No. 12-71363

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[redacted]
Petitioner,

v.

Eric H. HOLDER, Jr.,
Respondent

Petition for Review from the Board of Immigration Appeals

PETITIONER'S REPLY 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

ESHA BHANDARI
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad Street
New York, New York 40001
Telephone: 212.284.7359
Facsimile: 212.549.2654

DETENTION STATUS

Petitioner is not detained.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

Petitioner [redacted] is a longtime resident of California with no criminal history of any kind. The Government seeks to deport him based on an alleged admission of alienage obtained in 2008, when armed immigration agents raided the El Balazo taco restaurant where he worked. Even on the Government's version of the facts, the agents seized him, handcuffed him, searched him, and subjected him to an extended detention and interrogation to obtain information about his immigration status—all without any individualized suspicion. That conduct violated his clearly established Fourth Amendment rights and controlling federal regulations.

In its effort to justify the erroneous denial of Mr. [redacted]'s suppression motion, the Government echoes the IJ and BIA's mistakes by misconstruing the governing case-law. The Government claims that it had virtually limitless authority to interrogate, handcuff, and search Mr. [redacted]'s person because it had a warrant to search the taco restaurant for documents that might prove that the owner had engaged in unlawful employment. But that reading of the authority created by the search warrant is directly contrary to two published cases of this Court, and would allow a narrow exception to the Fourth Amendment's requirement of individualized suspicion to largely swallow the rule.

In addition, even if the Government were correct as to the Fourth Amendment, federal regulations nowhere codify the Government's expansive interpretation of its authority, and they provide an independent basis for suppression. For the reasons explained in Mr. [redacted]'s opening brief and elaborated below, the Court should grant the petition for review.

II. BECAUSE MR. [redacted]'S INTRUSIVE AND PROLONGED DETENTION WAS A CLEAR VIOLATION OF THE FOURTH AMENDMENT, SUPPRESSION IS WARRANTED.

The Government's response brief makes no serious attempt to argue that the ICE agents had individualized suspicion to believe that Mr. [redacted] was a removable non-citizen, as would normally be required to detain him. Nor could it, for, as this Court's case-law makes clear, individualized suspicion requires specific facts supporting "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). The ICE agents had no such particularized facts here. *See* Pet. Op. Br. at 24-30.

Instead, the Government leans on *Michigan v. Summers*, 452 U.S. 692 (1981), which carves out a limited exception to the Fourth Amendment's requirement of individualized suspicion when agents are executing a search warrant. The Government argues that *Summers* confers a "categorical

authority" to detain. Resp. Br. at 34. Mr. [redacted]'s argument, however, is not that ICE agents were prohibited from detaining him in a reasonable manner while they executed the search warrant. Rather, his argument is that the ICE agents prolonged and exploited his detention to interrogate him about his immigration status without individualized suspicion, detained him in an unreasonable manner, and searched him without consent or justification. For these reasons, his detention was unlawful.

It was well settled in 2008 that, even when officers have the authority to detain under *Summers*, they cannot exploit or prolong the detention beyond the time "reasonably required to complete" the search. *Muehler v. Mena*, 544 U.S. 93, 101 (2005) (internal quotation marks omitted). It was equally well settled that the manner in which they effectuate that detention must be "reasonable." *Id.* at 98-99. Indeed, six years after *Summers*, this Court held in *Nygaard* that the suspicionless detention and interrogation of a worker during an INS raid was unconstitutional, *even though the officers had a search warrant*. *See* Pet. Op. Br. at 26, 30 (citing *Nygaard*, 831 F.2d at 824). Sixteen years later—and still five years before the El Balazo raid—this Court held in *Ganwich* that the suspicionless interrogation of workers during a search warrant operation was unconstitutional, even as it cited *Summers*. Pet. Op. Br. at 23 (citing *Ganwich v. Knapp*, 319 F.3d 1115, 1123

(9th Cir. 2003)). The Government has no response to *Nygaard*, and its attempt to distinguish *Ganwich* based on immaterial facts cannot be reconciled with *Ganwich*'s reasoning.

A. *Summers* and *Mena* did not authorize ICE to prolong and exploit Mr. [redacted]'s detention to interrogate him about his immigration status.

In *Summers*, the Supreme Court carved out a narrow exception to the Fourth Amendment's probable cause requirement, granting officers a "limited authority" to detain individuals without individualized suspicion while executing a search warrant. 452 U.S. at 705. It did so based on the expectation that "the type of detention imposed here is not likely to be exploited by the officer or unduly prolonged in order to gain more information [from the detainee]." *Id*. at 701. Accordingly, *Summers* authorized officers to detain only "while a *proper* search is conducted." *Id.* at 705 (emphasis added). Importantly, a "proper" search means 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 (internal quotation marks omitted). *Mena* reaffirmed that officers effecting a *Summers* detention may not "prolong[]" the detention "beyond the time reasonably required to complete" the search. *Mena*, 544 U.S. at 101 (internal quotation marks omitted).

The Government suggests that *Summers*'s warning is merely descriptive language, not a meaningful restraint on official abuse. Resp. Br. at 46. But that implausible re-description finds no support in the text of *Summers* or subsequent authority. In fact, the Supreme Court recently emphasized that because the *Summers* rule is an "exception to the Fourth Amendment rule prohibiting detention absent probable cause," it "must not diverge from its purpose and rationale." *Bailey v. United States*, 133 S.Ct. 1031, 1038 (2013). Moreover, it is well settled even outside the *Summers* context that officials may not "prolong[]" a seizure "beyond the time reasonably required" to resolve the reason for that seizure without an independent Fourth Amendment justification. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

The ICE agents here flouted these limits. They deliberately exploited the *Summers* exception and prolonged Mr. [redacted]'s detention, without probable cause or reasonable suspicion, in order to interrogate him, search him, and obtain information about his immigration status—actions they had no independent authority to undertake. *See* Pet. Op. Br. at 32-35. The agents raided the restaurant soon after it opened when they knew workers would be present. They were "expecting" to encounter workers, AR at 780, and they brought approximately twice as many agents and enough detention

vans to interrogate, arrest, and transport those workers. *Id*.; *see also id.* at 752-53. Several of the agents—including Agent Webster—were assigned the role of "interviewers," whose task was to interrogate workers one by one and obtain admissions of alienage. *Id*. at 704-05, 724-25; *see also* Pet. Op. Br. at 33. The record thus makes clear that the raid was organized as a deliberate attempt to circumvent the Fourth Amendment's basic requirement of individualized suspicion.

The Government also relies on *Mena* for its claim that the agents did not violate the Fourth Amendment by questioning Mr. [redacted]. Resp. Br. at 43-45. *Mena*, however, involved a single INS officer who rode along with the SWAT team executing the warrant, and the Supreme Court expressly did not consider whether the INS agent's questioning unlawfully prolonged the plaintiff's detention, because the court of appeals had not reached that question. 544 U.S. at 101; *see also id.* at 105 (Stevens, J., concurring) (agreeing with majority that, on remand, court of appeals should consider whether the detention lasted too long). There were no "interview teams" in *Mena*, no detention vans, and no other indications that the operation was aimed at "us[ing] the[] [workers'] continued detention to coerce them into submitting to interrogations," contrary to *Summers*'s

warning. *Ganwich*, 319 F.3d at 1124 (holding detention and interrogation unconstitutional under those circumstances).

The Government protests that the Fourth Amendment does not require agents to execute a search warrant in the most efficient way possible. Resp. Br. at 48. The question before the Court, however, is whether the agents performed a "diligent[]" search, *Summers*, 452 U.S. at 701 n.14 (internal quotation marks omitted), taking no more time than was "reasonably required to complete [their] mission" of locating the documents identified in the search warrant. *Mena*, 544 U.S. at 101 (internal quotation marks omitted). Courts routinely perform this sort of analysis. *See, e.g.*, *Caballes*, 543 U.S. at 407 (a traffic stop "can become unlawful if it is prolonged beyond the time reasonably required to complete that mission"); *Florida v. Royer*, 460 U.S. 491, 505 (1983) (considering "whether it would have been feasible to investigate the contents of Royer's bags in a more expeditious way"); *United States v. Digiovanni*, 650 F.3d 498, 510-11 (4th Cir. 2011) (officer "did not diligently pursue the traditional purposes of a traffic stop" where he asked "numerous questions" about drugs "instead of either completing the warning ticket or beginning the driver's license check"; rejecting government's argument that "because the overall length of the

traffic stop (approximately fifteen minutes) was reasonable, there was no Fourth Amendment violation.").

In this case, several of the agents were engaged solely in one-on-one custodial interrogation, along with photographing and searching the sequestered workers, seeking to obtain information unrelated to the execution of the search warrant. Pet. Op. Br. at 10-11. Such conduct obviously did not constitute a diligent search as *Summers* requires. Had the ICE agents focused on locating the documents listed in the warrant—rather than rounding up the workers, handcuffing, separating, photographing, searching, and interrogating them—it obviously would have "reasonably required" far less time to complete their mission. *Mena*, 544 U.S. at 101 (internal quotation marks omitted). Indeed, if the agents were not separating the workers and conducting one-on-one interrogations, it would have taken only one or two agents to guard the workers in a central location while the other agents searched for the documents—and in fact, this is how the warrant was executed in *Mena*. *See* 544 U.S. at 96 ("While the search proceeded, one or two officers guarded the four detainees, who were allowed to move around the garage but remained in handcuffs."); *see also id.* at 103 (Kennedy, J., concurring) (while two officers guarded the detainees, "the other 16 officers on the scene conducted an extensive search").

Perhaps recognizing that the extensive interrogation here is materially indistinguishable from that in *Ganwich*, the Government argues that *Ganwich*'s holding with respect to interrogation "is no longer good law" after *Mena*. Resp. Br. at 47. But this Court continues to cite *Ganwich* when assessing the validity of *Summers*-type detentions after *Mena*. *See, e.g.*, *Tekle v. United States*, 511 F.3d 839, 848-49 (9th Cir. 2007); *Dawson v. City of Seattle*, 435 F.3d 1054, 1065-69 (9th Cir. 2006). And nothing in *Mena* disturbs *Ganwich*'s recognition that officers effecting a *Summers* detention may not do "what the *Summers* Court warned was improper: . . . exploit[] the detention, prolonging it to gain information from the detainees, rather than from the search." *Ganwich*, 319 F.3d at 1124.

The Government makes an equally implausible attempt to distinguish *Ganwich* on its facts, arguing that in *Ganwich*, "[t]he officers told the employees that they would be held until they submitted to individual interviews with investigators in a back room," whereas here, "[t]he interviews with the workers took place in a central area of the restaurant and Agent Webster never told [redacted] he would be held until he answered the questions." Resp. Br. at 47. But Agent Webster did not *need* to tell Mr. [redacted] that fact; as she herself testified, it was perfectly clear that the handcuffed workers were "detained" and not "free to leave," even if they did

not wish to be questioned. *See* AR at 709-10. And the Government's attempted distinction between moving the detainees to a "back room" for interrogation in *Ganwich*, Resp. Br. at 47, and moving the detainees to separate tables in a partitioned dining area of the restaurant here, *see* AR at 401-02, is meaningless. *Ganwich*'s holding that officers may not "exploit . . . [a] legitimate [*Summers*] detention by holding the plaintiffs incommunicado and coercing them into submitting to interrogations" applies regardless of this locational difference. *Ganwich*, 319 F.3d at 1125. In any event, Mr. [redacted]'s detention and interrogation were not supported by any independent Fourth Amendment justification, and they undoubtedly delayed completion of the search. Those facts alone establish a Fourth Amendment violation.

The IJ perfunctorily rejected Petitioner's argument that his detention was unlawfully prolonged, stating that his "initial detention lasted for less than thirty minutes before Agent Webster interrogated [him]," and that "[t]he Court does not consider this to be an unreasonable amount of time." AR at 845. But the IJ ignored the elephant in the room—that the agents would have executed the search in far less time had they not interrogated the

workers at all, and that the agents conducted the raid in this way by design. The Court should vacate the agency's decisions and order suppression.[1]

B. *Summers* and *Mena* did not authorize ICE agents to detain Mr. [redacted] in an unreasonable manner.

Even if the Court concludes that ICE did not prolong and exploit Mr. [redacted]'s detention, it still must find the agents' conduct clearly unconstitutional because of the manner in which they detained him. As the opening brief explains, the ICE agents detained Mr. [redacted] in an unreasonably intrusive manner, contrary to *Summers* and *Mena*, by entering the restaurant with at least one gun drawn, locking the workers inside,[2]

---

[1] Although the agents certainly would have completed the search more quickly had they not interrogated the workers, the IJ made no finding as to how long the agents reasonably required to complete the search for documents. *See* AR at 845. The failure to make this finding was itself error. Once Petitioner established a *prima facie* case that the agents violated his Fourth Amendment rights under *Matter of Barcenas*, 19 I. & N. Dec. 609 (BIA 1988), the Government bore the burden of establishing that his detention was justified under the *Summers* exception, including by showing that it was not prolonged beyond the time needed to execute the warrant. *Cf. Royer*, 460 U.S. at 500 ("It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion [i.e., an exception to the Fourth Amendment's probable cause requirement] was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure."); *United States v. Hawkins*, 249 F.3d 867, 872 (9th Cir. 2001) ("The burden is on the Government to persuade the district court that a [warrantless] seizure comes under one of a few specifically established exceptions to the warrant requirement.") (internal quotation marks omitted).

[2] The Government suggests that the doors might not have been locked. *See* Resp. Br. at 15 n.7. The record, however, establishes that an agent took the keys from Mr. [redacted] and went to lock the doors—although Mr.

immediately handcuffing Mr. [redacted], and forcibly searching him before subjecting him to custodial interrogation. *See* Pet. Op. Br. at 35-41. In response, the Government offers only generalized, speculative assertions about the importance of officer safety, untethered to the record. As the Supreme Court and the Ninth Circuit have repeatedly made clear, however, courts must engage in fact-specific balancing to determine whether the manner of a *Summers* detention—including the use of handcuffs—is reasonable under the circumstances of each case. *See Mena*, 544 U.S. at 99-100; *Ganwich*, 319 F.3d at 1122-23; *Meredith v. Erath*, 342 F.3d 1057, 1061-63 (9th Cir. 2003).

The Government makes the remarkable argument that ICE agents may routinely subject *Summers* detainees to handcuffs and other restraints, regardless of the particular circumstances, except in "rare instances" involving "child[ren], bedridden, manifestly ill or injured" individuals. Resp. Br. at 38; *see also id.* at 41-42 (arguing that *Summers* and *Mena* support "routine measures . . . to reduce the risks posed by unknown persons detained during a search").

[redacted] did not "see [the agent] anymore" after that, AR at 398, because he was moved to the seating area for interrogation. *See id.* at 408. The record also establishes that at least one police officer stood guarding the door throughout the raid. *See id.* at 837. It is uncontested that the workers could not leave.

Fortunately, this position is foreclosed by this Court's precedent. In *Meredith*, this Court made clear that an officer may not use handcuffs during a *Summers* detention *unless* specific circumstances in that case justify it. *Meredith*, 342 F.3d at 1062-63. *Meredith* involved the detention of an apparently able-bodied adult; the Court still held that the use of handcuffs was unreasonable given the absence of any specific threat to officer safety. It therefore squarely forecloses the Government's position.[3]

The Government's assertion of near-blanket authority to use handcuffs is also incompatible with *Mena*, which did not adopt a categorical rule or even a presumption, but instead employed a balancing inquiry to determine whether handcuffs were reasonable under the circumstances. *Mena* emphasized that the operation in that case was "no ordinary search"—it was an "inherently dangerous" "search for weapons" with "a wanted gang

[3] The Government misreads *Meredith* as invalidating only the use of "overly tight handcuffs that caused . . . unnecessary pain." Resp. Br. at 38. But *Meredith* contains more than one holding. It ruled that the officers unlawfully subjected the plaintiff to painfully tight handcuffs for the first 30 minutes of her detention, 342 F.3d at 1063-64, *and* that using handcuffs *at all* was unreasonable in that case, announcing "the rule that detaining a person in handcuffs during the execution of a warrant . . . is permissible . . . only when justified by the totality of the circumstances." *Id.* at 1062-63. The separate holdings are apparent because the Court denied the officers qualified immunity for the first constitutional violation, but granted qualified immunity for the second. *Id.* at 1063 (noting that the right was not clearly established in 1998, but emphasizing that "[o]ur decision today makes it clear that such conduct, absent justifiable circumstances, will result in a Fourth Amendment violation.").

member resid[ing] on the premises"—and that there were only "two officers" detaining "four detainees." 544 U.S. at 100. Given these circumstances, *Mena* concluded it was reasonable for officers to handcuff the plaintiff while detaining her. Justice Kennedy wrote separately to stress that "[t]he use of handcuffs . . . must be objectively reasonable under the circumstances" and should not "become[] . . . routine." *Id.* at 102-03 (Kennedy, J., concurring). *See also id.* at 103 (noting that even if handcuffing was initially reasonable, it may become unreasonable if, "at any point during the search, it would be readily apparent . . . that removing the handcuffs would not compromise the officers' safety . . . .").

The circumstances here are a far cry from *Mena*. The agents were executing a daytime search of a taco restaurant, seeking documentary evidence of employment violations that involved no violence of any kind. Mr. [redacted] was unarmed, posed no threat to officer safety, and made no attempt to flee. AR at 395. The agents had no reason to believe that anyone at the restaurant was armed, violent, or involved in gang activities. No one offered any resistance; Mr. [redacted] and his coworkers were "orderly" and cooperative. *Id.* at 717-18; *see also id.* at 735.

These are precisely the sort of circumstances that this Court held in *Meredith*—five years before the El Balazo raids—made the use of handcuffs

unreasonable. In *Meredith*, the Court found the use of handcuffs unreasonable given the facts that the officer "was investigating tax related crimes, which, although felonies, are nonviolent offenses"; that the officer "had no reason to believe that the occupants were dangerous"; and that the detainee posed no "threat" and "made no attempt to flee." *Meredith*, 342 F.3d at 1063. The same is true of Mr. [redacted]'s detention, making the use of handcuffs unreasonable.[4]

The only "legitimate safety concern[]" the Government can muster is the presumed presence of "knives and other [unidentified] sharp objects" *to make tacos* in the restaurant's kitchen. Resp. Br. at 40. Naturally, however, cooking utensils are likely to be present in *any* home or restaurant. If hypothetical cooking utensils were enough to justify handcuffs, then handcuffs would be presumptively permissible in virtually all *Summers* detentions—they would become "routine," contrary to Justice Kennedy's specific warning. *Mena*, 544 U.S. at 102 (Kennedy, J., concurring).[5] When

[4] *See also Baird v. Renbarger*, 576 F.3d 340, 342, 347 (7th Cir. 2009) (denying qualified immunity to officer who pointed gun at plaintiff when executing a search warrant related to a "crime [that] itself does not involve violence; [where] there was no suggestion that anyone at the search location was armed or dangerous; and no one at the site presented any resistance.").

[5] The agency's historical worksite raid practices underscore the unreasonableness of the Government's position. Even when conducting raids of large factories, which presumably contained machinery and tools no less "dangerous" than the cooking utensils to which the Government points

assessing the reasonableness of a *Summers* detention, the Ninth Circuit does not recognize safety concerns that are merely "conjectural" or "speculative." *Ganwich*, 319 F.3d at 1123. The record must show specific reasons for the use of handcuffs; here, it does not.[6]

The fact that two of Mr. [redacted]'s coworkers were *not* detained in handcuffs during the search further undermines the Government's argument. *See* Pet. Op. Br. at 8, 36-47. The Government protests that the record does not conclusively establish whether those two employees *left* the restaurant or remained on site, *see* Resp. Br. at 41 n.20, but the point is not whether they stayed or left. Rather, the point is that they were not restrained in handcuffs, even though they were no less likely to endanger the officers or disrupt the search than was Mr. [redacted]. This discrepancy in treatment confirms that Mr. [redacted]'s detention in handcuffs was

---

here, agents routinely allowed workers to remain free of handcuffs. *See INS v. Delgado*, 466 U.S. 210, 213 (1984) (describing garment factory "survey" where "employees continued with their work and were free to walk around within the factory" while agents questioned them); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1036-37 (1984) (describing operation where agents entered a potato processing plant without shutting down operations).

[6] The Government also argues that "the record need not establish the actual existence of threats to persons or evidence to justify a *Summers* detention." Resp. Br. at 40. Here, the Government appears to be conflating two different questions. While *Summers* frees courts from making case-by-case determinations about whether detention *vel non* is permissible, 452 U.S. at 702, courts must still look to the circumstances *actually* presented in each case to determine whether the detention was carried out in a reasonable *manner*. *See supra* at 11-12; Pet. Br. at 35-39; *Mena*, 544 U.S. at 98-100.

unrelated to any legitimate officer safety or preservation-of-evidence rationale.

Moreover, the intrusion here went beyond handcuffs; the agents also frisked Mr. [redacted], forced him to his feet, took his wallet and searched its contents without consent or probable cause, and took his photograph for processing—all before Agent Webster asked him a single question. Given these highly invasive actions, his seizure "resemble[s] a full-fledged arrest," not a limited *Summers* detention. *Bailey*, 133 S. Ct. at 1041; *see also* Pet. Op. Br. at 41 n.8. Indeed, when asked why Mr. [redacted] was searched and handcuffed, Agent Webster testified that it was "standard" practice, explaining, "[t]hat's how we're trained to arrest people." AR at 736. All this happened *before* Agent Webster claimed she questioned Mr. [redacted] and acquired probable cause to believe he was removable—assuming the truth of her version of events. *See also* Pet. Op. Br. at 9. Neither *Summers* nor the record in this case justifies this degree of intrusive detention.

C. *Summers* and *Mena* did not authorize ICE agents to search Mr. [redacted]'s person or wallet.

Finally, *Summers* and *Mena* do not give officers any categorical power to *search* the people they have detained. This Court has made clear that to conduct even a *Terry*-style pat-down of a *Summers* detainee—let

alone a more intrusive search of the detainee's pockets, wallet, or personal effects—officers must point to specific facts amounting to reasonable suspicion that the detainee is armed. *See United States v. Davis*, 530 F.3d 1069, 1082 (9th Cir. 2008) (to frisk defendant who was properly detained under *Summers*, officers needed "reasonable . . . suspicion that he could be armed or posed a threat to their safety"); *United States v. Prieto-Villa*, 910 F.2d 601, 605 (9th Cir. 1990) (even during *Summers* detention, "there must be reasonable suspicion to justify frisking a person who is detained. Persons detained during a search . . . cannot be searched . . . simply because they are there.") (internal quotation marks omitted); *accord Denver Justice and Peace Comm., Inc. v. City of Golden*, 405 F.3d 923, 931-32 (10th Cir. 2005); *Leveto v. Lapina*, 258 F.3d 156, 165 (3d Cir. 2001) (Alito, J.); *see also Panaderia La Diana, Inc. v. Salt Lake City Corp.*, 342 F. Supp. 2d 1013, 1049 (D. Utah 2004). There were no such facts here.[7]

[7] The BIA recently adopted this reasoning in the cases of two other individuals who were arrested during the same El Balazo raids on May 2, 2008. *See Matter of O- M- and S- M-* (BIA Mar. 7, 2013) (non-precedential) (attached as Appendix A). In those cases, as here, agents searched respondents' purse and wallet without consent or individualized suspicion. The BIA held that the IJ failed to make necessary factual findings and erroneously put the burden on the respondents to show that the taint of the searches had not dissipated. *Id.* at *3-*4. The BIA remanded for further proceedings, correctly reasoning that "if the DHS officers illegally searched the respondents' personal property prior to engaging in what otherwise would have been lawful questioning of the respondents pursuant to the

The Government attempts to avoid this settled law by offering its own alternative version of the timeline of events. It concedes, as it must, that Mr. [redacted] was patted down and his wallet was removed from his pocket *before* Agent Webster approached and began questioning him. Resp. Br. at 18 n.9. But it posits that the agents may not have *opened* his wallet and looked at the identification cards inside until *after* Agent Webster's questioning, while they were inventorying his cash and bagging it for safekeeping. *Id*. This is pure speculation by counsel. Agent Webster, the Government's sole witness, did not see the agents searching Mr. [redacted] and removing his wallet; Mr. [redacted]'s testimony that the agents who searched him also searched his wallet stands uncontested. *See* Pet. Op. Br. at 9. In any event, it remains uncontroverted that ICE agents did search Mr. [redacted]'s *person*—without consent, a warrant, or the requisite individualized suspicion—before Agent Webster began questioning him. This search was a clear constitutional violation.

The IJ assumed, without deciding, that the agents had searched the contents of Mr. [redacted]'s wallet before the questioning began, but she nevertheless held that the search did not affect the lawfulness of his detention. AR at 846. This was error for two reasons. First, even if Agent

---

search warrant, such illegal conduct may render the [respondents' statements] subsequently inadmissible." *Id*. at *5 n.6.

Webster did not directly use the information on the identification cards to fill out the I-213, Mr. [redacted]'s alleged statements—made only after he knew that ICE had seen his identification cards—were the fruit of that unlawful search. *See Brown v. Illinois*, 422 U.S. 590, 605 & n.12 (1975). Second, the fact that ICE unlawfully searched Mr. [redacted]'s person affects the reasonableness inquiry, rendering his detention significantly more intrusive than *Summers* permits. *See, e.g.*, *Leveto*, 258 F.3d at 165. Thus, his detention cannot be justified by reference to *Summers*, and any statements he allegedly made while detained are the fruit of the poisonous tree and must be suppressed.

III. THE ICE AGENTS' VIOLATIONS OF GOVERNING FEDERAL REGULATIONS REQUIRE SUPPRESSION.

Petitioner's opening brief describes several regulatory protections that the agents violated when detaining and interrogating him. Pet. Op. Br. at 45-52. Petitioner also cited two recent Ninth Circuit cases holding that such regulatory violations warrant suppression when the regulation in question "serves a purpose of benefit" to the individual, *id*. at 45 (citing *Hong v. Mukasey*, 518 F.3d 1030, 1035 (9th Cir. 2008)), and that "[n]o showing of prejudice is required . . . when a rule is intended primarily to confer important procedural benefits upon individuals or when alleged regulatory violations implicate fundamental statutory or constitutional rights." *Id*.

(citing *Montes-Lopez v. Holder*, 694 F.3d 1085, 1091 (9th Cir. 2012) (holding violation of right to counsel required no showing of prejudice) (internal quotation marks and alteration omitted)).

Petitioner's regulatory arguments have independent significance for two reasons. First, the Court need not find the regulatory violations to be "egregious" to order suppression. *Cf. Orhorhaghe v. INS*, 38 F.3d 488, 493 (9th Cir. 1994) (Fourth Amendment violation must be "egregious" or "deliberate[]" to merit suppression). Second, with respect to Petitioner's argument under 8 C.F.R. § 287.8(b)(2) in particular, that regulation takes on added significance in light of the Government's reliance on *Summers* to defend the constitutionality of its conduct. Section 287.8(b)(2) plainly does not contain the broad exception for which the Government argues under *Summers*. It prohibits ICE agents from even "briefly detain[ing a] person for questioning" unless they have "reasonable suspicion, based on specific articulable facts, that the person . . . is . . . illegally in the United States." *Id.* It says nothing about an exception for search warrants. Thus, if this regulation has been violated, as explained below, then Petitioner must prevail regardless of whether or not *Summers* applies for purposes of the Fourth Amendment.

The Government's response to these regulatory arguments manifests a remarkable disregard for controlling precedent. The Government makes no mention of *Montes-Lopez* at all, and pays only lip service to *Hong*, before asking for extreme deference that has no support in the governing case-law. Resp. Br. at 50-51 (citing no authority for the assertion that "[u]ltimately, it should be left to the agency to decide whether a violation of a pre-hearing regulation warrants the extreme action of suppressing evidence at a removal hearing"). The Court should reject the Government's invitation to ignore its own case-law and should order termination of the proceedings in light of ICE's regulatory violations.

A. The regulations are enforceable.

The Government first argues that the ICE agents' regulatory violations do not merit suppression because the regulations provide only "'internal guidance,'" pointing to a boilerplate proviso at 8 C.F.R. § 287.12, which provides that the regulations do not "create any rights." *See* Resp. Br. at 49.

The most serious problem with this argument is that it is plainly contrary to *Hong*, *Matter of Garcia-Flores*, 17 I. & N. Dec. 325, 328 (BIA 1980), and decades of other precedent—from both before and after the promulgation of § 287.12—holding that suppression is an available remedy

for regulatory violations. Courts have long held that agencies have a basic duty to obey their own rules, and that in the immigration context, violations of those rules merits suppression and termination of proceedings in certain circumstances. *See Hong*, 518 F.3d at 1035 (recognizing *Garcia-Flores*'s rule that "a violation of agency regulations" merits suppression where the regulation "serve[s] 'a purpose of benefit to the [individual],'" and where "'the violation prejudiced interests of the [individual] which were protected by the regulation.'") (quoting *Garcia-Flores*, 17 I. & N. Dec. at 328); *accord Kohli v. Gonzales*, 473 F.3d 1061, 1066-67 (9th Cir. 2007); *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979); *Matter of Hernandez*, 21 I. & N. Dec. 224, 226 (BIA 1996). For the Government to prevail in its argument, the Court must find that 8 C.F.R. § 287.12, which was first promulgated more than a decade after *Garcia-Flores*, was intended to overrule that decision and do away with suppression for regulatory violations, and that the numerous subsequent cases in this and other circuits that continued to endorse suppression for regulatory violations were decided in error.

The Court should reject that view, and instead read the regulation in light of how the agency described it when it was promulgated. At that time, the agency described what is now § 287.12 as "a *standard* element for all

regulations affecting substantive federal criminal law enforcement authority" that "is only intended to ensure that the regulations do not create rights *not otherwise existing* in law." 59 Fed. Reg. 42406, 42414 (Aug. 17, 1994) (emphases added). In other words, the regulation should be read simply to confirm *Garcia-Flores*'s pre-existing rule that suppression is available only for violations of regulations that serve a "purpose of benefit to the [individual]," and not for regulations that merely set out internal operating guidelines. 17 I. & N. Dec. at 328.[8]

Further, the Government suggests generally that suppression should not be available for regulatory violations because the agency's own internal review processes deter misconduct better than does the suppression of evidence, specifically because an "agent might not even know that evidence was suppressed in a removal proceeding," making it "doubtful" that suppression would have a deterrent effect. Resp. Br. at 49 & n.24. The Government cites nothing for these assertions and makes no attempt to

[8] In *de Rodriguez-Echeverria v. Mukasey*, 534 F.3d 1047 (9th Cir. 2008), this Court noted that the agency "added a new regulation in 1994, which purports to limit the alien's ability to assert certain rights," but it declined to rewrite the standards that "potentially affect the conduct of every immigration officer and the rights of all aliens subject to arrest and interrogation," instead remanding to the BIA. *Id.* at 1052-53. On remand, the BIA did not decide the meaning of 8 C.F.R. § 287.12, holding that the regulation had not been violated at all. *See Matter of de Rodriguez-Echeverria*, 2010 WL 5173973 (BIA Nov. 30, 2010) (non-precedential).

reconcile them with the decades of case-law authorizing suppression for regulatory violations. Indeed, as this case shows, agents *do* know whether their conduct results in suppression, because they are generally required to testify whenever an individual makes a *prima facie* case for suppression under *Matter of Barcenas*, 19 I. & N. Dec. 609.

Most important, deterrence is meant to operate not just against individual officers, but as to an agency as a whole. *See Dunaway v. New York*, 442 U.S. 200, 221 (1979) (Stevens, J., concurring) (noting "the justification for the exclusion of evidence obtained by improper methods is to motivate the law enforcement profession as a whole—not the aberrant individual officer—to adopt and enforce regular procedures"). The availability of an "internal review process," Resp. Br. at 49, therefore, is no reason to abandon the remedy of suppression, particularly when Ninth Circuit law forbids that course of action.

B. For each of the regulations at issue, prejudice should be presumed, but even if it is not, Mr. [redacted] has suffered prejudice.

As explained in the opening brief, prejudice should be presumed because all three of the regulations at issue here protect fundamental constitutional or statutory rights, and their violation is sufficiently serious to require termination of the proceedings. *See* Pet. Op. Br. at 47, 50, 51; *see*

also Montes-Lopez, 694 F.3d at 1091 ("No showing of prejudice is required . . . 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.'") (other internal quotation marks omitted); *Garcia-Flores*, 17 I. & N. Dec. at 329 (prejudice may be presumed "[w]here compliance with the regulation is mandated by the Constitution" or "where an entire procedural framework, designed to insure the fair processing of an action affecting an individual[,] is created but then not followed by an agency"). The Government cursorily states that "in limited situations not applicable here, prejudice may be presumed," Resp. Br. at 50 n.25, but it makes no attempt to explain why it believes the regulations at issue here do not satisfy those circumstances. Prejudice should be presumed for the violations at issue here.

For example, the ICE agents violated 8 C.F.R. § 287.8(c)(2)(iii), which requires 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." This requirement implements "the most rudimentary demand[] of due process": Before the government deprives an individual of his liberty, it must tell him why. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). This is so basic a

constitutional right that Mr. [redacted] need not show more to merit suppression.[9] As Petitioner noted in his opening brief, neither the IJ nor the BIA considered his argument regarding the violation of § 287.8(c)(2)(iii). *See* Pet. Op. Br. at 51.

In addition, the agents' violation of 8 C.F.R. § 287.8(c)(2)(ii), which prohibits warrantless arrests except where there is probable cause to believe the individual is a removable non-citizen and will escape before a warrant can be obtained, violates so fundamental a protection that suppression and termination are required. This regulation derives from the statute, which authorizes ICE agents to make warrantless arrests only if they "ha[ve] reason to believe that the alien . . . is in the United States in violation of . . . law or regulation and is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357(a)(2). *See also Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 218 (9th Cir. 1995) (agents had no authority to arrest under § 1357(a)(2) where they "allege[d] . . . [no] grounds for a reasonable belief that [plaintiffs] were particularly likely to escape").[10]

---

[9] Petitioner can also show prejudice for the violation of this regulation insofar as his seizure rose to the level of an arrest at the outset, even before Agent Webster began interrogating him and obtained his alleged statements. *See* Pet. Op. Br. at 41 n.8.

[10] "The phrase 'has reason to believe' has been equated with the constitutional requirement of probable cause." *Tejeda-Mata v. INS*, 626 F.2d 721, 725 (9th Cir. 1980).

The Government suggests that the statute's flight risk requirement was satisfied here because "[a]fter Agent Webster interviewed [redacted], she determined that he was present in the United States unlawfully," and she "obviously was aware that if [redacted] was not placed under arrest, the agents would not have authority to detain him beyond the duration of the search." Resp. Br. at 54. These facts do not remotely establish probable cause to believe that Mr. [redacted] was likely to flee before a warrant could be obtained. If ICE could satisfy the flight risk requirement by pointing to nothing more than its suspicion that a person is removable and its desire to keep detaining the person after initiating a warrantless encounter, then ICE would *never* need to seek a warrant before making an arrest, and the statute and regulation would be a dead letter.

Even if prejudice is not presumed, the record shows that Mr. [redacted] suffered actual prejudice because the agents' regulatory violations "affected the outcome of the deportation proceedings." *Garcia-Flores*, 17 I. & N. Dec. at 329. For example, the agents violated 8 C.F.R. § 287.8(b)(2), which prohibits agents from even "briefly detain[ing] [a] person for questioning" without "reasonable suspicion, based on specific articulable facts," that he is removable. *Id.* As discussed in Mr. [redacted]'s opening brief, the agents had no reasonable suspicion to detain him at the outset of

the search. *See* Pet. Op. Br. at 46-47. His suspicionless seizure and interrogation, in violation of the regulation, unquestionably affected the outcome of these proceedings: The only evidence underlying his Notice to Appear came from the statements he allegedly made while detained during the raid. AR at 837. Were it not for ICE's regulatory violation, ICE would have had no evidence with which to initiate removal proceedings. Mr. [redacted] has therefore suffered actual prejudice because of the violation.

The Government contends that the violation of § 287.8(b)(2) is harmless because, either way, Mr. [redacted] could still have been detained and interrogated under *Summers* "consistent with the Fourth Amendment." Resp. Br. at 52. The Government's claim is wrong with respect to *Summers*, as explained above; the agents' actions were not at all consistent with the Fourth Amendment. *See supra* Part II. But even if that were not the case, it would not help the Government's regulatory argument because the *regulation* contains no *Summers* exception; it requires reasonable suspicion in all circumstances, without carving out an exception for the execution of search warrants. As the BIA has recognized, "[w]here 'the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures . . . even where the internal procedures are possibly more rigorous than otherwise would be required.'" *Garcia-Flores*,

17 I. & N. Dec. at 328 (quoting *Morton v. Ruiz*, 415 U.S. 199, 235 (1974)). The Court must focus on whether the regulatory violation itself caused prejudice to Mr. [redacted]—not whether, absent the regulation, his suspicionless detention might have been constitutionally permissible.

IV. CONCLUSION

For the foregoing reasons, the Court should grant the petition for review, vacate the agency's decisions, and grant relief as set forth in Petitioner's opening brief. Pet. Op. Br. at 52-53.

Dated: March 27, 2013

Respectfully submitted,

/s/ Katherine Desormeau

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
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

ESHA BHANDARI
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad Street
New York, New York 40001
Telephone: 212.284.7359
Facsimile: 212.549.2654
EBhandari@aclu.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

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,937 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

By: /s/ Katherine Desormeau

Attorney for: [redacted]

Date: March 27, 2013

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 March 27, 2013.

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: March 27, 2013
San Francisco, California

/s/ Katherine Desormeau
KATHERINE DESORMEAU