8737 Colesville Road, Suite 500
Silver Spring, MD 20910
301.917.6900

4922 Fairmont Ave., Suite 200
Bethesda, MD 20814
240.403.0913

Noem v. Vasquez Perdomo and the Deterioration of the Fourth Amendment

By, Jason Levy, Counsel

However you may feel about the immigration enforcement policies of the Trump Administration – pro or con – the legal case of *Noem v. Vasquez Perdomo* affects you.

The Fourth Amendment to the United States Constitution protects against "unreasonable searches and seizures," or put otherwise, unfair searches and arrests. It means the same thing for all of us–whether you are an undocumented immigrant or a U.S. born citizen.

When Fourth Amendment standards for stopping individuals for possible immigration violations are weakened, as they are following the decision in *Vasquez Perdomo*, the standards that apply to U.S. citizens who are stopped and searched on the street may also be diminished. When it comes to civil liberties and constitutional protections, we're in this together.

You've probably heard the news. Roving patrols of masked, unidentified, and armed Federal law enforcement officers conducting raids across the Los Angeles area and surrounding counties, detaining individuals based on their Hispanic or Latino appearance, accent, and physical location.

You're a U.S. citizen? No matter. "Operation At Large" will sweep you up just the same. Just ask Jason Gavidia, an East Angeleno, born and raised. While he was working on a car in his tow yard, masked agents suddenly ordered him to stop and repeatedly asked, rapid-fire, if he is a U.S. citizen. He confirmed he is, but when he couldn't immediately supply the name of the hospital he was born in (could you, on a moment's notice, when surrounded by a group of armed, masked men?), he was, according to court filings, "pushed up against the metal gated fence," arms twisted with hands behind his back. Fortunately for Mr. Gavidia, he was able to provide his REAL ID driver's license to establish his citizenship (although the officers kept it, adding insult to injury).

The government's argument for stopping Mr. Gavidia and a great many others largely boils down to this: There are a lot of people of Hispanic and Latin descent in

the general area who are unlawfully present in the United States, many of whom have an accent, and many of whom work in low-paying jobs at locations like auto tow yards. Although that description equally captures hundreds of thousands of individuals in the Los Angeles vicinity who are in the United States lawfully, the government believes those factors should be sufficient to stop and search someone.

Surprising? Probably more so given longstanding Supreme Court case law that defines when, consistent with the Fourth Amendment, someone can be briefly stopped for questioning to investigate their involvement in a crime. Back in 1968, the Supreme Court held in *Terry v. Ohio* that an officer must have a "reasonable suspicion" that a person committed, is committing, or is about to commit a crime before restraining the freedom of that individual. Twelve years later, in the 1980 case of *Reid v. Georgia*, the Supreme Court helped to clarify what reasonable suspicion requires, holding that a set of facts that "describe[s] a very large category of presumably innocent" people cannot, by itself, support reasonable suspicion.

No more, it seems. Or at least not for now.

Last month, in *Vasquez Perdomo*, the Supreme Court pivoted significantly from its previous interpretation of the Fourth Amendment as it relates to search and seizure in overturning a ruling by a lower court in California.

Previously, a federal district court had concluded that the immigration enforcement raids mentioned above likely violated the Fourth Amendment. That court consequently issued a short-term order, known as a temporary restraining order (TRO), preventing law enforcement officers from stopping individuals they suspect of being unlawfully present in the United States if their suspicion is based solely on any combination of four factors: (1) apparent race or ethnicity; (2) speaking Spanish or English with an accent; (3) presence at a particular location; or (4) the type of work one does. The government appealed the TRO to the Ninth Circuit Court of Appeals, which agreed with the district court and maintained the TRO.

The federal government appealed again, this time to the Supreme Court.

At the Supreme Court, six justices disagreed with the lower courts, holding that the government should not be restrained from conducting search and seizure based on those four factors.

The Supreme Court, in turn, "stayed" the TRO's seemingly unremarkable prohibition against racial profiling in so-called *Terry* stops. As a result, stops based solely on some combination of the above four factors may be permissible while the case proceeds. In Justice Kavanaugh's written opinion supporting this decision, he justifies the Court's order, in part, on "commonsense." He also reasons that "[t]he interests of individuals who are illegally in the country in avoiding being stopped by law enforcement for questioning is ultimately an interest in evading the law. That is not an especially weighty legal interest."

This is cool comfort to the many U.S. citizens, like Mr. Gavidia, who fit all or many of the four criteria and have already been or surely will be swept up in future raids.

Justice Sotomayor (joined by Justice Kagan and Justice Jackson) saw things very differently. In her dissenting opinion, Justice Sotomayor concludes with a warning that bears repeating:

> The Fourth Amendment protects every individual's constitutional right to be free from arbitrary interference by law officers. After today, that may no longer be true for those who happen to look a certain way, speak a certain way, and appear to work a certain type of legitimate job that pays very little. Because this is unconscionably irreconcilable with our Nation's constitutional guarantees, I dissent.

(internal citation and quotation marks omitted).

Where does that leave us?

The legal battle is ongoing. Now that the Supreme Court has allowed the raids to continue with an opinion that appears to dilute Fourth Amendment protections against unreasonable search and seizure, DHS enforcement activities in Los Angeles may resume based on an individual's appearance, spoken language, place or type of work, and nothing more. It is likely that DHS will feel emboldened to act similarly in other cities around the country. And we wonder what this means for police stops in other contexts.

Time will tell as the *Vasquez Perdomo* case proceeds and courts issue rulings– determinations that could shape the future of constitutional protections for generations. But that may take a while.