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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

OFFICE OF THE IMMIGRATION JUDGE

LOS ANGELES, CALIFORNIA

In the Matter of: Juan HERNANDEZ CUEVAS, Respondent, In Removal Proceedings.	No. [REDACTED] Hearing date: September 13, 2018 Hearing time: 1:00 P.M. Before: Hon. Judge Stancill

MOTION TO TERMINATE PROCEEDINGS

Introduction

Respondent, Juan Hernandez Cuevas, by and through counsel hereby moves to terminate these proceedings because ICE officials arrested him in violation of controlling regulations.

Mr. Hernandez files this motion in response to the egregious regulatory and constitutional violations that took place during a raid at Mr. Hernandez's workplace on September 25, 2017 in Los Angeles, California. ICE officials implemented a plan to enter the mechanic shop where Mr. Hernandez works—carrying semi-automatic weapons and disguised as peace officers—in order to detain and arrest every employee at the garage. Instead of procuring a warrant for Mr. Hernandez's arrest, ICE officials decided to enter the worksite in a brazen display of force and arrest and handcuff every worker on the premises, *without* making any individualized determinations of probable cause or even reasonable suspicion that Mr. Hernandez or his co-workers were noncitizens subject to removal.

The integrity of the administrative and judicial process requires that proceedings arising out of these regulatory violations be terminated. *See Sessions v. Sanchez*, 870 F.3d 901, 910 (9th Cir. 2017); *Gonzalez–Rivera v. I.N.S.*, 22 F.3d 1441, 1448 (9th Cir. 1994).

Statement of Facts

On September 25, 2017, Juan Hernandez Cuevas was at work at View Park Automotive, a garage in South Los Angeles where he worked as a car mechanic, when ICE agents violently raided his workplace, arresting Mr. Hernandez, the two other mechanics employed at the garage, and the garage's owner. *See generally* Exh. 1 (Declaration of Respondent Hernandez).

The entire raid was captured on the garage's surveillance cameras. This footage corroborates Mr. Hernandez's account of how the raid occurred. Exhs. 3 and 4 (Video Footage); *see also* Exh. 2 (Declaration of Marco Loera describing the garage's surveillance cameras).

Just before 1:30 p.m., at least six ICE agents bearing semi-automatic weapons and wearing jackets or vests that read POLICE stormed the shop, entering through the front gate carrying their weapons. *See* Exh. 1 at ¶ 4; Exh. 3 at 1:11–1:45;[1] Exh. 6 at ¶¶ 3–4, 7 (Declaration of Vanessa Alba). Without identifying themselves, two agents with their guns drawn immediately ordered everyone in the garage—the shop owner, the three mechanics, a customer and a vendor who had just delivered parts and was in his truck about to pull out of the garage—to freeze and put up their hands. Exh. 1 at ¶ 4; Exh. 3 at 1:11–2:00; Exh. 4 at 2:17–2:30. Everyone complied, including Mr. Hernandez. *See id.* One agent stood near the entrance gate, preventing anyone from leaving or entering. *E.g.* Exh. 3 at 2:25. Mr. Hernandez did not feel he was free to leave, and, neither he, nor the other men, were in fact free to leave. Exh. 1 at ¶ 6; *see also* Exh. 6 at ¶ 5.

The agents then ordered Mr. Hernandez and the other garage employees to stand against the nearest car with their hands on its roof. Exh. 1 at ¶ 7; Exh. 3 at 2:20–2:30. Without informing any of the men who they were or why they were arresting them, the agents proceeded to handcuff all of the employees. Exh. 1 at ¶ 8.

Specifically, at 1:30 pm, one agent approached Mr. Hernandez. Exh. 3 at 2:42–2:58 (showing ICE agent approaching, searching and handcuffing Mr. Hernandez, who was wearing a blue shirt). Without asking him any questions, not even for his name, the agent took Mr. Hernandez's hands, pulled them behind his back and handcuffed him. *Id.*; Exh. 1 at ¶ 8. After

[1] The pinpoint citations for Exhibits 3 and 4 are timestamps that denote the minutes and seconds elapsed on the video files submitted as evidence.

handcuffing Mr. Hernandez, the agent patted him down. Exh. 3 at 2:42–2:58; Exh. 1 at ¶¶ 8–10. As the agent patted him down, he asked Mr. Hernandez to identify himself. Exh. 1 at ¶¶ 8–10. Before Mr. Hernandez could answer, the agent found Mr. Hernandez's wallet in his pocket and removed his California driver's license. *Id.* The agent asked Mr. Hernandez no other questions, including about his immigration status, and Mr. Hernandez provided no information. *Id.*

The agent then walked Mr. Hernandez, handcuffed, over to where the other two mechanics, who had also been handcuffed, were being detained, and the three men stood together for a few minutes. Exh. 3 at 2:50–5:00. During this time, the ICE agents permitted the customer who had been waiting for work to be completed on his car to go, and allowed a man who was at the shop delivering parts and who had climbed back into his pickup immediately prior to the raid to drive away. Exh. 3 at 4:45–5:00. The agents, however, continued detaining Mr. Hernandez and his colleagues. *Id.*

After a few minutes, ICE agents put Mr. Hernandez and the other two mechanics (but not the shop owner) into a black SUV. Exh. 1 at ¶ 12; Exh. 3 at 7:45–9:45; Exh. 6 at ¶ 6. ICE agents drove Mr. Hernandez and his colleagues to a processing facility in downtown Los Angeles. This was the first time Mr. Hernandez learned that the officers who arrested him were ICE agents. Exh. 1 at ¶ 14. During the ride, an agent asked Mr. Hernandez questions about the names of his parents and of any children. Exh. 1 at ¶ 15.

At the processing facility, Mr. Hernandez was asked to sign papers, answer questions, and give his fingerprints. Shortly thereafter, he was transferred to the Adelanto Detention Facility. Exh. 1 at ¶¶ 15–16.

Mr. Hernandez lives in Los Angeles with his wife and young daughter, and he is their sole provider. Exh. 1 at ¶ 17. Prior to this raid, Mr. Hernandez had no contact with immigration authorities.

Procedural History

On September 25, 2017, ICE took Mr. Hernandez into custody and issued a Notice to Appear charging him as removable pursuant to Section 212(a)(6)(A)(i) of the Immigration and Nationality Act.

On October 26, 2017, Mr. Hernandez appeared with undersigned counsel Megan Brewer before Judge Penalosa in Adelanto, California. The Court granted Mr. Hernandez release on a $5,000 bond and, on October 31, 2017, Mr. Hernandez was released from custody upon paying the bond. *Id.* Following his release, Mr. Hernandez filed a motion to transfer venue to Los Angeles, California, which was granted on November 27, 2017.

Summary of Argument

Mr. Hernandez respectfully moves for termination of these proceedings. ICE agents violated the regulations governing their authority to conduct investigative detentions and arrests by arresting and detaining Mr. Hernandez without a warrant and absent individualized reasonable suspicion or probable cause. *See* 8 C.F.R. 287.8(b)–(c). These regulations are designed to implement the protections of the Fourth Amendment to the U.S. Constitution and safeguard the rights of people like Mr. Hernandez. *See id*.; U.S. Const. amend. IV; *Sanchez*, 870 F.3d at 910. Because these proceedings result from ICE agents' violation of governing regulations, this Court should grant Mr. Hernandez's motion to terminate. *See Matter of Garcia–Flores*, 17 I. & N. Dec. 325, 328 (1980).

Argument

I. Removal Proceedings Should be Terminated Because ICE's Arrest and Detention of Mr. Hernandez Cuevas was Unlawful

This Court should terminate Mr. Hernandez's proceedings because ICE agents' arrest of Mr. Hernandez violated governing regulations, statutes, and the Fourth Amendment to the U.S. Constitution. First, ICE officials detained and arrested Mr. Hernandez without reason to believe that he was a noncitizen subject to removal. *See* 8 C.F.R. § 287.8(b)(1), (2); 8 C.F.R. § 287.8(c)(2)(i). Second, ICE officials arrested Mr. Hernandez without a warrant, even though they had no reason to believe that he was "likely to escape" before a warrant could be obtained. *See id.* § 287.8(c)(2)(ii). Third, ICE officials entered Mr. Hernandez's place of business disguised as police officers and failed to identify themselves as immigration enforcement agents. *See id.* § 287.8(c)(2)(iii).

This conduct was plainly unlawful. ICE agents knew nothing about Mr. Hernandez when they pointed their guns at him, ordered him to freeze and put his hands up, patted him down, took his wallet, and placed him under arrest—other than that he appeared to work at the garage and looked Latino. The agents did not even know his name before detaining him.

The agents also had no reason to believe that Mr. Hernandez was likely to escape before a warrant could be obtained—Mr. Hernandez, whose wife and child live in Los Angeles with him, came to work regularly and could have been located at the garage on any day.

Finally, ICE agents failed to identify themselves as immigration agents or explain the reasons for Mr. Hernandez's arrest. Mr. Hernandez did not know the arresting agents were immigration officers until he was placed in a van and transported to an ICE processing facility.

Because ICE agents disregarded regulatory provisions designed to safeguard Mr. Hernandez's constitutional rights, the Court should terminate proceedings. *See Sanchez*, 870 F.3d at 912–13.

A. Standards for Termination

An immigration court must terminate removal proceedings when the government violates its own immigration regulation if (1) the regulation serves "a purpose of benefit to [the noncitizen]" and (2) the violation prejudiced the noncitizen's protected "interests in such a way as to affect potentially the outcome of the[] deportation proceeding." *Garcia–Flores*, 17 I. & N. at 328; *accord Sanchez*, 870 F.3d at 912.

The Ninth Circuit has held that the regulations at issue in this case—8 C.F.R. § 287.8(b) and (c)— were designed to benefit noncitizens by protecting their right to privacy and preventing them from being subject to racial profiling and unjust detention. *Sanchez*, 870 F.3d at 912–13. The regulations enforce statutory and constitutional constraints on agents' authority to carry out detentions and arrests. 8 C.F.R. § 287.8 sets out the rules that "*must* be adhered to by every immigration officer involved in enforcement activities." *Id.* (emphasis added). ICE officials may only detain an individual for questioning if they have "reasonable suspicion, based on specific articulable facts, that the person being questioned" is a noncitizen without authorization to be in the United States. 8 C.F.R. § 287.8(b)(1), (2). Similarly, 8 C.F.R. § 287.8(c), like the statute it implements, INA § 287(a)(2), only permits ICE to make a warrantless arrest if it has "reason to believe" the person "is an alien illegally in the United States" and is likely to escape before a warrant can be obtained. 8 C.F.R. § 287.8(c)(2)(i)–(ii). "Reason to believe" is the constitutional equivalent of "probable cause." *Tejeda–Mata v. Immigration & Naturalization Serv.*, 626 F.2d 721, 725 (9th Cir. 1980). *See also, e.g., U.S v. Cantu*, 519 F.2d 494, 496 (7th Cir. 1975) ("The

words of the statute 'reason to believe' are properly taken to signify probable cause."). The regulation also requires ICE agents to identify themselves as immigration officers authorized to make arrests and to provide reasons for the arrest "as soon as it is practical and safe to do so." 8 C.F.R. § 287.8(c)(2)(iii). Therefore, 8 C.F.R. § 287.8(b) and (c) serve "a purpose of benefit" to Mr. Hernandez: they protect his rights under the statute and under the Fourth Amendment.

"Where compliance with the regulation is mandated by the Constitution, prejudice may be presumed." *Garcia–Flores*, 17 I. & N. at 329. This presumption of prejudice for certain regulatory violations is rooted in a long line of Supreme Court cases invalidating agency action when the agency violates a regulation promulgated to protect a fundamental right. *See, e.g.*, *Bridges v. Wixon*, 326 U.S. 135, 152–53 (1945) (invalidating a deportation order based on statements obtained in violation of the INS's rules designed "to afford [the noncitizen] due process of law"); *see also Leslie v. Holder*, 611 F.3d 171, 180 (3d Cir. 2010) (collecting cases and concluding, "For the sake of emphasis we repeat: we hold that when an agency promulgates a regulation protecting fundamental statutory or constitutional rights of parties appearing before it, the agency must comply with that regulation. Failure to comply will merit invalidation of the challenged agency action without regard to whether the alleged violation has substantially prejudiced the complaining party."). As noted, 8 C.F.R. § 287.8 creates an "entire procedural framework" that was "designed to insure the fair processing of an action affecting an individual," *Garcia–Flores*, 17 I. & N. at 328—here, by safeguarding that individual's Fourth Amendment rights. *Sanchez*, 870 F.3d at 912–13. Therefore, ICE's violation of these regulations "can be deemed prejudicial." *See Garcia–Flores*, 17 I. & N. at 329.

B. ICE Agents Detained and Arrested Mr. Hernandez Without Reasonable Suspicion or Probable Cause to Believe He Was a Noncitizen Subject to Removal

This Court should terminate Mr. Hernandez's proceedings because ICE agents detained and arrested him in violation of 8 C.F.R. §§ 287.8(b)(1)–(2) and 287.8(c)(2)(i). As described above, the regulations governing enforcement operations make clear that ICE officials may only detain an individual for questioning if they have "reasonable suspicion, based on specific articulable facts, that the person being questioned" is a noncitizen without authorization to be in the United States. 8 C.F.R. § 287.8(b)(1). Absent reasonable suspicion, an official may only question an individual so long as that person knows that he or she is free to leave. *See* 8 C.F.R. § 287.5; *id.* 8 C.F.R. § 287.8(b)(1)–(2); *see also* 59 Fed. Reg. 42406, 42411 (Aug. 17, 1994) ("[Q]uestioning must not lead the person being questioned to believe that he or she is not free to leave the presence of the officer."); *I.N.S. v. Delgado*, 466 U.S. 210 (1984); *United States v. Manzo–Jurado*, 457 F.3d 928, 936 (9th Cir. 2006) (finding Fourth Amendment violation in immigration context because detention lacked "particularized suspicion of the person to be stopped").

Further, 8 C.F.R. § 287.8(c)(2) mandates that "[a]n arrest shall be made only when the designated immigration officer has reason to believe that the person to be arrested has committed an offense against the United States or is an alien illegally in the United States." *Id.* As explained above, this substantive standard articulated in this provision is equivalent to the constitutional requirement of probable cause. *Tejeda–Mata*, 626 F.2d at 725. Probable cause exists when "the facts and circumstances within [an officer's] knowledge and of which [he has] reasonably trustworthy information [a]re sufficient to warrant a prudent man in believing that [the arrestee] has committed or was committing an offense." *Beck v. State of Ohio*, 379 U.S. 89, 91 (1964). Although "[c]onclusive evidence of guilt is not necessary to establish probable cause," "[m]ere

suspicion, common rumor, or even strong reason to suspect are not enough." *McKenzie v. Lamb*, 738 F.2d 1005, 1008 (9th Cir. 1984) (citing *Henry v. United States*, 361 U.S. 98, 101 (1959). Critically, the facts an officer relies on to justify arrest must be "particularized with respect to *that person*." *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (emphasis added).

It is "well-settled" in the Ninth Circuit that a person's detention and arrest cannot be justified by discriminatory factors: neither an individual's apparent race or ethnicity nor his language ability provide reasonable suspicion or probable cause to justify his seizure. *See Sanchez*, 870 F.3d at 910 (it is "clearly established" that "seizing a person solely based on ethnic appearance" is unlawful); *Orhorhaghe*, 38 F.3d at 494 ("[A]llowing INS agents to seize and interrogate an individual simply because of his foreign-sounding name *or* his foreign-looking appearance risks allowing race or national-origin to determine who will and who will not be investigated."); *see also Manzo–Jurado*, 457 F.3d at 935 (individuals' appearance as a Hispanic work crew, inability to speak English, proximity to the border, and unsuspicious behavior, taken together, did not provide a federal immigration officer reasonable suspicion to conduct a stop).

In the present case, ICE officers detained Mr. Hernandez immediately upon entering View Park Automotive. Agents carrying semi-automatic weapons ordered the garage workers to freeze and put up their hands, shepherded the workers into the outside bay, handcuffed them, and remained near the exits. The officers' actions, demeanor, and, crucially, weaponry "communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Orhorhaghe*, 38 F.3d at 494 (relevant factors include whether a person's path is blocked, whether officers make clear they are carrying weapons, and whether officers act in an authoritative manner); *Manzo–Jurado*, 457 F.3d at 934 n.3 (order requiring subject to "show hands" constituted detention); *LaDuke v. Nelson*, 762 F.2d 1318, 1326 (9th Cir. 1985) (stationing

officers at exits was evidence that those inside were detained). No reasonable person in Mr. Hernandez Cuevas's position—handcuffed and surrounded by armed ICE agents—would have felt "free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). ICE officials decided to point their weapons at Mr. Hernandez and handcuff him *first*, then take him into their vehicle, and only *then* ask questions. The only thing the officers knew about Mr. Hernandez when they decided to detain him was his place of business and his Latino appearance. As the cases cited above make plain, this cannot provide probable cause to suspect that he is a noncitizen subject to removal.

Neither the location of Mr. Hernandez's arrest (his workplace) nor any probable cause the agents might have had to arrest anyone else in the shop alters this analysis. The Ninth Circuit has made clear that an immigration officer may not "detain a worker short of an arrest" during a worksite raid without having "an objectively reasonable suspicion that the *particular* worker" is a noncitizen subject to removal. *Martinez v. Nygaard*, 831 F.2d 822, 827 (9th Cir. 1987) (emphasis added); *Benitez–Martinez v. I.N.S.*, 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."); *cf. Manzo–Jurado*, 457 F.3d at 936, 940 (holding ICE agents lacked reasonable suspicion to detain member of Hispanic, Spanish-speaking work crew near the Canadian border). 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.* These same principles apply with even greater force in the case of an arrest, which must be supported by probable cause. *See Wong Sun v. United States*, 371 U.S.

471, 479 (1963) ("It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion . . . .").

ICE agents detained Mr. Hernandez without reasonable suspicion and arrested him without probable cause in violation 8 C.F.R. §§ 287.8(b)(1)–(2) and 287.8(c)(2)(i). Because these regulations serve to protect individuals like Mr. Hernandez and are part of a regulatory scheme designed to implement constitutional requirements, *see Sanchez*, 870 F.3d at 912–13, ICE agents' violation is presumptively prejudicial. *Garcia–Flores*, 17 I. & N. at 329. This Court should terminate Mr. Hernandez's removal proceedings on the basis of these violations.

C. ICE Agents Arrested Mr. Hernandez without Obtaining a Warrant or Making a Determination of Likelihood of Escape

Mr. Hernandez's proceedings should be terminated for the additional reason that ICE officials arrested him without a warrant and without making an individualized determination that he was a flight risk. 8 C.F.R. § 287.8(c)(2), which implements INA § 287(a)(2), requires agents to obtain a warrant prior to making an arrest unless the official has "reason to believe" the person "is likely to escape before a warrant can be obtained." *Id.* The Supreme Court and the Ninth Circuit have long recognized that ICE may only carry out a warrantless arrest if it has made the individualized determination that the person at issue is likely to escape. *See, e.g.*, *Arizona v. United States*, 567 U.S. 387, 408–09 (2012) (invalidating as preempted an Arizona statute that purported to give Arizona law enforcement unlimited warrantless arrest authority, emphasizing that ICE's warrantless arrest authority is limited to situations when there is a likelihood of escape); *Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 218 (9th Cir. 1995) (finding no grounds to believe that the *specific individuals* at issue were "particularly likely to escape"); *United States v. Meza–Campos*, 500 F.2d 33, 34 (9th Cir. 1974) (applying an individualized likelihood-of-escape analysis); *Araujo v. United States*, 301 F. Supp. 2d 1095, 1101–02 (N.D.

Cal. 2004) (holding that a warrantless INS arrest could not be sustained under § 1357(a)(2) because there was no likelihood of escape).

Here, agents had absolutely no reason to believe that Mr. Hernandez would escape the garage—his place of business, where he had been employed for seven years—before they could obtain a warrant for his arrest. The agents approached the garage from an adjacent parking lot, exiting from several vehicles and entering in a coordinated manner. *See* Exh. 1 at ¶ 4; Exh. 3 at 1:11–1:45. The officials' conduct, as evident in the video recording, makes clear that this raid was planned. Further, the raid on View Park Automotive took place during a week of similar ICE enforcement actions in cities across the United States. *See, e.g.*, Sam Levin, *Hundreds of Immigrants Arrested in Sanctuary Cities Across US*, The Guardian (Sept. 29, 2017, 9:12 PM), https://www.theguardian.com/us-news/2017/sep/28/sanctuary-city-raid-deportation-trump-immigration (attached as Exh. 5). These facts strongly suggest that ICE knew in advance that it would carry out at least one arrest at the shop on that date; it was incumbent upon them to secure a warrant.

As for Mr. Hernandez in particular: he had been attending work regularly at the garage for years. He lives with his wife and young daughter, both U.S. citizens, and he is their sole provider. Exh. 1 at ¶ 17; c*f. Araujo*, 301 F. Supp. 2d at 1101–02 ("The government has not attempted to demonstrate, and cannot demonstrate, that Jose Araujo was 'likely to escape before a warrant can be obtained.' The only evidence in the record is to the contrary: at the time of his arrest Jose Araujo was living with his wife and had filed an Application to Adjust Status to lawful permanent resident, hardly evincing an intention to flee."). Nothing about his circumstances could give rise to a reasonable belief that he might escape.

Nothing in the record indicates that ICE officials could not have secured a warrant prior to approaching the garage, nor that they made the individualized determination that Mr. Hernandez was a flight risk. Therefore, Mr. Hernandez was arrested in violation of 8 C.F.R. § 287.8(c)(2). Because this regulation protects his constitutional rights and is part of a comprehensive scheme designed to protect those in his situation, *see Sanchez*, 870 F.3d at 912–13, Mr. Hernandez was presumptively prejudiced by this violation and this Court should terminate these proceedings.

D. ICE Agents Failed to Identify Themselves as Immigration Officers

Third, the ICE officials who arrested Mr. Hernandez and his co-workers failed to identify themselves as immigration enforcement agents as required by 8 C.F.R. § 287.8(c)(2)(iii)(A). The regulation provides that, at the time of arrest, an agent shall "identify himself or herself as an immigration officer who is authorized to execute an arrest . . . as soon as it is practical and safe to do so." *Id.* But in this case, ICE officials failed to identify themselves promptly: Mr. Hernandez did not know that the agents were immigration officers until he was handcuffed, transferred into an SUV, and transported to an ICE processing facility. Exh. 1 at ¶ 14. Indeed, the ICE officials who conducted the raid on View Park Automotive did so disguised as peace officers, wearing bulletproof vests or windbreakers that read POLICE. Exh. 1 at ¶ 5; Exh. 3; Exh. 4; Exh. 6 at ¶¶ 3–4, 7.

Once again, the regulations that ICE agents violated in the course of Mr. Hernandez's arrest are part of "an entire procedural framework, designed to insure the fair processing of an action affecting an individual," that was not followed by the agency, *Garcia–Flores*, 17 I & N. Dec. at 329. Violation of just one of these regulations would warrant termination, because the regulations are designed to implement statutory and constitutional mandates. *Id.* In this case, ICE officers violated *multiple* parts of a coordinated regulatory scheme designed to benefit individuals

like Mr. Hernandez; therefore, the violations that led to Mr. Hernandez's arrest "can be deemed prejudicial." *Id.* Finally, if this Court were to require an individualized showing of prejudice, Mr. Hernandez could easily clear this bar: he simply would not have been put into federal custody, answered the agents' questions, or provided his fingerprints were it not for his unlawful arrest. Termination is the proper remedy.

II. Relief Requested

Mr. Hernandez respectfully requests that the Court terminate these proceedings because ICE violated governing regulations in the course of his detention and arrest.

Dated: December 14, 2017

Respectfully submitted,

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