No. 24A949

IN THE

Supreme Court of the United States

KRISTI NOEM, SECRETARY OF HOMELAND SECURITY, ET AL.,
Applicants,

v.

KILMAR ARMANDO ABREGO GARCIA, ET AL.,
Respondents.

RESPONDENTS' MOTION FOR LEAVE TO FILE SUR-REPLY

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Counsel for Respondents

April 9, 2025

Respondents respectfully request that the Court direct the Clerk to file the attached Sur-Reply responding to new factual contentions raised for the first time in the Government's Reply in Support of Application to Vacate the Injunction Issued by the United States District Court for the District Of Maryland (the "**Reply**"), filed April 8, 2025. In support, Respondents state as follows:

1. This Court does not consider factual contentions and arguments raised for the first time in a reply brief. *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 140 n.2 (2014).

2. The Government's Reply advances two new arguments, however, and selectively disclaims positions taken by its representative before the district court. The Government's evolving arguments necessitate this brief response.

3. *First*, the Government asserts in its Reply (at 5) for the *first time* that the Office of the Solicitor General "has been informed" that El Salvador has its "own legal rationales for detaining members of criminal associations and foreign terrorist groups like MS-13."

4. *Second*, the Government's Reply contends that certain of the representations made by its attorney before the district court "do not reflect the position of the United States." (Reply at 5).

5. Raising such new factual allegations for the first time in a reply brief is improper and requires a response.

For these reasons, Respondents respectfully submit that their proposed three-page Sur-Reply would assist the Court in acting on the Government's Application. Respondents respectfully request that the Court direct the Clerk to file their proposed

brief, appended hereto, as a Sur-Reply in opposition to the Government's stay Application.

Respectfully submitted,

Dated: April 9, 2025

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Recognizing that the Government's concession below that it lacks a "satisfactory" answer as to why it "can't" bring Abrego Garcia back is case-dispositive, the Government's Reply (at 5) takes the extreme step of disavowing its own lawyer's statements. Yet the Government *still* has not supplied a satisfactory answer to that central question. It points to no evidence—only pure conjecture about El Salvador's general views on criminal enforcement. But Abrego Garcia left El Salvador as a teenager in 2011 and has not been charged with a crime there (or here). The United States arranged his incarceration and surely can arrange his release. Nowhere in any of its briefs has the Government stated that the United States is *actually* powerless to facilitate and effectuate Abrego Garcia's return. It can and it should.

A. The Government's Allegation That El Salvador "May Have Its Own Compelling Reasons To Detain" Abrego Garcia Is Forfeited And Meritless

For the first time in Reply (at 4-5, 10), the Government contends, ominously, that El Salvador "may have its own compelling reasons to detain" Abrego Garcia and its "own legal rationales for detaining members of … foreign terrorist groups like MS-13," and that those "reasons" and "rationales" may inhibit the Government from securing Abrego Garcia's return. These vague speculations are forfeited because they were never previously asserted and, in any event, devoid of factual support. There is no *actual* evidence that *any* nation has a criminal charge against Abrego Garcia. The *only* evidence is that he has never been charged or convicted of a crime in any country. And, of course, Abrego Garcia has not even lived in El Salvador since 2011—some 14 years ago—when he was 16 years old, rendering the Government's claim implausible. If the Government has evidence as to Abrego Garcia, it should say so. It refuses. As the

district court put it, "[t]hat silence is telling." App. 82a. The Government's retreat to innuendo cannot bear the weight of the extraordinary relief it seeks: to perpetuate an unlawful incarceration that the United States itself engineered.

Nor should the Court concern itself with speculative difficulties of compliance.[1] The Government must make all *efforts* to comply with judicial orders, *see Maness v. Meyers*, 419 U.S. 449, 458 (1975), but "the Constitution … does not demand the impossible or the impracticable," *Yakus v. United States*, 321 U.S. 414, 424 (1944). To the extent returning Abrego Garcia from a U.S.-contracted facility regularly visited by U.S. officials proves impossible,[2] or requires the Presidential diplomacy the Government suggests, the Government may present those facts to the district court. That would allow the factual record of the Government's efforts to carry out the court's order, and any actual impediments thereto, to be probed and challenged as part of the ordinary adversary process. But the Government cannot have license to evade a court order based on hypothetical obstacles that are nothing more than a figment of its imagination.[3]

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[1] The Government's attack on the injunction's use of the verb "effectuate" all but concedes that the order appropriately requires it to "facilitate" Abrego Garcia's return. To "facilitate an alien's return" includes "engag[ing] in activities which allow a lawfully removed alien to travel to the United States." Reply 6 (citing ICE Policy Directive No. 11061.1, § 3.1, Facilitating the Return to the United States of Certain Lawfully Removed Aliens (Feb. 24, 2012) (capitalization omitted)). The only thing preventing Abrego Garcia from returning to the United States is the Government's arrangement to have him incarcerated in El Salvador. *See* SA096-100; Opp. 2.

[2] *See, e.g.*, Opp. at 6 (describing visit by Secretary Noem); Nelson Renteria et al., *Explainer: What Is El Salvador's Mega-Prison Holding Venezuelans Deported from the US?*, REUTERS (Mar. 20, 2025), https://tinyurl.com/4ry8mzjt (describing visit by a congressional delegation).

[3] In fact, the Government has already returned eight female deportees from El Salvador to the United States after it tried to deposit them in CECOT and the prison

B. The Government's Admissions In The District Court Are Appropriately Before This Court

Also for the first time in reply—and perhaps, for the first time in any Government brief to this Court—the Government impugns its own counsel, whose candor the district court commended, for making admissions that purportedly "did not and do not reflect the position of the United States." Reply at 5. But the Government, like any litigant, cannot disavow the concessions of its own counsel—especially when it does not even contend that anything about them is factually untrue. *See United States v. Yildiz*, 355 F.3d 80, 82 (2d Cir. 2004) ("[T]he government's attorneys can bind the government with their in-court statements." (citations omitted)); *see also Magallanes-Damian v. INS*, 783 F.2d 931, 934 (9th Cir. 1986) (party is bound by its counsel's in-court admissions "absent egregious circumstances"). Courts would cease to function if they could no longer rely on concessions by counsel at oral argument. There is no basis for the Government to withdraw the good-faith admissions of its experienced agent simply because it now finds them inconvenient.

CONCLUSION

The Court should deny the Government's Application.

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refused to take women. Didi Martinez et al., *'We Were Lied To': Two Women the Trump Administration Tried to Send to El Salvador Prison Speak Out*, NBC NEWS (Apr. 2, 2025), https://tinyurl.com/ycy48vs4.

Respectfully submitted,

Dated: April 9, 2025

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