

# To Be or Not to Be “Egregious”: The Need for a Nationwide Egregiousness Standard in Immigration Removal Suppression Hearings

JEANNE M. PRENDERGAST DE SANTOS\*

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\* Senior Articles Editor, Vol. 50 *The University of Memphis Law Review*. 2020 Juris Doctor Candidate, The University of Memphis Cecil C. Humphreys School of Law. I would like to thank each person who generously took the time to read my Note and provide feedback, with special gratitude to the Hon. Charles E. Pazar, whose insight was invaluable throughout the writing process. Thank you also to my wonderful parents for being who they are. Better role models I could not ask for. Most of all, from the bottom of my heart and with all my love, thank you to my husband, Oscar—my absolute rock—and our four children, Santiago, Samuel, Maya, and Thais. You are all present in everything I do. And a final shout-out to our sweet dog, Sid, whose constant company has been a gift.

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## I. INTRODUCTION

At 5:00 a.m. on June 30, 2008, Maria Yanez-Marquez and her long-time partner, Jose Umana Ruiz, were abruptly awakened by loud banging on their second-floor bedroom door and someone yelling, “police[!]”<sup>1</sup> Before Jose could reach the bedroom door, two Immigration and Customs Enforcement (“ICE”) agents<sup>2</sup> broke it down and “burst”

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1. *Yanez-Marquez v. Lynch*, 789 F.3d 434, 439–40 (4th Cir. 2015).

2. *See Who We Are*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/about> (last updated Jan. 8, 2020) (describing the structural organization of ICE and the general duties of each division of ICE). When referring to “ICE agents,” this Note is referencing the immigration law enforcement agents with jurisdiction in the interior of the United States. ICE is a branch of the Department of Homeland Security (DHS), and for the purposes of this Note, is the main branch of DHS that will be of concern. ICE is divided into four divisions to perform enforcement, investigations, litigation, and departmental management services. *Id.* This Note will be concerned particularly with the ICE divisions that perform enforcement and legal services for ICE, as they are the divisions involved with removal operations. Enforcement and Removal Operations (ERO) is the law enforcement arm of ICE that is responsible for identification and arrest, bond management and post-detention supervision, among other duties. *Id.* The Office of the Principle Legal Advisor (OPLA)

into the room, again screaming, “police[!]”<sup>3</sup> One of the agents grabbed Jose by the neck and threw him to the ground while the other agent held a gun to his head and pinned his body and face to the floor.<sup>4</sup> Then “an agent pointed a gun at [Maria’s] head and yelled ‘don’t move.’”<sup>5</sup> Maria, dressed only in a nightshirt, cried and begged to be allowed to put on more clothes, but the agent screamed at her not to move, the gun still pointed at her head.<sup>6</sup> Jose informed the agents that Maria was pregnant and asked that she be allowed to dress.<sup>7</sup> The agents handcuffed Jose and led him downstairs, then escorted Maria downstairs at gunpoint, where four more ICE officers were in the living room with other occupants of the home.<sup>8</sup> Maria and the others told the agents no one else was in the home, but the agents knocked down doors anyway, finding no one.<sup>9</sup> After several minutes of questioning, the agents took Jose and another person away in handcuffs and then proceeded to search the whole house, “‘ripp[ing] apart each room that they went through,’ kicking down doors, scattering documents, and turning over furniture.”<sup>10</sup> After procuring Maria’s car keys, the agents searched her car, then demanded she sign some papers she did not understand.<sup>11</sup> When the agents left, they took Maria’s pay stubs, tax returns, and photo albums, among other items, which she never saw again.<sup>12</sup>

During her later immigration removal proceedings, Maria Yanez-Marquez filed a motion to suppress the evidence the ICE agents had obtained that morning, alleging that the agents had egregiously violated her Fourth Amendment rights against unlawful search and sei-

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is the legal division of ICE that, among other legal services, is the exclusive representative of ICE before EOIR in removal proceedings. *Id.*

3. *Yanez-Marquez*, 789 F.3d at 440.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

zure, her Fifth Amendment due process rights, and several federal regulations.<sup>13</sup> After hearing her recounting of the events, the immigration judge denied her motion without requiring evidence from the ICE agents to defend the legality of their actions.<sup>14</sup> The Board of Immigration Appeals (“BIA”) affirmed the immigration judge’s decision and dismissed Maria’s appeal.<sup>15</sup> Likewise, the United States Court of Appeals for the Fourth Circuit denied her petition for review.<sup>16</sup>

The Fourth Circuit found that while the agents had indeed violated Maria’s Fourth Amendment rights,<sup>17</sup> the violation was not sufficiently “egregious” to suppress the evidence that led to her removal from the United States.<sup>18</sup> In fact, the majority deemed it a “‘mere garden-variety’<sup>19</sup> violation of her Fourth Amendment rights”: “Unfortunately for Yanez, the force used by the agents was reasonable. . . . [It]

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13. *Id.* at 441. *See* U.S. CONST. amend. IV (The Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”); U.S. CONST. amend. V (The Fifth Amendment, among other rights, guarantees a person will not “be deprived of life, liberty, or property, without due process of law[.]”).

14. *Yanez-Marquez*, 789 F.3d at 445.

15. *Id.* at 438. The BIA is the highest administrative appellate body for immigration matters. It, along with the immigration courts, forms part of the Executive Office for Immigration Review, which is housed within the Department of Justice. *See Board of Immigration Appeals*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/eoir/board-of-immigration-appeals> (last visited Feb. 6, 2020).

16. *Yanez-Marquez*, 789 F.3d at 475.

17. *Id.* at 476. In this case, although the ICE officers executed an otherwise valid search warrant, the court found that the search violated the Fourth Amendment because the officers executed a daytime warrant during nighttime hours, without consent or exigent circumstances. *Id.* at 468. In finding a constitutional violation, the court noted the Supreme Court “has deemed it ‘difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home[.]’” *id.* at 465 (quoting *Jones v. United States*, 357 U.S. 493, 498 (1958)), “because, during the nighttime hours, searches of dwellings by government agents tend to involve ‘rousing the residents out of their beds, and forcing them to stand by in indignity in their night clothes,’ all of which ‘smack[s] of a police state lacking in the respect for’ individual privacy rights.” *Id.* (quoting *Gooding v. United States*, 416 U.S. 430, 462 (1974) (Marshall, J., dissenting)). Nevertheless, the court went on to affirm the denial of *Yanez-Marquez*’s motion to suppress, *id.* at 475, concluding that “the Fourth Amendment violation here lacks the severity necessary to support a finding of egregiousness.” *Id.* at 472.

18. *Id.* at 471.

19. *Id.* (quoting *Garcia-Torres v. Holder*, 660 F.3d 333, 336 (8th Cir. 2011)).

unquestionably was measured and by no means excessive (in the constitutional sense or otherwise).”<sup>20</sup> Maria also claimed that her statements were involuntary due to the excessive force used by the ICE agents, and thus it was a violation of her Fifth Amendment due process rights to use them against her.<sup>21</sup> The court rejected that claim also, finding that her statements were not involuntary because she did not show the agents used “coercion, duress, or improper action . . . [to] over[bear] her will.”<sup>22</sup> Her argument that the ICE agents violated five administrative regulations was likewise rejected.<sup>23</sup> The evidence gathered that day was deemed admissible despite the constitutional violation, and Maria was ordered removed from the United States.<sup>24</sup>

If Maria had been charged with a crime and was being tried in criminal court, the evidence could have been suppressed as the fruit of an unlawful search.<sup>25</sup> But Maria was in immigration court and thus, her case was governed by the 1984 Supreme Court case, *Immigration & Naturalization Service v. Lopez-Mendoza*, which held that the exclusionary rule does not apply in immigration deportation proceedings,<sup>26</sup> except in the case of egregious or widespread Fourth Amendment violations.<sup>27</sup> The egregious violation exception, joined by a plurality of

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20. *Id.* at 471–72.

21. *Id.* at 473.

22. *Id.*

23. *Id.* at 474.

24. *Id.* at 438.

25. *Wong Sun v. United States*, 371 U.S. 471, 485 (1963) (“The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.”).

26. 468 U.S. 1032, 1034 (1984). When *Lopez-Mendoza* was decided, there were two separate processes by which individuals were expelled from the United States—“deportation” and “exclusion”—with significant differences between the two processes, in terms of individual rights, burdens of proof, and detention, for example. 5 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 65.02 (rev. ed. 2020). The passage of “[t]he Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRAIRA”) dramatically revised and toughened the process by which noncitizens can be expelled from the United States.” 6 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 72.01 (rev. ed. 2020). The two processes were unified into one “removal” proceeding, with much more stringent provisions. *Id.* For the purpose of this Note, the term “removal” will be used unless quoting from or referring to pre-IIRAIRA case law, in which case “deportation” will be used.

27. *Lopez-Mendoza*, 468 U.S. at 1050–51.

the Court, was only loosely articulated.<sup>28</sup> Consequently, the circuits have varied in their interpretation of what constitutes an egregious violation, resulting in unequal application of the law throughout the country.<sup>29</sup> This lack of predictability and uniformity constitutes a threat to the due process rights of respondents when they allege a violation of their Fourth Amendment rights.<sup>30</sup>

With nationwide jurisdiction over immigration cases, the BIA has the power and the responsibility to address this lack of uniformity. It is charged with issuing precedent decisions to provide “clear and uniform guidance . . . on the proper interpretation and administration” of immigration laws.<sup>31</sup> Yet the BIA thus far has failed to give substantive

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28. *Id.* For a discussion of the exception as articulated by the *Lopez-Mendoza* plurality see *infra* Section III.A..

29. See *infra* Sections II.B., III.A., and III.B. for a discussion of the holding, exception, and the resultant circuit split.

30. See Irene Scharf, *The Exclusionary Rule in Immigration Proceedings: Where it Was, Where it Is, Where it May be Going*, 12 SAN DIEGO INT’L L.J. 53, 82–85 (2010) (discussing the need for predictability and uniformity in judicial decisions to ensure due process

31. 8 C.F.R. § 1003.1(d) provides:

The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it. The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations. In addition, the Board, through precedent decisions, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.

See also *Rosendo-Ramirez v. Immigration & Naturalization Serv.*, 32 F.3d 1085, 1091 (7th Cir. 1994) (“National uniformity in the immigration and naturalization laws is paramount: rarely is the vision of a unitary nation so pronounced as in the laws that determine who may cross our national borders and who may become a citizen. The BIA cannot achieve its goal of uniform application of the laws when the circuits are split and its decisions are subject to review potentially in any circuit.”) (citations omitted). The *Rosendo-Ramirez* court noted that immigration law and labor law both have “venue-uncertain provisions” that can bring unpredictability and nonuniformity to the choice of law a circuit applies. *Id.* at 1092–93. The court noted that the NLRB deals with this uncertainty by “instruct[ing] ALJs to apply NLRB precedent rather than (potentially adverse) circuit law” and suggested that the BIA “could take cues from the NLRB, requiring IJs to decide cases according to BIA precedent only, while the BIA decides upon review whether it wishes to acquiesce to a circuit’s precedent.” *Id.* at

guidance as to what constitutes an egregious Fourth Amendment violation. As the highest administrative body for interpreting and applying immigration laws throughout the nation, the BIA is uniquely and appropriately situated to issue such guidance.

This Note asserts that the BIA must establish an egregiousness standard to promote uniformity, predictability, and due process in removal suppression hearings in the interest of all involved parties including immigration judges, lawyers, and, of course, respondents, but also immigration law enforcement. This Note further asserts that the Ninth Circuit standard should be applied to satisfy the respondent's prima facie burden for suppression of evidence and should be the most significant factor in the totality of the circumstances test the immigration judge will use to determine whether ICE committed an egregious Fourth Amendment violation.

Part II of this Note begins by reviewing the exclusionary rule analysis as presented in the seminal case *Lopez-Mendoza* against the backdrop of then-current exclusionary rule jurisprudence to give context to the holding and its exception. It then considers the Court's analysis from a contemporary perspective to justify the egregiousness standard proposed by this Note. Part III traces the contours of the *Lopez-Mendoza* egregiousness exception and its interpretation in the various circuits to illustrate the factors at play when judges decide whether to apply the exclusionary rule in a given situation. It then briefly discusses the current state of the exclusionary rule to show how

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1093. The court further noted that “our laws already provide a mechanism to achieve the goal of uniform application of the immigration laws within the current framework . . . . *Chevron* deference should result in more uniform interpretation of the immigration laws among the circuit courts.” *Id.* at 1094 (citing *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). Note that Congress amended the venue section of the INA in 1997 to eliminate Court of Appeals venue where the alien resides. *Compare* Immigration and Nationality Act (INA) § 242(b)(2), 8 U.S.C. § 1252(b)(2) (2020) (“The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings.”), *with* the parallel provision in former INA § 106, 8 U.S.C. § 1105a(a)(2) (amended 1997) (“[T]he venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence . . . of the petitioner, but not in more than one circuit[.]”). So, for example, the Sixth Circuit decides cases from the Memphis Immigration Court by way of the BIA of respondents living in Arkansas and Mississippi, which previously could have also been heard in the Eighth and Fifth Circuits, respectively.

its application in the criminal context largely comports with the exception contemplated by *Lopez-Mendoza*. Part IV proposes that the BIA issue guidance that recognizes the Ninth Circuit standard as operative for establishing prima facie evidence for suppression and as the most significant factor immigration judges should consider when ruling on motions to suppress evidence. It also describes how the guidance will add a measure of uniformity and fairness to the removal suppression hearing process, and it discusses the limitations of such an agency-issued standard. Part V briefly concludes this Note.

## II. *LOPEZ-MENDOZA*'S EXCLUSIONARY RULE ANALYSIS

The Supreme Court held in *Lopez-Mendoza* that the exclusionary rule did not apply in immigration deportation proceedings except in cases of egregious or widespread Fourth Amendment violations.<sup>32</sup> The holding itself was hardly surprising, given the state of exclusionary rule jurisprudence when the case was decided in 1984. The Court's analysis and holding were necessarily informed by contemporary facts and suppositions. A current perspective, though, challenges the underlying assumptions and highlights the need for reform.

### A. *The State of Exclusionary Rule Jurisprudence in 1984*

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]"<sup>33</sup> It is long-settled that all persons, even non-citizens, are entitled to the protections of the Fourth Amendment.<sup>34</sup> To ensure this right, the Supreme Court established the exclusionary

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32. *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984). *See infra* Part III.

33. U.S. CONST. amend. IV.

34. *See Cotzojay v. Holder*, 725 F.3d 172, 181 (2d Cir. 2013) ("[I]t is uncontroversial that the Fourth Amendment applies to aliens and citizens alike. *See, e.g., Lopez-Mendoza*, 468 U.S. at 1046 (observing that it is '[i]mportant . . . to protect the Fourth Amendment rights of all persons,' despite finding that application of the exclusionary rule is not necessary in every context).").



rule to prevent evidence obtained through unlawful searches from being used at trial against criminal defendants.<sup>35</sup> When the Supreme Court first created the exclusionary rule, it considered it a constitutional mandate, recognizing that the protections of the Fourth Amendment have little meaning when there is no way to enforce them:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.<sup>36</sup>

The rationale was that excluding unconstitutionally obtained evidence from a subsequent criminal trial would deter police from future

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35. *Weeks v. United States*, 232 U.S. 383, 392–98 (1914) (establishing that evidence obtained by the government in violation of the constitutional rights of the defendant under the Fourth Amendment must be excluded from its use in federal criminal trials), *overruled by* *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

36. *Weeks*, 232 U.S. at 393.

misconduct<sup>37</sup> and punishing unlawful government conduct would promote judicial integrity.<sup>38</sup>

As the exclusionary rule evolved away from being a remedy to vindicate individual rights and came to be seen strictly as a measure to deter police misconduct, its strength diminished commensurately. *Mapp v. Ohio* was the high-water mark for the exclusionary rule: all evidence obtained illegally was inadmissible, without exception.<sup>39</sup> Over time, though, the Court retreated from *Mapp*'s broad application of the exclusionary rule and began creating exceptions to the rule, diluting the rule's effect and, in turn, the protections of the Fourth Amendment itself.<sup>40</sup> When the Court began to focus its analysis exclusively on the deterrence effect, the exclusionary rule took on a negative connotation, with associated costs, rather than being seen as a positive force that upheld the values of the Constitution.<sup>41</sup> The cost-benefit balancing test was an apt vehicle to express that shift in viewpoints, and it

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37. *Mapp*, 367 U.S. at 655 (holding that the exclusionary rule is applicable to the states through the Fourteenth Amendment). The Court explained that upholding the constitutional right:

could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold [sic] its privilege and enjoyment. Only last year the Court itself recognized that the purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.

*Id.* at 656 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). The deterrence rationale for the exclusionary rule was first pronounced by the Supreme Court in *Wolf v. Colorado*, which incorporated the Fourth Amendment to the States through the Fourteenth Amendment but declined to mandate the exclusionary rule to the states. 338 U.S. 25, 27–28, 33 (1949). *Mapp* later overruled *Wolf* to extend the exclusionary rule to the States. *Mapp*, 367 U.S. at 654–655.

38. *Mapp*, 367 U.S. at 659 ("The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.").

39. *Id.* at 655.

40. See, e.g., Yale Kamisar, Opinion, *Court's 'Good Faith' Exception*, N.Y. TIMES (July 11, 1984), <https://www.nytimes.com/1984/07/11/opinion/court-s-good-faith-exception.html>.

41. See Lindsay Macdonald, Note, *Why the Rule-of-Law Dictates That the Exclusionary Rule Should Apply in Full Force to Immigration Proceedings*, 69 U. MIAMI

allowed the Court to justify its withdrawal from upholding fundamental constitutional principles.

When asked to consider the applicability of the exclusionary rule outside of the criminal context, the Court declined to extend the rule to entire classes of cases. The Court reasoned that the costs of applying the exclusionary rule in non-criminal contexts outweighed the “uncertain” deterrent effect.<sup>42</sup> By the time the question of applying the exclusionary rule was before the Court in *Lopez-Mendoza*, the cost-benefit analysis was the predominant analytical framework. Indeed, it was so entrenched in the jurisprudence that Justice O’Connor wrote, “Imprecise as the exercise may be, the Court recognized in *Janis* that there is *no choice* but to weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs.”<sup>43</sup> With that statement, the writing was on the wall as to the outcome of the case.

A similar evolution was underway in the criminal context. In fact, on the same day as *Lopez-Mendoza*, the Court decided *United States v. Leon*, which gave the first major exception to the exclusionary rule, also justified through a cost-benefit analysis.<sup>44</sup> In *Leon*, the Court held that the exclusionary rule did not apply when police officers relied in good faith on a warrant issued by a neutral magistrate judge.<sup>45</sup> The deterrence rationale drove the decision:

[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope

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L. REV. 291, 316–18 (2014) (discussing the evolution of the purposes of the exclusionary rule and the consequent shift in focus away from its role of protecting the “underlying long-term values” of the Constitution).

42. See *United States v. Janis*, 428 U.S. 433, 454 (1976) (declining to extend it to a federal civil tax proceeding); *United States v. Calandra*, 414 U.S. 338, 351–52 (1974) (declining to extend the rule to grand jury proceedings).

43. *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1041 (1984) (emphasis added).

44. *United States v. Leon*, 468 U.S. 897, 922, 926 (1984). The Court also decided *Massachusetts v. Sheppard* that day, in which it followed *Leon* and declined to extend the exclusionary rule in another case involving a search warrant later found to be defective. *Massachusetts v. Sheppard*, 468 U.S. 981, 990–91 (1984).

45. *Leon*, 468 U.S. at 926.

to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.<sup>46</sup>

*Leon*'s cost-benefit test elicited a rather predictable result: where the exclusionary rule would have little to no deterrent effect, the costs of excluding tainted evidence—that criminals would go free on a technicality and the frustration of the truth-seeking function of the judiciary—would be too high to merit the exclusion of evidence.<sup>47</sup> Such was the state of exclusionary rule jurisprudence on July 5, 1984, when the *Lopez-Mendoza* opinion was issued.

#### B. *The Lopez-Mendoza Analysis: Then and Now*

A cost-benefit analysis was the prevailing method to analyze whether the exclusionary rule should be available in any given context. In the non-criminal realm, the cost-benefit analysis was well-established precedent, and in the criminal realm, *Leon* established it as the mode of analysis for future cases.<sup>48</sup> The *Lopez-Mendoza* Court found that the costs of applying the exclusionary rule in immigration removal proceedings outweighed the benefits. However, the time is ripe to reevaluate the analysis. A more nuanced approach is necessary, in light of the nearly 35 years of changes that have impacted immigration law and policy since the holding, as well as the evidence that Fourth Amendment violations have not been held in check, as the *Lopez-Mendoza* Court had hoped.<sup>49</sup>

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46. *Id.* at 919 (quoting *United States v. Peltier*, 422 U.S. 531, 539 (1975)).

47. *Id.* at 922.

48. *Id.* at 906–07 (explaining that the only question before the Court was “[w]hether the exclusionary sanction is appropriately imposed in a particular case, . . . and it must be resolved by weighing the costs and benefits of preventing the use in the prosecution’s case in chief. . .”).

49. This Note would be remiss if it did not recognize from the outset the continued viability of Justice O’Connor’s suggestion that class action lawsuits are the best way to deter Fourth Amendment violations, versus the case-by-case approach involving motions to suppress. See *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1045 (1984) (“The INS is a single agency, under central federal control, and engaged in operations of broad scope but highly repetitive character. The

## 1. The Civil-Criminal Dichotomy and the Cost-Benefit Analysis

The Court began its analysis by characterizing a deportation proceeding as “a purely civil action” that was not meant to punish the respondent and, therefore, did not require the “various protections that apply in the context of a criminal trial.”<sup>50</sup> This characterization laid the groundwork to deny respondents in immigration proceedings the protection of the exclusionary rule. The Court reasoned that if the exclusionary rule were available in this context, it would complicate what was meant to be a streamlined proceeding to determine “eligibility to remain in this country, nothing more.”<sup>51</sup> The “purely civil” characterization demanded a cost-benefit analysis, an ostensibly objective tool

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possibility of declaratory relief against the agency thus offers a means for challenging the validity of INS practices. . . .”). While this Note recognizes that these two avenues of redress exist, it will only examine the case-by-case approach. This is not to say that Justice O’Connor’s observation regarding class action lawsuits is necessarily any less valid today. On the contrary, perhaps it is even more valid, given the significant amount of litigation that has arisen based on the egregious exception pronounced in *Lopez-Mendoza*. However, this Note focuses on the removal suppression hearing process precisely because of the huge number of suppression cases that have been filed and the need to address the due process deficiencies therein. *But see* Mikaela A. Devine, Note, *Suppressing Evidence in Immigration Proceedings: The Need for a Lenient Egregiousness Standard and Rebellious Lawyering*, 99 MINN. L. REV. 313, 330–32 (2014) (discussing how changes to immigration law, especially in regard to judicial review and legislative jurisdiction stripping, have effectively limited the rights of noncitizens to file individual or class action civil lawsuits); Jill E. Family, *Threats to the Future of the Immigration Class Action*, 27 WASH. U.J.L. & POL’Y 71, 81–94 (2008) (discussing “the three threats to the future of the immigration class action[.]” including “(1) a general congressional willingness to restrict immigration judicial review; (2) the application of waivers of judicial review to immigration law; and (3) legislative jurisdiction-stripping attacks more specific to the immigration class action.”).

50. *Lopez-Mendoza*, 468 U.S. at 1039. *Compare id.* at 1041–50 (holding that the exclusionary rule does not apply in immigration removal proceedings, based on a cost-benefit analysis), *with Sandoval*, 17 I. & N. Dec. 70, 80–84 (B.I.A. 1979) (holding the same as *Lopez-Mendoza* and using largely the same analytical points in its cost-benefit analysis, which points to the substantial deference that the Court gave to the immigration agency in its reasoning and holding).

51. *Lopez-Mendoza*, 468 U.S. at 1039.

that will yield seemingly justifiable results.<sup>52</sup> The problem with this framework, though, is that administrative costs are more concrete and quantifiable than the abstract deterrent benefit of the exclusionary rule. Consequently, the analysis will almost always yield greater costs than benefits to justify denial of the exclusionary rule.<sup>53</sup>

Though the four dissenting justices in *Lopez-Mendoza* did not specifically take issue with the characterization of deportation proceedings as civil in nature, they all agreed that the exclusionary rule should apply in civil deportation proceedings.<sup>54</sup> Justice White's dissent reasoned that, because the enforcement of immigration law was sufficiently analogous to criminal law enforcement, the exclusionary rule would have the same deterrent effect in both contexts.<sup>55</sup> Thus, even at

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52. See Macdonald, *supra* note 41, at 314–16 (discussing the inherent problems with using a balancing test to measure and compare legal interests that do not have measurable weight and are inherently complex and ambiguous).

53. See *id.* at 315–17 (discussing how the cost-benefit analysis used by the *Lopez-Mendoza* Court would yield different results today, largely because the analysis purports to answer questions that are immeasurable in real terms and misunderstands the purpose of the exclusionary rule in the first place); Kamisar, *supra* note 40 (commenting on the Court's use of the cost-benefit analysis in *Leon*, shortly after the opinion was issued).

A cost-benefit approach strongly favors the exclusionary rule's critics. The costs of the rule . . . are immediately apparent but the rule's benefits are only conjectural. It is never easy to prove a negative, and police compliance with the Constitution produces a "non-event" not directly observable—it consists of not carrying out an illegal search.

Moreover, if one must 'balance the competing interests' how does one do so without measuring imponderables and comparing uncomparable factors? How does one balance the rights of privacy or liberty against the interest in suppressing crime? Since these are different kinds of interests, how can they be balanced without injecting the policy values of those doing the balancing?

Kamisar, *supra* note 40.

54. See *Lopez-Mendoza*, 468 U.S. at 1051–1061 (Brennan, White, Marshall, Stevens, JJ., dissenting).

55. See *Lopez-Mendoza*, 468 U.S. at 1053 (White, J., dissenting) ("The majority nonetheless concludes that application of the rule in such proceedings is unlikely to provide significant deterrence. Because INS agents are law enforcement officials whose mission is closely analogous to that of police officers and because civil deportation proceedings are to INS agents what criminal trials are to police officers, I cannot

the time, the civil-criminal dichotomy in immigration proceedings was not as “black and white” as the majority proclaimed. Had even one justice from the majority of this 5–4 opinion approached the question with the nuance suggested by the dissenting justices, a contrary result may have issued.<sup>56</sup> Regardless, a more nuanced approach may have better stood the test of time and should guide any present-day analysis of the meaning and effect the holding and its exception should have.

Indeed, despite the longstanding formalistic designation of immigration law as civil and not criminal, the Court, going back to the 1940s and ’50s, has recognized the profound effects of deportation on respondents and the corresponding need to ensure the fairness of proceedings.<sup>57</sup> This history suggests that immigration law is at least quasi-

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agree with that assessment. . . . [T]here is no principled basis for distinguishing between the deterrent effect of the rule in criminal cases and in civil deportation proceedings.”). Justices Brennan, Marshall, and Stevens all expressed agreement with Justice White’s dissent, while writing in separate dissents to add their own points. *See id.* at 1051–52 (Brennan, J., dissenting), 1060–61 (Marshall, J., dissenting), and 1061 (Stevens, J., dissenting). *See also* *Oliva-Ramos v. Att’y Gen. of the United States*, 694 F.3d 259, 271 (3d. Cir. 2012) (affirming that while only a plurality of the *Lopez-Mendoza* Court signed on to the widespread or egregious exceptions, the four dissenting justices “believed that the exclusionary rule should generally apply in deportation proceedings . . . . Thus, . . . the plurality opinion can only be read as affirming that the remedy of suppression justifies the social cost.”). The *Oliva-Ramos* Court explicitly made this point as a corrective to the BIA’s prior finding in the case that “these comments from a plurality of the Supreme Court are obiter dictum” and “our own precedents, by which we are bound, recognize no such exception to the inapplicability of the exclusionary rule premised on widespread Fourth Amendment violations.” *Id.* at 266 (quoting from the *Oliva-Ramos* BIA opinion). *See also* Elizabeth A. Rossi, *Revisiting INS v. Lopez-Mendoza: Why the Fourth Amendment Exclusionary Rule Should Apply in Deportation Proceedings*, 44 COLUM. HUM. RTS. L. REV. 477, 491–92 (2013) (reviewing Justice Blackmun’s conference notes, scholarly works, and the *Lopez-Mendoza* dissents to show the different opinions and reasoning as to whether deportation proceedings are civil or criminal in nature and the determinative effect of the designation on the majority opinion).

56. *See* Rossi *supra* note 55, at 493 (noting that the exclusionary rule was traditionally applied in criminal proceedings; therefore, the civil/criminal distinction was key to the Court’s holding).

57. *See, e.g.,* *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (“Here the liberty of an individual is at stake. Highly incriminating statements are used against him—statements which were unsworn and which under the governing regulations are inadmissible. We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a

criminal, a factor that should be considered when determining the appropriate egregiousness standard.

## 2. The Deterrent Value of Applying the Exclusionary Rule

The *Lopez-Mendoza* Court recognized that the immigration law enforcement scenario is precisely the kind of situation in which the exclusionary rule is likely to be most effective;<sup>58</sup> however, it also identified several other factors that it believed would function to deter Fourth Amendment violations.<sup>59</sup> In reliance on these other factors, the Court found the deterrent value of the exclusionary rule to be minimal.<sup>60</sup> Some of these factors are still in play today and arguably could reduce the effectiveness of the exclusionary rule, but not to such an extent as to continue to justify its almost complete inapplicability.<sup>61</sup> Two important factors were analyzed using then-current statistics and policy

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great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.”).

58. *Lopez-Mendoza*, 468 U.S. at 1042–43 (discussing the “intrasovereign” nature of the violations). That is, the ICE officer’s main objective is to use evidence in a later deportation proceeding. When the law enforcement agents that arrest the individual are agents of the same sovereign who seek the removal of that individual, the arresting officers who gather the evidence have an interest in the evidence being admissible in the subsequent removal proceeding. *Id.*

59. *Id.* at 1043–45. See generally Stella Burch Elias, “Good Reason to Believe”: Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting *Lopez-Mendoza*, 2008 WIS. L. REV. 1109 (2008) (positing that, pursuant to the “widespread” aspect of the *Lopez-Mendoza* exception, because Fourth Amendment violations by ICE have become widespread, the exclusionary rule must be applied in immigration proceedings to remain faithful to *Lopez-Mendoza*).

60. *Lopez-Mendoza*, 468 U.S. at 1046 (“Important as it is to protect the Fourth Amendment rights of all persons, there is no convincing indication that application of the exclusionary rule in civil deportation proceedings will contribute materially to that end.”).

61. See *id.* at 1043–45. For example, removal can often still be accomplished using evidence gathered independently of, or sufficiently attenuated from, the illegal arrest. *Id.* at 1043. This includes the fact that a respondent’s silence can be used against her, as evidence of alienage, since she is “not protected by a presumption of citizenship comparable to the presumption of innocence in a criminal case.” *Id.* (citation omitted). Further, the Court notes that alternative remedies are available to



information, which have changed drastically in the nearly 35 years since the opinion was rendered, and thus clearly require reevaluation with current information.

First, the majority noted that in a given year, of the almost 500 arrests per immigration officer, only about twelve per year, per officer, resulted in a formal deportation hearing.<sup>62</sup> At the time, over 97.5% of those arrested agreed to take a voluntary departure, a sort of “plea bargain” that allows an arrestee to return to her country, in lieu of pursuing deportation (now, removal)<sup>63</sup> proceedings.<sup>64</sup> Thus, the *Lopez-Mendoza* Court reasoned that because there would only be very occasional challenges to the legality of a given arrest, “the consequences from the point of view of the officer’s overall arrest and deportation record will be trivial. In these circumstances, the arresting officer is most unlikely to shape his conduct in anticipation of the exclusion of evidence at a formal deportation hearing.”<sup>65</sup> This reasoning is inapplicable today because the number of immigration arrests that end in a deportation hearing has increased dramatically.<sup>66</sup> Yet, ICE officers still have no real incentive to alter their conduct, given the extremely high bar for the suppression of evidence.<sup>67</sup> The vast increase in arrests resulting in re-

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challenge agency action, outside of immigration courts, such as petitioning for injunctive relief. *Id.* at 1045.

62. *Id.* at 1044.

63. See 5 IMMIGRATION LAW AND PROCEDURE, *supra* note 26, § 64.01.

64. *Lopez-Mendoza*, 468 U.S. at 1044.

65. *Id.*

66. See U.S. DEP’T OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REVIEW, STATISTICS YEARBOOK FISCAL YEAR 2017 10 fig.3 (2019), <https://www.justice.gov/eoir/page/file/1107056/download> (reporting that there were 405,947 removal cases received in fiscal year 2017, a 28% increase from FY 2016 to FY 2017).

67. See, e.g., BESS CHIU ET AL., CARDOZO IMMIGR. JUST. CLINIC, CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS, 9–16 (2009) (reporting on widespread patterns of constitutional violations in ICE raids in New York and New Jersey, based on evidence gleaned from two Freedom of Information Act (FOIA) lawsuits, news accounts, and legal filings). ICE officers have little incentive to comply with constitutional search and seizure requirements because (1) suppression motions are extremely difficult to win in immigration court, given the largely unsettled definition of what constitutes an egregious violation, (2) often when a suppression motion is granted, independently obtained evidence will allow the deportation anyway, and (3) most ICE agents have never been called to testify and justify their conduct. *Id.* at 24–25. The results of the FOIA that informed the Cardozo report

removal hearings, coupled with many allegations of constitutional violations by ICE officers, proportionally increases the deterrent value of the exclusionary rule in removal proceedings. This added deterrent value in the modern context must be taken into account when establishing an “egregiousness” standard for use by immigration judges.

Second, one of the “perhaps most important” factors that drove the holding in *Lopez-Mendoza* was the Court’s reliance on the immigration agency’s “comprehensive scheme for deterring Fourth Amendment violations by its officers.”<sup>68</sup> The Court relied heavily in its opinion on the government’s evidence stating that immigration law enforcement officers strictly adhered to agency regulations, that new officers underwent “instruction and examination in Fourth Amendment law, and that others receive[d] periodic refresher courses in law.”<sup>69</sup> Furthermore, the Court relied on a 1981 Memorandum on Violations of Search and Seizure Law, issued by the Attorney General who served under President Carter, which communicated that it was Department of

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were submitted as evidence in a Third Circuit case, *Oliva-Ramos v. U.S. Att’y Gen.*, 694 F.3d 259 (2012), which noted that “the documents certainly appeared relevant” to the legal claims of Oliva-Ramos, resulting in a grant of a motion to reopen, previously denied by the BIA, and a remand to the BIA to permit Oliva-Ramos to present evidence that ICE’s conduct fell within the exception allowed by *Lopez-Mendoza*.” *Id.* at 694 F.3d at 269 n.18, 282, 287.

68. *Lopez-Mendoza*, 468 U.S. at 1044–45 (relying on statistics and information provided by the government’s brief, citing agency rules and policies that bolster the agency-petitioner’s argument). See also *The Role of the Exclusionary Rule in Removal Hearings*, 126 HARV. L. REV. 1633, 1637 n.32 (2013) [hereinafter *The Role of the Exclusionary Rule*] (noting that the opinion did not address why internal policy and procedures worked to bar the exclusionary rule in the immigration context, but not in the criminal context, given that ordinary law enforcement agencies also have internal policies, procedures, and training designed to prevent constitutional violations).

69. *Lopez-Mendoza*, 468 U.S. at 1044–45 (citing the Brief for Petitioner at 39–40, *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210 (1984) (No. 82-1291)).

Justice policy to exclude evidence “seized through intentionally unlawful conduct[.]”<sup>70</sup> Finally, the Court relied on the government’s evidence that the Immigration and Naturalization Service (INS)<sup>71</sup> had procedures to investigate and punish immigration officers who committed Fourth Amendment violations.<sup>72</sup>

In his dissent, Justice White considered the government’s evidence with a more skeptical eye, pointing out that while there was evidence of the existence of disciplinary schemes within the agency, there was no evidence of any scheme having been exercised.<sup>73</sup> Likewise, he read the government’s evidence of training and education programs for its officers differently than did the majority, positing that the availability of the exclusionary rule was perhaps the very reason these programs existed because it provided the agency with an incentive to make sure its officers did not violate the Constitution.<sup>74</sup>

Regardless of the probative value of internal policies and officers’ adherence to them, executive agency policies can—and did—change with subsequent administrations. To base such a sweeping decision on evidence that was likely pertinent only at the time of the holding in question invites and requires future reevaluation in order to faithfully uphold the rationale of the *Lopez-Mendoza* holding and its exception.

Finally, as noted above, the Court premised its holding on the purely civil nature of immigration proceedings, but that reasoning is

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70. *Id.* at 1045 (citing Memorandum from Benjamin R. Civiletti to Heads of Offices, Boards, Bureaus, and Divisions, Violations of Search and Seizure Law (Jan. 16, 1981)).

71. See *infra* note 107 for a brief discussion of the restructuring of the executive agency governing U.S. immigration law after September 11, 2001.

72. *Lopez-Mendoza*, 468 U.S. at 1044–45 (citing OFFICE OF GENERAL COUNSEL, INS, U.S. DEP’T OF JUSTICE, THE LAW OF ARREST, SEARCH, AND SEIZURE FOR IMMIGRATION OFFICERS 35 (1983)).

73. *Id.* at 1054 n.2 (White, J., dissenting) (pointing out that INS’s evidence of officer discipline did not offer instances of officers who were disciplined for Fourth Amendment violations, but rather showed that of the 20 officers disciplined, 11 had been terminated for rape or assault.).

74. *Id.* at 1054–55 (“Since the deterrent function of the rule is furthered if it alters either ‘the behavior of individual law enforcement officers or the policies of their departments,’ it seems likely that it was the rule’s deterrent effect that led to the programs to which the Court now points for its assertion that the rule would have no deterrent effect.” (quoting *United States v. Leon*, 468 U.S. 897, 918 (1984))).

much more tenuous today, given the criminalization of immigration laws<sup>75</sup> and the increased cooperation between state and local police forces and immigration law enforcement.<sup>76</sup> Under Section 287(g) of the Immigration and Nationality Act (“INA”), state or local law enforcement officers may be authorized to perform functions of federal immigration officers “in relation to the investigation, apprehension, or detention of aliens in the United States[.]”<sup>77</sup> The provision requires that a State or local officer performing duties under a 287(g) agreement has knowledge of, adheres to, and receives adequate training in relevant Federal immigration laws.<sup>78</sup> However, this vast expansion of enforcement authority was well beyond the purview of the *Lopez-Mendoza* Court.<sup>79</sup> Even if the majority was right to trust the government’s assertion that INS officers were well-trained in Fourth Amendment law, to place that same trust in all the potential state and local law enforcement bodies that might sign 287(g) agreements goes well beyond the evidence and assertions relied upon in *Lopez-Mendoza*.

Moreover, many 287(g) programs are rife with precisely the kinds of problems that call for the needed reevaluation of *Lopez-Mendoza*. For example, research has shown that 287(g) programs are susceptible to racial profiling,<sup>80</sup> which indicates that ICE has failed to train

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75. See Macdonald, *supra* note 41, at 303 n.105 (citing examples of statutes that criminalize immigration offenses).

76. See Macdonald, *supra* note 41, at 310–12 (discussing how this cooperation can in fact create costs to state and local law enforcement efforts, as enforcing immigration law can jeopardize the relationship that local police forces forge with the immigrant community, which can lead to decreased trust and thus decreased reporting of crimes).

77. Immigration and Nationality Act (INA) § 287(g)(1), 8 U.S.C. § 1357(g)(1) (2020) (authorizing the Department of Homeland Security (DHS) to enter into formal written agreements with state or local police departments to permit state and local law enforcement officers to perform the functions of federal immigration agents. See also AM. IMMIGRATION COUNCIL, THE 287(G) PROGRAM: AN OVERVIEW I (2019) [hereinafter AIC: 287(G)].

78. INA § 287(g)(2), 8 U.S.C. § 1357(g)(2).

79. 287(g) was instituted as part of the comprehensive immigration reform IIRAIRA in 1996.

80. See, e.g., LINDSAY KEE, ACLU OF TENNESSEE, CONSEQUENCES AND COSTS: LESSONS LEARNED FROM DAVIDSON CTY., TENNESSEE’S JAIL MODEL 287(G) PROGRAM 4 (2012), <https://www.aclu-tn.org/wp-content/uploads/2015/01/287gF.pdf> (showing a significant increase in arrests “based on characteristics such as appearance, ethnicity, or language skills” while the 287(g) agreement was in effect). Arrests for

state and local forces who in turn have failed to meet appropriate training standards.<sup>81</sup> Systemic racial profiling erodes trust between immigrant communities and law enforcement, which discourages immigrants from reporting crime and seeking help, undermining public safety for the entire community.<sup>82</sup> The fact that these programs did not exist when *Lopez-Mendoza* was decided and the high incidence of racial profiling that occurs with these programs give strong support for the proposition that it is time to reexamine the logic of *Lopez-Mendoza*.<sup>83</sup>

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traffic violations and minor crimes were among the top five charges that led to immigrant deportations. *Id.* at 6; *see also, e.g.*, Julia Preston, *Immigrant, Pregnant, is Jailed Under Pact*, N.Y. TIMES (July 20, 2008), <https://www.nytimes.com/2008/07/20/us/20immig.html> (reporting that a nine-month pregnant Mexican woman who was stopped for a minor traffic violation and arrested for her unlawful immigration status, gave birth to her son while shackled to her hospital bed and guarded by a Davidson County, Tennessee, sheriff's officer.). Lawyers and immigrant advocates noted that this case “shows how local police can exceed their authority when they seek to act on immigration laws they are not fully trained to enforce.” *Id.*; *see also* Joshua Breisblatt, *Civil Rights Concerns Continue Over 287(g) Immigration Enforcement Program*, IMMIGR. IMPACT (Aug. 22, 2017), <http://immigrationimpact.com/2017/08/22/civil-rights-concerns-enforcement-program> (reporting on the prevalence of racial profiling in communities with 287(g) agreements).

81. *See, e.g.*, DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., LACK OF PLANNING HINDERS EFFECTIVE OVERSIGHT AND MANAGEMENT OF ICE'S EXPANDING 287(G) PROGRAM, OIG-18-77, at 2–3 (2018) (reporting that after President Trump issued *Executive Order: Border Security and Immigration Enforcement Improvements*, Exec. Order No. 13767, Jan. 25, 2017, which encouraged expansion of 287(g) agreements, “the number of law enforcement agencies participating in the 287(g) program rose by more than 100 percent[,]” resulting in deficiencies in ICE's onboarding of the agencies: “ICE may not be training law enforcement officers efficiently and is not monitoring the officers to ensure they complete required training. Approving all new participants without adequate planning has hindered ICE's oversight and management of the 287(g) program and may be affecting participating agencies' ability to assist ICE in enforcing immigration laws and identifying removable aliens.”).

82. *See KEE, supra* note 80, at 4.

83. *See National Map of 287(g) Agreements*, IMMIGRANT LEGAL RESOURCE CTR. (Nov. 11, 2019), <https://www.ilrc.org/national-map-287g-agreements> (showing that “90 . . . jurisdictions across 20 states . . . currently have 287(g) agreements,” 52 of which have signed agreements during the Trump Administration, and several jurisdictions that have terminated agreements).

Furthermore, even in the absence of an authorized joint law enforcement effort, state and local officials can wield significant influence over the removal of noncitizens, whether through lawful or unlawful police conduct.<sup>84</sup> Though the Supreme Court established in *Arizona v. United States* that state and local officers not privy to a Section 287(g) agreement cannot stop or arrest individuals for suspected civil immigration violations, it did not prohibit them from asking about an individual's immigration status during a lawful stop, such as for a traffic violation, as long as the inquiry does not unreasonably prolong the stop.<sup>85</sup> Furthermore, state law enforcement officers may have authority to make arrests for some federal immigration crimes, such as illegal entry, a criminal immigration provision.<sup>86</sup> The Supreme Court

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84. See *The Role of the Exclusionary Rule*, *supra* note 68, at 1643 (discussing the increased role of state and local officials in immigration enforcement by sharing with ICE immigration-related information obtained through an arrest). For example, interested or overzealous state and local officials can play a role in deportation by targeting someone of a particular ethnicity to uncover evidence of undocumented status and turning him over to ICE for removal proceedings, where the unconstitutional stop would go unnoticed because of *Lopez-Mendoza*. *Id.* at 1646–49; see also Matthew S. Mulqueen, Note, *Rethinking the Role of the Exclusionary Rule in Removal Proceedings*, 82 ST. JOHN'S L. REV. 1157, 1178–81 (2008) (discussing, among other things, how inter-agency enforcement can lead to increased racial profiling).

85. 567 U.S. 387, 413–15 (2012) (noting that the challenged legal provision of Arizona State law, § 2(B), had not yet gone into effect, so there was “a basic uncertainty about what the law means and how it will be enforced[,]” hence the Court's hesitance to evaluate its validity and its finding that the provision could be read to avoid constitutional concerns and thus did not preempt federal law). In that respect, the *Arizona* Court left an open question: “This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.” *Id.* at 415; see also AM. IMMIGRATION COUNCIL, MOTIONS TO SUPPRESS IN REMOVAL PROCEEDINGS: CRACKING DOWN ON FOURTH AMENDMENT VIOLATIONS BY STATE AND LOCAL LAW ENFORCEMENT OFFICERS 2–3 (2017) [hereinafter AIC: CRACKING DOWN] (noting that when state or local officials are acting pursuant to a Section 287(g) agreement or are engaged in a joint operation with ICE, they may have the authority to make arrests for immigration violations).

86. See AIC: CRACKING DOWN, *supra* note 85, at 3–4 (citing *United States v. Di Re*, 332 U.S. 581, 589 (1948), for the proposition that state law governs whether state officers are authorized to make arrests for federal crimes).

in *Arizona* left this question explicitly undecided, and despite good argument to the contrary, the result has been uncertainty over the state of the law and who has authority to enforce it.<sup>87</sup>

In 1984, the interplay between state and local police forces and immigration law enforcement was minimal, which explains why the Court gave minimal emphasis to the implications of that interaction. The “intrasovereign” nature of immigration law enforcement that was cited in *Lopez-Mendoza* as a factor that increased the deterrence value of the exclusionary rule<sup>88</sup> is more significant today than ever because not only ICE, but also state and local police forces have a stake in obtaining evidence that will not later be suppressed in a removal hearing.<sup>89</sup> The complexity of immigration enforcement and the interaction with state and local police forces has increased the potential deterrent role of the exclusionary rule and has heightened the urgency to apply it more broadly through an egregiousness standard that embraces the full picture.

### 3. The Social Costs of Applying the Exclusionary Rule

Likewise, the *Lopez-Mendoza* Court identified that application of the exclusionary rule would come with costs; but these, too, are in need of reevaluation.<sup>90</sup> The first cost that seemed to be of great concern to the Court was that applying the exclusionary rule in a deportation

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87. *Arizona*, 567 U.S. at 414 (declining to decide whether state officers had the authority to enforce *criminal* immigration law: “There is no need in this case to address whether reasonable suspicion of illegal entry or another immigration crime would be a legitimate basis for prolonging a detention, or whether this too would be preempted by federal law.”).

88. *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1042–43 (1984).

89. *See Who We Are*, *supra* note 2 (“ERO’s work is critical to the enforcement of immigration law against those who present a danger to our national security, are a threat to public safety, or who otherwise undermine the integrity of our immigration system.”).

90. *Lopez-Mendoza*, 468 U.S. at 1046–50. Again, it is notable that Justice White in his dissent, with which three other justices largely agreed, responded to each point of the majority’s cost-benefit analysis with equally well-reasoned analysis, coming to the exact opposite conclusion: that the exclusionary rule should apply in immigration removal proceedings, just as it does in criminal proceedings. *Id.* at 1051–61 (White, J., Brennan, J., Marshall, J., and Stevens, J., dissenting).

proceeding “would require the courts to close their eyes to ongoing violations of the law[,]” namely, that of unlawful presence, which the Court was unwilling to do.<sup>91</sup> Though the opinion is premised on the civil nature of deportation proceedings that are not meant to punish or adjudicate guilt, the *Lopez-Mendoza* majority considered the criminality of unlawful presence as representing a grave social cost of applying the exclusionary rule.<sup>92</sup> Indeed, the Court analogized the release of an undocumented individual back into U.S. society to allowing a leak at a hazardous waste dump to continue unabated or to returning “contraband explosives or drugs to their owner if the contraband had been unlawfully seized.”<sup>93</sup> The great weight given this social cost was premised on the suggestion that unlawful presence constituted a crime and by extension, a threat to public safety.<sup>94</sup>

However, as Justice White in his dissent pointed out at the time, unlawful presence was not a crime under the Immigration and Naturalization Act (INA),<sup>95</sup> and in 2012, in *Arizona v. United States*, the Court definitively put that notion to rest: “As a general rule, it is not a crime for a removable alien to remain present in the United States.”<sup>96</sup> Furthermore, Justice Kennedy recognized that prosecutorial discretion was a necessary practical measure used regularly by immigration authorities to manage enforcement of immigration laws.<sup>97</sup> The recognition

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91. *Id.* at 1045, 1046–47 n.3 (noting that the respondent’s unregistered presence in the country constituted a continuing crime, based on a legal duty for “aliens” to register their presence in the country, and that an unlawful entry is “both punishable and continuing grounds for deportation.”). Additionally, Justice O’Connor noted early in the opinion that “[a] deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though *entering or remaining unlawfully in this country is itself a crime.*” *Id.* at 1038 (emphasis added).

92. *Id.* at 1046.

93. *Id.*

94. See *The Role of the Exclusionary Rule*, *supra* note 68, at 1649–51.

95. *Lopez-Mendoza*, 468 U.S. at 1056–57 (White, J., dissenting) (noting that under the INA, a noncitizen’s unregistered presence in the United States did not constitute a crime; unlawful entry was (and is) a misdemeanor for the first offense and a felony for any subsequent offense, but “the statute does not describe a continuing offense.”).

96. *Arizona v. United States*, 567 U.S. 387, 407 (2012).

97. *Id.* at 406–10 (explaining that the decision to allow a foreign national to remain in the country is at the sole discretion of the federal government and at times



that sometimes it will be necessary for the federal government to allow an otherwise removable individual to remain in the United States cuts against the *Lopez-Mendoza* Court's finding that allowing the respondent to remain in the country is a public safety risk and thus represents a significant social cost to applying the exclusionary rule.<sup>98</sup>

The *Lopez-Mendoza* Court was also concerned that allowing allegations of constitutional violations by respondents would unnecessarily complicate the "deliberately simple deportation hearing system, streamlined to permit the quick resolution of very large numbers of deportation actions . . . ." <sup>99</sup> The backlog of cases on immigration judges' dockets has only increased since 1984, so this concern is still very real. However, the Court's concern that "[n]either the hearing officers nor the attorneys participating in those hearings are likely to be well versed in the intricacies of Fourth Amendment law"<sup>100</sup> is in sharp contrast to the Court's reliance on immigration law enforcement officers to safeguard the Fourth Amendment in the field by following agency policies and procedures.<sup>101</sup> This is an example of the Court using essentially the same factor (level of expertise in Fourth Amendment law) to skew its cost-benefit analysis to get a particular result. This line of reasoning was not convincing then, and it is not convincing now.

The Court itself undermined its commitment to the "streamlined" nature of deportation proceedings by inviting litigation when it recognized an exception to the general rule of the exclusionary rule's non-applicability in this context. Ostensibly, the exception was set forth because the Court realized that tolerating "egregious" and "widespread" constitutional violations was unacceptable, even in the face of potential litigation. The very existence of the exception recognized

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it may be appropriate to exercise such discretion to allow a "removable" individual to remain in the United States).

98. See *The Role of the Exclusionary Rule*, *supra* note 68, at 1649–50 ("Revisiting the deterrence inquiry post-Arizona, then, the Court could no longer begin from a perspective that treats the exclusionary rule's application with a priori greater skepticism than in the criminal context.").

99. *Lopez-Mendoza*, 468 U.S. at 1048.

100. *Id.*

101. *Id.* at 1044–45 (noting that "INS has its own comprehensive scheme for deterring Fourth Amendment violations by its officers" and that officer training and education in Fourth Amendment law is a factor that lessens the deterrent value of the exclusionary rule).

that, in certain circumstances, the benefit of applying the exclusionary rule outweighed the social costs, including that of judicial efficiency.<sup>102</sup>

#### 4. The Time is Ripe for a Reevaluation of the *Lopez-Mendoza* Criteria

As many scholars have noted, and the preceding Sections have described, much of the reasoning and underlying facts that the Court used in its cost-benefit analysis to support its holding have changed drastically since 1984.<sup>103</sup> Even if that analysis were accurate in 1984,<sup>104</sup> thirty-five years of examples and data show that the *Lopez-Mendoza* Court was incorrect in its predictions that the deterrence value of the exclusionary rule in the immigration context would be minimal and that other factors would deter immigration law enforcement misconduct.<sup>105</sup>

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102. See *supra* note 49 (regarding the viability of class action lawsuits to request declaratory or injunctive relief of widespread constitutional violations, posited by the *Lopez-Mendoza* majority as an alternative to the application of the exclusionary rule, that would directly respond to the very real concern of the immigration courts' ever-growing backlog of cases). As noted previously, further discussion of this alternative is beyond the scope of this Note.

103. See generally Macdonald, *supra* note 41; Rossi, *supra* note 55; Elizabeth L. Young, *Converging Systems: How Changes in Fact and Law Require a Reassessment of Suppression in Immigration Proceedings*, 17 U. PA. J. CONST. L. 1395, 1397-99 (2015).

104. All four justices signed on to Justice White's dissent, which asserted that "the costs and benefits of applying the exclusionary rule in civil deportation proceedings do not differ in any significant way from the costs and benefits of applying the rule in ordinary criminal proceedings." *Lopez-Mendoza*, 468 U.S. at 1060 (White, J., dissenting).

105. See *id.* at 1042-50. See generally CHIU ET AL., *supra* note 67, at 25 (explaining that ICE policy and procedure, as set out in agency field and policy manuals, is consistent with constitutional requirements, but that officer conduct is not necessarily consistent with agency policy); Delphine Schrank, *Trump's Season of Fear: Inside the Devastation Left by Immigration Raids*, THE GUARDIAN (Mar. 13, 2017), <https://www.theguardian.com/us-news/2017/mar/13/undocumented-immigration-raids-ice-impact>; *Hunger, Fear, Desperation: What Came of an Ordinary ICE Raid*, CBS NEWS (July 9, 2018, 2:34 PM), <https://www.cbsnews.com/news/hunger-fear-desperation-what-came-of-an-ordinary-ice-raid>.

In the thirty-five years since *Lopez-Mendoza* was decided, there have been innumerable changes to U.S. immigration law and a conceptual evolution of immigration itself has occurred in response to political and economic realities. Two major reforms to immigration law, in an effort to control and deter unlawful immigration, have drastically altered the nature of immigration proceedings and law enforcement.<sup>106</sup> The aftermath of the terrorist attacks of September 11, 2001, led to a major reorganization of the immigration law agency<sup>107</sup> and a heightened focus on the criminalization of immigration law. This led to a far greater number of criminal prosecutions for immigration-related crimes and an increased role of state and local police in immigration enforcement.<sup>108</sup> President Trump and his key advisors have engaged in demeaning rhetoric against immigrants that reveals a propensity for

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106. See Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009; Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359; see also Elias, *supra* note 59; Young, *supra* note 103, at 1397–1400.

107. See *Operational and Support Components*, U.S. DEP'T OF HOMELAND SECURITY, <https://www.dhs.gov/operational-and-support-components> (last updated Jan. 24, 2020) (listing each agency and office within the Department of Homeland Security (DHS) and the areas of responsibility of each). The INS was the executive agency that governed U.S. immigration law prior to the formation of DHS. See also *History*, U.S. DEP'T OF HOMELAND SECURITY (June 15, 2018), <https://www.dhs.gov/history>. DHS was created after the terrorist attacks of September 11, 2001. *Id.* It was formally formed in November of 2002 with the passage of the Homeland Security Act by Congress. *Id.* Its creation unified 22 different federal departments into one unified, integrated, Cabinet-level department. *Id.* DHS includes three agencies that administer and enforce immigration law and policy: USCIS (United States Citizenship and Immigration Services), ICE (Immigration and Customs Enforcement), and CBP (Customs and Border Protection), each of which has jurisdiction over different aspects of U.S. immigration policy. See also *The Role of the Exclusionary Rule*, *supra* note 68, at 1655 (positing that the division of INS into three semiautonomous agencies under the auspices of homeland security segregated immigration law enforcement officers from professionals who saw immigration enforcement “through a humanitarian lens[,]” which “may have had the collateral effect of aggravating the enforcement regime’s propensity for overreach”). Further, because the creation of DHS was prompted as a response to terrorism, the immigration enforcement effort has an underlying terrorist-fighting focus, which automatically raises the stakes and thus the risk of law enforcement abuse that is normally kept in check by the exclusionary rule. See *id.* 1656.

108. See *supra* Section II.B.3; Rossi, *supra* note 55, 1141–46; Mulqueen, *supra* note 84, at 1178–81.

race-based policymaking. President Trump began his presidential campaign with disparaging remarks about Mexicans: “They’re bringing drugs. They’re bringing crime. They’re rapists.”<sup>109</sup> Days after his inauguration, he announced a travel ban targeting Muslim-majority countries.<sup>110</sup> His campaign promise to build a wall on the Mexican-U.S. border led to a record thirty-five day government shutdown, costing at least six billion dollars,<sup>111</sup> and ultimately leading to his declaring a national emergency to secure funding for the border wall.<sup>112</sup> His anti-

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109. Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <http://time.com/4473972/donald-trump-mexico-meeting-insult>; see also Ibram X. Kendi, *The Day ‘Shithole’ Entered the Presidential Lexicon*, THE ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054> (making the point that Trump’s words that demean Latino, black, and Muslim immigrants construct a racial hierarchy that reveals Trump to be more “pro-white than anti-immigrant”); David Leonhardt & Ian Prasad Philbrick, *Donald Trump’s Racism: The Definitive List, Updated*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/interactive/2018/01/15/opinion/leonhardt-trump-racist.html> (reporting on Trump’s saying immigrants from Haiti “all have AIDS” and that Nigerians, once in the U.S., would never “go back to their huts”).

110. See *Timeline of the Muslim Ban*, ACLU WASH., <https://www.aclu-wa.org/pages/timeline-muslim-ban> (last visited Mar. 16, 2019).

111. See Nicholas Fandos, Sheryl Gay Stolberg & Peter Baker, *Trump Signs Bill Reopening Government for 3 Weeks in Surprise Retreat from Wall*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/2019/01/25/us/politics/trump-shutdown-deal.html>.

112. See Eliana Johnson & Katie Galioto, *Trump Issues First Veto of his Presidency*, POLITICO (Mar. 15, 2019, 5:04 PM), <https://www.politico.com/story/2019/03/15/trump-veto-national-emergency-1223285> (reporting on the veto Trump signed rejecting a bipartisan congressional resolution that would have blocked him from obtaining the funding for the wall through his declaration of a national emergency, pursuant to the National Emergency Act); see also Ginger Thompson, *Families are Still Being Separated at the Border, Months After “Zero Tolerance” Was Reversed*, PROPUBLICA (Nov. 27, 2018, 4:45 PM), <https://www.propublica.org/article/border-patrol-families-still-being-separated-at-border-after-zero-tolerance-immigration-policy-reversed> (reporting that the Trump Administration’s policy of separating parents from their children at the U.S.–Mexico border is still occurring, even though the Administration had reportedly ended that policy); Philip Rucker, Josh Dawsey & Seung Min Kim, *Trump Defiant as Crisis Grows Over Family Separation at the Border*, WASH. POST (June 18, 2018), [https://www.washingtonpost.com/politics/trump-defiant-as-crisis-grows-over-family-separation-at-the-border/2018/06/18/210c78ca-730f-11e8-805c-4b67019fcfe4\\_story.html](https://www.washingtonpost.com/politics/trump-defiant-as-crisis-grows-over-family-separation-at-the-border/2018/06/18/210c78ca-730f-11e8-805c-4b67019fcfe4_story.html) (reporting on the Trump Administration’s roundly condemned policy of separating families at

immigrant policies are supported and shaped by his senior policy advisor Steven Miller, whose aim is to drastically cut all immigration to the United States and to reduce to an all-time low the number of refugees allowed in the United States.<sup>113</sup>

The time for reassessment of the analysis undertaken by the *Lopez-Mendoza* Court in 1984 is now because the stakes are higher than ever. The three and a half decades of unaccountability for constitutional violations has led immigration law enforcement bodies to commit widespread constitutional violations.<sup>114</sup> Evidence of the Department of Justice acting to impede the independence of the immigration judges and the BIA panel, who are after all employees of the Department, indicates that internal regulations will not suffice to protect the rights of respondents in removal proceedings.<sup>115</sup>

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the U.S. Southwest border). More than 2,300 children were separated from their parents at the border between May 5 and June 9, 2018. *Id.* See Christine Murray, *Tired of Waiting for Asylum, Migrants from Caravan Breach U.S. Border*, REUTERS (Dec. 3, 2018, 11:54 PM), <https://www.reuters.com/article/us-usa-immigration-caravan/tired-of-waiting-for-asylum-migrants-from-caravan-breach-us-border-idUSKBN1O30D5> (reporting on the thousands of Central American refugees who have walked to the U.S. border with Mexico, while the Trump Administration sends troops to stop them and has tried to circumvent international law to keep the refugees out of the United States); Alan Yuhas, *U.S. Agents Fire Tear Gas Across Mexican Border*, N.Y. TIMES (Jan. 1, 2019), <https://www.nytimes.com/2019/01/01/world/americas/migrants-border-tear-gas.html> (reporting that American border officers threw tear gas across the border at about 150 refugees trying to cross the border into the United States).

113. See Nahal Toosi, *Inside Stephen Miller's Hostile Takeover of Immigration Policy*, POLITICO (Aug. 29, 2018, 5:13 AM), <https://www.politico.com/story/2018/08/29/stephen-miller-immigration-policy-white-house-trump-799199> (describing Stephen Miller's "power grab" to set the anti-immigration agenda for the Trump Administration).

114. See CHIU ET AL., *supra* note 67.

115. See *generally Strengthening and Reforming America's Immigration Court System: Hearing Before the Subcomm. on Border Sec. and Immigration of the S. Comm. on the Judiciary*, 115th Cong. (2018) (statement of J. A. Ashley Tabaddor, President, National Association of Immigration Judges) (advocating for increased judicial independence through legislation, explaining that a neutral court should not be contained within a law enforcement agency nor be subject to politicization); Remarks, Jeff Sessions, Att'y Gen., U.S. Dep't of Justice, Attorney General Sessions Delivers Remarks to the Largest Class of Immigration Judges in History for the Executive Office for Immigration Review (EOIR) (Sept. 10, 2018), <https://www.jus>

Today's focus on immigration law enforcement is perhaps at its height. ICE's annual budget is approximately six billion dollars.<sup>116</sup> The Trump Administration has made a concerted effort to increase the agency's workforce and its technological capabilities to meet the increased needs that have resulted from the Administration's focus on enforcement and removal and its rejection of prosecutorial discretion.<sup>117</sup> For example, ICE's budget request for 2019 includes \$571 million to hire personnel and \$35.5 million for technological infrastructure to meet the demands of the President's Executive Orders calling for increased enforcement.<sup>118</sup>

Furthermore, technology has advanced considerably since 1984 and it can be harnessed to address administrative efficiency concerns. For instance, in the event that ICE officers are required to respond to allegations in a removal suppression hearing, the immigration judge could readily and securely communicate with them via smart phone, allowing them to testify remotely. Regardless, while economic and administrative realities are important considerations, such concerns should not supersede the upholding of constitutional rights, which is a fundamental role of the Supreme Court: "The Court may be willing to

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tice.gov/opa/speech/attorney-general-sessions-delivers-remarks-largest-class-immigration-judges-history ("As we work to restore rule of law in our immigration system, we will send a clear message to the world that the lawless practices of the past are over. The world will know what our rules are, and great numbers will no longer undertake this dangerous journey. The number of illegal aliens and the number of baseless claims will fall. A virtuous cycle will be created, rather than a vicious cycle of expanding illegality. The American people have spoken. They have spoken in our laws and they have spoken in our elections. They want a safe, secure border and a lawful system of immigration that actually works. Let's deliver it for them."); Cody Wofsy & Katrina Eiland, *Jeff Sessions' Illegal Attacks on Asylum Seekers*, ACLU: SPEAK FREELY BLOG (Aug. 7, 2018, 4:30 PM), <https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/jeff-sessions-illegal-attacks-asylum-seekers> (reporting on former Attorney General's "deeply flawed legal decision" changing longstanding asylum law principles as part of the Trump Administration's effort to eliminate that benefit for domestic violence victims).

116. See *Who We Are*, *supra* note 2.

117. See generally Matthew Albence & Derek Benner, *Statement Regarding the Fiscal Year 2019 President's Budget Request*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Apr. 12, 2018), <https://www.ice.gov/sites/default/files/documents/Speech/2018/180412albenceBenner.pdf>.

118. See *id.* at 7.

throw up its hands in dismay because it is administratively inconvenient to determine whether constitutional rights have been violated, but we neglect our duty when we subordinate constitutional rights to expediency in such a manner.”<sup>119</sup>

Nevertheless, relying on immigration law enforcement’s good faith self-regulation, the *Lopez-Mendoza* Court effectively exempted an entire administrative bureaucracy and its law enforcement body from oversight and enforcement of a fundamental constitutional right. However, the Court did not address the logic of whether an enforcement body or the political branches of government can be relied upon to exercise such self-imposed restraint when it makes their mission more difficult to accomplish.<sup>120</sup> A bird’s eye view from today’s perspective shows that it could not and cannot be relied upon. Today more than ever, the wisdom of the *Lopez-Mendoza* holding is being tested, and the key to maintaining its relevance is through proper application of the exception. For that, a workable agency-issued, egregious standard must be established and put into practice.

### III. THE *LOPEZ-MENDOZA* EGREGIOUSNESS EXCEPTION: WHEN SHOULD THE EXCLUSIONARY RULE APPLY IN IMMIGRATION REMOVAL

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119. *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1059 (1984) (White, J., dissenting).

120. *See United States v. Leon*, 468 U.S. 897, 941 (1984) (Brennan, J., dissenting) (citation omitted) (“Thus, some criminals will go free *not*, in Justice (then Judge) Cardozo’s misleading epigram, ‘because the constable has blundered,’ but rather because official compliance with Fourth Amendment requirements makes it more difficult to catch criminals.”) (emphasis added); *see also* Stewart Potter, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1389 (1983) (discussing the exclusionary rule as the primary measure to deter police misconduct, given the “vast majority of fourth amendment violations—the frequent infringements motivated by commendable zeal, not commendable malice. For those violations, a remedy is required that inspires the police officer to channel his enthusiasm to apprehend a criminal toward the need to comply with the dictates of the fourth amendment. There is only one such remedy—the exclusion of illegally obtained evidence. . . . ‘[T]he rule . . . compel[s] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.’” (quoting his own majority opinion in *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

## PROCEEDINGS?

By issuing an exception to its holding that the exclusionary rule does not apply in deportation proceedings, the *Lopez-Mendoza* Court affirmed that in certain circumstances, regardless of the “unusual and significant” administrative and social costs it had identified, the exclusionary rule should apply.<sup>121</sup> Interestingly, although the opinion revolved around the deterrence rationale, the exception does not contemplate deterrence as its *raison d’être*: it cannot be said that an egregious violation is inherently more deterrable than an ordinary constitutional violation.<sup>122</sup> Rather, the exception seems to be grounded in judicial integrity: while the Court can effectively condone a “garden-variety” violation,<sup>123</sup> it would be a bad look for the Court to allow the government to “egregiously” violate people’s rights.<sup>124</sup> This Part explores the meaning of the exception as formulated by the *Lopez-Mendoza* plurality and the interpretations of the exception as expressed by the lower courts. It will then briefly review the current state of exclusionary rule jurisprudence in the criminal context to show that the exception as written in 1984 is largely compatible with the standard used in the criminal context today. This will guide the subsequent proposal for the agency-wide egregiousness standard laid out in Part IV of this Note.

*A. The Lopez-Mendoza Egregiousness Exception*

Though the Supreme Court held that the exclusionary rule does not apply in civil immigration proceedings, in Part V of the opinion, a plurality of the Court attempted to soften that seemingly categorical holding by establishing two exceptions, leaving open a “glimmer of

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121. *Lopez-Mendoza*, 468 U.S. at 1046, 1050–51 (“Finally, we do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained . . . . At issue here is the exclusion of credible evidence gathered in connection with peaceful arrests by INS officers. We hold that evidence derived from such arrests need not be suppressed in an INS civil deportation hearing.”) (citation omitted).

122. See *The Role of the Exclusionary Rule*, *supra* note 68, at 1641.

123. See, e.g., *Garcia-Torres v. Holder*, 660 F.3d 333, 336 (8th Cir. 2011) (“Petitioner points to nothing more than a warrantless entry of business premises and arrest, mere garden-variety error, if a Fourth Amendment violation at all.”).

124. *Id.*



hope of suppression.”<sup>125</sup> First, it recognized that the applicability of the exclusionary rule was a product of the moment from which the holding issued: “Our conclusions concerning the exclusionary rule’s value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.”<sup>126</sup> Second, the plurality limited its holding to apply to “evidence gathered in connection with peaceful arrests by INS officers,” and in so doing created an exception for egregious violations: “we do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.”<sup>127</sup>

Determining whether a Fourth Amendment violation has occurred depends on case-specific details of the interaction between the immigration officers and the individual. Whether any given violation meets the “egregiousness” standard requires another layer of analysis, the results of which vary greatly by jurisdiction and individual authority. The text of Part V that refers to the exception itself, the accompanying footnote, and the case references given therein suggest that the Court was recognizing an exception for Fourth Amendment violations that rose to the level of due process violations,<sup>128</sup> an affirmation of BIA practice pre-*Lopez-Mendoza*.<sup>129</sup>

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125. *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 21 (1st Cir. 2004); *Lopez-Mendoza*, 468 U.S. at 1050–52.

126. *Lopez-Mendoza*, 468 U.S. at 1050.

127. *Lopez-Mendoza*, 468 U.S. at 1050–51. While five justices joined Parts I through IV of the opinion holding that the exclusionary rule does not apply in removal proceedings, only four justices signed on to Part V, which delineated the exception for egregious or widespread Fourth Amendment violations. *Id.*

128. *Id.* See generally Rossi, *supra* note 55, at 495–500 (discussing the case law referenced in the text and footnote of Part V and referring to Justice Blackmun’s notes and the parties’ briefs and oral arguments to help explicate the kind of exception that might be invoked as “egregious,” and the Court’s intention to create a due process exception).

129. *Lopez-Mendoza*, 468 U.S. at 1051 n.5 (citing *Garcia*, 17 I. & N. Dec. 319, 321 (B.I.A. 1980) (suppression granted after respondent’s “request for counsel had been repeatedly refused”); *Toro*, 17 I. & N. Dec. 340, 343 (B.I.A. 1980) (stating that evidence would be suppressed if its use in proceedings would be “‘fundamentally unfair’ and in violation of due process requirements of the Fifth Amendment”); *Ramira-Cordova*, No. A21 095 659 (B.I.A. 1980) (suppression granted where evidence was “obtained as a result of a nighttime warrantless entry into the aliens’ residence”))).

Although the text of the exception seems to suggest that for the exception to apply, an egregious violation must both “transgress . . . fundamental fairness *and* undermine the probative value of the evidence[.]”<sup>130</sup> several circuits have not interpreted the standard that way.<sup>131</sup> Fourth Amendment violations almost always generate evidence with high probative value, whether found to be “fundamentally unfair” or not. Therefore, if, for the exception to apply, the violation had to meet both requirements to merit suppression, Fourth Amendment analysis would almost always rule out the exception.<sup>132</sup> In *Gonzalez-Rivera v. INS*, a Ninth Circuit case, the court explicitly rejected the government’s literal interpretation, explaining that “a fundamentally unfair Fourth Amendment violation is considered egregious regardless of the probative value of the evidence obtained.”<sup>133</sup> Furthermore, the court noted that two of the exemplary cases cited in *Lopez-Mendoza, Rochin v. California*<sup>134</sup> and *Matter of Toro*,<sup>135</sup> were both cases that considered the egregiousness of the violations based on fundamental fairness grounds, probative value of the evidence notwithstanding.<sup>136</sup> In the third case cited, *Matter of Garcia*, the court suppressed evidence on due process grounds based on its unreliability due

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130. *Lopez-Mendoza*, 468 U.S. at 1050–51 (emphasis added).

131. *See, e.g., Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1451 (9th Cir. 1994); *see also The Role of the Exclusionary Rule, supra* note 68, at 1639 n.46.

132. *See The Role of the Exclusionary Rule, supra* note 68, at 1639–40 (discussing why the language of that sentence in the exception must be read as disjunctive, not conjunctive, for the exception to have any meaning).

133. *Gonzalez-Rivera*, 22 F.3d at 1451.

134. 342 U.S. 165, 166 (1952). *Rochin* involved a defendant who had ingested two morphine pills and the police forcibly induced vomiting to recover the pills to use as evidence. *Id.* Although the evidence was highly probative, it was nevertheless suppressed on fundamental fairness grounds. *Id.*

135. 17 I. & N. Dec. 340, 341 (B.I.A. 1980). *Toro* involved a respondent who moved to suppress evidence obtained in violation of her Fourth Amendment right when she was stopped by an immigration officer solely based on “her obvious Latin appearance.” *Id.* (citations omitted). The probative value of the evidence was not at issue in the inquiry regarding whether the violation was sufficiently egregious to merit suppression of the evidence. *Id.*

136. *Gonzalez-Rivera*, 22 F.3d at 1451 (noting if the government’s interpretation of the standard were followed, “the Supreme Court’s own examples of egregious conduct would not satisfy its definition of the term.”).

to egregious officer tactics.<sup>137</sup> Other circuits have also followed this common-sense “disjunctive” interpretation of the standard.<sup>138</sup>

Justice O’Connor cited *Rochin v. California* to exemplify an egregious violation.<sup>139</sup> In *Rochin*, the police pumped the suspect’s stomach to elicit the evidence they sought, evidence that the Court later excluded.<sup>140</sup> This citation at first blush suggests that to be egregious, the officer conduct must “shock[] the conscience”<sup>141</sup> in a similarly severe fashion as in *Rochin*, to merit application of the exclusionary rule. However, the *Rochin* court suppressed the evidence due to a violation of the defendant’s Fifth Amendment due process rights.<sup>142</sup> Thus, if the *Lopez-Mendoza* egregiousness exception would only be satisfied by conduct such as that in *Rochin*,<sup>143</sup> then Fourth Amendment analysis

137. 17 I. & N. Dec. 319, 321 (B.I.A. 1980). In *Garcia*, the BIA suppressed the evidence, deeming it unreliable, as it was obtained after a prolonged period of detention during which Garcia’s request for an attorney was ignored and he was told he “had no rights whatsoever[,]” among other coercive practices. *Id.*

138. See *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 234–35 (2d Cir. 2006) (“The Court, seemingly inadvertently, used the conjunctive ‘and’ instead of the disjunctive ‘or’ to link these two possible grounds for deeming a violation egregious[,] [which] . . . could be read as saying that proof of both prongs . . . was needed to justify exclusion . . . . This, however, is plainly not what the Court intended.”) (citation omitted); *Puc-Ruiz v. Holder*, 629 F.3d 771, 778 (8th Cir. 2010) (“The probative value of the evidence obtained as a result of Puc-Ruiz’s arrest is undisputed; we therefore examine whether the alleged Fourth Amendment violation was sufficiently egregious to ‘transgress notions of fundamental fairness.’”); see also Rossi, *supra* note 55, at 496–97 (explaining that the *Lopez-Mendoza* Court, in citing *Rochin*, preserved the due process egregious violation that had been applied pre-*Lopez-Mendoza* by the BIA).

139. *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1051 (1984) (citing *Rochin*, 342 U.S. 165 (1952)).

140. 342 U.S. at 166.

141. *Id.* at 172.

142. *Id.* at 174 (“On the facts of this case the conviction of the petitioner has been obtained by methods that offend the Due Process Clause.”). At the time *Rochin* was decided, the Court had not yet decided *Mapp*, which mandated in state courts the use of the exclusionary rule for *Fourth Amendment* violations. Therefore, the Fourth Amendment was not the basis for exclusion of evidence in *Rochin*; it was rather a decision based on a violation of Fifth Amendment due process rights. See YALE KAMISAR ET AL., *BASIC CRIMINAL PROCEDURE* 28–29 (14th ed. 2015).

143. *Rochin*, 342 U.S. at 172 (“They are methods too close to the rack and the screw to permit of constitutional differentiation.”).

would be superfluous, “as the *Rochin* doctrine would independently require suppression.”<sup>144</sup>

*Lopez-Mendoza* was decided 5–4, with each of the dissenting justices writing separately to find that the exclusionary rule should apply in immigration removal proceedings.<sup>145</sup> Thus, though technically the exception was supported by only a plurality of the Court, eight justices agreed that the exclusionary rule should apply in removal proceedings in cases of widespread or egregious Fourth Amendment violations.<sup>146</sup> However, because only a plurality of the Court officially

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144. *The Role of the Exclusionary Rule*, *supra* note 68, at 1640 (explaining the likely significance of the “*Cf. Rochin*” citation in Part V of the *Lopez-Mendoza* plurality opinion, to show that a violation that is fundamentally unfair merits the application of the exclusionary rule). *See cf., Compare*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“As a citation signal, *cf.* directs the reader’s attention to another authority or section of the work in which contrasting, analogous, or explanatory statements may be found.”).

145. *See* *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1051–52 (1984) (Brennan, J., dissenting) (“I believe the basis for the exclusionary rule does not derive from its effectiveness as a deterrent, but is instead found in the requirements of the Fourth Amendment itself . . . . The Government of the United States bears an obligation to obey the Fourth Amendment; that obligation is not lifted simply because the law enforcement officers were agents of the Immigration and Naturalization Service, nor because the evidence obtained by those officers was to be used in civil deportation proceedings.”); *id.* at 1052–53 (White, J., dissenting) (“I believe that the conclusion of the majority is based upon an incorrect assessment of the costs and benefits of applying the rule in [removal] proceedings . . . . [T]here is no principled basis for distinguishing between the deterrent effect of the rule in criminal cases and in civil deportation proceedings.”); *id.* at 1060–61 (Marshall, J., dissenting) (“[A] sufficient reason for excluding from civil deportation proceedings evidence obtained in violation of the Fourth Amendment is that there is no other way to achieve ‘the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.’”) (quoting *United States v. Calandra*, 414 U.S. 338, 357 (1974)); *id.* at 1061 (Stevens, J., dissenting) (“Because the Court has not yet held that the rule of *United States v. Leon* . . . has any application to warrantless searches, I do not join the portion of Justice White’s opinion that relies on that case. I do, however, agree with the remainder of his dissenting opinion.”).

146. *See* *Oliva Ramos v. Att’y Gen. of the U.S.*, 694 F.3d 259, 271–72 (3d Cir. 2012) (affirming the view that eight justices supported the exception); *see also* *Yanez-Marquez v. Lynch*, 789 F.3d 434, 449 (4th Cir. 2015) (“[E]ight justices in *Lopez-Mendoza* seem to have agreed that the exclusionary rule applies in removal proceedings in some form.”).

signed on to the exception, its application was left open to interpretation by lower courts. Furthermore as dicta the exception is not strictly subject to *stare decisis*, which makes it vulnerable to being rather easily overturned by a Court that would be so inclined.<sup>147</sup> What was intended to be a bright-line rule formulated by a five-justice majority has resulted in division among the courts as to whether and when to apply the exclusionary rule in removal proceedings.<sup>148</sup>

### B. *The Circuits' Interpretations of the Egregious Exception*

Justice O'Connor's rather cursory and amorphous description of the exception has generated variation among the circuits as to what constitutes an egregious violation, whether and when it applies, and at what point violations have become widespread.<sup>149</sup> For its part, the BIA has generally recognized the applicability of the egregiousness exception but has offered little concrete guidance in its decisions as to the scope of the exception.<sup>150</sup> Five circuits—the Second, Third, Fourth,

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147. See Judy C. Wong, *Egregious Fourth Amendment Violations and the Use of the Exclusionary Rule in Deportation Hearings: The Need for Substantive Equal Protection Rights for Undocumented Immigrants*, 28 COLUM. HUM. RTS. L. REV. 431, 441–42 (1997) (discussing the tenuousness of the Ninth Circuit's approach to interpreting Fourth Amendment violations based on racial targeting as egregious because it relies on a close textual reading of the citation of *Rochin v. California*, 342 U.S. 165, 166 (1952) in *Lopez-Mendoza's* exception, which as dicta is vulnerable to reinterpretation by the Supreme Court). Wong argues that instead, the egregiousness question should be interpreted under an equal protection analysis. *Id.* at 451–452.

148. See generally Rossi, *supra* note 55, at 504–21 (providing a summary of then-current decisions to illustrate the different interpretations of “egregious” violations and when the exclusionary rule was applied in immigration proceedings).

149. See generally Elias, *supra* note 59 (showing that in 2008 there was already substantial evidence Fourth Amendment violations were widespread, both geographically and institutionally); Rossi, *supra* note 55, at 504–22 (providing a summary of decisions to illustrate the different interpretations of “egregious” violations and applications of the exclusionary rule in immigration proceedings).

150. See AM. IMMIGRATION COUNCIL, PRACTICE ADVISORY, MOTIONS TO SUPPRESS IN REMOVAL PROCEEDINGS: A GENERAL OVERVIEW 8–9 (2017) [hereinafter AIC: GEN'L OVERVIEW], [https://www.americanimmigrationcouncil.org/practice\\_advisory/motions-suppress-removal-proceedings-general-overview](https://www.americanimmigrationcouncil.org/practice_advisory/motions-suppress-removal-proceedings-general-overview) (noting that, although in general the BIA has recognized the exception, in one unpublished decision (later reversed on appeal to the Third Circuit in *Oliva-Ramos v. Att'y Gen. of the U.S.*, 694 F.3d 259 (3d. Cir. 2012)), a BIA panel did not follow its own precedent when it

Eighth, and Ninth—consider the exception for egregious violations binding within their jurisdiction.<sup>151</sup> Five other circuits—the First, Fifth, Sixth, Seventh, and Tenth—have acknowledged that the exception might apply in certain circumstances, and the Eleventh Circuit has not weighed in.<sup>152</sup>

Post-*Lopez-Mendoza*, the circuits that have explicitly adopted the exception as binding have developed differing tests to determine egregiousness.<sup>153</sup> As respondents have brought motions to suppress evidence before the courts, different factors have come into play in removal suppression jurisprudence in the circuits.

### 1. The Conduct-Based, Totality of the Circumstances Approach

The Second, Third, Fourth, and Eighth Circuits have developed tests that focus on the severity of the misconduct of the officers—essentially an objective approach to the question.<sup>154</sup> This approach largely adheres to what seems to be the *Lopez-Mendoza* idea of what constitutes an egregious violation, based on its reference to *Rochin*,

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declined to review a claim for exclusion based on the exception); Rossi, *supra* note 55, at 521–24.

151. See AIC: GEN'L OVERVIEW, *supra* note 150, at 9–12 (specifying that only the Ninth Circuit has ordered suppression based on facts indicating an egregious violation, where the other circuits have remanded for further proceedings); Rossi, *supra* note 55, at 504–21.

152. See *Batres-Garay v. United States Att'y Gen.*, No. 16-16117, 2018 U.S. App. LEXIS 23754, at \*11–12 (11th Cir. Aug. 23, 2018) (stating that the Eleventh Circuit has not addressed the question whether an egregious violation of the Fourth Amendment would require suppression of evidence from removal proceedings, and that the court “need not decide it now because Batres failed to make a prima facie showing of an egregious violation of the Fourth Amendment.”). Judge Martin wrote separately in a concurrence to state that “as a rule, evidence obtained through egregious violations of constitutional rights may properly be suppressed in removal proceedings[,]” noting that eight justices in *Lopez-Mendoza* “suggested that evidence obtained through egregious violations . . . should be excluded in removal proceedings” and citing several other circuits that have concluded the same. *Id.* at \*16–17 (Martin, J., concurring). See also AIC: GEN'L OVERVIEW, *supra* note 150, at 12 (reviewing the circuits' stances on the question); Rossi, *supra* note 55, at 504–21.

153. See AIC: GEN'L OVERVIEW, *supra* note 150, at 9–12; Rossi, *supra* note 55, at 504–21; Scharf, *supra* note 30, at 73–81.

154. See AIC: GEN'L OVERVIEW, *supra* note 150, at 9–10.

where the officers' severe misconduct formed the basis for exclusion.<sup>155</sup> This interpretation of egregiousness lends credence to the notion that the Court's exception maintained a concern for judicial integrity because it "shields the judiciary from association with the types of police misconduct like racism and brutality that are most likely to elicit the public's disapprobation."<sup>156</sup> Furthermore, this interpretation of the exception does not respond to the deterrence motivation of the exclusionary rule because it cannot be said that "violent or race-driven police behavior is inherently more deterrable than ordinary Fourth Amendment misconduct."<sup>157</sup>

In general, the circuits named above seem to adopt an "I'll know it when I see it," case-by-case approach to determine if the violation merits suppression, often citing to each other to express general agreement as to the factors to consider when deciding whether the misconduct in question is egregious. Generally though, the standard assumes that "if a Fourth Amendment violation is measured by what is reasonable, then an egregious violation must surely be something more than unreasonable."<sup>158</sup>

The Second Circuit explicitly agreed with the Third Circuit's non-exhaustive list of factors that may help the BIA or an immigration judge determine whether a law enforcement officer's misconduct is sufficiently egregious to warrant suppression of evidence.<sup>159</sup> The "totality of the circumstances" inquiry should include the following factors, depending on the circumstances of each case, with none being dispositive on its own: whether the violation was intentional or occurred under threats, coercion or physical abuse, whether the seizure was base-

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155. See *The Role of the Exclusionary Rule*, *supra* note 68, at 1641 ("In primarily looking to the manner and characteristics of law enforcement actions, it appropriately draws upon *Rochin* as a benchmark without going so far that it makes the inquiry redundant with *Rochin* due process doctrine.").

156. *Id.* (referencing the Ninth Circuit's criticism of that interpretation of the exception in *Adamson v. Comm'r*, 745 F.2d 541, 545–46 (9th Cir. 1984)).

157. *Id.*

158. *Cotzojay v. Holder*, 725 F.3d 172, 182 (3d Cir. 2013) (citing *Oliva-Ramos v. Att'y Gen. of the U.S.*, 694 F.3d 259, 276 (3d Cir. 2012)).

159. See *id.* at 182–83 (citing *Oliva-Ramos v. Att'y Gen. of U.S.*, 694 F.3d 259, 279).

less as well as gross or unreasonable, whether there was an unreasonable show of force, and whether the seizure or arrest was based on “race or perceived ethnicity.”<sup>160</sup>

The Second Circuit identified two circumstances where a suspicionless stop might be deemed egregious to merit exclusion of evidence. The court in *Almeida-Amaral v. Gonzales* stated that while a seizure made for no reason at all “sets the stage for egregiousness,” the seizure must be “sufficiently severe” to qualify as an egregious exception, noting that a stop that is “particularly lengthy” or where there is a “show or use of force” might rise to the level of egregious.<sup>161</sup> Second, even where the stop is not “severe,” it may qualify as egregious “if the stop was based on race (or some other grossly improper consideration).”<sup>162</sup> In a 2013 case, the Second Circuit applied the exclusionary rule when ICE effected a nighttime, warrantless search without consent

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160. *Oliva-Ramos*, 694 F.3d at 279. In this case, the court did not rule on whether the violation was in fact egregious, but rather remanded to the BIA “(and perhaps the IJ)” to “meaningfully examine the particular facts and circumstances of the ICE agents’ conduct.” *Id.* *Oliva-Ramos*’s suppression motion was originally denied by the immigration judge (IJ) because his allegations of widespread violations were based on evidence that was in possession of the government and which the government refused to provide. *Id.* at 265. The IJ did not allow him time to receive the information via FOIA request and he denied the motion to suppress. *Id.* at 266. *Oliva-Ramos* appealed to the BIA, before whom he was able to present the information that he had obtained from the government through FOIA litigation. *Id.* The BIA refused to review the evidence and affirmed the IJ’s decision, in the process stating that the “widespread” exception of the *Lopez-Mendoza* plurality was “obiter dictum” and that neither the Supreme Court nor its own precedents recognized such an exception. *Id.* at 266–70. The Third Circuit Court of Appeals explicitly recognized that the “widespread exception” was “as much a part of the *Lopez-Mendoza* discussion as ‘egregious’” violations and found the BIA had erred in not recognizing it and not reviewing the evidence offered by *Oliva-Ramos* in support of his motion to suppress. *Id.* at 279–80, 283.

161. 461 F.3d 231, 235–36 (2d Cir. 2006).

162. *Id.* at 235. The evidence here was not suppressed because, though the respondent alleged he was stopped for no reason other than his race, he was unable to offer proof. *See id.* at 237. It has been competently argued that in cases alleging racial profiling, a heightened standard of review should be used to analyze the violation under an equal protection framework, rather than a Fourth Amendment deterrence framework, to determine if exclusion of evidence is warranted. *See Wong, supra* note 147, at 460–64.



or exigent circumstances, without requiring that the violation involve a threat or physical violence.<sup>163</sup>

The Eighth Circuit has concurred in the judgment that an egregious violation does not require physical brutality to qualify, but it does require more than a violation.<sup>164</sup> In *Puc-Ruiz v. Holder*, the court did not find an egregious violation but it did provide some guidance by listing several factors that might point to an egregious violation.<sup>165</sup> These factors include “employ[ing] an unreasonable show or use of force in arresting and detaining” the individual, arresting an individual based on “race or appearance[,] or “invas[ing] private property and detain[ing] individuals with *no* articulable suspicion whatsoever.”<sup>166</sup> As have the other circuits, the court was careful to note that this was not an exhaustive list of conduct that could be found to be egregious for the purposes of the *Lopez-Mendoza* exception.<sup>167</sup>

## 2. The Ninth Circuit’s “Objective Bad Faith” Approach

The Ninth Circuit has the most generous interpretation of the egregious exception for respondents in removal proceedings. While its interpretation of the exception also does not require physical brutality, the Ninth Circuit is alone in recognizing an exclusionary rule that would apply to “bad-faith” violations of the Fourth Amendment, based on an objective reasonableness standard.<sup>168</sup> The Ninth Circuit’s bad

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163. *See Cotzojay*, 725 F.3d at 182.

164. *See Puc-Ruiz v. Holder*, 629 F.3d 771, 778 (8th Cir. 2010) (citing *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 236 (2d Cir. 2006)).

165. *See id.* at 779.

166. *Id.*

167. *Id.*

168. *Adamson v. Comm’r*, 745 F.2d 541, 546 (9th Cir. 1984) (citing *United States v. Leon*, 468 U.S. 897, 919 n.20 (1984)) (“An objective test should be used to determine whether a reasonable police officer would have believed that the search was legal.”). *See Leon*, 468 U.S. at 919 n.20 (“We emphasize that the standard of reasonableness we adopt is an objective one. Many objections to a good-faith exception assume that the exception will turn on the subjective good faith of individual officers. ‘Grounding the modification in objective reasonableness, however, retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment.’ The objective standard we adopt, moreover, requires officers to have a reasonable knowledge of what the law

faith egregiousness standard mandates exclusion of evidence that “is obtained by deliberate violations of the fourth amendment, or by conduct a *reasonable officer should have known* is in violation of the Constitution.”<sup>169</sup> The standard is objective, not subjective, because it relies upon the notion that where there is an “unequivocal doctrinal backdrop” of Fourth Amendment principles, reasonable officers know or should know when they are acting in violation thereof.<sup>170</sup> By the same token, violating clear Fourth Amendment principles under such circumstances constitutes a deliberate violation, the fruits of which will be suppressed.<sup>171</sup>

The Ninth Circuit premised its standard on a reading of the exception that invoked one of the original purposes of the exclusionary rule, that of preserving judicial integrity, because “[f]ederal courts cannot countenance deliberate violations of basic constitutional rights. To do so would violate our judicial oath to uphold the Constitution of the United States.”<sup>172</sup> For example, *Gonzalez-Rivera* involved a respondent who alleged he was stopped by Border Patrol officers solely because of his Hispanic appearance.<sup>173</sup> The immigration judge granted his motion to suppress, finding the race-based stop to be an egregious violation; the BIA reversed, and the Ninth Circuit Court of Appeals reversed the BIA, reinstating the immigration judge’s grant of the motion.<sup>174</sup> As in the other circuits, a purely racially-motivated stop is considered an egregious violation, but it is often the case that the respondent is unable to provide sufficient evidence to prove the stop was motivated solely because of race.

Other circuits and even judges within the Ninth Circuit have criticized this test as overbroad and untethered to the *Lopez-Mendoza* standard<sup>175</sup> because of its seeming lack of concern for officer conduct

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prohibits.”) (quoting *Illinois v. Gates*, 462 U.S. 213, 261 n.15 (1983) (White, J., concurring))).

169. *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1448 (9th Cir. 1994) (citing the standard first pronounced in *Adamson*, 745 F.2d at 545).

170. *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1018–19 (9th Cir. 2008).

171. *Id.*

172. *Gonzalez-Rivera*, 22 F.3d at 1448.

173. *Id.* at 1443.

174. *Id.* at 1444, 1452.

175. *See, e.g., Lopez-Rodriguez*, 536 F.3d at 1019–20 (Bybee, Circuit J., concurring); *Oliva-Ramos v. Att’y Gen. of the U.S.*, 694 F.3d 259, 276–77 (2012) (noting

that “transgresses notions of fundamental fairness,” as exemplified by the *Rochin* citation.<sup>176</sup> Rather, the Ninth Circuit focuses on an officer’s conduct in relation to the Fourth Amendment itself to decide whether it is egregious. When an officer “knows or should have known” that he is violating another person’s Fourth Amendment rights,<sup>177</sup> he will also know or should know that any evidence he obtains through that violation will be suppressed in a subsequent deportation proceeding.

The advantage of the Ninth Circuit’s approach is that it does not require a special standard for the immigration context, so it does not unnecessarily complicate the analysis, either for immigration judges or officers in the field.<sup>178</sup> That is, where an officer’s conduct falls outside well-established Fourth Amendment doctrine, it is considered egregious and merits the application of the exclusionary rule.<sup>179</sup> For example, the Ninth Circuit’s standard can exclude evidence more readily in the case of a nonconsensual, warrantless home entry without exigent circumstances, because the officers will be held to the reasonableness standard without further inquiry into the severity of the officers’ conduct.<sup>180</sup> In this regard, the Ninth Circuit egregiousness standard best responds to one of the major concerns of the *Lopez-Mendoza* majority, that of unnecessarily complicating “a deliberately simple deportation

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that application of the Ninth Circuit standard to situations such as that of *Oliva-Ramos*, where ICE agents conduct searches or seizures based on ICE policy directives that violate the Fourth Amendment, their good-faith actions can be deemed to be objectively reasonable and thus not egregious).

176. See *The Role of the Exclusionary Rule*, *supra* note 68, at 1640.

177. See *Adamson v. Comm’r*, 745 F.2d 541, 545 (9th Cir. 1984) (establishing the standard for egregiousness that is still used today in the Ninth Circuit: “When evidence is obtained by deliberate violations of the Fourth Amendment, or by conduct a reasonable officer should know is in violation of the Constitution, the probative value of that evidence cannot outweigh the need for a judicial sanction.”).

178. See *The Role of the Exclusionary Rule*, *supra* note 68, at 1642–43. But see AIC: GEN’L OVERVIEW, *supra* note 150, at 11 (warning attorneys that the opinion in *Martinez-Medina v. Holder*, 673 F.3d 1029 (9th Cir. 2011) “could make it more difficult to satisfy the standard in cases where the law may be subject to some ambiguity.”). In *Martinez-Medina*, a sheriff’s deputy detained individuals who conceded unlawful presence, and because the law was unclear over state officers’ authority to make arrests for civil violations of the INA, the court declined to even determine whether the officer violated the Fourth Amendment “because a reasonable officer could not have been expected to know that his conduct was unconstitutional.” *Id.*

179. *The Role of the Exclusionary Rule*, *supra* note 68, at 1642–43.

180. See *Lopez-Rodriguez*, 536 F.3d at 1018.

hearing system,”<sup>181</sup> by framing the egregiousness analysis squarely within Fourth Amendment doctrine.<sup>182</sup>

Arguably, the different approaches to this issue among the circuits is not in fact an irreconcilable split. Rather, the circuits’ interpretations of the egregious exception offer two ways of looking at the question, both ways being appropriate. Nevertheless, the varying approaches can lead to immigration judges who sit within different circuits to treat similarly situated respondents differently. The BIA can issue guidance to clarify for immigration judges what test to apply when a respondent alleges a Fourth Amendment violation.

C. *The Current State of the Exclusionary Rule in the Criminal Context as Compared to the Lopez-Mendoza Exception*

Before moving on, as a backdrop to the following discussion, it is useful here to consider the current state of Fourth Amendment jurisprudence in terms of the current standard the Court has established to determine whether illegally obtained evidence will be suppressed in a criminal proceeding. Though exclusionary rule analysis is a fact-intensive inquiry that turns on the circumstances of each case, the trend in its jurisprudence reveals a general underlying standard that disfavors use of the exclusionary rule and begins to look much like the exception announced by the *Lopez-Mendoza* Court.

After several decades of decisions that chipped away at the standard for use of the rule set by *Mapp*,<sup>183</sup> in 2009, the Supreme Court

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181. *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1048 (1984).

182. *See The Role of the Exclusionary Rule*, *supra* note 68, at 1642–43 (explaining that the Ninth Circuit interpretation of egregiousness, while not strictly adhering to the text of the *Lopez-Mendoza* exception, finds validity in the rest of the decision, which displayed a highly deferential attitude to the immigration agency’s execution of immigration law and policy and a great concern for not complicating the process for immigration law enforcement or immigration judges).

183. *Mapp v. Ohio*, 367 U.S. 643, 659–60 (1961) (finding that the exclusionary rule was a constitutional rule, grounded in principles of deterrence but also judicial integrity, while recognizing that there are costs to applying it: “The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence . . . . Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police

retreated again from *Mapp* in *Herring v. United States* when it held that “the exclusionary rule serves to deter deliberate, reckless, or grossly negligent [police] conduct or in some circumstances recurring or systemic negligence.”<sup>184</sup> With this holding, the Court added another layer to the inquiry by first considering the level of culpability of the officer, using an objective standard, to determine the weight to be given to the deterrence factor in the cost-benefit analysis.<sup>185</sup> The new rule meant that an officer’s negligence, when sufficiently attenuated from the search, would not result in exclusion.<sup>186</sup>

The dissent strongly opposed the new rule, reminding the majority that another well-established purpose of the exclusionary rule—judicial integrity—was still very much at play: “It ‘enabl[es] the judiciary to avoid the taint of partnership in official lawlessness,’ and it ‘assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.’”<sup>187</sup> Though the *Herring* holding specifically relates to negligent recordkeeping by police, it indicates the Court’s trend of continually eroding the exclusionary rule at the expense of individual liberty. Justice Ginsburg ends her dissent with a reminder of what is at stake: “The rule ‘is needed to make the Fourth Amendment something real; a guarantee that does not carry with it the exclusion of evidence obtained by its violation is a chimera.’”<sup>188</sup>

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officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.”).

184. 555 U.S. 135, 144 (2009).

185. *Id.* at 145–46 (responding to Justice Ginsburg’s query in her dissent as to “how the Court squares its focus on deliberate conduct with its recognition that application of the exclusionary rule does not require inquiry into the mental state of the police.” *Id.* at 157 n.7. (Ginsburg, J., dissenting) (citing *Whren v. United States*, 517 U.S. 806, 812–13 (1996))). The majority was careful to note that in prior precedent “our good-faith inquiry [was] confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal’ in light of ‘all the circumstances.’” *Id.* at 145 (quoting *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984)).

186. *Id.* at 137.

187. *Id.* at 152 (Ginsburg, J., dissenting) (quoting *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting)).

188. *Id.* at 157.

Two years later, in *Davis v. United States*, the trend would continue when yet another expansion of the good-faith exception was announced.<sup>189</sup> Again, the holding covered a fairly specific situation—“searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to exclusionary rule”<sup>190</sup>—but the essence of the holding indicates the strength, or lack thereof, of the exclusionary rule at this time. In fact, Justice Breyer, in his dissent, saw the end of the exclusionary rule in sight.<sup>191</sup> Where the Court places “determinative weight upon the culpability of an individual officer’s conduct” and only applies the exclusionary rule to a “‘deliberate, reckless, or grossly negligent’” Fourth Amendment violation, “‘then the ‘good faith’ exception will swallow the exclusionary rule. . . . It would become a watered-down Fourth Amendment, offering its protection against only those searches and seizures that are *egregiously unreasonable*.”<sup>192</sup>

In fact, the *Davis* Court cites to *Lopez-Mendoza* as one in a line of by-now familiar cases that “imposed a more rigorous weighing of its costs and deterrence benefits” and does not require a reflexive application of the exclusionary rule whenever a Fourth Amendment violation is identified.<sup>193</sup> The Court then noted that beginning with *Leon*, “we also recalibrated our cost-benefit analysis in exclusion cases to focus

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189. 564 U.S. 229, 232 (2011).

190. *Id.*

191. *Id.* at 257, 258 (Breyer, J., dissenting) (“If the Court means what it says, what will happen to the exclusionary rule . . . [?]”). Justice Breyer reminds us that the rule was created to enforce the tenets of the Fourth Amendment, without which the Fourth Amendment becomes devoid of all meaning. *Id.*

192. *Id.* at 258–59 (emphasis added) (explaining that the Court’s trend toward weakening the exclusionary rule was already being followed in some lower courts, which were remanding cases to perform a cost-benefit analysis and “to consider ‘whether the degree of police culpability . . . rose beyond mere . . . negligence,’” with the resulting weight leaning more toward preserving the evidence for use in conviction, unless the officers had “‘engage[d] in deliberate, reckless, or grossly negligent conduct.’”) (first quoting *United States v. Julius*, 610 F.3d 60, 60–67 (2d Cir. 2010); then quoting *Herring v. United States*, 555 U.S. 135, 144 (2009)).

193. *Id.* at 238 (first citing *United States v. Calandra*, 414 U.S. 338, 338 (1974); then citing *United States v. Janis*, 428 U.S. 433 (1976); and then citing *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032 (1984), among others, that applied a cost-benefit analysis to limit the rule’s operation strictly to situations where the deterrent purpose “[is] thought most efficaciously served.” *Calandra*, 414 U.S. at 348).

the inquiry on the ‘flagrancy of the police misconduct’ at issue.”<sup>194</sup> The costs of applying the exclusionary rule were now seen to far outweigh the benefits and thus it should be put to very limited use: “. . . society must swallow this bitter pill when necessary, but only as a ‘last resort.’”<sup>195</sup> Given the development of exclusionary rule jurisprudence in the nearly thirty-five years since *Lopez-Mendoza*, it would seem that Justice O’Connor was a prophet and saw exactly where the trend would lead when she penned the egregious and widespread exception, for it seems quite similar to the exclusionary rule that applies in criminal proceedings. As exclusionary rule jurisprudence has developed to drastically limit the use of the rule in the criminal context, it is time the BIA issue clear guidance regarding the egregiousness standard for immigration proceedings that is appropriate for today’s reality.

#### IV. AN IMMIGRATION AGENCY-DEFINED EGREGIOUSNESS STANDARD TO BE USED IN REMOVAL SUPPRESSION HEARINGS

The BIA must establish an egregiousness standard that clarifies the parameters of the exception, in the interest of uniformity, predictability, and due process. Immigration law enforcement agents need clear and enforceable limits on their behavior, and immigration lawyers and judges must be able to identify a violation that merits the application of the exclusionary rule when they see it. Immigration judges throughout the country must use a uniform egregiousness standard when evaluating alleged Fourth Amendment violations in removal suppression hearings to ensure procedural fairness.

##### *A. A Review of Current Immigration Removal Suppression Hearing Framework*

A motion to suppress is the procedural mechanism the accused party uses when she seeks to exclude unlawfully obtained evidence that the government wants to use to prosecute the individual, thereby preventing the government from meeting its burden of proof.<sup>196</sup> Both criminal defendants and respondents in immigration removal proceedings can seek to exclude unlawfully obtained evidence. However, in

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194. *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 909, 911 (1984)).

195. *Id.* at 237 (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)).

196. *See* AIC: GEN’L OVERVIEW, *supra* note 150, at 1.

immigration court, only “egregious” or “widespread” violations will merit suppression of evidence.<sup>197</sup> In immigration court, the usual judicial practice is to first determine whether a Fourth Amendment violation has occurred (an already high bar, for purposes of applying the exclusionary rule) before determining whether the violation was “egregious.”<sup>198</sup> As noted above, immigration courts have on occasion suppressed evidence based on the egregious exception, and the Board of Immigration Appeals has, though rarely, affirmed such grants of suppression. However, the standard has not been clearly delineated.<sup>199</sup>

When a respondent is charged with being unlawfully present in the United States, the government bears the initial burden of proof to establish removability.<sup>200</sup> To do so, the government only needs to prove the respondent’s identity and alienage,<sup>201</sup> which is usually accomplished through the government’s submission of Form I-213, Record of Deportable/Inadmissible Alien Data.<sup>202</sup> As its name indicates, the arresting officer uses this form to report the respondent’s identity and alienage information obtained from the initial interaction with the respondent.<sup>203</sup>

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197. See *supra* text accompanying notes 26–29.

198. See *Orhorhaghe v. Immigration & Naturalization Serv.*, 38 F.3d 488, 493 (9th Cir. 1994) (“In order to determine whether the agents in this case committed such violations, we must first determine whether the agents violated the Fourth Amendment. If they did, then we must determine whether the agents committed the violations deliberately or by conduct a reasonable officer should have known would violate the constitution.”); *Cotzoy v. Holder*, 725 F.3d 172, 183 (2d Cir. 2013) (vacating the BIA decision and remanding to the immigration court to allow the government to prove that the ICE officers had obtained voluntary consent to enter the respondent’s home and bedroom – “*thereby effecting the basic Fourth Amendment violation that must underlie any egregious violation.*”) (emphasis added).

199. See *Rossi*, *supra* note 55, at 521–26; *Scharf*, *supra* note 30, at 73–81.

200. AIC: GEN’L OVERVIEW, *supra* note 150, at 32 (citing first 8 C.F.R. § 1240.8(c); and then citing *In re Vicente Cervantes-Torres*, 21 I. & N. Dec. 351, 354 (B.I.A. 1996)).

201. See sources cited in *supra* note 200.

202. Dree K. Collopy et al., *Challenges and Strategies Beyond Relief*, 2014 IMMIGR. PRAC. POINTERS 518, 523 (Dec. 29, 2015) <https://www.aila.org/File/Related/11120750b.pdf>.

203. *Id.*



Once identity and alienage are established, the burden then shifts to the respondent to establish the time, place, and manner of entry.<sup>204</sup> Where the respondent cannot establish her legal presence in the country and has no other available form of relief under the INA, removal is usually a foregone conclusion, unless a motion to suppress can successfully exclude the Form I-213 and any other evidence obtained from the search in question.<sup>205</sup> The individual respondent bears a heavy burden when challenging the conduct of immigration law enforcement.<sup>206</sup> This challenge is presented through a motion to suppress at the initiation of removal proceedings.<sup>207</sup> Suppression of the evidence that proves the respondent's alienage may result in termination of the proceedings.<sup>208</sup>

In *Matter of Barcenas*, the BIA laid out a burden-shifting framework for the suppression hearing.<sup>209</sup> The respondent who questions the legality of the evidence must provide proof—often in the form of an affidavit—to establish a prima facie case before the burden shifts to the

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204. AIC: GEN'L OVERVIEW, *supra* note 150, at 32.

205. *Id.* at 2. Again, recognizing here that *Lopez-Mendoza* speaks of class action litigation leading to enforceable injunctions as a preferable means of rectifying widespread constitutional violations, rather than through piecemeal litigation. *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1045 (1984). In focusing on the suppression hearings, this Note addresses the fact that until a class action injunction is issued, motions to suppress evidence will continue to be filed in removal proceedings, and the question of due process is always present and worth attention.

206. *Maldonado v. Holder*, 763 F.3d 155, 161 (2d Cir. 2014) (in which petitioners argue that requiring them to provide an affidavit establishing a prima facie egregious violation is unfair and deprives them of due process because much of the evidence they need to describe is not within their domain of personal knowledge, as only law enforcement possesses the knowledge of their plan and motivations for arrest). This is particularly true in the case of a petitioner who is trying to establish that the arrest was based on racial profiling. *See generally* Wong, *supra* note 147 (advocating for an equal protection analysis for racial profiling cases).

207. AIC: GEN'L OVERVIEW, *supra* note 150, at 33, 35 (explaining that at no time must respondent concede alienage, and attorneys should deny allegations of alienage in the Notice to Appear (“NTA”) at the first master calendar hearing. After the government submits its proof of alienage (usually Form I-213, Record of Deportable/Inadmissible Alien Data), the attorney should advise the court that she will file a motion to suppress).

208. *See* AIC: GEN'L OVERVIEW, *supra* note 150, at 1.

209. 19 I. & N. Dec. 609, 611 (B.I.A. 1988).

government to “justify[] the manner in which it obtained the evidence.”<sup>210</sup>

Some judges shift the burden to the government upon finding a constitutional violation and others will require a showing of egregiousness before doing so.<sup>211</sup> Thus, the standard for establishing a prima facie case varies among the circuits. This creates a situation where, in some circuits, the judge will decide the egregiousness question without ever requiring the government to justify its conduct in obtaining the evidence, and in others, the judge will hear testimony from both sides.

Whether or not government testifies to justify its conduct, the judge must determine whether the violation was egregious. The BIA, in *Matter of Barcenas*, laid out this procedural framework to guide immigration judges in their evaluation of motions to suppress but did not

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210. *Id.* (laying out the procedural framework of an evidentiary suppression hearing in the context of a removal proceeding) (quoting *Matter of Burgos*, 15 I. & N. Dec. 278, 279 (B.I.A. 1975)).

211. *See Cotzojay v. Holder*, 725 F.3d 172, 178 (2d Cir. 2013). This Second Circuit case is instructive of the ambiguity regarding the threshold for establishing a prima facie case for suppression and provides support for the Ninth Circuit standard to apply as a benchmark for establishing the prima facie case for suppression. *Id.* *Cotzojay* involved a nighttime non-consensual warrantless home raid without exigent circumstances. *Id.* at 174–75. Both the immigration judge and the BIA improperly found that the respondent had not established his prima facie burden and thus did not shift the burden to the government. *Id.* at 183–84. The IJ found that neither *Cotzojay* nor his witness offered sufficient facts to establish that the ICE officers had entered without consent because they had not “observed any official enter the dwelling.” *Id.* at 179. The court found this to be error, explaining that the “personal knowledge” requirement refers to information the respondent possesses; “it cannot extend to information the respondent does not have.” *Id.* at 178. This case suggests that once a respondent establishes that the officers “effect[ed] the basic Fourth Amendment violation that must underlie any egregious violation” the prima facie standard is satisfied, and the burden should shift to the government. *Id.* at 183. This is notable because other circuits have interpreted the prima facie burden to require a showing of an egregious violation before the burden shifts, as the IJ did here, which the Second Circuit found to be in error. *Id.* at 179. This case was vacated and remanded to the immigration court: “We conclude that the best course is to remand for further proceedings to give the Government a meaningful opportunity to show that its officers obtained consent to enter [*Cotzojay*’s] home.” *Id.* at 184. The Second Circuit thus offers authoritative support for the use of the Ninth Circuit egregious standard as a baseline at which a respondent can be said to have met her prima facie burden, at which point the burden must shift to the government to justify the manner in which it obtained the evidence.

define even the basic contours of an egregious violation.<sup>212</sup> Subsequent BIA decisions have not made significant progress toward a more defined standard.<sup>213</sup>

*B. Establishing an Egregiousness Standard for Suppression Hearing Procedure*

This Note has reached several incremental conclusions. First, the underlying factors that supported the *Lopez-Mendoza* holding have changed, and a reevaluation of the logic of *Lopez-Mendoza* shows that it can no longer be taken for granted that the costs of applying the exclusionary rule in removal proceedings outweigh the benefits. Second, when the Court articulated the egregious and widespread exception in 1984, it applied to an exclusionary rule that was still broadly applied in the criminal context. In contrast, the exclusionary rule today has a much higher standard that must be met before it will be applied to suppress evidence in a criminal trial. A Supreme Court Justice has even suggested that the exclusionary rule is in effect subject to an egregiousness standard, even in the criminal context.<sup>214</sup> Third, the different interpretations of the egregiousness standard among the circuits are reconcilable to the extent that they all represent a totality of the circumstances approach.<sup>215</sup> A focus on the significant common ground among the approaches can bring greater uniformity to a complex evaluation process. Fourth and finally, the BIA has the authority and the responsibility to issue guidance, much like it did in *Matter of Barcenas*,

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212. See *supra* notes 210–11 and accompanying text.

213. See, e.g., Rossi, *supra* note 55, at 521. And in some cases, the decisions have taken concerning steps backward. For a discussion of the BIA interpretation of the “widespread” exception which led to the Third Circuit’s decision in *Oliva-Ramos v. Att’y Gen. of the U.S.*, 694 F.3d 259, 271 (3d Cir. 2012), see *supra* note 55.

214. See *Davis v. United States*, 564 U.S. 229, 258–60 (2011) (Breyer, J., dissenting).

215. See *Cotzojay v. Holder*, 725 F.3d 172, 180–81 (2013) (noting that the Second Circuit has never found a sufficiently egregious violation to merit suppression in a removal proceeding, but that “[o]ther courts have identified egregious violations under arguably less severe circumstances.”). The *Cotzojay* court points out that this difference in interpretations merely shows that “there is no one-size-fits-all approach to determining whether a Fourth Amendment violation is egregious.” *Id.* at 181 (quoting *Oliva-Ramos*, 694 F.3d at 279).

to bring uniformity, predictability, and due process to the immigration removal suppression process.

The Ninth Circuit's objective bad faith egregiousness standard<sup>216</sup> should be the first benchmark in the removal suppression hearing and should be applied at the prima facie stage. Thus, where the respondent provides facts to establish that the law enforcement officers were acting in objective bad faith—by violating clearly established Fourth Amendment principles—the burden then shifts to the government to justify the manner in which it obtained the evidence. Using the Ninth Circuit standard at the prima facie stage would prompt immigration judges to shift the burden to the government more readily and more consistently. In this way, when evidence suggests that an immigration officer acted in objective bad faith, the immigration judge will hear the facts as presented by each side and can then make a fully informed final decision as to whether the violation was egregious. To determine whether the conduct was egregious, the immigration judge follows the proposed BIA factor test, as laid out below.

The determinative, agency-wide egregiousness standard must incorporate the reasoning of all the circuits who have weighed in on the question and cannot be radically different from any one circuit's precedent. The guidance therefore takes a "totality of the circumstances" approach—much like the method followed by the Second, Third, Fourth, and Eighth Circuits—and provides the following non-exhaustive list of factors, taken from current case law, for the immigration judge's consideration<sup>217</sup>:

1. Was the Fourth Amendment violation intentional or in "objective bad faith"? (Would a reasonable officer know or should he have known that his conduct was unlawful?). This factor reflects the Ninth Circuit egregiousness standard.
2. Was the violation unreasonable beyond the fact of its illegality?
3. Were there promises, threats, coercion, physical abuse, or any other unreasonable show of force?
4. Was the search or seizure gross or unreasonable?

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216. See *supra* Section III.B., for a discussion of the Ninth Circuit's egregiousness standard.

217. See *Yanez-Marquez v. Lynch*, 789 F.3d 434, 460–61 (4th Cir. 2015) (consolidating a non-exhaustive list of factors "deem[ed] relevant to the egregiousness inquiry[.]" as gleaned from the Second, Third, and Eighth Circuits).

- a. Was the stop based on race or ethnicity or “some other grossly improper consideration”?
  - b. Was the illegal stop, seizure, search, or questioning particularly lengthy?
  - c. Was there an unreasonable show or use of force?
  - d. Was there any brandishing of weapons?
5. Was there no articulable suspicion for the search or seizure?
  6. Did the officers have a properly executed warrant?
    - a. Was the warrant shown to the individuals?
    - b. Was the conduct strictly within the scope of the warrant?
    - c. Was informed consent properly obtained before entering?
  7. When, where, and how did the search, seizure, or questioning take place?
  8. Are there any unique characteristics of the noncitizen that, for example, might make him or her more vulnerable to coercion or duress or might heighten the unreasonableness of the stop, search, seizure, or questioning?

If any of these factors, or a combination thereof, would render use of the unlawfully obtained evidence fundamentally unfair or if the facts and circumstances of the stop, seizure, search, or questioning would undermine the reliability of the evidence in dispute, regardless of its unfairness, the officer’s conduct would constitute an egregious exception.<sup>218</sup>

The guidance does not suggest a strict test, largely because Fourth Amendment analysis turns on the facts and circumstances of each case, but rather employs a balancing test that asks the immigration judge to give appropriate weight to the applicable factors. Consequently, the immigration judge retains her usual discretion to ultimately decide whether to grant the motion to suppress. For example, the judge retains discretion to apply binding circuit law regarding egregious violations, when precedent is applicable to the facts of a case. Furthermore, deference for the immigration judge’s discretionary judgment of credibility will still apply.

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218. *See supra* note 138 (discussing the general agreement among the circuits that a two-pronged exception is the only logical interpretation).

The Ninth Circuit's objective bad faith standard will again come into play as the first factor to consider in the BIA factor test. If the case is being heard in the Ninth Circuit, this factor will be determinative. Immigration courts in jurisdictions that require more than the Ninth Circuit's standard to find an egregious exception would also weigh the rest of the factors to reach their decision.

The immigration judge should consider the extent of the officers' bad faith when weighing its significance as a factor of the totality of the circumstances. For example, if officers effect a non-consensual, nighttime warrantless home raid without exigent circumstances, the "objective bad faith" standard should be given substantial weight, because the violation blatantly breaches clearly established Fourth Amendment parameters.<sup>219</sup> Moreover, in the articulation of its exception, *Lopez-Mendoza* specifically cited *Matter of Ramira-Cordova*, a case where evidence that had been obtained as a result of a nighttime warrantless entry into the respondent's home was suppressed.<sup>220</sup> Therefore, under these circumstances, the severe violation would be objectively in bad faith and would bear significantly on egregiousness. In the Ninth Circuit, this kind of objective bad faith violation would be sufficient on its own to merit a grant of the motion to suppress evidence.<sup>221</sup>

Furthermore, the key circuits have all identified a search or seizure based solely on race or ethnicity "or some other grossly improper

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219. See *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (stating that the home is where a person's physical and psychological expectation of privacy is the most heightened).

220. *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 n.5 (1984) (citing *Matter of Ramira-Cordova*, No. A21 095 659 (Feb. 21, 1980)).

221. See *Cotzojay v. Holder*, 725 F.3d 172, 178 (2d Cir. 2013). This case is also notable because both the IJ and the BIA misinterpreted Second Circuit case law as to what government conduct is required to find an egregious Fourth Amendment violation. *Id.* at 179. The IJ and the BIA thought that because the respondent was not physically threatened or harmed during the home raid, it was not an egregious violation. *Id.* This was found to be an erroneous reading of the *Rochin* citation, which the IJ interpreted to mean that only conduct that "shocks the conscience" rises to the level of egregious. *Id.* at 181–82. The court finds that the citation does not mean that physical coercion or harm must be present for a violation to be egregious, but rather the question turns on whether the evidence was obtained in a "fundamentally unfair" manner." *Id.* at 182.

consideration”<sup>222</sup> as constituting an egregious violation, even in the absence of severe conduct. However, substantiating this type of allegation often proves difficult for respondents because pretextual stops are considered lawful. Consequently, officers can avoid a finding of egregiousness by articulating some viable reason for having stopped the respondent in the first place. Cases involving racial profiling could benefit from the application of the Ninth Circuit standard at the prima facie stage because, if a respondent can provide facts of racial profiling that, if true, could present a case for suppression, the immigration judge would shift the burden to the government to justify the search or seizure. In this way, both sides would provide relevant testimony that informs a judge as she balances the evidence. Moreover, this burden-shifting would perhaps have a deterrent effect by “shap[ing] [the officer’s] conduct in anticipation of the exclusion of evidence at a formal deportation hearing.”<sup>223</sup>

The main change effected by this guidance takes place at the prima facie stage, where the Ninth Circuit’s “objective bad faith” egregiousness standard will cause some jurisdictions to have to shift the burden to the government sooner than they would have otherwise in the interest of providing an opportunity to the respondent in removal proceedings to fully and fairly present a case before the court. With *Matter of Barcenas*, the BIA established the procedural framework of a removal suppression hearing so that when a respondent meets her prima facie burden, the government must make reasonable efforts to provide proof that would justify admitting the evidence.<sup>224</sup>

By setting the prima facie burden at a reasonable level that presumes proper officer training and good faith, factors which the *Lopez-Mendoza* Court itself relied on, the respondent’s due process rights are

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222. *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006).

223. *Lopez-Mendoza*, 468 U.S. at 1044 (explaining that an arresting officer is “most unlikely to shape his conduct in anticipation of the exclusion of evidence at a formal deportation hearing[.]” given that very few arrests ended in formal deportation hearings in 1984).

224. 19 I. & N. Dec. 609, 611 (B.I.A. 1988).

protected, and the INA provision that governs aliens’<sup>225</sup> rights in removal proceedings will be respected.<sup>226</sup> That is, Section 240(b)(4)(B) of the Act provides that “the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government . . . .”<sup>227</sup>

The concern that this prima facie standard would complicate removal proceedings, which are meant to be streamlined, is a valid concern but often overstated. Immigration courts frequently use technology to facilitate efficient hearings. When an immigration judge determines that a respondent has met her prima facie burden and the burden shifts to the government, INA §§ 240(b)(2)(iii) and (iv)(B) provide that “[t]he proceeding may take place through video conference, or<sup>228</sup> . . . through telephone conference.”<sup>229</sup> Thus, frequently used technology can help address any efficiency or communications issues.

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225. See Immigration and Nationality Act (INA) § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2020) for definitions as used in the INA (defining the term “alien” to mean “any person not a citizen or national of the United States.”). The term “alien” is used in this Note only when directly referring to the INA, preferring the term “noncitizen,” because, although the term “alien” has been used throughout history and continues to be used throughout the INA and by other government agencies to denote noncitizens, it is not without its negative connotations. The term “illegal alien” has an even clearer pejorative meaning, and both terms can signal anti-immigrant sentiment. Notably, CNN has reported that the Trump Administration issued a directive to U.S. attorneys’ offices to use the term “illegal alien” to refer to noncitizens. Tal Kopan, *Justice Department: Use ‘Illegal Aliens,’ not ‘Undocumented,’* CNN POLITICS (July 25, 2018), <https://edition.cnn.com/2018/07/24/politics/justice-department-illegal-aliens-undocumented/index.html>. Compare with the Associated Press Stylebook, which is followed by most news outlets, which has changed its terminology to use the term “illegal” only to refer to an action, not a person, unless in direct quotations. Paul Colford, *‘Illegal Immigrant’ No More*, AP: THE DEFINITIVE SOURCE (Apr. 2, 2013), <https://blog.ap.org/announcements/illegal-immigrant-no-more>. The far-right media, such as Breitbart and Fox News “frequently call immigrants ‘illegal aliens’ because they prefer language that encourages fear and distrust of immigrants.” Elizabeth Rosenman, Opinion, *This New Year, Let’s Stop Using the Word ‘Alien,’* THE HILL (Jan. 2, 2019), <https://thehill.com/opinion/immigration/423570-this-new-year-lets-stop-using-the-word-alien>.

226. See INA § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B) (2020).

227. *Id.*

228. INA § 240(b)(A)(2)(iii), 8 U.S.C. § 1229a(b)(2)(A)(iii) (2020).

229. INA § 240(b)(2)(A)(iv), 8 U.S.C. § 1229a(b)(2)(A)(iv) (2020).



The egregiousness standard would actually increase efficiency in the long-term. A clear-cut egregiousness standard that sets a uniform baseline for establishing a prima facie burden can lead to fewer suppression cases that reach the Courts of Appeals only to be remanded to give the government the opportunity to meet their burden of proof.<sup>230</sup> Also, a standard like that used by the Ninth Circuit does not require specialized rules tailored to immigration proceedings. On the contrary, because it relies on well-established Fourth Amendment doctrine, judges and law enforcement officers in the field will be able to better enforce and adhere to it. Finally, using the Ninth Circuit standard at the prima facie stage ensures that the immigration judge will more often have testimony from both the respondent and the government, leading to a better-informed application of the proposed factor test.

## V. CONCLUSION

When the Supreme Court decided *Immigration & Naturalization Service v. Lopez-Mendoza*, application of the exclusionary rule was narrowing, perhaps in response to years of a more liberal application of the rule under *Mapp*'s precedent. At the same time, the Court recognized that the deterrence value of the exclusionary rule would reveal itself over time. Justice O'Connor alluded to the possibility of Fourth Amendment violations becoming "widespread" when she penned the exception to the holding in *Lopez-Mendoza*: "Our conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread."<sup>231</sup> Justice O'Connor cited to Justice Blackmun's concurrence in *United States v. Leon*, who expressed the sentiment even more explicitly:

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230. See, e.g., *Zuniga-Perez v. Sessions*, 897 F.3d 114, 128 (2d Cir. 2018) ("hold[ing] that [the] petitioners made a sufficient showing to warrant a suppression hearing"); *Cotzojay v. Holder*, 725 F.3d 172, 184 (2d Cir. 2013) ("remand[ing] for further proceedings to give the Government a meaningful opportunity to show that its officers obtained consent to enter [Cotzojay's] home"); *Oliva-Ramos v. Att'y Gen. of the U.S.*, 694 F.3d 259, 287 (3d Cir. 2012) ("remand[ing] to the BIA with instructions . . . to reopen the proceedings and that it conduct further proceedings (which may include a remand to the IJ) consistent with this opinion").

231. *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (citing *United States v. Leon*, 468 U.S. 897, 928 (1984) (Blackmun, J., concurring)).

What must be stressed, however, is that any empirical judgment about the effect of the exclusionary rule in a particular class of cases necessarily is a provisional one. By their very nature, the assumptions on which we proceed today cannot be cast in stone. To the contrary, they now will be tested in the real world of state and federal law enforcement, and this Court will attend to the results . . . .

If a single principle may be drawn from this Court's exclusionary rule decisions, . . . it is that the scope of the exclusionary rule is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom. It is incumbent on the Nation's law enforcement officers, who must continue to observe the Fourth Amendment in the wake of today's decisions, to recognize the double-edged nature of that principle.<sup>232</sup>

The assumptions upon which the *Lopez-Mendoza* Court based its findings have been tested in the real world for nearly thirty-five years, and it is time to "attend to the results."<sup>233</sup>

The implementation of an egregiousness standard in removal suppression hearings will add uniformity and fairness to a procedure that is one-sided by design, given that it is meant to be a "deliberately simple deportation hearing system, streamlined to permit the quick resolution of very large numbers of deportation actions."<sup>234</sup> Furthermore, the suggested standard will not contravene the *Lopez-Mendoza* holding. On the contrary, the genius of Justice O'Connor's opinion lies in its inherent allowance for evolution of its standard. Using the Ninth Circuit standard at the prima facie stage of the proceeding will provide concrete nationwide guidance as to when the burden must shift to the government, which will add predictability to the process. As a result, ICE officers as well as local and state police officers will be encouraged and equipped to respect the constitutional principles they have been trained to know and uphold. Holding law enforcement officers accountable for their conduct can positively influence their behavior in

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232. *Leon*, 468 U.S. at 928 (Blackmun, J., concurring).

233. *Id.*

234. *Lopez-Mendoza*, 468 U.S. at 1048.

the field so that the exclusionary rule may only rarely need to be applied.

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