." *Rettele*, 550 U.S. at 614. The ICE agents who flooded into the restaurant were all armed, and at least one drew his gun. AR at 394, 833, 1053. They surrounded Mr. [REDACTED], handcuffed him

without any individualized reason, and locked the restaurant doors, trapping him inside. *Id.* at 394, 397-98, 1054. Agents then moved Mr. [redacted] to a seating area that was partitioned from the rest of the restaurant, *id*. at 401-02, 833, 1054, where they photographed him, searched his person, and searched and inventoried the contents of his wallet. *Id.* at 404, 407-08, 833, 1054. They then forced him to sit at a table, still handcuffed and facing the wall, to await his interrogation. *Cf. Ganwich*, 319 F.3d at 1122 n.12 ("[E]ven if individualized suspicion existed, it would not have justified the officers' coercing the plaintiffs into back-room interrogations."). This is a far cry from the "incremental intrusion" that *Summers* and *Mena* approved when they authorized the detention of individuals whose homes had already been made the target of a search warrant by a judge. *Mena*, 544 U.S. at 98; *Summers*, 452 U.S. at 703.

We know with certainty that Mr. [redacted]'s intrusive detention was not necessary to ensure officer safety and the efficacy of the search for one simple reason: The agents allowed two other workers present in the restaurant to leave shortly after they had detained Mr. [redacted]. AR at 756, 833, 1054. Any conceivable officer-safety rationale for keeping Mr. [redacted]'s detained in handcuffs evaporated when the ICE agents

released those two other employees. Agent Webster testified that releasing these employees did not present any risk to officer safety:

> Q. . . . . Did you have any concerns that having those people leave the restaurant could endanger officer safety?
> A. No.

Id. at 757. Once these two employees had been released, there was no longer any plausible safety-related reason to continue detaining Mr. ████ ████ in this intrusive manner. *Cf. Ganwich,* 319 F.3d at 1123 (the officers' "speculative interest" in detaining workers for officer safety reasons "became too weak to justify [the detention] . . . after the first . . . employee was released"); *Mena*, 544 U.S. at 100 ("The duration of a detention can, of course, affect the balance of interests [in the reasonableness inquiry].").

If the Court were to find it necessary to look beyond the seemingly indisputable inference arising from the fact that the agents released two of Mr. ████████'s co-workers, further examination of the record reveals no evidence of any safety-based rationale for the detention at issue here. The agents were conducting a daytime search of a taco restaurant—a far cry from the dangerous searches for narcotics, weapons, and wanted gang members in *Mena* and *Summers*. *See also Meredith v. Erath*, 342 F.3d 1057, 1063 (9th Cir. 2003) (seizure in handcuffs was unreasonable where, among other things, officers were investigating "nonviolent," "tax related crimes").

Nothing in the record suggests that anyone at the restaurant was armed or involved in gang activities, and no one offered any resistance. Agent Webster testified that "there were no problems. Everything went as planned orderly [sic]." AR at 717-18. She "didn't see anybody running" or "anything that gave [her] cause for alarm[.]" *Id.* at 735; *see also id.* at 394-95 (Mr. ██████ did not attempt to run or hide from the agents).

In addition, the ICE agents outnumbered the workers by approximately two to one. *See id.* at 392, 722, 832-22, 1053 (establishing that there were approximately six to eight workers at the restaurant during the raid); *id.* at 393-94, 397, 725, 833, 1053 (establishing that there were approximately twelve to sixteen agents present at the raid); *cf. Mena*, 544 U.S. at 100 (handcuffs were reasonable because "this case involved the detention of *four* detainees by *two* officers during a search of a gang house for dangerous weapons") (emphasis added); *Tekle v. U.S.*, 511 F.3d 839, 849-50 (9th Cir. 2012) (restrictive seizure was unreasonable where, *inter alia*, officers outnumbered suspects); *Meredith*, 342 F.3d at 1063 (seizure unreasonable where, among other things, detainee posed no threat and made no attempt to flee); *Franklin*, 31 F.3d at 876-77 (same).

Nor did the agents have an interest in detaining Mr. ██████ to facilitate "the orderly completion of the search." *Summers*, 452 U.S. at 703.

No one asked Mr. [REDACTED] for help in locating the documents listed in the search warrant. By Agent Webster's own admission, the purpose of interviewing Mr. [REDACTED] and filling out the I-213 "was just to determine [his] aliena[ge]." AR at 779. Indeed, ICE agents chose not to detain the restaurant manager, the very employee who would have been best able to facilitate the search for documents. *Id.* at 396, 756-57, 833.

Thus, the agents' detention of Mr. [REDACTED] was not justified by reference to the need to ensure either officer safety or the orderly execution of the search warrant. It was therefore unreasonable. *See Meredith*, 342 F.3d at 1063 ("Our decision today [in 2003] makes it clear" that detaining a person in handcuffs while executing a search warrant, "absent justifiable circumstances, will result in a Fourth Amendment violation.").

Finally, even if the agents had not exploited the warrant and prolonged Mr. [REDACTED]'s detention when they interrogated him, and even if his intrusive and lengthy detention could have been justified on the basis of safety or the need to execute the search, the agents' conduct went beyond that authorized by *Summers* and *Mena* because neither case could reasonably be read to create "the right to *search persons*" while detaining them. *Summers*, 452 U.S. at 695 (emphasis added). Neither of the detainees in *Summers* and *Mena* were searched during their detention; in *Summers,* the

officers did not search the detainee until *after* they had acquired probable cause to put him under arrest, *id.*, while in *Mena* the detainee was apparently never searched at all.

Here, in contrast, the agents searched Mr. [REDACTED]'s person, removed his wallet from his pocket, and searched the wallet's contents, obviously for evidence of his immigration status (and *not* to ensure their own safety). They had no justification for doing so. As noted above, there was no indication that Mr. [REDACTED] posed any threat. Officers may search small containers like wallets without individualized suspicion *after* they have made an arrest, but not during a *Terry*-type seizure or a suspicionless *Summers* detention. *Compare United States v. Robinson*, 414 U.S. 218, 235 (1973) (search of a cigarette packet incident to arrest required no additional Fourth Amendment justification), *with Terry v. Ohio*, 392 U.S. 1, 30 (1968) (when conducting a *Terry* stop, police may pat down an individual's outer clothing for indications of weapons if they have reasonable suspicion to believe the individual is armed); *see also United States v. Davis*, 530 F.3d 1069, 1082 (9th Cir. 2008) (holding that officers needed reasonable suspicion to frisk the defendant, who was properly detained under *Summers* during a search of a residence, but finding that there was reasonable suspicion to believe he was armed); *Leveto v. Lapina*,

258 F.3d 156, 164 (3d Cir. 2001) (officers may not pat down detainees during a *Summers* detention without "reasonable belief that the subject is armed and dangerous"). In this respect, too, the agents' intrusion on Mr. ██████'s Fourth Amendment interests plainly exceeded their authority under *Summers* and *Mena*.[8]

* * *

In sum, Mr. ██████'s detention was not justified under *Summers* and *Mena*. No reasonable agent—not even one who was unaware of this Court's binding precedent in *Nygaard*—would have believed that the mere

---

[8] Notably, *Summers* authorizes only limited detentions, not arrests. *See Summers*, 452 U.S. at 696 (limiting inquiry to "the constitutionality of a *pre-arrest seizure*") (emphasis added; internal quotation marks omitted); *Mena*, 544 U.S. at 98 (relying on *Summers* and characterizing the seizure as a "detention," not an arrest); *see also Ganwich*, 319 F.3d at 1120 n.7 ("We assume, without deciding, that the plaintiffs' detention here did not mature into a full-fledged arrest."). Although Petitioner need not establish that he was arrested in order to prevail, on the totality of the circumstances, Mr. ██████'s seizure likely arose to the level of an arrest, thus rendering *Summers* wholly inapplicable.

In addition, *Summers* and *Mena* likely should be read to authorize detentions only during searches (1) of homes (2) for contraband, given that the Supreme Court's rationale in both cases was tied very closely to those two key factors. *Summers*, 452 U.S. at 701 ("Of prime importance in assessing the intrusion is the fact that the police had obtained a warrant to search respondent's house for contraband."); *see also id.* at 705 n.20 (declining to "decide whether the same result would be justified if the search warrant merely authorized a search for evidence"); *Mena*, 544 U.S. at 98. However, Petitioner recognizes that this Court has applied *Summers* in these contexts. *See Dawson v. City of Seattle*, 435 F.3d 1054, 1066 (9th Cir. 2007) (search for evidence); *Ganwich*, 319 F.3d at 1115 (search of a business for evidence).

existence of a search warrant for documents authorized the highly intrusive and prolonged detention, search, and interrogation of Mr. ████████ without reasonable suspicion.

3. The violations of Mr. ████████'s Fourth Amendment rights also require suppression because they were part of a widespread pattern of violations.

Even if a Fourth Amendment violation is not "egregious," the Supreme Court has recognized that it may still merit suppression in removal proceedings if there is "good reason to believe that Fourth Amendment violations by [immigration] officers [are] widespread." *Lopez-Mendoza*, 468 U.S. at 1050; *see also Oliva-Ramos v. Holder*, 694 F.3d 259, 282 (3d Cir. 2012) (finding that BIA erred in refusing to permit respondent to present evidence that violations of his Fourth Amendment rights were widespread).[9]

---

[9] Although only four Justices of the Supreme Court joined the passage of the majority opinion that held that widespread Fourth Amendment violations could give rise to a broader application of the exclusionary rule in removal proceedings, four Justices would have applied the exclusionary rule in *all* removal cases, whether or not the violations were egregious or widespread. *See Lopez-Mendoza*, 468 U.S. at 1052 (White J., dissenting, joined in relevant part by Brennan J., Stevens J., and Marshall J.). "Thus, though technically correct to characterize the portion of the majority opinion recognizing a potential exception to the Court's holding as a 'plurality opinion,' eight Justices agreed that the exclusionary rule should apply in deportation/removal proceedings involving egregious or widespread Fourth Amendment violations. Thus, where an alien can establish either of those two circumstances, the plurality opinion can only be read as affirming that the remedy of suppression justifies the social cost." *Oliva-Ramos*, 694 F.3d at 271-72.

The violations in question here were clearly not the result of mistakes made by individual bad actors in a system that otherwise operates within constitutional restraints. *Cf. Herring v. United States*, 555 U.S. 135, 147-48 (2009) ("[W]hen police mistakes are the result of negligence . . . , rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not pay its way.") (internal quotation marks omitted). This is therefore precisely the sort of case where the exclusionary rule is needed to deter law enforcement agencies from incorporating systemic practices that violate the Constitution into their regular operations.

The raid on the restaurant where Mr. ██████ was working was one of eleven coordinated raids that took place simultaneously on May 2, 2008. Agent Webster testified that she and approximately "100 or more" other ICE agents attended a large briefing on the day before the raid to prepare for it. AR at 705, 722. Some agents, including Agent Webster, were assigned the role of "interviewers," whose job it would be to interrogate workers found on site, *id.* at 704-05; Agent Webster testified that assigning agents to this role is a "standard procedure" in ICE operations. *Id.* at 751. In total, more than sixty El Balazo employees were arrested on the day of the raid, *see id.* at 959, 1045, and many of them have pursued motions to suppress alleging Fourth Amendment violations similar to the ones

described above. *See id.* at 324, 351, 1026-124 (motion to suppress and supporting documents); *see also Aparicio Zavala v. Holder*, No. 12-70225 (9th Cir. docketed Jan. 23, 2012) (motion to suppress arising from the same raid).

In addition, Mr. ████████ presented ample evidence that Fourth Amendment violations have become widespread in ICE raids nationwide. He submitted a substantial body of documents—including court decisions, newspaper articles, and academic articles—showing the widespread nature of these violations. *See* AR at 1026-124 (motion to suppress and supporting documents); 888-94 (exhibit list and request for judicial notice of evidence of widespread violations). The IJ declined to consider this evidence, explaining: "[S]ince I already found a *prima facie* case for egregious violations, I don't think that the evidence [of widespread violations] is particularly necessary." *Id.* at 351. Ultimately, because the IJ incorrectly determined that there had been no Fourth Amendment violations in this case at all, she did not have occasion to consider the question whether such violations were widespread.

The Court need not decide whether Fourth Amendment violations by ICE agents have become widespread on this petition for review. If the Court concludes that Mr. ████████'s Fourth Amendment rights were violated

but the violation was not egregious, it should remand to the agency with instructions to consider Mr. [redacted]'s evidence of widespread violations as an alternative ground for suppression. *Cf. Oliva-Ramos*, 694 F.3d at 282, 286-87.

B. ICE agents violated governing federal regulations by detaining Mr. [redacted] without reasonable suspicion, arresting him without a warrant, and refusing to explain to him why he had been arrested.

Independent of the Fourth Amendment violations discussed above, the ICE agents' regulatory violations present an additional ground for suppressing Mr. [redacted]'s alleged statements during the raid. The ICE agents violated three separate provisions of the agency's own regulations: 8 C.F.R. § 287.8(b), § 287.8(c)(2)(ii), and § 287.8(c)(2)(iii). It is well established that a regulatory violation calls for suppression when the regulation "serves a purpose of benefit" to the individual and the violation prejudiced the individual's interests. *Hong v. Mukasey*, 518 F.3d 1030, 1035 (9th Cir. 2008) (internal quotation marks omitted); *see also Matter of Garcia-Flores*, 17 I. & N. Dec. 325, 328-29 (BIA 1980). "No showing of prejudice is required, however, when a rule is 'intended primarily to confer important procedural benefits upon indiv[i]duals' or 'when alleged regulatory violations implicate fundamental statutory or constitutional rights.'" *Montes-Lopez v. Holder*, 694 F.3d 1085, 1091 (9th Cir. 2012)

(alteration in original) (quoting *Leslie v. Attorney General*, 611 F.3d 171, 176 (3d Cir. 2010)); *see also Matter of Garcia-Flores*, 17 I. & N. Dec. at 329 (prejudice is "presumed" where compliance with the regulation is mandated by the Constitution). As explained below, ICE agents violated three separate regulatory provisions here.

1. **Agents violated 8 C.F.R. § 287.8(b) by detaining and interrogating Mr. [redacted] without "reasonable suspicion, based on specific articulable facts."**

Section 287.8(b) prohibits ICE agents from "briefly detain[ing a] person for questioning" without "reasonable suspicion, based on specific articulable facts, that the person being questioned is . . . illegally in the United States." 8 C.F.R. § 287.8(b). Consistent with Fourth Amendment case-law, the regulation defines "detention" as "restr[icting] the freedom of an individual . . . to walk away." *Id.* § 287.8(b)(1).

The IJ did not consider § 287.8(b) in her decision, but the BIA did: It held that the agents did not violate the regulation because Mr. [redacted] was "clearly dressed as a worker at the restaurant, and the subject of the search warrant was to gather evidence regarding the hiring and harboring of illegal aliens." AR at 4. As argued at length above, this holding rests on a fundamental misunderstanding of what "reasonable suspicion" means and of the authority created by the warrant. *See* Section VII(C)(2), *supra*.

Because the regulation precisely tracks the contours of Fourth Amendment, this Court need not find prejudice to reverse the BIA's decision on this basis. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (Fourth Amendment requires that brief detentions be supported by "specific articulable facts . . . that reasonably warrant suspicion."). In any event, § 287.8(b) serves to benefit Mr. ██████ by protecting him from arbitrary detentions that are not supported by individualized suspicion, and the violation of this regulation unquestionably prejudiced Mr. ██████, who would not have been interrogated had he been allowed to leave the restaurant. The agents' violation of § 287.8(b) merits suppression and termination. The Court need not remand to the agency to make this determination; rather, it should apply the law to the undisputed facts and order suppression.

2. Agents violated 8 C.F.R. § 287.8(c)(2)(ii) by arresting Mr. ██████ without a warrant.

Section 287.8(c)(2)(ii) requires that ICE agents "shall . . . obtain[]" a "warrant of arrest" before making an arrest, "except when the . . . immigration officer has reason to believe that the person [being arrested] is likely to escape before a warrant can be obtained." 8 C.F.R. § 287.8(c)(2)(ii). Section 287.8 was promulgated pursuant to 8 U.S.C. § 1357, which similarly authorizes ICE agents to make warrantless arrests only if

they have "reason to believe" that the person "is in the United States in violation of . . . law . . . *and* is likely to escape before a warrant can be obtained for his arrest." *Id.* § 1357(a)(2) (emphasis added); *see also Arizona*, 132 S.Ct. at 2506 (discussing statutory limitations on ICE's arrest authority). The phrase "reason to believe" as used in the statute has been interpreted to mean "probable cause." *See Tejeda-Mata v. INS*, 626 F.2d 721, 725 (9th Cir.1980).

The BIA made no mention of Mr. [REDACTED]'s § 287.8(c)(2)(ii) claim, and the IJ cursorily dismissed it, reasoning that "under the circumstances, it was reasonable for Agent Webster to believe that placing Respondent under arrest was necessary to prevent him from fleeing before a warrant could be obtained." AR at 846. But the IJ did not explain what "circumstances" she had in mind, *id.*, and there is nothing in Agent Webster's testimony or elsewhere in the record to suggest ICE could not have obtained a warrant for the arrest of Mr. [REDACTED] and other El Balazo workers, if in fact it already possessed evidence that workers at the restaurant were unlawfully present.

Indeed, even after the agents began the raid, the record shows that Mr. [REDACTED] did not attempt to flee, *id.* at 394-95, and that he and his coworkers were "orderly" and cooperative during the entire ordeal. *Id.* at

717-18, 735; *cf. Matter of Au, Yim and Lam*, 13 I. & N. Dec. 294, 300-01 (BIA 1969) (individuals were likely to escape where they attempted to flee when they saw agents approaching).[10]

The "likelihood of escape" requirement must be "seriously applied," *United States v. Cantu*, 519 F.2d 494, 497 (7th Cir. 1975), and serious application here compels the conclusion that the agents violated the regulation. The agents knew in advance where to find the workers; Agent Webster testified that "there was an investigation that determined the number of employees" prior to the raid. AR at 780. Nothing in the record suggests that the agents did not have time to investigate the identities of the workers (for example, through an I-9 audit) and obtain arrest warrants before the raid, if in fact such evidence existed.

Arresting Mr. [REDACTED] without a warrant was therefore a violation of § 287.8(c)(2)(ii). This violation merits suppression because it undeniably "prejudiced interests . . . which were protected by the regulation": Mr. [REDACTED]'s interest in being free from an unreasonable warrantless seizure. *Hong*, 518 F.3d at 1035 (internal quotation marks and citation

---

[10] To the extent the IJ meant that Mr. [REDACTED]'s alleged alienage itself provided the agents with probable cause to believe he would flee before a warrant could be obtained, that proposition is clearly wrong. It cannot be that *every* alleged non-citizen is therefore also a flight risk; if that were so, a warrant would *never* be needed, and the regulation would be meaningless.

omitted). Moreover, this requirement is not a "relatively minor procedural rule adopted for the orderly transaction of business"; it is an important protection of individuals' right to be free from unreasonable searches and seizures. *Montes-Lopez*, 694 F.3d at 1093. As this Court recently recognized, "some regulatory violations are so serious as to be reversible error without a showing of prejudice." *Id*. This is such a violation. The ICE agents' failure to comply with the regulation—particularly in light of the fact that they planned this raid well in advance—cannot be allowed to stand. The Court should apply the law to the facts and order suppression, or at least remand to the agency. *See id*. at 1092 (requiring at least remand when "an agency has not correctly applied controlling law, . . . even if we think the error was likely harmless") (citing *INS v. Ventura*, 537 U.S. 12, 16–17 (2002)).

3. Agents violated 8 C.F.R. § 287.8(c)(2)(iii) by failing to advise Mr. [REDACTED] of the reason for his arrest.

Section 287.8(c)(2)(iii) provides that "[a]t the time of the arrest, the designated immigration officer shall, as soon as it is practical and safe to do so . . . [s]tate that the person is under arrest and the reason for the arrest." 8 C.F.R. § 287.8(c)(2)(iii). At no point during the raid did any agent explain why Mr. [REDACTED] had been arrested—not even when he asked them directly. *See* AR at 395, 833, 1053-55. Nor did the agents ever mention the

warrant to Mr. [REDACTED], which was the ostensible reason why they had come to the restaurant in the first place. The regulation that the agents violated in failing to advise Mr. [REDACTED] of the reason for his arrest tracks the protections that the Fourth and Fifth Amendments afford to people in Mr. [REDACTED]'s position in the criminal context. *See Miranda v. Arizona*, 384 U.S. 436, 468 (1966); *see also Navia-Duran v. INS*, 568 F.2d 803, 808 (1st Cir. 1977) ("consideration of the absence of warnings can be a relevant factor in assessing the question of voluntariness" for Fifth Amendment Due Process purposes). Prejudice should therefore be presumed.[11]

Neither the IJ nor the BIA considered Mr. [REDACTED]'s arguments concerning § 287.8(c)(2)(iii). The agency's failure to consider Mr. [REDACTED]'s argument is reversible error. *See Sagaydak v. Gonzales*, 405 F.3d 1035, 1040 (9th Cir. 2005) ("IJs and the BIA are not free to ignore arguments raised by a [party]."). The Court should remand to the agency to remedy its errors and consider Mr. [REDACTED]'s argument in the first instance.

* * *

---

[11] Notably, the applicability of § 287.8(c)(2)(iii) is not affected by *Samayoa-Martinez v. Holder*, 558 F.3d 897, 901-02 (9th Cir. 2009), which concerns a separate advisal requirement at 8 C.F.R. § 287.3(c) and is based on the specific text of that provision.

Any one of these regulatory violations would be sufficient to require suppression and termination of the proceedings, or at least remand. For these independent reasons, the BIA and IJ's decisions cannot stand.

VIII. CONCLUSION

For the foregoing reasons, Mr. ██████ requests that the Court grant his petition for review. If the Court concludes that the ICE agents committed a violation of the Fourth Amendment that was egregious—i.e., deliberate or contrary to clearly established law—it should grant the petition and order suppression of the I-213s and termination of the proceedings. *See Lopez-Rodriguez*, 536 F.3d at 1019 (finding egregious Fourth Amendment violation and remanding "with instructions to dismiss the removal proceedings" because "the government did not introduce any other evidence tending to show . . . alienage").

If the Court determines that the ICE agents violated the Fourth Amendment, but that the violation was not egregious, it should remand to the agency to consider Mr. ██████'s alternative argument that the violation is part of a "widespread" pattern of such abuses by ICE. *Lopez-Mendoza*, 468 U.S. at 1050.

Alternatively, the Court should grant the petition for review based on the ICE agents' regulatory violations. It can order suppression and

termination outright based on the agents' violations of 8 C.F.R. § 287.8(b) or § 287.8(c)(2)(ii), or it can order a remand for the agency to consider Mr. Flores Perez's claim under § 287.8(c)(2)(iii), which both the IJ and the BIA failed to address.

At a minimum, the agency's decisions cannot be affirmed on the present record. If the Court determines that further fact-finding is necessary—for example, regarding the search of Mr. [REDACTED]'s wallet or the intrusive nature of his detention—it should grant Mr. [REDACTED]'s petition for review, clarify the applicable legal standards, and remand to the agency for further proceedings.

Dated: November 13, 2012 Respectfully submitted,

/s/ Katherine Desormeau

KATHERINE DESORMEAU
CECILLIA WANG
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Immigrants' Rights Project
39 Drumm Street
San Francisco, California 94111
Telephone: 415.343.0778
Facsimile: 415.395.0950
KDesormeau@aclu.org
CWang@aclu.org

____
AHILAN ARULANANTHAM
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Immigrants' Rights Project
1313 West 8th Street
Los Angeles, California 90017
Telephone: 213.977.5211
Facsimile: 213.977.5297
AArulanantham@aclu-sc.org

NICHOLAS NAPOLITAN
JASON R. BARTLETT
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522
NNapolitan@mofo.com
JBartlett@mofo.com

Attorneys for Petitioner

STATEMENT OF RELATED CASES

This petition for review raises issues similar to those in *Aparicio Zavala v. Holder*, No. 12-70225 (9th Cir. docketed Jan. 23, 2012).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,989 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

By: /s/ Katherine Desormeau

Attorney for:

Date: November 13, 2012

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 13, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I declare under penalty of perjury that the above is true and correct.

Dated: November 13, 2012
San Francisco, California

/s/ Katherine Desormeau
KATHERINE DESORMEAU