UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

NERY VIDAL REMIREZ ZAPET; Petitioner, vs. LADEON FRANCIS, *ICE Atlanta Field Office Director*; and TODD LYONS, *in his official capacity as Acting Director of Immigration and Customs Enforcement*; and KRISTI NOEM, *Secretary of Homeland Security* And PAMELA BONDI, *U.S. Attorney General.* Respondents.	)	CASE No.: 1:25-cv-07085-VMC

PETITIONER'S REPLY IN SUPPORT OF MOTION FOR TRO/ PRELIMINARY INJUNCTION

I. The Court Has Jurisdiction Over The Unlawful Arrest Claim

Contrary to Respondents' claim, 8 U.S.C. § 1252(g) does not bar this Court from reviewing Petitioner's unlawful arrest claim (Count 11). This argument by Respondents has been rejected in each and every similar case before this Court which have granted writs of habeas to similarly-situated petitioners. *See Rojano Gonzalez v. Sterling et al*, 1:25-cv-06080-MHC, *Hernandez v. Udzinski* et al, 2:25-cv-00373-RWS, *Ortiz de Leon v. Pierce, et. al.*, 4:25-cv-00315-WMR and *M.C.H.L. v. Roberson, et. al*, 4:25-cv-00329-WMR, just to name a few of counsel's cases.

"The provision [§ 1252(g)] applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings,

adjudicate cases, or *execute* removal orders." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (emphasis in original); *see also Jennings v. Rodriguez*, 583 U.S. 281, 294 (2018) ("We did not interpret this language to sweep in any claim that technically can be said to 'arise from' the three listed actions of the Attorney General. Instead, we read the language to refer to just those three specific actions themselves."). "When asking if a claim is barred by §1252(g), courts must focus on the action being challenged." *Canal A Media Holding, LLC v. United States Citizenship and Immigr. Servs.*, 964 F.3d 1250, 1258 (11th Cir. 2020; *Garcia v. Noem*, 2025 WL 3041895, at *1 (M.D. Fla. Oct. 31, 2025).

Respondents' reliance on *Gupta v. McGahey*, 709 F.3d 1062, 1064 (11th Cir. 2013) is unavailing. First, Gupta did not challenge any legal bases for his detention in a habeas petition. Instead, Gupta claimed generally under *Bivens* that all ICE agents' actions related to the initiation of removal proceedings violated his constitutional rights. Thus, the decision in *Gupta* does not demonstrate that § 1252 (g) strips this Court of jurisdiction to adjudicate Petitioners' habeas claims. *See Villa v. Normand*, No. 5:25-CV-100, 2025 WL 3188406, at *5 (S.D. Ga. Nov. 14, 2025). As the district court recently explained in *Villa v. Normand*, where the petitioner (like Mr. Zapet here) was only challenging the underlying legal bases of detention; not directly challenging his removal proceedings or a decision or action to commence proceedings, adjudicate cases, or execute removal orders, *the Gupta* case was "not

analogous." 2025 WL 3188406, at *4. The court concluded that the "decision in *Gupta* does not demonstrate that § 1252(g) strips this Court of jurisdiction to adjudicate Petitioners' habeas claims." *Id.*

Second, in *Gupta*, ICE already had a valid and approved arrest warrant as well as a Notice to Appear (NTA) for removal proceedings and specifically came to serve the NTA, execute the arrest warrant, and detain Gupta. Thus, Gupta was challenging actions related to the initiation of his removal proceedings. Conversely here, ICE's wrongful conduct stems from the unlawful, warrantless arrest that occurred *before* Petitioner was served with a NTA and thus, *before* any decision to commence removal proceedings was made. *See Bogomazov v. United States Dep't of Homeland Sec.*, No. 1:20-CV-24482, 2022 WL 769801, at *10 (S.D. Fla. Feb. 27, 2022), report and recommendation adopted, No. 20-24482-CIV, 2022 WL 767104 (S.D. Fla. Mar. 14, 2022) (finding Gupta inapplicable and concluding the court had jurisdiction over a habeas petition where "the alleged wrongful conduct here stemming from the first arrest occurred *before* Plaintiff was served the Notice to Appear and, therefore, *before* removal proceedings were initiated).

As the court in *Brito Matom v. ICE*, explained, "[s]ignificantly, the Eleventh Circuit relied on the fact that ICE's alleged misconduct occurred after it served Gupta with a notice to appear and secured a warrant for his arrest, reasoning that "[s]ecuring an alien while awaiting a removal determination constitutes an action

taken to commence proceedings." *Brito Matom v. ICE / U.S. Immigr. & Customs Enf't*, No. 2:25-CV-648-JES-NPM, 2025 WL 2577424, at *2 (M.D. Fla. Sept. 5, 2025). The court continued that unlike *Gupta*, the notice to appear was not served on Brito Matom (and no warrant was executed for his arrest) until after he was detained and therefore "the government's alleged misconduct during Brito Matom's arrest cannot be considered to arise from the decision to commence or execute removal orders." *Id.* The *Brito Matom* court emphasized that the fact "that removal proceedings were ultimately initiated does not divest this Court of jurisdiction over Brito Matom's claims involving ICE conduct that occurred before the initiation of removal proceedings." *Id.*; see *Gonzales v. FedEx Ground Package System, Inc.*, No. 12-CV-80125-RYSKAMP/HOPKINS, 2013 WL 12080223, at *10 (S.D. Fla. Aug. 1, 2013) ("[T]he fact that removal proceedings were ultimately initiated is not enough to divest this Court of jurisdiction."). Several courts have held the same. *See, e.g., Najera v. United States*, 926 F.3d 140, 141 (5th Cir. 2019) (concluding that Section 1252(g) did not deprive the court of jurisdiction over the plaintiff's claims where "ICE filed the charging document—the notice to appear—with the [ ] Immigration Court ... two days after [the plaintiff's] release from his allegedly false imprisonment"); *Nava v. Dep't of Homeland Sec.*, 435 F. Supp. 3d 880, 895 (N.D. Ill. 2020) (concluding that Section 1252(g) did not deprive the court of jurisdiction over the claims against ICE because the alleged wrongdoing "occurred

well before the government decided to initiate removal proceedings against [p]laintiffs, and therefore does not arise from the prosecutorial decisions listed in Section 1252(g)") (quotations and citations omitted); *Medina v. U.S. Dep't of Homeland Sec.*, No. C17-218-RSM-JPD, 2017 WL 2954719, at *16 (W.D. Wash. Mar. 14, 2017), *report and recommendation adopted*, 2017 WL 1101370 (W.D. Wash. Mar. 24, 2017) (concluding that Section 1252(g) did not deprive the court of jurisdiction over the "[p]etitioner's constitutional claims regarding his arrest and detention [because they] relate only to events that occurred prior to the decision to commence removal proceedings by filing a Notice to Appear").

II. Factual Issues Supporting Unlawful Arrest.

Next, Respondents' brief reveals material factual disputes that go to the heart of the legality of Petitioner's arrest and continued detention by U.S. Immigration and Customs Enforcement (ICE). To the extent necessary, Petitioner respectfully requests that the Court conduct an evidentiary hearing to resolve these factual issues, as live testimony is essential to a fair and accurate determination of the lawfulness of the arrest, the subsequent initiation of removal proceedings, and the ongoing detention. However, from the I-213 in this case (ECF No. 11-2) it is clear that the ICE agent's arrest of Petitioner was improper.

Specifically, the government's response at ECF 11, citing (Graumenz Decl., Ex. A. (Form I-213), is belied by its own exhibits. *See* ECF No. 11-2 (Ex. A Form I-

213). The I-213 does not state the individual, who ICE officers had been tracking, was in the car with Petitioner and the other arrestees. The narrative also does not state that the target "was subject to arrest for different reasons." (Graumenz Decl., Ex. A. (Form I-213). Further, the declaration from Officer Graumenz does not mention the details of the arrest at all. *See* ECF 11-1. It merely refers back to the I-213 and says that if Petitioner is ordered removed, ICE can remove him.

Instead, the I-213 shows that Petitioner was a collateral arrest only encountered for being in the area while officers were investigating a specific target (another individual). ECF 11-2. The I-213 never states that the target came out of the building or entered the vehicle with Petitioner. *See id.* Instead, it reports "Officers noticed that several individuals [not including the target] exit the last known residence of identified target and enter a vehicle that was picking up just outside the target residence. ERO Officers followed the vehicle and conducted a vehicle stop...." *Id.* In other words, a group of individuals, who had no known or obvious affiliation with the "target," left a building in the morning and got into a vehicle that was picking them up, presumably to go to work, none of the individuals was identified as the "target" and the vehicle was followed by ERO officers without probable cause and stopped shortly thereafter. This shows that Petitioner was stopped and arrested based solely on his proximity to a building

associated with the target and his presence at the surveilled location, without any individualized suspicion or confirmation of his identity ***prior*** to the stop.

Next, the I-213 details that the ERO officers, who "were working in a plain clothes capacity but were wearing their agency-branded outer armor carriers and had their agency badges prominently displayed)," approached the driver/passengers in the vehicle and identified themselves as "Police." *Id.* The ERO officers conducted "a brief field interview to confirm identity and nationality," during which, Petitioner "freely admitted to being a citizen of Guatemala." *Id.* The narrative does not provide any indication that Petitioner attempted to flee or resist. *See id.* Yet, the narrative claims that "[c]onsidering the totality of circumstances, including the subject's lack of U.S. identification, unwillingness to provide a valid address in the US, and the mobile setting of the encounter, Officer Musheno had probable cause to believe was likely to escape before a warrant could be obtained. Therefore, Officer Musheno effected a warrantless arrest." Notably, despite Officer Musheno's alleged concerns, the "Subject was taken into ICE custody without incident."

These facts, provided by Respondents, show that Petitioner was followed because he and the other individuals looked Hispanic and without probable cause. Further, Respondents admit that Petitioner was arrested without a warrant and fail to articulate any probable cause. Thus, there is a factual dispute as the officers

clearly did not have probable cause to arrest Petitioner or any facts specific to *Petitioner* to justify a warrantless arrest under the Fourth Amendment and 8 U.S.C. § 1357(a)(2). An officer's mere assertion that someone is likely to escape before a warrant could be obtained is insufficient.

In summary, the key factual issues—probable cause, the circumstances and motivation for the arrest, and the lawfulness of continued detention—are genuinely disputed and material to the outcome of the habeas petition. These issues cannot be resolved on the papers alone and require the Court's fact-finding through live testimony and cross-examination, unless the Court agrees with Petitioner based on the paperwork and grants unconditional and immediate release. The credibility of the witnesses, the accuracy of the government's account, and the existence (or lack thereof) of individualized suspicion are all factual matters that are best determined through an evidentiary hearing. These are not mere technicalities; they go to the heart of whether the arrest complied with the Fourth Amendment and 8 U.S.C. § 1357(a)(2), and whether the subsequent detention is lawful or tainted as fruit of the poisonous tree.

III. Unlawful Stop and Arrest: Absence of Individualized Suspicion and Probable Cause; Racial and Ethnic Profiling Is Unconstitutional—Even Under *Noem v. Vasquez Perdomo*

The Fourth Amendment prohibits law enforcement from stopping or arresting individuals based solely on ethnicity, appearance, language, or mere

presence in a particular location. The Supreme Court has repeatedly held that "Mexican appearance" or similar ethnic characteristics alone are never sufficient to justify a stop, even near the border. Officers must have "specific articulable facts" that reasonably suggest a person is engaged in unlawful activity—generalizations or stereotypes are not enough. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975); *Reid v. Georgia*, 448 U.S. 438, 441 (1980). The Fourth Amendment applies to undocumented individuals. *Munoz Materano v. Arteta*, No. 25 Civ. 6137 (ER), 2025 WL 2630826 (SD N.Y., Sep, 29, 2025).

To lawfully stop an individual for brief questioning about immigration status, the government must have reasonable suspicion—supported by specific, objective facts—that the person is unlawfully present in the United States. This standard is assessed under the totality of the circumstances. *See Brignoni-Ponce*, 422 U.S. at 885 n.10; *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *United States v. Sokolow*, 490 U.S. 1, 7 (1989). The Supreme Court recently reaffirmed that "[t]o be clear, apparent ethnicity alone cannot furnish reasonable suspicion." *Noem v. Vasquez Perdomo*, --- S.Ct. ----, 2025 WL 2585637, at *3 (2025). At most, ethnicity may be a "relevant factor" when considered alongside other salient facts, but it is never sufficient on its own. *Id.* at *6 (citing *Brignoni-Ponce*, 422 U.S. at 887). The Court in *Vasquez Perdomo* stayed an injunction against certain enforcement practices but did not hold that ethnicity or appearance alone can justify a stop. The majority's

reasoning did not abrogate the requirement of individualized suspicion or the constitutional prohibition on racial profiling. The stay was based in part on procedural grounds, including issues with the plaintiffs' standing for injunctive relief, not on the merits of the Fourth Amendment claim. Id. at *2.[1]

In Mr. Zapet's case, the facts are clear and troubling. On December 8, 2025, ICE officers were surveilling a building in Canton, Georgia, for a different individual with a final order of removal. Mr. Zapet was observed leaving the building and entering a vehicle nearby. There were no specific, articulable facts linking Petitioner to criminal activity or to the subject of surveillance. Nevertheless, ICE officers initiated a vehicle stop based solely on the proximity of Mr. Zapet and the vehicle he entered—not on any individualized suspicion or evidence particular to him.

The Fourth Amendment prohibits exactly what occurred here: seizing individuals based solely on a set of facts that "describe[s] a very large category of presumably innocent" people. *Vasquez Perdomo*, 2025 WL 2585637, at *9 (dissenting op.). Even under the standards articulated in *Vasquez Perdomo*, profiling Mr. Zapet based solely on his ethnicity, appearance, or proximity to a surveilled location is

[1] The Ninth Circuit, applying these principles, has reiterated that detentive stops for immigration enforcement must be based on "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the person stopped may be illegally in the country." *Vasquez Perdomo v. Noem*, 148 F.4th 656, 682–83 (9th Cir. 2025). Broad profiles—such as apparent race or ethnicity, language, location, and type of work—do not meet this standard.

impermissible. The Supreme Court has never held that ethnicity or appearance alone can justify a stop. The majority in *Vasquez Perdomo* focused on the government's interest in immigration enforcement but did not abrogate the requirement of individualized suspicion or the constitutional prohibition on racial profiling. The dissent reaffirmed that stops based solely on ethnicity, language, location, and job type are unconstitutional.

The Equal Protection Clause further forbids law enforcement from targeting individuals for investigation or arrest based on race or ethnicity, absent individualized suspicion. *See Whren v. United States*, 517 U.S. 806, 813 (1996). Courts across the country have recognized that racial profiling erodes public trust, perpetuates discrimination, and is fundamentally at odds with constitutional values. Permitting law enforcement to target individuals like Mr. Zapet based solely on ethnicity, appearance, or mere proximity to a surveilled location would subject millions of innocent people to arbitrary stops and detention—a result the Constitution does not permit. *Vasquez Perdomo*, 2025 WL 2585637, at *9.

The government's conduct cannot be justified under any reading of the Fourth Amendment, and the only appropriate remedy is immediate and unconditional release. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth

and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). As the Supreme Court has explained:

> The scope and flexibility of the writ [of habeas corpus]—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected."

Harris v. Nelson, 394 U.S. 286, 291 (1969); ("Release from custody represents the only adequate remedy in this case, and it is within this Court's broad equitable power to grant it." (citing *Swann*, 402 U.S. at 15-16)).

IV. Legal Basis for an Evidentiary Hearing in Habeas Proceedings

Federal courts possess broad authority to conduct evidentiary hearings in habeas corpus proceedings where material facts are in dispute and the written record is insufficient to resolve those disputes. Under 28 U.S.C. § 2243, the court "shall summarily hear and determine the facts, and dispose of the matter as law and justice require," and may "take evidence by deposition, affidavit, or oral testimony." The Supreme Court has long recognized that an evidentiary hearing is required when a petitioner alleges facts which, if true, would entitle him to relief and those facts are genuinely disputed or not adequately developed in the record. *See Townsend v. Sain*, 372 U.S. 293, 312–13 (1963) (holding that a federal court must grant an evidentiary hearing if the habeas applicant did not receive a full and fair

evidentiary hearing in a state court, or if the material facts were not adequately developed); *Blackledge v. Allison*, 431 U.S. 63, 82–83 (1977) (noting that "a hearing is necessary whenever the petitioner's allegations, if proved, would entitle him to relief and the state court record does not conclusively resolve the factual dispute").

In the context of immigration detention, courts have specifically ordered evidentiary hearings where the lawfulness of the arrest, the existence of probable cause, or the factual basis for detention is contested. *See*, e.g., *Perez Cruz v. Barr*, 926 F.3d 1128, 1136–37 (9th Cir. 2019) (remanding for further factual development where the record did not conclusively establish the lawfulness of the detention); *United States v. Pacheco-Alvarez*, 227 F. Supp. 3d 863, 872–73 (S.D. Ohio 2016) (conducting an evidentiary hearing to resolve factual disputes regarding the circumstances of a warrantless arrest and the existence of probable cause). Where, as here, the petitioner's liberty turns on disputed facts regarding the circumstances of arrest, the officers' knowledge and intent, and the sequence of events, live testimony and cross-examination are essential to a fair adjudication. The Court's fact-finding function cannot be meaningfully exercised on the papers alone when credibility and the weight of the evidence are at issue. In this case, the need for immediate relief and the fundamental liberty interests at stake further underscore the necessity of a full and fair evidentiary hearing.

V. Similar Writs of Habeas; New Class Action Decision and the Unique Circumstances of This Case Require a Different Remedy

As previously mentioned, this Court granted writ of habeas petitions to similarly-situated petitioners, who entered without inspections and arrested by Respondents in the interior of the country under 8 U.S.C. § 1225(b) years after their entry. *See Rojano Gonzalez v. Sterling et al,* 1:25-cv-06080-MHC, *Hernandez v. Udzinski* et al, 2:25-cv-00373-RWS, *Ortiz de Leon v. Pierce,* et. al., 4:25-cv-00315-WMR and *M.C.H.L. v. Roberson, et. al,* 4:25-cv-00329-WMR. In all those cases, the court ordered a bond hearing, however none of these cases involved a 4th Amendment violation and unlawful arrest such as this one.

Furthermore, Petitioner is a member of the *Maldonado Bautista* Class. *Maldonado Bautista v. Santacruz* No. 5:25-CV-01873-SSS-BFM (C.D. Cal., Dec. 18, 2025). Exhibit 1-2. In its December 18, 2025 order on reconsideration, the *Maldonado Bautista* court entered final judgment under Federal Rule of Civil Procedure 54(b) as to Counts I–III, declared the DHS policy of classifying such interior arrests under § 1225(b) unlawful, and granted classwide **vacatur of that policy under the Administrative Procedure Act (APA).** The court further explained that the core holding of *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216 (BIA 2025)—subjecting noncitizens present in the U.S. without inspection to § 1225(b) and denying them bond hearings for lack of jurisdiction—"cannot be squared" with its summary-judgment ruling and is therefore no longer tenable as controlling authority. Despite this final

judgment, the *Maldonado Bautista* court found that DHS and EOIR have continued to apply § 1225(b) and *Yajure Hurtado* to class members and to deny them bond hearings, directing Immigration Judges to "hold the position that *Yajure Hurtado* remains good law," thereby creating exigent circumstances and a risk of irreparable harm to detained class members. Petitioner's ongoing detention thus rests on a DHS policy that has been vacated in a final judgment and on an EOIR precedent the issuing court has deemed no longer tenable, powerfully confirming both his likelihood of success on the merits and the unlawfulness of his continued confinement under § 1225(b).

The Constitution has long recognized that judicial power includes the authority to inquire into the legality of executive detention and to provide a swift and effective remedy when that detention is unlawful, including ordering a detainee's release. In the habeas context, the Supreme Court has described the writ as the "fundamental instrument for safeguarding individual liberty against arbitrary and lawless state action" and a "swift and imperative remedy in all cases of illegal restraint or confinement." *Fay v. Noia*, 372 U.S. 391, 400 (1963). Those principles reflect a broader equitable framework: when the government cannot lawfully justify confinement, federal courts have both the power and the duty to bring that confinement to an end, whether through habeas relief or, as here, temporary injunctive relief directing immediate release pending full adjudication.

Respectfully Submitted,

This 19th day of December, 2025.

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Local Rules 5.1 and 7.1(D), that the filing(s) filed herewith have been prepared using Book Antiqua, 13 point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2025, this DOCUMENT was served, via electronic delivery to Respondents' counsel via the CM/ECF system, which will forward copies to Counsel of Record.

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