IMMIGRANT & NON-CITIZEN
RIGHTS CLINIC

MAIN STREET
LEGAL SERVICES

CUNY SCHOOL OF LAW

STRATEGIES FOR SUPPRESSION OR TERMINATION IN THE "GANG-RELATED" IMMIGRATION ENFORCEMENT CONTEXT

Strategies to Move to Terminate Removal Proceedings by Motion to Suppress due to Egregious or Widespread Fourth Amendment Violations or to Terminate Removal Proceedings Due to Regulatory Violations Arising out of "Gang-Related" Enforcement

Practice Note
June 2019

Maya Leszczynski, Prof. Talia Peleg, and Prof. Nermeen Arastu
Immigrant & Non-Citizen Rights Clinic

Table of Contents

Strategies for Suppression or Termination in the "Gang-related" Immigration Enforcement Context[1]

Strategies to Move to Terminate Removal Proceedings by Motion to Suppress due to Egregious or Widespread Fourth Amendment Violations or to Terminate Removal Proceedings due to Regulatory Violations Arising out of "Gang-Related" Enforcement

Practice Note
June 2019

Introduction

Latinx[2] youth are increasingly at greater risk of removal due to unreliable and overbroad gang allegations resulting from an upsurge in gang policing that disproportionately targets black and brown communities.[3] This translates to federal and local law enforcement adopting overaggressive policies, practices, and customs profiling targeted communities on the basis of race and national origin, often in violation of the U.S. Constitution.

One option for practitioners to challenge these constitutional violations is through pursuit of a motion to suppress based on an egregious or widespread Fourth Amendment violation where advocates move to suppress unlawfully obtained evidence of alienage, which if successfully suppressed, may be sufficient to terminate proceedings. Moving to suppress also shifts the focus to the U.S. Immigration and Customs Enforcement ("ICE")[4] or other law enforcement agents and their unlawful

---

[1] Maya Leszczynski, Prof. Nermeen Arastu, Prof. Talia Peleg, Immigrant & Non-Citizen Rights Clinic (INRC), City University of New York (CUNY) School of Law. We extend our sincere gratitude to INRC and CLEAR law students, faculty, and staff whose generations of work on behalf of marginalized communities subjected to law enforcement misconduct and discriminatory policing benefited this Practice Note. Special thanks to Chris Kovalski for his preliminary research, to Wilkiris Batista, Matias Gonzalez, Andrea Natalie for their contributions, and to Professor Ramzi Kassem, Lana Delgadillo, Mehmet Ali Kepir, Kevin Worthington, Diana Palacios, Melissa Smyth, Mudassar Toppa whose legal advocacy in a clinic suppression case influenced this Practice Note. *The legal research contained herein does not constitute an exhaustive search of all relevant case law in all jurisdictions. The views and arguments are of the authors and are not a substitute for independent legal advice or research conducted by a lawyer familiar with a client's case.*

[2] *Latinx* means "of, relating to, or marked by Latin American heritage – used as a gender-neutral alternative to *Latino* or *Latina*." *Latinx*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/Latinx.

[3] *See* NERMEEN ARASTU ET AL., SWEPT UP IN THE SWEEP: THE IMPACT OF GANG ALLEGATIONS ON IMMIGRANT NEW YORKERS 19 (May 2018) [hereinafter SWEPT UP IN THE SWEEP], http://www.thenyic.org/userfiles/file/SweptUp_Report_Final.pdf.

[4] U.S. Customs and Border Protection ("CBP"), U.S. Citizenship and Immigration Services ("CIS" or "USCIS"), and U.S. Immigration and Customs Enforcement (ICE) are components of U.S. Department of Homeland Security ("DHS"). U.S Dep't Homeland Security, *Operational and Support Components*, https://www.dhs.gov/operational-and-support-components. Homeland Security Investigations ("HSI") is the principal investigative component of ICE. Enforcement and Removal Operations ("ERO") is the

behavior. Another option is for the practitioner to explore a separate basis to argue for termination where the Department of Homeland Security ("DHS") has violated its own regulations.

This note is geared toward practitioners seeking to suppress evidence in immigration proceedings due to an egregious or widespread Fourth Amendment violation and in the alternative to terminate proceedings due to regulatory violations in the context of gang enforcement actions by DHS. This note emphasizes Second Circuit law, but also relies on law in other circuits where the Second Circuit is silent or underdeveloped. Below are sample arguments that can be included in a motion to suppress in removal proceedings based on an egregious or widespread Fourth Amendment violation or in the alternative to terminate removal proceedings based on regulatory violations where gang allegations are being raised against a non-citizen.

Motion to Suppress[5]: For many Latinx migrants who have entered the United States without inspection, a motion to suppress based on an egregious and/or widespread Fourth Amendment violation can be a viable option to suppress DHS's evidence of alienage.[6] If the respondent is present in the United States without having been admitted or paroled, it is DHS's burden of proof to establish the respondent's alienage.[7] A suppression motion is most likely to benefit a respondent when there is no other evidence of alienage in the individual's A-file, like a previously filed petition or application.

It is crucial that when non-citizens have grounds for filing a motion to suppress that they deny charges and relevant allegations in the Notice to Appear ("NTA") and, **most importantly**, that alienage is **never** conceded at any point of the case. Then, if the government is unable to show an untainted independent source or basis for establishing alienage, the respondent can move to terminate removal proceedings.

Motion to Terminate: For those who have already independently provided alienage information to the government because they have sought lawful permanent resident or other status, a motion to terminate based on regulatory violations may be a viable option. As DHS increasingly pursues overbroad gang enforcement against Latinx communities, there is a risk that DHS violates its own regulations or policies in regards to seizure, use of force, notice, and other provisions in Title 8 of the Code of Federal

component of ICE that identifies, arrests, and ensures the departure of removable non-citizens from the United States. U.S. Immigration & Customs Enf't, Who We Are, https://www.ice.gov/about.

[5] For a practice advisory and general overview regarding motions to suppress, please refer to the American Immigration Council's Practice Advisory, updated Aug. 1, 2017, *Motions to Suppress in Removal Proceedings: A General Overview*. Copyright © American Immigration Council. Reprinted with permission.

[6] The Fifth Amendment can serve as another basis for filing a motion to suppress, but is outside of scope of this Practice Note. This can be coupled with a Fourth Amendment argument as well as with regulatory arguments.

[7] 8 C.F.R. § 1240.8.

Regulations ("C.F.R."). DHS conduct in violation of DHS's own internal guidelines can support a Motion to Terminate.

This Practice Note contains key cases, arguments, and suggestions to help create and bolster arguments to suppress evidence introduced in removal proceedings and to terminate removal proceedings due to DHS's own regulatory violations.

The Problem

DHS launched Operation Matador ("Matador") in 2017 as part of Operation Community Shield to use "broad authority" to target "gang activity" in the New York metropolitan area, including Long Island and the Hudson Valley.[8] Due to this initiative and others like it, Latinx communities, particularly youth and young adults, have been facing greater risk of immigration detention, deportation, and removal proceedings due to unreliable and overbroad allegations of gang affiliation.[9] The far-ranging latitude federal agents exercise in policing Latinx communities for alleged gang involvement has resulted in the government labeling large swaths of Central American youth as gang members with little or no substantiation.[10]

Emboldened by federal efforts to curtail unlawful immigration and arrest "gang members," local law enforcement officers are using aggressive gang enforcement tactics to arrest, detain, and remove Latinx individuals.[11] Increasingly, the federal government has been engaging in indiscriminate targeted raids against Latinx individuals, accusing many as gang-affiliated without any or with only minimal evidence.[12] These circumstances give rise to potential Fourth Amendment and other violations by law enforcement that practitioners should investigate as they could provide bases for suppression of unlawfully collected evidence or for termination of proceedings.

Generally, suppression serves as a deterrent to law enforcement misconduct.[13] However, because removal proceedings are civil in nature, motions to suppress are not always available to the same extent as in criminal proceedings.[14] Presumably, the resultant lack of accountability of federal law enforcement conduct in the removal proceeding context may enable Fourth Amendment violations. Indeed, immigration

---

[8] SWEPT UP IN THE SWEEP, *supra* note 3, at 19.
[9] *See id.*
[10] *See id.*
[11] *Id.* at 21-23.
[12] *See id.* at 22; Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U.L. Q. 675, 677-78 (2000) ("Race-based enforcement deserves special scrutiny because it disproportionately burdens persons of Latin American ancestry in the United States, the vast majority of whom are U.S. citizens or lawful immigrants. Generally speaking, whether they are U.S. citizens, lawful immigrants, or undocumented aliens, persons of Latin American ancestry or appearance are more likely than other persons in the United States to be stopped and interrogated about their immigration status.").
[13] United States v. Leon, 468 U.S. 897 (1984) (criminal case).
[14] *See, e.g.*, I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984) (exclusionary rule generally does not apply in civil-removal proceedings).

agencies are facing accusations of rampant racial profiling, which is explicitly prohibited by the U.S. Constitution's "promises of equal protection under the law to all and freedom from unreasonable searches and seizures."[15] That many Latinx people without prior criminal history end up in removal proceedings with conclusory and unsupported gang allegations suggests that law enforcement agents have been employing unreasonable tactics violating Fourth Amendment constitutional rights of New Yorkers. Evidence of serious and frequent Fourth Amendment violations committed by immigration authorities have been mounting.[16] Although Fourth Amendment violations are not similarly actionable in immigration court as in criminal court,[17] practitioners should nevertheless push Fourth Amendment boundaries in the immigration context.

Important Note about "Law Enforcement"

This Practice Note broadly uses the term "law enforcement" rather than "ICE" or "police" to encapsulate action by both. However, practitioners should **carefully track** what law enforcement conduct is attributable to local law enforcement, to a specific component of DHS, or to other agencies. This is important in order to ascertain whether New York State law enforcement officers acted beyond the arrest authority afforded them by law, to track whether DHS violated any of its own regulations, to document the collaboration and interrelationship between local and federal law enforcement, and to be prepared to counter any arguments raised by DHS.

Notably, in the context of "gang enforcement," policing generally involves local law enforcement collaborating with DHS via information sharing, joint task forces, and other coordinated efforts.[18] Federal agencies rely on information gathered by and provided by local law enforcement to enact immigration arrests and/or initiate removal

---

[15] *See e.g.*, Kavitha Surana, *How Racial Profiling Goes Unchecked in Immigration Enforcement*, PROPUBLICA (June 8, 2018), https://www.propublica.org/article/racial-profiling-ice-immigration-enforcement-pennsylvania ("A Pennsylvania judge heard uncontested evidence that ICE agents violated constitutional rights during an arrest last year, but that wasn't enough to stop deportation proceedings"); *Racial Profiling*, ACLU, https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/racial-profiling (last visited Apr. 24, 2019) ("Racial profiling is patently illegal, violating the U.S. Constitution's core promises of equal protection under the law to all and freedom from unreasonable searches and seizures. Just as importantly, racial profiling is ineffective. It alienates communities from law enforcement, hinders community policing efforts, and causes law enforcement to lose credibility and trust among the people they are sworn to protect and serve.").

[16] Michael J. O'Brien, "Widespread" Uncertainty: The Exclusionary Rule in Civil-Removal Proceedings, 81 U. CHI. L. REV. 1883, 1885 (2014); see also Mary Holper, The Unreasonable Seizures of Shadow Deportations, 86 U. CIN. L. REV. 923, 926 (2018); see e.g., Eoin Higgins, *ICE Agents Should Know the Law, but They're Fine with Warrantless Raids*, VICE (Apr. 27, 2018), https://www.vice.com/en_us/article/7xdyab/ice-agents-should-know-the-law-but-theyre-fine-with-warrantless-raids.

[17] We note this difference to emphasize that civil immigration proceedings differ procedurally from criminal proceedings and, as such, have specific challenges, including the lack of certain safeguards afforded to criminal defendants. The problematic nature of aggressive discriminatory policing, unsubstantiated gang allegations, and serious collateral consequences of such allegations are pervasive in the criminal sphere as well, but outside the scope of this note.

[18] *See id.* at 19, 27, 35.

proceedings.[19] Crucially, the U.S. Department of Justice's *Racial Profiling Guidance* explicitly extends to state and local law enforcement participating in federal law enforcement task forces.[20] Indeed, the government boasts that task forces are a "highly effective way for the FBI and federal, state, and local law enforcement to join together to address specific crime problems and national security threats," including gangs.[21]

Alienage evidence gathered due to egregious or widespread Fourth Amendment violations by law enforcement may be suppressible in immigration court when the actor is federal, state, or local law enforcement and/or DHS. The court in *Zuniga-Perez* explicitly focused on unlawful conduct by local law enforcement demonstrating that egregious Fourth Amendment violations by local law enforcement can result in the suppression of evidence in the immigration context even where DHS was not the primary actor.[22]

In *Zuniga-Perez v. Sessions*, the presence of immigration officials during local law enforcement action merely bolstered the argument that local law enforcement action was based on race or ethnicity and therefore egregious.[23] The court scrutinized New York State police action and weighed the presence of two accompanying members of the U.S. Customs and Border Control, who were allegedly brought along to provide "translation assistance," as "support[ing] the notion that law enforcement was targeting Hispanic migrant workers from the start," thus undermining any argument that there was not a race-based motive – a factor signifying egregiousness.[24]

On the other hand, when moving to terminate removal proceedings due to DHS's own regulatory violations, improper conduct by law enforcement is generally actionable only when the actor is DHS. Since termination is only possible after a showing that DHS violated its own regulations, local law enforcement conduct is less likely to prevail as a basis for termination unless there is proof that DHS was intertwined in the violative conduct.[25] However, if local law enforcement was involved in an arrest action at the

---

[19] *Id.* at 19-21.
[20] *Fact Sheet: U.S. Department of Justice Racial Profiling Guidance,* U.S. DEP'T OF HOMELAND SEC. (Dec. 8, 2014), https://www.dhs.gov/news/2014/12/08/fact-sheet-us-department-justice-racial-profiling-guidance ("[a]mong other things, the revised police will: expand the characteristics it protects to include prohibitions on profiling on the basis of gender, national origin, religion, sexual orientation and gender identity, in addition to race and ethnicity; apply not only to federal law enforcement officers, but also state and local law enforcement officers participating in federal law enforcement task forces; and generally eliminate the broad carve-outs for law enforcement activities, with some narrower exceptions.").
[21] *Do FBI Agents Work with State, Local, or Other Law Enforcement Officers on "Task Forces"?*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/about/faqs/do-fbi-agents-work-with-state-local-or-other-law-enforcement-officers-on-task-forces ("Absolutely, and we consider it central to our success today.") (last visited June 6, 2019).
[22] *See* Zuniga-Perez v. Sessions, 897 F.3d 114, 119 (2d Cir. 2018) (holding that local law enforcement conduct was found suppressible as an egregious constitutional violation and therefore petitioner was entitled to suppression hearing).
[23] *See id.*
[24] *Id.* at 119, 126.
[25] The standards for enforcement activities under § 287.8 apply to "every immigration officer involved in enforcement activities," but are silent as to their applicability to local or state law enforcement. 8 C.F.R. §

behest of DHS and failed to abide by DHS regulations, practitioners should explicitly link the improper conduct to DHS action and still move for termination due to regulatory violations. Demonstrating that local or state police was involved in a joint taskforce with federal or immigration law enforcement or that local or state police were operating under a 287(g) program[26] could establish an explicit link.

In both the suppression and termination contexts, practitioners should argue local or state police action went beyond its arrest authority, especially if the result was a civil immigration arrest.[27]

Local law enforcement is generally unable to independently enforce immigration law, whether by carrying out deportations or even detaining people to ask them about their immigration status, except potentially under a 287(g) agreement when U.S. Immigration and Customs Enforcement ("ICE") contracts with local law enforcement to deputize their police and jail officers to help enforce immigration law inside local jails.[28] Local

---

287.8. *See e.g.*, Sanchez v. Sessions, 904 F.3d 643, 649-50 (9th Cir. 2018) ("In practice, 14 U.S.C. § 89(b) ensures that when—as here—Coast Guard officers detain individuals in service of the INA, they act as immigration agents subject to the same regulations as their counterparts in CBP and Immigration and Customs Enforcement ("ICE"). We therefore conclude that when the Coast Guard officers detained Sanchez, they were acting as 'immigration officers' within the meaning of 8 C.F.R. § 287.8(b)(2).") (holding egregious violation of DHS's own internal regulation of 8 C.F.R. § 287.8(b)(2) *could* warrant termination of removal proceedings without prejudice and remanding to afford the government an opportunity to rebut Sanchez's prima facie case).

[26] Section 287(g) of the U.S. Immigration and Nationality Act authorizes DHS to deputize selected state and local law enforcement officers to enforce federal immigration law. U.S. IMMIGR. & CUSTOMS ENF'T, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, https://www.ice.gov/287g (last visited June 6, 2019).

[27] *See* People ex rel. Wells v. DeMarco, 168 A.D.3d 31, 47-49, 53 (2d Dep't 2018) ("The narrow issue in this case is whether New York law permits New York state and local law enforcement to effectuate civil immigration arrests, and not whether federal civil immigration officers have the authority to effectuate such arrests. Nor do we decide any issues under federal law deputizing state and local law enforcement officers to act as federal immigration officers."); *see* United States v. Argueta-Mejia, 166 F.Supp.2d 1216, 1222-29 (D. Colo. 2014), *aff'd*, 615 F. App'x 485 (10th Cir. 2015) (granting motion to suppress in illegal reentry case where local police officer had no authority to arrest defendant for an immigration violation and court rejected INA § 287(g)(10) argument).

[28] While this is outside the scope of this Practice Note, practitioners should consider the validity and constitutionality of such agreements. *See* Lena Graber et al., *Ending 287(g): A Toolkit for Local Organizers*, IMMIGR'T. L. RESOURCE CTR. (Apr. 2019), https://www.ilrc.org/sites/default/files/resources/2019.04_ilrc_287g_final.pdf (toolkit for local organizers fighting 287(g) agreements in their communities). A local or state officer, not acting under a Section 287(g) agreement, cannot conduct a civil immigration seizure or arrest. Arizona v. United States, 567 U.S. 387, 409-11 (2012) ("If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent."). "Detaining individuals solely to verify their immigration status would raise constitutional concerns." *Id.* at 413 (internal citations omitted). New York State law does not permit state officers to hold people on immigration detainers or otherwise arrest a person for civil immigration violations, superseding provisions in local detainer laws and policies that allow a person to be held for ICE. People ex rel. Wells v. DeMarco, 168 A.D.3d at 48-49. A 287(g) agreement was not at issue in *People ex rel. Wells v. DeMarco*, but the court did state that such agreements are only valid "to the extent consistent with state and local law." *Id.* at 49; *see* 8 U.S.C. § 1357(g)(1).

law enforcement actions under 287(g) could be actionable under termination arguments where local law enforcement is being deputized.

Where the initial arresting officers are local or state police, practitioners should not be hindered and still pursue all arguments, but be prepared for arguments from DHS denying responsibility for violative local law enforcement conduct. When seeking termination due to regulatory violations, practitioners should consider whether law enforcement conduct clearly violates a particular regulation, whether the regulatory scheme clearly identifies to whom the standards apply, and which law enforcement actor is responsible for the conduct.

Motion to Suppress Based on Egregious or Widespread Fourth Amendment Violations

Overview of "Egregious" & "Widespread" Fourth Amendment Violations

FOURTH AMENDMENT VIOLATIONS, EXCLUSIONARY RULE, AND SUPPRESSION OF EVIDENCE IN REMOVAL PROCEEDINGS

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. IV. The Fourth Amendment "contains no provision expressly precluding the use of evidence obtained in violation of its commands," *Arizona v. Evans*, 514 U.S. 1, 10 (1995), to deter violations of the Fourth Amendment. Yet, the Supreme Court established the exclusionary rule,[29] *Weeks v. United States*, 232 U.S. 383, 398 (1914), which, "when applicable, forbids the use of improperly obtained evidence at [a criminal] trial." *Herring v. United States,* 555 U.S. 135, 139 (2009); *see also I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1040-41 (1984) ("The general rule in a criminal proceeding is that statements and other evidence obtained as a result of an unlawful, warrantless arrest are suppressible if the link between the evidence and the unlawful conduct is not too attenuated."). "[T]he exclusionary sanction applies to any 'fruits' of a constitutional violation—whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention." *United States v. Crews*, 445 U.S. 463, 470 (1980) (footnotes omitted). The exclusionary rule applies to evidence obtained either directly or *indirectly* from conduct that violated the Fourth Amendment. *Crews*, 445 U.S. at 470; *Wong Sun*, 371 U.S. 471, 484, 487-88.

Although the Fourth Amendment exclusionary rule does not usually apply in civil removal proceedings,[30] exclusion of evidence is warranted in immigration proceedings if the record shows that:

- There are "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness," *I.N.S. v. Lopez-*

[29] The purpose of the exclusionary rule is to deter misconduct by law enforcement. Davis v. United States, 131 S. Ct. 2419, 2427, 2432 (2011).

[30] In immigration proceedings, evidence is admissible provided it does not violate the non-citizen's right to due process of law. Zhen Nan Lin v. U.S. Dep't of Justice, 459 F.3d 255, 268 (2d Cir. 2006). To satisfy due process, evidence in an immigration proceeding must be relevant, probative, and fundamentally fair. *Id.* at 268; Felzcerek v. I.N.S., 75 F.3d 112, 115-116 (2d Cir. 1996); *In re* Barcenas, 19 I. & N. Dec. 609, 611 (B.I.A. 1988). A removal proceeding "is a civil matter, and the heightened protections of a criminal trial are not necessarily constitutionally required." Felzcerek, 75 F.3d at 115-116.

Mendoza, 468 U.S. 1032, 1050-51[31]; *see also Maldonado v. Holder*, 763 F.3d 155, 159 (2d Cir. 2014); *Zuniga-Perez v. Sessions*, 897 F.3d 114, 124 (2d Cir. 2018); or,

- There is a policy or "widespread" abuse, *Lopez-Mendoza*, 468 U.S. at 1050.

Or, even outside the suppression context, exclusion of evidence may warranted when:

- There is a violation, which "regardless of its egregiousness or unfairness . . . undermined the reliability of the evidence in dispute." *Zuniga-Perez*, 897 F.3d at 124 (quoting *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 234, 235 (2d Cir. 2006)).[32]

Therefore, immigration practitioners must first show that evidence they seek to exclude was tainted due to a Fourth Amendment violation and then that the Fourth Amendment violation rises to the level of "egregious" and/or "widespread."

Process for Requesting the Court to Suppress Evidence in Removal Proceedings

In the case of a respondent charged as being in the United States without admission or parole, the government bears the burden to prove alienage by clear and convincing evidence. 8 C.F.R. § 1240.8.[33] Practitioners must hold DHS to its burden of establishing alienage and deny any factual allegations and charges of removability in the charging document, Form I-862, Notice to Appear ("NTA"). The government's evidence often

[31] Here, the respondents did not allege "egregious" Fourth Amendment violations; Lopez-Mendoza allegedly did not object to the evidence at issue and while Sandoval-Sanchez contended that the evidence offered by I.N.S. should be suppressed as fruit of an unlawful arrest within the meaning of the Fourth Amendment, he made no claim that the Fourth Amendment violation was egregious. The Supreme Court concludes: "We do not condone any violations of the Fourth Amendment that may have occurred in the arrests of respondents Lopez-Mendoza or Sandoval-Sanchez . . . we do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness 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." Lopez-Mendoza, 468 U.S. 1032, 1050-51.

[32] Reliability is a separate attack outside the scope of this Practice Note. For more information about undermining the reliability of the evidence in dispute, please refer to *Evidentiary Objections to Challenge Commonly Introduced Evidence Used in Support of Gang Allegations*.

[33] At the onset of proceedings, evidence of foreign birth gives rise to a rebuttable presumption of alienage, shifting the burden to the respondent to prove U.S. citizenship with a preponderance of credible evidence. *In re* Rodriguez-Tejedor, 23 I. & N. Dec. 153, 164 (B.I.A. 2001); *In re* Tijerina-Villareal, 13 I. & N. Dec. 327, 330 (B.I.A. 1969). Once DHS establishes alienage by clear and convincing evidence, the burden shifts to the non-citizen to: (1) demonstrate by clear and convincing evidence that he is lawfully present in the U.S. pursuant to a prior admission; or (2) prove that he is clearly and beyond a doubt entitled to be admitted to the U.S. and is not inadmissible as charged. INA § 240(c)(2)(A)-(B); 8 C.F.R. § 1240.8(c). Practitioners should remember that the purpose of the suppression motion is to exclude evidence of alienage and to terminate proceedings because DHS failed to meet its threshold burden to show alienage.

includes Form I-213, Record of Deportable/Inadmissible Alien[34], which includes information alleging the respondent's alienage and bases for removability from the United States.[35] Practitioners must object to the admission of this evidence and alert the immigration judge ("IJ") of their plan to file a suppression motion, a termination motion, or both, identifying all known grounds for the motion based on the evidence that DHS produced to establish alienage.

Practice Tip: Practitioners should consider asking the court to set a deadline for the government to present all the evidence it has in its possession prior to the deadline for the motion to suppress. Having access to the full body of evidence will help identify the entirety of the evidence that should be suppressed.

In *Zuniga v. Sessions*, the Second Circuit offers a framework for asking the court to suppress evidence in a removal proceeding. *See Zuniga v. Sessions,* 897 F.3d 114, 125 (2018). Someone "seeking to suppress evidence in a removal proceeding initially bears the burden of coming forward with proof 'establishing a prima facie case.'" *Id.* (internal citations omitted). This means preparing and providing the court an affidavit that, taken as true, could support a basis for excluding evidence. *Id.* A sufficient statement should not be general, conclusory, or based on conjecture; it must be based on personal knowledge, setting forth a prima facie case of the illegality of law enforcement actions. *In re Wong*, 13 I. & N. Dec. 820, 1971 WL 24387 (B.I.A. Dec. 15, 1971). It must also enumerate the articles and/or statements to be suppressed. *Id.* Then, "if the affidavit is sufficient, the petitioner is entitled to an opportunity to confirm those allegations in an evidentiary hearing." *Zuniga v. Sessions,* 897 F.3d at 125 (internal citations and quotations omitted).

Once a petitioner makes out a prima facie case, the burden shifts to the government to demonstrate why the evidence should be admitted, *id.*, and to justify the manner in which it obtained he evidence at issue. *In re Burgos*, 15 I. & N. Dec. 278, 279 (B.I.A. 1975). In deciding whether the burden shifts, the evidence and alleged facts must be viewed in favor of the petitioner. *Id.* The court will then determine whether there was a sufficient showing of an egregious constitutional violation to warrant an evidentiary hearing. *Id.* (concluding that petitioners made a sufficient showing of an egregious constitutional violation to warrant an evidentiary hearing). The burden is then on the government to prove the evidence was gathered in a manner that did not violate the constitutional rights of the individual in removal proceedings. *In re Tang*, 13 I. & N. Dec. 691, 692 (B.I.A. 1971).

[34] "A Form I-213 is an 'official record' prepared by immigration officials when initially processing a person suspected of being the United States without lawful permission." *Zuniga-Perez v. Sessions*, 897 F.3d 114, 119 (2d Cir. 2018).
[35] DREE K. COLLOPY ET AL., *Challenges and Strategies Beyond Relief*, *in* IMMIGRATION PRACTICE POINTERS 519 (Am. Immigr. Law. Ass'n 2014-15 ed.), https://www.aila.org/File/Related/11120750b.pdf.

Miscellaneous Considerations

Deciding What Evidence to Suppress Based on an Egregious or Widespread Fourth Amendment Violation

As discussed in the introduction, a motion to suppress is useful in removal proceedings to prevent the government from using evidence obtained during an arrest to try to establish the "alienage" of a respondent when it has no other independent basis of establishing alienage. Thus, suppression arguments are most useful to non-citizens who have had no formal contact with immigration authorities.

For a non-citizen present in the United States without admission or parole, and who has never sought immigration benefits, a successful suppression motion will very likely result in the government not being able to present an independent basis to establish alienage. When the government has no other independent evidence of alienage, DHS has not met its initial burden and thus, the court should dismiss the matter entirely.

Many Latinx youth being arrested in New York on overbroad gang allegations tend to fall into this category, i.e. being present without inspection or parole who have not previously filed for relief with USCIS.

Practice Tip: For individuals who may have grounds to file a motion to suppress, it is imperative that practitioners deny charges and relevant allegations in the NTA and that no one (lawyer, client, witness) concedes alienage at any point during the case.[36] For example, practitioners should be careful not to include any information bearing on alienage when filing Freedom of Information Act ("FOIA") requests or an application for an Employment Authorization Document ("EAD").

In their suppression motion, respondents should move for the suppression and exclusion of **all** evidence, physical and testimonial, obtained or derived from, through, or as a result of DHS, ICE, and/or local or state police activities that led to an unlawful search, seizure, interrogation, arrest and detention.

Specifically, respondents may move for the suppression and exclusion of the following:

1. Any statements or forms completed from information that may have been given by the Respondent during arrest, throughout custody, and after the arrest, and any forms signed by Respondent on or about [DATE] and at any time thereafter, including forms completed from information that may have been given by

[36] Am. Immigr. Council, *Practice Advisory, Motions to Suppress in Removal Proceedings: A General Overview* (last updated Aug. 1, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/motions_to_suppress_in_removal_proceedings_a_general_overview.pdf.

Respondent but which Respondent refused to sign. (for example, forms I-213, I-214).

2. Any statement(s) made by Respondent, signed or unsigned, or any oral statements or confessions made by Respondent. (for example, form I-215B).

3. Any and all other property, papers, information, or testimony pertaining to Respondent, obtained or taken from them, on or about [DATES] and at any time in between or thereafter, by agents of DHS, ICE, FBI, or NYPD, or by any other person acting in concert with them.

4. Any and all other property, papers, reports, information, or testimony pertaining to Respondent obtained as the fruit of the illegal search, seizure, detention, interrogation, and arrest that occurred on or about [DATES].

5. Any and all documents from any DHS internal and external searches and requests triggered by the unlawful search, seizure, detention, interrogation, and arrest that occurred on or about [DATES].[37]

6. Any and all evidence to be offered at this proceeding.

Practice Tip: Practitioners should note that these are some examples and not an exhaustive list. Include all federal, state, local agencies, organizations, or departments relevant to the facts of the case. If multiple police departments or task forces were involved in an enforcement action, be sure to include them as well.

Practice Tip: Practitioners should pro-actively ask for suppression of documentation from DHS's own internal and external searches in its own archives in reaction to or as a result of an unlawful incident. There may be some limitations to this argument.

Identity-related Evidence and Independent Evidence

Unfortunately, there is a risk that even if the immigration court agrees that there was an egregious Fourth Amendment violation warranting suppression of evidence, DHS may try establish alienage by convincing the court that the evidence of alienage was identity-related evidence or independent evidence, despite and contrary to the salient argument that DHS would not have searched its internal records or have had access to this evidence, but for the constitutional violation at issue.

[37] There are limitations to this argument. Please refer to Identity Related Evidence and Independent Evidence for more information.

Practice Tip: Practitioners should document and query how specific identity-related or alienage-related evidence was obtained. For example, was a name entered into a database? Were documents requested from foreign consulates or local police departments?

Identity-related Evidence

DHS may argue that the evidence obtained during a search or seizure is "identity-related" evidence[38] and thus cannot be suppressed. To make these arguments, DHS relies on language from *Lopez-Mendoza* that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1039-40 (1984).[39]

However, the Second Circuit has concluded that this language pertains only to jurisdictional identity evidence. *Pretzantzin v. Holder*, 736 F.3d 641, 647-48, 650-51 (2d Cir. 2013). In other words, *Lopez-Mendoza* does not preclude suppression of identity-related evidence and is narrowly construed to personal jurisdiction.[40] In *Lopez-Mendoza*, Mr. Lopez-Mendoza was only objecting "to the fact that he had been summoned to a deportation hearing following an unlawful arrest; he entered no objection to the evidence offered against him." *Pretzantzin*, 736 F.3d at 647-48 (citing *Lopez-Mendoza*, 468 U.S. at 1040.[41] In that specific context, the court held that "[t]he mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding." *Pretzantzin*, 736 F.3d at 647 (citing *Lopez-Mendoza*, 468 U.S. at 1040). Here, identity itself, and nothing else, was contested as suppressible for the sole purpose of challenging the court's personal jurisdiction over the respondent. *Pretzantzin*, 736 F.3d at 647-648 ("*Lopez-Mendoza's* identity statement merely confirmed the jurisdictional rule that an unlawful

[38] Examples of identity-related evidence include passport, birth certificate, fingerprints, and other items or documentation that can be obtained during unlawful arrest.
[39] *Lopez-Mendoza* concerns the consolidated appeals of Mr. Lopez-Mendoza and Mr. Sandoval-Sanchez as to whether the exclusionary rule bars the Immigrant and Naturalization Service (INS) from using deportation proceedings evidence obtained by INS officers in violation of the Fourth Amendment.
[40] The Second Circuit similarly supports a narrow jurisdictional reading of *Lopez-Mendoza*. Pretzantzin v. Holder, 736 F.3d 641, 648 (2d Cir. 2013) ("*Lopez-Mendoza*'s reliance on the *Ker-Frisbie* line of authority in support of its identity statement leaves no doubt that the Court was referencing the long-standing jurisdictional rule that an unlawful arrest has no bearing on the validity of a subsequent proceeding rather than announcing a new rule insulating all identity-related evidence from suppression.") Under the *Ker-Frisbie* doctrine, illegal police activity affects only the admissibility of evidence and not the jurisdiction of the court over the defendant. Frisbie v. Collins, 342 U.S. 519, 522 (1952) (criminal case); Gerstein v. Pugh, 420 U.S. 103, 119 (1975) (criminal case); *see also* United States *ex rel*. Bilokumsky v. Tod, 263 U.S. 149, 153, 155 (1923) (preceding *Ker-Frisbie* doctrine) (immigration case).
[41] Conversely, Mr. Sandoval-Sanchez "objected not to his compelled presence at a deportation proceeding, but to evidence offered at that proceeding." 468 U.S. at 1040, specifically the admissibility of statements memorialized in an I-213 form, likely also containing identity-related statements, yet the Court did not distinguish between identity-related statements and other statements and merely recited the "general rule" concerning the exclusion of "statements and other evidence" in criminal proceedings. *Lopez-Mendoza*, 468 U.S. at 1040-41.

arrest has no bearing on the validity of a subsequent proceeding; the Court did not announce a new rule insulating all identity-related evidence from suppression.") (citations omitted). The Ninth Circuit has found that however broadly identity evidence reaches, it does not include evidence pertaining to alienage. *Perez Cruz v. Barr*, No. 15-70530, 2019 WL 2454850, at *5 (9th Cir. June 13, 2019).

Therefore, to the extent that a respondent is objecting *only* to being summoned to proceedings following an allegedly unlawful arrest, and not seeking suppression of any specific piece of evidence, current case law indicates that a motion to suppress will not be successful.

Independent Evidence

One possible hurdle for practitioners is that DHS may attempt to establish alienage through "evidence [ ] independent of any constitutional violation." *Pretzantzin v. Holder*, 736 F.3d 641, 651 (2d Cir. 2013). In *Pretzantzin,* for example, the government argued birth certificates from the U.S. Embassy in Guatemala and a criminal history report that listed Guatemala as Mr. Pacheco-Lopez's birthplace were independent of the constitutional violations. *Id.* at 643.

The government bears the burden to show that the evidence is sufficiently independent or attenuated. *See United States v. Oguns*, 921 F.2d 442, 447 (2d Cir. 1990). To ascertain whether evidence was independently obtained, courts look at "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Pretzantzin*, 736 F.3d at 651 (citing *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Then, the government assumes the burden "of justifying the manner in which it obtained the evidence." *Pretzantzin*, 736 F.3d at 651 (citing *In re Barcenas*, 19 I. & N. Dec. 609, 611 (B.I.A. 1988) (internal quotation marks omitted).

Practitioners should, where possible, argue that all sources of information that DHS purports are "independent" **stem from the unlawful encounter** with law enforcement as described in the underlying motion to suppress.

Practice Tip: Practitioners should always argue that the allegedly "independently" obtained evidence is tainted by the Fourth Amendment violation rendering its use in removal proceedings as *fruit of the poisonous tree*. This includes any subsequent internal or external searches by DHS of its immigration records or of external criminal records.

Practitioners should *hold the government to its burden* and insist it demonstrate that the evidence is sufficiently attenuated/independent from the primary taint and justify the manner in which it obtained the evidence of alienage. The government should be asked to prove how it connected the preexisting evidence of alienage to the instant matter using *only* the non-citizen's name.

Additionally, it is worthwhile to consider that the more attenuated the evidence, the greater effort needed to obtain the evidence and presumably the less likely the government would have obtained it absent constitutional violation. Where DHS uses aspects of the respondents' *identity* (e.g. birthdate, place of birth) beyond their name to obtain evidence of alienage and fails to show how it obtained such evidence, the government has not met its burden in establishing independent evidence of alienage. *Pretzantzin v. Holder*, 736 F.3d 641, 651 (2d Cir. 2013).

The government must demonstrate how it obtained its evidence, justify the manner in which it obtained the evidence, and proffer evidence as to how it did so in court. The government's failure to proffer any (or adequate) evidence demonstrating how the respondent's records were obtained by the government should prompt the practitioner to argue that the government failed to meet its burden to justify the manner in which it obtained the evidence and of establishing that the evidence was independent of any constitutional violation. *See Pretzantzin*, 736 F.3d at 652 ("we are unable to find that this evidence was linked to him through the use of his name alone, and, therefore, we find that the BIA erred in concluding that the government had met its burden of establishing that this evidence was independent of any constitutional violation."). In *Pretzantzin*, for example, the government's proof consisted only of their own arguments and a Federal Express package label, not the actual letter sent by ICE to the U.S. Embassy in Guatemala. *Id.* at 651.

Pre-existing immigration records are one such precarious category of alienage evidence that the government will argue was independently obtained. *Pretzantzin* suggests it matters whether the alienage-related evidence is already in the possession of immigration officials (i.e., *Reyes-Basurto*, 477 F.App'x 788, 789 (2d Cir. 2012) (non-precedential summary order)) or whether it was obtained from an outside agency, e.g. in possession of a U.S. embassy or municipal police department. 736 F.3d at 651-52. The Second Circuit in *Pretzantzin* is that the government show it obtained evidence of alienage using "only [a] name[ ]" and *nothing more*. *Id*.

If the government argues that the language in *Pretzantzin* is intended to preclude pre-existing immigration records from suppression, practitioners could argue that the language is dicta stemming from *Reyes-Basurto*, a non-precedential summary order, and that the discussion did not form part of *Pretzantzin's* holding and is therefore not binding. Furthermore, *Pretzantzin* reiterates that the government has the burden of proof to justify how it properly obtained its evidence in the instant case. 736 F.3d at 651-52.

Practice Tip: Practitioners should be prepared that the government may argue that they have "independent evidence" of alienage in the case of a non-citizen who has a criminal record. The government may try to introduce a RAP sheet or other document from a criminal tribunal that includes "place of birth" to try to establish alienage. Practitioners should insist that the government demonstrate how it obtained such evidence and must show it was obtained only using *only* the name of the non-citizen. If any other information was used, such as fingerprints obtained through the illegal arrest, practitioners should move to exclude such evidence as fruit of the poisonous tree. Should these arguments fail, practitioners should raise arguments challenging the reliability of the documents, such as RAP sheets, which are hearsay and are well-documented to be error-prone.

The government may also try to rely on the broad holding in *Cervantes-Torres* to support that courts may rely on pre-existing or on *any* independently obtained evidence of an admittedly deficient search. *Cervantes-Torres*, 21 I. & N. Dec. 351, 353 (B.I.A. 1996) ("[O]nce the respondent has been placed in deportation proceedings, any evidence which is independently obtained may be relied upon, regardless of the alleged illegal arrest.").[42] Again, *Pretzantzin* itself limits this holding and qualifies that the government has the burden of proof in demonstrating and justifying how it obtained untainted evidence of alienage. *Pretzantzin v. Holder*, 736 F.3d 641, 651-52 (2d Cir. 2013).

[42] A critical point of distinction limiting the scope of *Cervantes-Torres* is that the respondent voluntarily submitted materials conceding alienage to the immigration *during the course* of removal proceedings. *In re* Cervantes-Torres, 21 I. & N. Dec. 351 (B.I.A. 1996). This suggests that admissions of alienage are only dispositive when they occur during immigration proceedings. The BIA noted that the "respondent's voluntary submission of a copy of his Form I-688A to the Immigration Court in support of his 1991 motion to administratively close his proceeding to await the outcome of his legalization application" as "tacitly admit[ing] his alienage." *Id.* at 354. The principle that a voluntary submission of evidence during immigration proceedings can constitute a concession of alienage does not foreordain the admissibility of submissions made to immigration authorities to secure benefits prior to an unlawful arrest. *Vanegas-Ramirez v. Holder* also clarifies that concessions regarding alienage are admissible "because these concessions are not 'fruit' of the illegality, but of an *intervening* 'act of free will," i.e. an alien's own choice to concede his removability . . . It is this *intervening* act that 'purge[s] the primary taint." 768 F.3d 226 (2d Cir. 2014) (emphasis added) (citations omitted). This language emphasizing intervening causes is further indicia that alienage admissions are only dispositive when they occur during immigration proceedings.

Considering a Motion to Strike When the Government Attempts to Introduce New Evidence

If DHS attempts to introduce *new evidence* before there has been a ruling on the motion to suppress, practitioners should consider submitting a Motion to Strike DHS's response and exhibits due to "improper" filing, "untimely" filing, or both.[43] In moving to strike, practitioners should note that respondent does not concede the admissibility of DHS's new exhibits and that it reserves the right to put forth substantive objections to DHS's evidence (both old and recently filed) going to its weight and reliability, among other considerations, should the court choose to deny the motion to strike and motion to suppress.

Practice Tip: Although DHS may argue that the new evidence was obtained independently, practitioners have a strong argument that any evidence obtained by the government *after* the Fourth Amendment violation is nonetheless linked to and derived from the "tainted" incident.

To determine if evidence is suppressible as fruit of the poisonous tree, a court should ask "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *see also In re Cabrera-Carillo*, 2012 WL 1705588 (B.I.A. Apr. 30, 2012) (remanding for determination whether DHS could have obtained respondent's birth certificate in a manner untainted by violation).

Practice Tip: If DHS attempts to offer evidence gleaned from the *bond record* to establish an independent basis for alienage, argue the basic notion that the bond record may not be considered in removal proceedings.

Then, practitioners should specify that were it not for the egregious and/or widespread Fourth Amendment violations that occurred, DHS would not have received or gathered the "new" evidence it submitted. Practitioners should explain that it was only after the original, underlying interaction that later tracking and surveillance by law enforcement occurred. Had law enforcement not egregiously violated the respondent's Fourth Amendment rights, there not be further investigation (e.g. Joint Terrorism Task Force (JTTF) or gang task force involvement) because such task force would not have been informed. In fact, it was a direct result of the egregious Fourth Amendment violations that the gang task force created a record in its files or on its databases associated with respondent's identity. Practitioners should argue that absent the original egregious Fourth Amendment interaction, and the consequent creation of e.g. gang task force

[43] In doing so, practitioners should cite to the Immigration Court Practice Manual (ICPM), which has strict filing deadlines and outlines evidence requirements. U.S. Dep't Justice, Exec. Off. Immigr. Rev., *Immigration Court Practice Manual* (Aug. 2018), https://www.justice.gov/eoir/page/file/1084851/download.

records associated with his identity, respondent's later law enforcement interactions would have yielded no information regarding respondent. Practitioners should carefully document how the underlying egregious Fourth Amendment violation set in motion the chain of events that resulted in the accumulation of additional tainted evidence.

Practice Tip: Practitioners should consider whether DHS's recent submissions further support that it is engaging in widespread Fourth Amendment violations warranting suppression. For instance, consider whether any subsequent interactions with law enforcement are a further example of the widespread nature of impermissible racial/ethnic profiling. Address whether this is due to the improper inclusion of respondent in an unreliable gang database or gang task force surveillance, if known.

Conclude by stating that for the reasons set forth above, and those articulated in earlier briefs and submissions, this Court should suppress the exhibits that DHS recently filed in these proceedings along with other evidence.

After Evidence has been Suppressed and/or Government Cannot Show Alienage

If the court finds egregious and/or widespread violations of the Fourth Amendment sufficient to grant suppression of the enumerated evidence, then the government will have failed to show alienage, a threshold issue. For a non-citizen present in the United States without admission or parole, and who has never sought immigration benefits, the government will then very likely not be able to present an independent basis to establish alienage. When the government has no other independent evidence of alienage, the practitioner should move for termination of proceedings for the government's failure to meet its burden to show alienage, if the court has not dismissed the matter. Generally, such a motion to terminate proceedings is filed along with the initial motion to suppress.

Raising "Egregious" Fourth Amendment Violations for Suppression in Removal Proceedings

I. THE EVIDENCE WAS OBTAINED THROUGH CONDUCT THAT CONSTITUTES AN "EGREGIOUS" VIOLATION OF THE FOURTH AMENDMENT AND THEREFORE SHOULD BE EXCLUDED.

Step One: Was the Evidence Obtained through a Fourth Amendment Violation?

For immigration practitioners seeking to suppress evidence of alienage, the first step is to establish that law enforcement contacts with the non-citizen constituted an unreasonable "*seizure*" for Fourth Amendment purposes. The next step is to assess the reasonableness of these contacts, that is, whether law enforcement had a sufficient articulable basis for making that seizure. Then, having established a Fourth Amendment violation, the practitioner can argue that the violations were sufficiently egregious to justify suppression of evidence tainted by the unlawful encounter, as outlined in Step Two: Was the Fourth Amendment Violation "Egregious?"

Unreasonable Seizure

There must be an unreasonable seizure of a person within the meaning of the Fourth Amendment violation before assessing whether the alleged stop was sufficiently "egregious" to justify suppression of the evidence. *Pinto-Montoya v. Mukasey*, 540 F.3d 126, 127, 131 (2d Cir. 2008) ("We need not consider whether a stop and seizure pursuant to the protocol might constitute conduct so egregious as to justify suppression because we conclude that, in the instant case, petitioners were not seized within the meaning of the Fourth Amendment.") (internal citations omitted).

The test for whether a seizure occurred is whether a reasonable person would have felt "*free to leave*." *See I.N.S. v. Delgado,* 466 U.S. 210, 215 (1984) ("[T]he protection against unreasonable seizures also extends to seizures that involve only a brief detention short of traditional arrest. What has evolved from our cases is a determination that an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.") (internal citations and quotations omitted); *Florida v. Royer*, 460 U.S. 491, 501, 514 (1983) (test endorsed by plurality and dissenter). To determine whether a reasonable person would have felt free to leave, the court considers the *totality of the circumstances*. *United States v. Mendenhall*, 446 U.S. 544, 557-58, 576 (1980) ("The question whether the respondent's consent to accompany the agents was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances, and is a matter which the Government has the burden of proving."). A seizure clearly occurs if an officer takes a

person into custody, physically restrains the person, or otherwise requires the person to submit to the officer's authority. *Id.* at 574-75, 577. However, an encounter may be considered "consen[sual]" and not a seizure, if the person "freely and voluntarily" engages in a conversation with an officer. *See id.* at 555-56, 558-59.

The Second Circuit has held that whether a seizure has occurred is dependent upon a number of factors, including displays of *physical force*, use or display of *weapons*, *language* indicating that an individual is not free to leave and *other shows of authority*. *Gardiner v. Inc. Vill. of Endicott,* 50 F.3d 151, 155 (2d Cir. 1995) ("Factors suggesting that a seizure has occurred include: the threatening presence of police officers; the display of a weapon; physical contact by the officer; language indicating that compliance with the officer is compulsory; prolonged retention of a person's belongings; and a request by an officer to accompany him or her to the police station or a police room."); *see also Terry v. Ohio,* 392 U.S. 1, 19 n.16 (1968) ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."); *but see Pinto-Montoya*, 540 F.3d at 128-29, 131(brothers were not "seized" when plain-clothed immigration agents approached them as they stepped off the plane and asked them if they had "papers" and inquired whether they had "permission to stay in this country" despite brothers not meeting any of the criteria in protocol used by agents to identify individuals for questioning, other than choice-of-flight and racial characteristics).

In *Zuniga-Perez*, the Second Circuit reaffirms "two *non-exclusive* inquiries to aid the determination of whether an '*egregious violation*' of constitutional rights has occurred,"[44] reaffirming that 1) "characteristics and severity of the offending conduct" must be considered in addition to the "validity (or invalidity) of the stop" and that 2) "a seizure may be an egregious violation, even when it is not 'especially severe,' if the seizure was 'based on race (or some other grossly improper consideration).'"[45] The court considers factors such as "whether the violation was intentional; whether the seizure was 'gross or unreasonable' and without plausible legal ground; whether the invasion involved 'threats, coercion[,] physical abuse' or 'unreasonable shows of force'; and whether the seizure or arrest was based on race or ethnicity."[46] Although these factors are used to determine whether a Fourth Amendment violation is "egregious," they are also pertinent as to whether there was an "unreasonable" seizure within the meaning of the Fourth Amendment, at the outset.

[44] Zuniga-Perez v. Sessions, 897 F.3d 114, 124 (2018) (emphasis added).
[45] *Id.* (internal citations omitted).
[46] *Id.* (quoting Oliva-Ramos v. Att'y Gen of U.S., 694 F.3d 259, 279 (3d Cir. 2012).

Select Cases Enumerating Factors to Establish a Fourth Amendment Seizure as a Prerequisite for an Egregious Violation

United States v. Mendenhall, 446 U.S. 544, 553-54 (1980)[47] (outlining indicia of temporary detention or seizure including 1) *threatening presence* of several officers, 2) display of *weapons* by officer, 3) some *physical touching* of the individual, 4) use of *language or tone* of voice indicating compliance with the request might be compelled) (outlining variables indicative of a consensual stop) (criminal case).

I.N.S. v. Delgado, 466 U.S. 210, 218-21, 225, n. 2, 226 (1984) (holding that *factory-wide surveys* of workers did not result in the seizure of the entire workforce and the individual questioning of the employees by INS agents concerning their citizenship was not seizure) (dissenting opinion by Justice Brennan concludes the factory sweep was certainly a seizure of the respondents, but agrees that the INS surveys here did not result in a single continuous seizure of the entire factory work force from the moment that the INS agents first secured the factory exits until the completion of the survey because most of the employees were generally free to continue working without interruption and to move around the workplace) (immigration case).

Perez Cruz v. Barr, No. 15-70530, 2019 WL 2454850, at *13 (9th Cir. June 13, 2019) (concluding there was a Fourth Amendment violation where a non-citizen was impermissible seized during a factory raid where ICE had a search warrant for documents, but no arrest warrants) ("The *Summers* line of cases does not justify using the execution of a search warrant for documents to 'target' for detention, interrogation, and arrest busloads of people who could not otherwise be detained. The detentions, we conclude, violated an ICE regulation (as well as the Fourth Amendment).").

Practice Tip: Practitioners should not be deterred even if DHS argues that an encounter with law enforcement was consensual. An initially consensual encounter "can be transformed into a seizure or detention within the meaning of the Fourth Amendment, 'if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *I.N.S. v. Delgado,* 466 U.S. at 215 (quoting *Mendenhall*, 446 U.S. at 554).

The former U.S. Immigration and Naturalization Service ("INS") was forbidden from detaining persons for questioning on less than *reasonable suspicion*. *See United States*

[47] Here, Ms. Mendenhall's Fourth Amendment rights were not violated under the totality of circumstances because there was no evidence of coercion or duress when Ms. Mendenhall was stopped by U.S. Drug Enforcement Administration (DEA) agents, asked to produce her identification and airline ticket, and when the names on the two did not match was asked to accompany the DEA agents to an office where she was asked to consent to a search of her person and handbag, and said "go ahead" handing the agent her purse. When a policewoman officer arrived on the scene, she confirmed with the agents that Mendenhall consented to a search, and Ms. Mendenhall followed the policewoman into a private room, where the policewoman again asked if Ms. Mendenhall consented to a search, to which she replied that she did, and produced two packages, one of heroin, when she was told the search would require removal of clothing.

v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) ("For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.") (criminal case).

Reasonable suspicion is based on "an assessment of the whole picture [that] must yield a particularized suspicion . . . based upon all circumstances . . . . that the particular individual being stopped is engaged in wrongdoing." *United States v. Cortez*, 449 U.S. 411, 418 (1981) (criminal case).

United States v. Dunn, 345 F.3d 1285, 1289-90 (11th Cir. 2003)[48] ("[A]t some point in the investigative process, police procedures can qualitatively and quantitatively be so intrusive with respect to a suspect's *freedom of movement* and *privacy interests* as to trigger the full protection of the Fourth and Fourteenth Amendments.") (criminal case). *United States v. Dunn,* 345 F.3d at 1290 (quoting *Hayes v. Florida*, 470 U.S. 811, 815-16 (1985).

United States v. Perez, 443 F.3d 772, 778 (11th Cir. 2006) ("Factors relevant to this inquiry [to determine whether an individual reasonably feels '*free to leave*'] include, among other things: 'whether a citizen's path is blocked or impeded; whether identification is retained; the suspect's age, education and intelligence; the length of the suspect's detention and questioning; the number of police officers present; the display of weapons; any physical touching of the suspect, and the language and tone of voice of the police.' A seizure occurs for Fourth Amendment purposes, however, 'only when, by means of physical force or a show of authority, [a person's] freedom of movement is restrained.'") (internal citations omitted) (holding an officer's encounter with defendant was "consensual" and not a Fourth Amendment seizure judging from the officer's "conversational" tone, the fact the officer's firearm remained holstered, that the officer did not obstruct anyone from leaving the area and did not ask specifically to see identification, to board the boat, or to see the interior of the cabin, and because it was undisputed that Perez *offered* to get his boat registration, *invited* the officer aboard, and *voluntarily* opened the cabin door, which led to the discovery of Cuban nationals) (criminal case).[49]

California v. Hodari D., 499 U.S. 621, 625-26 (1991) (show of authority plus application of some quantum of *physical force* may constitute seizure) (holding there was no seizure because defendant was untouched *inter alia*) ("The narrow question before us is

---

[48] Here, the appellant argued that "the seizure of his person in this case exceeded the outer boundaries of an investigatory *Terry* stop and became a de facto arrest" because "his detention was too intrusive to be permissible under *Terry*, as he was held by the guards at gunpoint, handcuffed, Mirandized and placed in the back seat of a police cruiser prior to being formally arrested." Dunn, 345 F.3d at 1289-90. The court does not engage in a "detailed analysis of whether Dunn's detention was permissible under *Terry*" because "even assuming the guards and/or police effected a de facto arrest that required probable cause, they plainly had probable cause to arrest appellant for discharging a weapon in public." *Id.* at 1290.

[49] *United States v. Perez* also goes towards consent.

whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not . . . An arrest requires *either* physical force (as described above) *or*, where that is absent, *submission* to the assertion of authority.") (criminal case).

Pinto-Montoya v. Mukasey, 540 F.3d 126, 128, 131-32 (2d Cir. 2008) (per curiam) (finding that petitioners were not "seized" for Fourth Amendment purposes when they answered officials' questions at an airport even where INS protocol stated that Agents "look for passengers typically of Mestizo physical appearance" and INS judged the passengers to be on a flight identified by INS as "likely to contain illegal aliens" because there was no evidence that petitioners were "physically restrained, ordered to stop, or otherwise coerced to answer questions when agents approached them.*")* (immigration case).[50]

Cotzojay v. Holder, 725 F.3d 172, 182 (2d Cir. 2013) ("We see no good reason to require that Fourth Amendment violations *must* involve some sort of physical threat or trespass before they 'transgress notions of fundamental fairness.'") (citing *Lopez-Mendoza*, 468 U.S. at 1051 n.5) (immigration case).[51]

Home Raid Seizures

Practitioners should consider whether suppression is an option whenever there is a warrantless home raid seizure for *all* inhabitants.

The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States Dist. Ct.,* 407 U.S. 297, 313 (1972)*; see also Payton v. New York*, 445 U.S. 573, 586 (1980) ("It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.") (internal quotations and citations omitted) (criminal case). The "*presumption of unconstitutionality* that accompanies 'the [warrantless] entry into a home to conduct a search or make an arrest' may be overcome only by showing 'consent or exigent circumstances.' *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1016-17 (9th Cir. 2008) (citing *Steagald v. United States,* 451 U.S. 204, 211 (1981)) ("Accordingly, the bare fact that [petitioner] neither refused to speak to [INS] nor ordered [INS] to leave after they pushed the door open and entered her home is insufficient to establish consent. As a consequence, the arrest of the petitioners in their home violated their Fourth Amendment rights.") (citing *Payton*, 445 U.S. at 589-90).

[50] Here, petitioners argued that the alleged stop was sufficiently "egregious" to justify suppression of the obtained evidence because petitioners were stopped solely on the basis of their race and nationality. However, the court decided it "need not consider whether a stop and seizure pursuant to the protocol might constitute conduct so egregious as to justify suppression because [it] conclude[s] that, in the instant case, petitioners were not seized within the meaning of the Fourth Amendment." Pinto-Montoya, 540 F.3d at 131,133 ("Because we conclude that petitioners were not seized within the meaning of the Fourth Amendment, we need not consider what role petitioners' racial characteristics played in the agents' decision to approach them for questioning.").

[51] Cotzojay v. Holder is discussed more extensively under Home Raid Seizures.

In *Zuniga-Perez*, law enforcement agents held out a felony search warrant as a bid to justify a home entry and to question the petitioners regarding their immigration status; the Second Circuit still found that *pretext* questionable. *Zuniga-Perez v. Sessions*, 897 F.3d 114, 123 (2d. Cir. 2018). The *Zuniga-Perez* court found that "a pre-dawn raid of a home without warrant, consent, or reasonable suspicion is one example of an egregious violation." *Id.* at 125.

Practice Tip: Practitioners should be mindful that DHS has argued that the Fourth Amendment does not protect people "on *public property*." Although *Zuniga-Perez* reaffirms that "[t]he Fourth Amendment reaches its zenith in the home," *Id.* at 122-23, that the home has always been sacrosanct territory for the Fourth Amendment, does not insulate law enforcement from unreasonable searches and seizures in locations outside the home. While this is beyond the scope of this Practice Note, where arrests take place in other locations, e.g. public transportation, practitioners should prepare to research Fourth Amendment violations in that specific or similar location and carefully analyze the fact-specific circumstances as to whether there was adequate individualized suspicion to justify a seizure.

In *Cotzojay v. Holder*, the Second Circuit looked to a non-exhaustive list of factors for determining whether a Fourth Amendment violation is sufficiently egregious and found that a *nighttime, warrantless raid* of a person's home by government officials without reasonable suspicion and without consent constituted an egregious violation of the Fourth Amendment. *Cotzojay v. Holder*, 725 F.3d 172, 182-83 (2d Cir. 2013) (remanded for government to show it obtained consent) (immigration case).

In *Pretzantzin v. Holder*, the Second Circuit directed the Board of Immigration Appeals ("BIA") to refer to *Cotzojay v. Holder* in its analysis as to whether there was an egregious Fourth Amendment violation. *Pretzantzin v. Holder*, 736 F.3d 641, 646 (2d Cir. 2013) (remanded for BIA to reach issue whether government agents obtained evidence of alienage independent of committing an egregious Fourth Amendment violation) ("Today, as discussed in a companion case argued in tandem with the case [*Cotzojay v. Holder*], we confirm what the BIA and other courts have already recognized: A *nighttime, warrantless raid* of a person's home by government officials may, and frequently will, constitute an egregious violation of the Fourth Amendment requiring the application of the exclusionary rule in a civil deportation hearing.") (internal citations omitted) (immigration case).

In *Lopez-Rodriguez*, the court found an egregious violation where immigration officers *entered the petitioner's home without consent or a judicial warrant*. *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1012, 1018 (9th Cir. 2008) ("Indeed, a full decade before the events giving rise to this litigation took place, we held that 'in the absence of a specific request by police for permission to enter a home, a defendant's failure to object to such entry is not sufficient to establish free and voluntary consent. We will not infer both the request and the consent.' Against this unequivocal doctrinal backdrop, reasonable

officers would not have thought it lawful to push open the door to petitioners' home simply because [petitioner] did not 'tell them to leave or [that] she did not want to talk to them.' There is nothing ambiguous or arcane about our holding in *Shaibu,* which was handed down ten years prior to the INS agents' entry of petitioners' home. Nor has the government pointed to any authority in our Fourth Amendment jurisprudence suggesting that the warrant requirement applies with any less force in the administrative context." *Id.* at 1018-19 (internal citations omitted) (immigration case).

Seizure Based on Race or Perceived National Origin

Whether a stop was based on "race" or "perceived national origin" is considered in determining whether there was a Fourth Amendment seizure. That there was a seizure based on race or perceived national origin generally elevates a Fourth Amendment violation to an "egregious" violation as discussed in the following section Step Two: Was the Fourth Amendment Violation "Egregious?"

Please note that the cases described here as part of the "egregious" analysis are also relevant to Step One: Was the Evidence Obtained through a Fourth Amendment Violation? because the first step is establishing "seizure" and a race-based motive is relevant to whether a stop is reasonable.

Practice Tip: Understanding exactly how "race" and "perceived national origin" fit into a claimed Fourth Amendment violation can be tricky because criminal and immigration courts have not used consistent language and these concepts often intersect. Criminal courts will generally not use the term "egregious" because a Fourth Amendment violation need not be egregious to require suppression in the criminal context. On the other hand, the "egregious" classification is generally required in the immigration context for suppression purposes; a seizure must not only be unreasonable, but it must also be egregious.

Thus, race may be a factor in determining whether there was an unreasonable Fourth Amendment violation and if it is clear that there has been a seizure under the Fourth Amendment, law enforcement's reliance on "race" or "national origin" can rise to the level of "egregious" in the immigration context. Thus, reliance on "race" may constitute an "unreasonable" seizure and simultaneously be "egregious."

The Fourth Amendment prohibition on reasonable searches and seizures is violated when a law enforcement officer relies on *race* to satisfy the reasonable suspicion standard required before stopping someone to conduct a search. Courts agree that race, when considered "by itself" and sometimes even in "tandem with other factors," does not generate reasonable suspicion to justify a stop. *United States v. Swindle*, 407 F.3d 562, 569-70 (2d Cir. 2005) (criminal case)[52]. In *Brignoni-Ponce* immigration officers

[52] *Swindle* enumerates significant cases supporting the impermissibility of race as a basis for a stop. Indeed, the court concludes under the totality of circumstances that "the officers acted unreasonably in

stopped a car, without a warrant or probable cause, at a location removed from the border and its functional equivalent. *United States v. Brignoni-Ponce*, 422 U.S. 873, 874-75 (1975) (criminal case). The officers cited the Latino appearance of the occupants as a reason for the stop. *See id.* at 887. The Supreme Court held that ethnic background, standing alone, cannot provide a basis for suspicion as "it does not justify stopping all Mexican-Americans to ask if they are aliens". *Id.* at 886-87. The Court reasoned that "the reasonableness of such seizures depends on a balance between public interest and the individual's right to personal security free from arbitrary interference by law officers. *Id.* at 878 (citations omitted). Neither *Swindle* nor *Brignoni-Ponce* does not specifically address "egregiousness" because the heightened severity is not needed in the criminal context.

Practice Tip: Practitioners should always note *differing standards* that apply in criminal and civil immigration proceedings. Immigration practitioners should continue to analogize to criminal cases, being mindful that criminal courts need not articulate that a Fourth Amendment violation was "egregious" to be a Fourth Amendment violation in the criminal context, even if it could have satisfied that high standard in the immigration context.

In fact, **numerous circuits** and the **BIA** have concluded that a stop carried out on the basis of race or ethnicity is an "egregious" constitutional violation and reliance on race or ethnicity alone constitutes an "egregious" violation of the Fourth Amendment that warrants suppression of evidence. *In re Guerrero-Renovato*, 2009 WL 2171592 (B.I.A. July 8, 2009)[53] (granting suppression) (immigration case); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235-37 (2d Cir. 2006)[54] (denying suppression) (immigration case); *Puc-Ruiz v. Holder*, 629 F.3d 771, 779 (8th Cir. 2010)[55] (denying suppression) (immigration

ordering Swindle to pull over. Swindle was simply a black man in a high-crime area driving a car that the wanted fugitive had previously been seen "near." As the officers conceded, Swindle had not been observed to break any law or do anything else to warrant a stop. Although we are precluded from holding that the officers' unreasonable order violated the Fourth Amendment, we believe that it was an abuse of authority for which Swindle and others like him might seek redress under a source of authority such as the Fourteenth Amendment or some provision of state law." *Id.* at 570. Nevertheless, the court held that the driver was not "seized" when the police officers activated patrol lights, even if a reasonable person would feel obligated to pull over, because there was no physical force preventing him from continuing. *Id.* at 572-73.

[53] The BIA, in *In re Guerrero-Renovato*, where immigration officers stopped the respondent at a gas station and market solely because he was Hispanic, held that a stop solely based on the respondent's Hispanic appearance should be found egregious. *In re* Guerrero-Renovato, 2009 WL 2171592 *2.

[54] "[W]ere there evidence that the stop was based on race, the violation would be egregious, and the exclusionary rule would apply." Almeida-Amaral, 461 F.3d at 237 (requiring facts to support belief that stop was racially or ethnically motivated).

[55] "While 'egregious' violations are not limited to those of physical brutality, *Lopez-Mendoza* requires more than a violation to justify exclusion . . . Additionally, Puc–Ruiz has not argued that the decision to arrest him was based on his race or appearance." Puc-Ruiz, 629 F.3d at 778-79 (internal citations omitted).

case); *Gonzalez-Rivera v. I.N.S.*, 22 F.3d 1441, 1449-50, 1452 (9th Cir. 1994)[56] (granting suppression) (immigration case); *Orhorhaghe v. I.N.S.*, 38 F.3d 488, 505 (9th Cir. 1994)[57] (granting suppression and excluding evidence when Border Patrol officers pulled over a vehicle solely based on petitioner's presumed national origin) (immigration case); *Ghysels-Reals v. U.S. Att'y Gen*., 418 F. App'x 894, 895-96 (11th Cir. 2011)[58] (denying suppression) (immigration case); *In re Armando Piscil*, 2012 WL 1495526 *2 (finding race-based stop indicated *prima facie* case of egregious Fourth Amendment violation) (B.I.A. Mar. 28, 2012) (immigration case); *Sanchez v. Sessions*, 904 F.3d 643, 656 (9th Cir. 2018) *en Banc reh'g denied Sanchez v. Barr*, 919 F.3d 1193 (9th Cir. 2019)[59] (stopping and seizing Mexican citizen based solely on his Hispanic appearance constituted an egregious Fourth Amendment violation) (immigration case); *see also In re Toro*, 17 I. & N. Dec. 340, 343-44 (B.I.A. 1980)[60] (denying suppression because case preceded Supreme Court's *Brignoni-Ponce* decision and INS comported with existing regulations) (immigration case).

The **Second Circuit** has similarly held that "a seizure may be an egregious violation, even when it is not 'especially severe,' if the seizure was 'based on race (or some other grossly improper consideration.)'" *Zuniga-Perez v. Sessions*, 897 F.3d 114, 124 (2d. Cir. 2018) (internal citations omitted). In *Zuniga-Perez*, the court recognized a sufficient showing of an egregious constitutional violation by law enforcement and reversed an IJ's decision to deny suppression without a hearing. *Id.* at 123. Here, the court noted that there was no record of illegal activity by the petitioners and any reasonable fact finder could conclude that they were targeted "merely because they appeared to be Hispanic migrants." *Id.* at 127 ("But being an Hispanic migrant is not a crime.") (internal citations omitted). Language on the Form I-213s that "there were known Hispanic migrants" believed to be present was enough for the court to believe that law enforcement was acting "at least in part on race." *Id.* at 126-27.

However, the Second Circuit found no egregious violation where immigration officials and local police targeted individuals for arrest on the basis of national origin and work as "day laborers." *Maldonado v. Holder*, 763 F.3d 155, 160-61 (2d Cir. 2014) (holding there was no egregious violation when day laborers approached undercover vehicle without duress during a sting operation) (immigration case). Notably, the "day laborers"

---

[56] Gonzalez-Rivera v. I.N.S., 22 F.3d 1441, 1446-48 (9th Cir. 1994) (holding that stopping an individual solely on the basis of his Hispanic appearance constitutes an egregious violation of the Fourth Amendment).

[57] The sole basis for the seizure was the defendant's racial background or national origin, a basis that was itself unreasonable. Orhorhaghe, 38 F.3d at 497.

[58] "Nothing in the record suggests that Ghysels–Reals was subjected to abuse, force, racial profiling, or other conduct that rises to the level required for exclusion." Ghysels-Reals, 418 F. App'x at 895.

[59] "We emphasize that race and ethnicity alone can never serve as the basis for reasonable suspicion." Sanchez v. Sessions, 904 F.3d at 656.

[60] "On the record before us, we cannot find that the arresting officers had a reasonable suspicion that the respondent was an alien when she was first stopped. Absent contrary testimony, it would appear that the respondent was stopped solely because of her 'Latin appearance.' Accordingly, the present record reflects that the initial stop of the respondent was in violation of her fourth amendment rights." *In re* Toro, 17 I. & N. Dec. at 342-43.

themselves approached and entered the nearby, unmarked vehicle driven by an undercover officer as part of a sting operation by law enforcement, were transported to a parking lot, and then arrested. Practitioners should distinguish the specific facts of this case rather than rely on its misleading holding suggesting that arrests of day laborers on the basis of national origin are permissible or cannot be egregious.

Practice Tip: Practitioners should identify any *race-based statements* or conduct by the officer or whether there are any *demonstrable disparities* in enforcement or policing practices regarding a particular person, group, or community. It is crucial that practitioners provide specific factual allegations and evidence to support that an individual was stopped due to his race. *See In re Armando Piscil*, 2012 WL 1495526 *2 (B.I.A. Mar. 28, 2012); *see Camargos Santos v. Holder*, 486 F. App'x 918, 920-21 (2d Cir. 2012).

Show of Force

Refer back to Unreasonable Seizure for more cases addressing the show of force in the totality of circumstances to establish seizure.

The Supreme Court in *Terry v. Ohio* stated that "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968). Indeed, a show of force generally weighs in favor of establishing seizure and DHS is only permitted to use "reasonable" force to affect a seizure. *See Murillo v. Musegades*, 809 F.Supp. 487, 500 (W.D. Tex. 1992) ("The Fourth Amendment protects individuals from physically intrusive behavior during an arrest.") (citations omitted); *see Ramirez v. Webb*, 719 F.Supp. 610, 616-18 (W.D. Mich. 1989) ("A seizure within the meaning of the Fourth Amendment occurs when a reasonable person would not feel free to leave in light of the official's use of physical force or display of authority.").

To determine whether force is *excessive* i.e. unreasonable, courts must balance the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interest at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (civil rights action) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983) (criminal case)) (internal quotations omitted); *Tennessee v. Garner*, 471 U.S. 1 (1985) (wrongful death civil action); *see also* 8 C.F.R. § 287.8 (standards for enforcement activities, including use of force).

Length of Seizure

In *Terry v. Ohio*, the Supreme Court "carved out an exception to the general rule requiring probable cause for a search, permitting an investigating officer to briefly detain an individual for questioning." *United States v. Vargas*, 369 F.3d 98, 101 (2d Cir. 2004) (criminal case); *see Terry v. Ohio*, 392 U.S. 1, 30 (1968). Accordingly, an officer "may, consistent with the Fourth Amendment, briefly detain an individual 'if the officer has a

reasonable suspicion that criminal activity may be afoot.' During [such] an investigatory stop, '[t]he investigating officer may also frisk an individual for weapons if the officer reasonably believes that person to be armed and dangerous.'" *Vargas*, 369 F.3d at 101 (quoting *United States v. Colon*, 250 F.3d 130, 134 (2d Cir. 2001)). In determining "whether an investigatory stop is sufficiently intrusive to ripen into a *de facto* arrest," the Second Circuit considers "the duration of the stop" among other factors. *Vargas*, 369 F.3d at 101.[61]

The Fourth Amendment limits the *permissible length of a detention during a valid stop for questioning* before it turns into an arrest or seizure, although there is no bright line rule. *See Rodriguez v. United States*, 135 S. Ct. 1609, 1611 (2015) (criminal case)[62]; *see Arizona v. Johnson*, 555 U.S. 323, 333 (2009) (criminal case)[63]; *see Florida v. Royer*, 460 U.S. 491, 500 (1983)[64]; *see United States v. Foreste*, 780 F.3d 518, 524-25 (2d Cir. 2015)[65]. During such a stop, the seizing officers must diligently pursue a means of investigation that is likely to *quickly* confirm or dispel their suspicions. *United States v. Sharpe*, 470 U.S. 675, 686 (1985)[66]. Indeed, in *Illinois v. Caballes*, the Supreme Court

---

[61] "[T]he Second Circuit considers the 'amount of force used by the police, the need for such force, and the extent to which an individual's freedom of movement was restrained, and in particular such factors as the number of agents involved, whether the target of the stop was suspected of being armed, the duration of the stop, and the physical treatment of the suspect, including whether or not handcuffs were used.'" United States v. Vargas, 369 F.3d 98, 101 (2d Cir. 2004) (citing United States v. Perea, 986 F.2d 633, 645 (2d Cir. 1993)).

[62] Here, the Court held that police may not extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff, remanding to the Eighth Circuit to determine if there was sufficient reasonable suspicion to justify Rodriguez beyond completion of the traffic infraction. *Rodriguez v. United States*, 135 S. Ct. 1609, 1616-17 (2015).

[63] Here, "[t]he Arizona Court of Appeals recognized that, initially, Johnson was lawfully detained incident to the legitimate stop of the vehicle in which he was a passenger. But, that court concluded, once Officer Trevizo undertook to question Johnson on a matter unrelated to the traffic stop, i.e., Johnson's gang affiliation, patdown authority ceased to exist, absent reasonable suspicion that Johnson had engaged, or was about to engage, in criminal activity." *Arizona v. Johnson*, 555 U.S. at 332. The Supreme Court reversed and remanded, holding that the patdown (for weapons) of the defendant was lawful because the officer did so based on her observations, Johnson's answers, and for "officer safety." *Id.* at 327-28.

[64] Here, the Court affirms the conclusion of the Florida Court of Appeal that not only was Royer "seized when he gave his consent to search his luggage but also that the bounds of an investigative stop had been exceeded" in that "the 'confinement' in this case went beyond the limited restraint of a Terry investigative stop, and Royer's consent was thus tainted by the illegality, a conclusion that required reversal in the absence of probable cause to arrest." Florida v. Royer, 460 U.S. 491, 501 (1983).

[65] Here, the court, in reliance on caselaw in other circuits, determines that successive stops be evaluated jointly and that they be reasonable both individually and in combination to be found to be lawful. Foreste, 780 F.3d at 524-26. Through combination, successive stops may be extended to an unreasonable length even if each individual stop was supported by probable cause and sufficiently limited. *Id.* When there are independent grounds for suspicion of criminal activity justifying the extension of each stop, the reasonableness of the investigation's scope and duration is separately evaluated. *Id.* at 526.

[66] Here, in approving a 20 minute detention of a driver, the Court indicated that it is "appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *Sharpe*, 460 U.S. at 676-77, 686. A more relaxed standard has been applied to detention of travelers at the border, the Court testing the reasonableness in terms of "the period of time necessary to either verify or dispel the

reaffirmed a "duration"/"length" limitation, declaring that a seizure "can become unlawful if is prolonged beyond the time reasonably required" to serve its lawful purpose. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (criminal case)[67]. If an investigation detention is particularly lengthy, it will be considered a *de facto arrest* and can even be found to be unconstitutional. *See Almeida-Amaral v. Gonzales*, 461 F.3d 231, 236 (2d Cir. 2006) (immigration case) ("Thus, exclusion may well be proper where the seizure itself is gross or unreasonable in addition to being without a plausible legal ground, *e.g.*, when the initial illegal stop is *particularly lengthy*, there is a show or use of force, etc.") (emphasis added) (immigration case).

Practice Tip: Some states have adopted statutory time limits on investigatory stops even where a longer time would otherwise be considered reasonable under the Fourth Amendment.[68] Practitioners should conduct separate research regarding time and investigative method limits in the jurisdictions where such a stop is at issue.[69]

While the Supreme Court has not specified any rigid time limitations on investigative detentions, it has repeatedly said they should be "*brief*." *Hiibel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177, 178, 185-86 (2004) (criminal case); *Dunaway v. New York*, 442 U.S. 200, 212 (1979) (criminal case); *Brignoni-Ponce*, 422 U.S. 873, 878, 881-82 (1975) (criminal case).

The Second Circuit found no egregious violation at a *fixed check point* and denied a motion to suppress where petitioner faced 3-hour detention, without *Miranda* or other warnings, after four or five uniformed officers escorted her and then interrogated, fingerprinted, and photographed her because ("stopping vehicles without a warrant at a fixed checkpoint is expressly authorized by INA § 287(a)(3)."). *Melnitzenko v. Mukasey*, 517 F.3d 42, 47-48 (2d Cir. 2008) (immigration case)

---

suspicion." United States v. Montoya de Hernandez, 473 U.S. 531, 544 (1985) (approving warrantless detention for more than 24 hours of traveler suspected of alimentary canal drug smuggling).

[67] Here, the Court's narrow question was whether "the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop" and decided that "conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy." *Id.* at 407-08.

[68] *See, e.g.*, *compare* Barrios-Lomeli v. State, 114 Nev. 779, 782 (1998) (60-minute statutory time limit may not be exceeded) *with* Townsend v. State, 350 Ark. 129, 137-38 (2002) (statute authorizing detention "for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances" does not mean 15 minutes outside limit in all cases; 32 minutes here justified considering defendant's repeated lies about his identification).

[69] *See generally* Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (Oct. 2018), 4 Search & Seizure § 9.2(f) (5th ed.).

Seized the Wrong Person

Corado-Arriaza v. Lynch, 844 F.3d 74, 78 (1st Cir. 2016) (holding there was no egregious Fourth Amendment violation where agents detained, arrested, and obtained information from a man they were not there to investigate)[70] ("bypass[ing] the question of whether there was any Fourth Amendment violation . . . because it [was] plain from [the] 'totality of circumstances' that the conduct [ ] fell short".) (immigration case).

Reasonable Basis for Seizure

Law enforcement must have a reasonable justification for a "seizure."

Practice Tip: Practitioners should be mindful of the jurisdiction where their non-citizen clients were stopped or seized.

Some states, like *New York*, have specific rules governing when a police officer may approach a private citizen. For example, *People v. De Bour*, 40 N.Y.2d 210 (1976) establishes *four levels of police conduct* when confronting individuals on the street, requiring a specific degree of suspicion (objective credible reason, founded suspicion, reasonable suspicion, and probable cause) to correspond with specific permissible law enforcement responses (approach to request information, common law right of inquiry, stop and, *if in fear of a weapon*, frisk, and arrest and full search incident to lawful arrest), respectively.[71]

Practitioners consider reaching out to the criminal defense bar for advice and support in raising similar arguments in the immigration context.

In the *criminal context*, generally the Supreme Court requires warrantless seizures to be supported by reasonable suspicion that the particular person is engaged in unlawful activity[72] or by "probable cause" to believe the particular person violated the law.

---

[70] Here, "Corado–Arriaza's manager told him that the men wanted to talk to Corado–Arriaza and then left the room. Two of the men moved in front of the door to block Corado–Arriaza's exit. They then identified themselves as ICE agents, and one of the agents asked him, 'Are you Gustavo Gomez?' The agent showed him some papers, which he believed to be a warrant, that included a fuzzy black-and-white photo of a man who Corado–Arriaza said 'was obviously not me.' Corado–Arriaza told the agent that his name was not Gustavo Gomez, but rather Gustavo Corado–Arriaza. Corado–Arriaza later learned that Gustavo Gomez was a man who had worked at the restaurant before him. When the agent asked Corado–Arriaza for his identification, Corado–Arriaza provided him with his Guatemalan driver's license. After Corado–Arriaza showed the agent his driver's license, the agents handcuffed his hands behind his back and began to question him about topics such as his date of birth and the names of his children." Corado-Arriaza v. Lynch, 844 F.3d 74, 75-76 (1st Cir. 2016).

[71] People v. De Bour, 40 N.Y.2d 210, 222-23 (1976) ("In evaluating the police action we must consider whether or not it was justified in its inception and whether or not it was reasonably related in scope to the circumstances which rendered its initiation permissible.").

[72] Reasonable suspicion must be based on "specific and articulable facts [ ] together with rational inferences from those facts." *Terry v. Ohio,* 392 U.S. 1, 21, 37 (1968).

Brignoni-Ponce, 422 U.S. 873, 881-82, 884 (1975) (holding that in the context of roving patrols, brief vehicle stops for immigration enforcement must be based on reasonable suspicion that a person is unlawfully present in the United States); *Terry v. Ohio*, 392 U.S. 1, 21, 26-27, 30 (1968) (holding that stops may be justified if a law enforcement officer has reasonable suspicion to believe that criminal activity may be afoot). Such suspicion must be supported by specific "reasonable inferences" and "articulable" facts and not merely based on his "inchoate and unparticularized suspicion or 'hunch.'" *Terry*, 392 U.S. at 21, 27. The "demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry,* 392 U.S. at 21 n.18.

Reasonable suspicion to question should be based on "an assessment of the whole picture [that] must yield a particularized suspicion . . . that the particular individual being stopped is engaged in wrongdoing." *United States v. Cortez*, 449 U.S. 411, 418 (1981).

In the *immigration context*, for a seizure by a government agent to be reasonable, the officer must "articulate objective facts providing a reasonable suspicion that [the subject of the seizure] was an alien illegally in this country." *See Orhorhaghe*, 38 F.3d 488, 497 (9th Cir. 1994) (internal citations and quotations omitted). This means providing a "rational basis" justification for the seizure that includes distinguishing between citizens, unauthorized immigrants, and other immigrants. *See id.*

Practice Tip: In analyzing "reasonable suspicion" consider the non-citizen's race, appearance, and languages spoken. What factors led officers to believe that someone they observed lacked immigration status? Race or perceived ethnicity will likely be a dominant factor for an immigration officer when there is no individualized suspicion. If applicable, argue that the non-citizen was stopped because of superficial and subjective factors relating to his national origin. *Orhorhaghe*, 38 F.3d at 504, n. 25.

Consent

Often, the government will argue that an individual voluntarily consented to a law enforcement interaction, stop, or search.

"The Supreme Court has made clear that '[c]onsent must be given voluntarily.'" *Oliva-Ramos v. Att'y Gen of U.S.,* 694 F.3d 259, 283 (3d Cir. 2012) (citing *United States v. Stabile*, 633 F.3d 219, 230 (3d Cir. 2011) (citing *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). Whether consent was *knowingly given* and *voluntary* is based on a careful examination of the *totality of circumstances* surrounding how that consent was obtained. *United States v. Watson*, 423 U.S. 411, 414 (1976); *Oliva-Ramos*, 694 F.3d at 283; *see United States v. Drayton*, 536 U.S. 194, 206-07 (2002); *Schneckloth v. Bustamonte,* 412 U.S. 218, 226, 228 (1973) (criminal case).

To determine if a stop was consensual, the IJ must analyze the totality of circumstances, including the age, education, and intelligence of the person who purportedly gave consent. *Oliva-Ramos*, 694 F.3d at 283. Additional factors that bear on whether there was consent include whether the subject was advised of his or her constitutional rights, the length of the encounter, the repetition or duration of the questioning, the use of physical punishment, the setting, and the parties' verbal and non-verbal actions. *Id.* (citing *United States v. Price*, 558 F.3d 270, 278 (3d Cir. 2009) (criminal case)). For example, in *Oliva-Ramos* an officer's notation in the Form I-213 that consent was given (absent any independent recollection that consent was given, even if the officer's testimony and language contained in the Form I-213 were consistent with the affidavit of the person who allegedly gave consent) was not sufficient to show that there was consent because IJ failed to evaluate evidence of other circumstances that might have invalidated the alleged consent. *See Oliva-Ramos v. Att'y Gen of U.S.,* 694 F.3d 259, 265, 283 (3d Cir. 2012); *but cf. United States v. Perez*, 443 F.3d 772, 778 (11th Cir. 2006) (enumerating indicia of a consensual encounter).[73]

Practice Tip: Emphasize any evidence or circumstances that might have existed to invalidate the alleged "consent." It is important for practitioners to show that the facts are simply not consistent with a consensual law enforcement-citizen encounter.

The Second Circuit consistently applies the "totality of circumstances" test to determine "whether a consent to search was in fact 'voluntary' or was the product of duress or coercion, express or implied"; "where there is coercion, there cannot be consent." *Schneckloth v. Bustamonte,* 412 U.S. 218, 227-28, 234 (1973) (criminal case); *see e.g., United States v. Faroulo*, 506 F.2d 490 (2d Cir. 1974) (criminal case) ("we must look to the 'totality of the circumstances' in determining whether a consent is voluntary or not.").

Practice Tip: When DHS claims a non-citizen voluntarily consented to a home entry (or to another interaction), determine whether in DHS's initial encounter with the non-citizen DHS officers misrepresented themselves as "police" rather than properly identified themselves as DHS-affiliated or as immigration officials. Practitioners should consider whether DHS's self-description adequately disclosed the scope and purpose of its investigation (especially if a home entry was involved), whether there are any indicia suggesting there was a ruse or misrepresentation, and whether the information provided by DHS conferred an "ability to voluntarily consent" by the non-citizen. Implied and inferred consent may not rise to the level of voluntary consent, especially if ensnarled with other coercive circumstances.

[73] *United States v. Perez* facts are described in greater detail above under Select Cases Enumerating Factors for Establishing a Fourth Amendment Seizure as Prerequisite for an Egregious Violation.

Practice Tip: Often, non-citizens give consent because they are not aware of their rights to refuse entry into their homes or to stop an interaction. Practitioners should work with community organizations and help spread awareness about the importance of individuals' legal rights and warn against the risks involved in interacting with law enforcement.

Step Two: Was the Fourth Amendment Violation "Egregious?"

The Supreme Court established that excluding evidence in removal proceedings is appropriate if it was obtained through an egregious Fourth Amendment violation or if its use would be fundamentally unfair. *See Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235-36 (2d Cir. 2006). Since *Lopez-Mendoza*, the Second Circuit and several other circuits have granted suppression in removal proceedings where evidence was procured through "egregious" violations of the Fourth Amendment, as shown below.

Please note that some immigration cases pertinent to an "egregious" Fourth Amendment analysis were also discussed in the previous section, Step One: Was the Evidence Obtained through a Fourth Amendment Violation.

Select Circuit Cases: The Second, Third, Fourth, Eighth, and Ninth Circuits have applied the exclusionary rule in cases of egregious Fourth Amendment violations.

In *Almeida-Amaral v. Gonzales*, the **Second Circuit** suggests that for a Fourth Amendment violation to be considered "egregious," the violation must be accompanied by an additional aggravating factor. 461 F.3d 231, 236 (2d Cir. 2006) (stating standard and some examples of "egregious" constitutional violations). An egregious violation that "*transgresses notions of fundamental fairness*" is not determined solely by the validity or invalidity of the stop, but also by the "*characteristics and severity of the offending conduct*." *Id.* at 235.[74] In *Almeida-Amaral* the court identifies two principles that bear on whether a stop was egregious: 1) seizure without adequate suspicion might merit suppression if "sufficiently severe" and, 2) a seizure "not especially severe" might merit suppression if based upon race or "some other grossly improper consideration." *Id.* at 235-36 ("Thus, if an individual is subjected to a seizure for *no* reason at all, that by itself may constitute an egregious violation, but only if the seizure is sufficiently severe.") ("[e]xclusion may well be proper where the seizure itself is gross or unreasonable in addition to being without a plausible legal ground, *e.g.*, when the initial illegal stop is particularly lengthy, there is a show or use of force, etc.").

In *Cotzojay v. Holder*, the court adopted a *totality of circumstances* approach for determining whether a seizure is sufficiently severe to constitute an egregious constitutional violation, "under which the threat or use of physical force is one relevant,

[74] Here, Almeida-Amaral argued that his arrest was an illegal seizure and because he was an unaccompanied minor when he spoke with the arresting agent, his statement should be inadmissible under regulations. Almeida-Amaral v. Gonzales, 461 F.3d 231, 232-33 ("Almeida-Amaral was approached by a uniformed border patrol agent just as he entered, by foot, the parking lot of a gas station adjacent to a restaurant along a highway in southern Texas. The agent instructed petitioner to stop and requested identification from him. In response, petitioner showed the officer his Brazilian passport, at which point he was arrested and taken into custody. At that time, Almeida-Amaral, who was then 17 years old, gave a statement to the arresting officer, which became the basis of an I-213 form . . . maintained by [INS]").

but not dispositive, consideration." 725 F.3d 172, 182 (2d Cir. 2013).[75] Other relevant factors include: "whether the violation was intentional; whether the seizure was 'gross or unreasonable' and without plausible legal ground; whether the invasion involved 'threats, coercion[,] physical abuse' or 'unreasonable shows of force'; and whether the seizure or arrest was based on race or ethnicity." *Id.* at 182 (quoting *Oliva-Ramos,* 694 F.3d at 279 (3d Cir. 2012). Applying the totality of circumstances standard, the *Cotzojay* court held that "the deliberate, nighttime, warrantless entry into an individual's home, without consent and in the absence of exigent circumstances, may constitute an egregious Fourth Amendment violation regardless of whether government agents physically threaten or harm residents." *Id.* at 183.

In *Pretzantzin v. Holder*, the court confirmed that "[a] *nighttime, warrantless raid* of a person's home by government officials may, and frequently will, constitute an egregious violation of the Fourth Amendment requiring the application of the exclusionary rule in a civil deportation hearing." *Pretzantzin v. Holder*, 736 F.3d 641, 646-51 (2d Cir. 2013).[76]

In *Zuniga-Perez v. Sessions*, the court recognized a sufficient showing of an egregious constitutional violation by law enforcement agents and reversed an IJ's decision to deny suppression without a hearing. *Zuniga-Perez v. Sessions*, 897 F.3d 114, 123 (2d. Cir. 2018). The *Zuniga-Perez* court determined that averring facts of a "deliberate, nighttime, warrantless entry into an individual's home without consent and in the absence of exigent circumstances" alone clearly warrants suppression. *Id.* at 127 (quoting *Cotzojay*, 725 F.3d at 183).

Further and separately, a race-based motive by law enforcement triggers "egregiousness." The *Zuniga-Perez* court considered the facts directly in the Form I-213s and affidavit – namely, that New York State troopers and Border Patrol agents went to the house because of a "suspected presence of a fugitive" and because they were looking for "known Hispanic migrants" *Id.* at 125. The court was persuaded by the non-citizen's argument that the warrant was *pretextual* and that the government's true targets were Hispanic migrant workers. *Id.* at 127. That "*race* was a factor" for law enforcement indicated to the court that "agents engaged in *severe conduct*." *Id.* at 127. Despite the government's insistence that "nothing in the record provides the requisite egregious circumstances as to the officers' conduct necessary to mandate application of the exclusionary rule," the court disagreed and explained how the language in Form I-

[75] Here, Cotzojay "awoke to hear people knocking on windows and doors at the duplex that he shared with approximately twenty people" who "identified themselves as police or probation officers" but were in fact ICE officers. After the man who ICE sought left the house with his passport, Cotzojay remained in his locked room, but fearing officers would force themselves in, opened the door. Armed ICE officers entered, placed him in handcuffs, and took him to another room where he was searched and instructed to remain on the floor. *Id.* at 174.

[76] Here, Pretzantzin awoke to loud banging of ICE on his apartment building's front door in the early morning hours. *Id.* at 644. ICE said they were "the police" and ordered Pretzantzin to open the door and he complied. *Id.* After confirming where he lived, the officers ordered him to let them inside without explaining their presence, presenting a warrant, or requesting to enter the apartment. *Id.* ICE then rounded up remaining petitioners who were asleep in their beds, demanding to see their "papers." *Id.* Officers did not ask whether Pretzantzin had legal status before arresting him. *Id.*

213 confirms that law enforcement was "acting based at least in part on race." *Id.* Although the court leaves open that there may have been "legitimate, nondiscriminatory reasons" for the law enforcement conduct, the court states that "those reasons are not apparent from the record." *Id.*

Zuniga-Perez also focused on New York State police as primary actors[77] who reached out to Border Patrol officers to act as interpreters, which suggested that the government's warrant was pretextual and that there was a race-based motive to search the home. *Id.* at 120-21.

In *Oliva-Ramos v. U.S. Att'y Gen.*, 694 F.3d 259, 275-79 (3d Cir. 2012)[78] the **Third Circuit** defined what it regarded as an egregious violation in the context of a nighttime household raid. The court determined that an egregious violation within the meaning of *Lopez-Mendoza* arises if "the record evidence establishes either (a) that a constitutional violation that was fundamentally unfair had occurred or, (b) that the violation – regardless of its unfairness – undermined the reliability of the evidence in dispute." *Id.* at 278.

In *Yanez-Marquez v. Lynch*[79] the **Fourth Circuit** joined the Second, Third, and Eighth Circuits in taking the *totality of circumstances approach* and not the more expansive "qualified immunity test" adopted by the Ninth Circuit, which held that "all 'bad faith' violations of the Fourth Amendment are egregious, warranting the application of the exclusionary rule." 789 F.3d 434, 453 (4th Cir. 2015) (citing *Gonzalez-Rivera v. I.N.S.*, 22 F.3d 1441, 1449 & n.5 (9th Cir. 1994)). The Court found that a 5 a.m. nighttime execution of a day time warrant that explicitly called for execution after 6 a.m., absent any consent or exigent circumstances violated Yanez's Fourth Amendment rights, but was not sufficiently severe to rise to the level of egregious under the totality of the circumstances. *Id.* at 464, 470 (noting ICE agents prepared a valid search warrant and the magistrate judge found the existence of probable cause to search the premises in

---

[77] This supports that conduct by local law enforcement is suppressible. Please refer to Important Note on "Law Enforcement."

[78] Here, Oliva-Ramos claimed ICE agents failed to obtain proper consent to enter his apartment, that ICE arrested him without a warrant, and without probable cause, and that they seized him without reasonable suspicion when Oliva-Ramos was apprehended by armed ICE officials at 4:30am in a nighttime raid with an administrative warrant for his sister, but with no information about the legal status of any of the other occupants of the apartment. *Id.* at 262, 274. Clara, the sister who opened the door (not Maria, the sister for whom ICE had an administrative warrant) "explained that she did not deny entry even though Maria was not there because she (Clara) believed that she could not refuse and that the order to arrest Maria gave the officers the right to enter even in Maria's absence. At some point during the exchange with the officers, Clara lost her foothold on the open door and it slammed shut, leaving her outside the apartment. Her son let her in, however, after she banged on the door. As she entered, the officers lined up behind her and followed her inside. Once inside, they began waking the occupants and ordering them into the living room while another agent blocked the door so that no one could leave." *Id.* at 262.

[79] Here, ICE was granted a broad search warrant and an hour before the warrant was in effect, burst into the bedroom where Yanez, who was pregnant, and her partner were sleeping pointing guns at them and telling them not move in English and Spanish. ICE contested Yanez's statements regarding the timing of the search and use of force.

the daytime). In dicta, the court notes that even under the Ninth Circuit's qualified immunity standard, Yanez would not have prevailed. *Id.* at 453 n.26.

Notably, the **Ninth Circuit** has adopted an expansive *qualified immunity test* meaning that the exclusionary rule should remain available in removal proceedings for all evidence obtained from "*bad faith constitutional violations*." *Gonzalez-Rivera v. I.N.S.*, 22 F.3d 1441, 1449 n.5 (9th Cir. 1994)[80] ("We emphasize that neither we nor the *Adamson* court that *only* bad faith violations are egregious, but rather that *all* bad faith constitutional violations are egregious.") (citing *Adamson v. C.I.R.*, 745 F.2d 541, 545, n. 1 (9th Cir. 1984)). "Bad faith" violations involve 1) "deliberate violations of the Fourth Amendment" or 2) "conduct a reasonable officer should know is in violation of the Constitution." *Id.* at 1448-49. The test to ascertain deliberateness is subjective – based on the officer's intent. *See id.* at 1450, 1451, n. 10. To determine whether a reasonable officer should have known conduct was unconstitutional, courts rely on the extensive Fourth Amendment training immigration officers receive and attribute it to knowledge. *See e.g., Lopez-Rodriguez v. Mukasey,* 536 F.3d 1012, 1018-19 (9th Cir. 2008) (finding agents entered residence without consent and without obtaining an arrest or search warrant) (reversing B.I.A.'s decision and remanding with instructions to dismiss removal proceedings).

The **Eighth Circuit** rejected the Ninth Circuit's qualified immunity test ("bad faith" standard) and found that the invasion of a home or a deliberate violation is not *per se* an egregious violation under the totality of the circumstances in *Martinez Carcamo v. Holder*, 713 F.3d 916, 918, 921-24 (8th Cir. 2013) (officers entered trailer home without a warrant or consent, but justified entry by *exigent circumstances* solely based on yelling "not to open the door").

Practice Tip: Notably, a showing of brutality is not required to show *egregiousness*, although an unreasonable show of force will support a finding of egregiousness. Egregiousness does not require beatings or physical threats. *See, e.g. Oliva-Ramos v. Att'y Gen of U.S.*, 694 F.3d 259, 276 (3d Cir. 2012) (refusing to limit suppression to activity that "shocks the conscience") (immigration case); *but see Escobar v. Holder*, 398 F. App'x 50, 54 (5th Cir. 2010) (unpublished) (limiting egregiousness to conduct similar to inducing vomiting while suspect is handcuffed in *Rochin v. California*, 342 U.S. 165 (1952) (criminal case)) (immigration case). Generally, there is egregiousness if law enforcement officers "employ [] an unreasonable show or use of force in arresting or detaining" an individual. *See Puc-Ruiz v. Holder*, 629 F.3d 771, 779 (8th Cir. 2010) (immigration case).

[80] Here, Gonzalez-Rivera and his father were travelling to work when INS officers pulled them over at least in part due to their Hispanic appearance, releasing the father because he had documentation of legal residence and arresting Gonzalez who did not have documentation.

Select BIA Cases: The Board of Immigration Appeals has applied the exclusionary rule in cases of egregious Fourth Amendment violations.

The Board of Immigration Appeals ("BIA") has adopted the exclusionary rule and suppresses evidence where there has been an egregious Fourth Amendment violation. *See, e.g., In re Cabrera-Carillo*, 2012 WL 1705588, at *4-5 (B.I.A. Apr. 30, 2012)[81] (remanding case to IJ to 1) adjudicate whether there was an egregious Fourth Amendment violation due to IJ's failure to abide by procedural requirements for DHS to present evidence that evidence was obtained by legal means and 2) assuming *arguendo* that there was an egregious violation, to determine the admissibility of a birth certificate that was obtained after proceedings commenced) (unpublished); *In re Rodriguez*, 2010 WL 4822981, at *3 (B.I.A. Nov. 5, 2010)[82] (remanding case for IJ to fact-find and clarify what happened during the arrest and what evidence was used to support the finding of alienage); s*ee In re Pacifico Pas*, 2010 WL 3157444, at *2 (B.I.A. July 22, 2010)[83] (unpublished) (remanding for suppression hearing, but finding that facts taken as true support a basis for establishing a case to exclude evidence); *In re Guerrero-Renovato*, 2009 WL 2171592, at *2 (B.I.A. July 8, 2009)[84] (unpublished) (granting suppression of evidence obtained as a result of "egregious" unlawful detention including the I-213; case remanding for further proceedings to address charges on NTA regarding removability and to give respondent another opportunity to file an application for relief from removal, in case he is found removable); *In re Avalos-Casillas*, 2008 WL 4722664, at *1-2 (B.I.A. Oct. 7, 2008)[85] (unpublished) (affirming IJ's grant of suppression due to "egregious" law enforcement arrest).

[81] Here, two ICE officers pulled over Cabrella-Carillo and her LPR husband who was driving the vehicle when he exhibited "nervous behavior" upon noticing the DHS officers' vehicle. Her husband claimed that they were stopped because they "look like people from Mexico or Central America."
[82] Here, immigration officers arrested Rodriguez outside the home of his employer.
[83] Here, immigration officers informed Pacifico Pas (who believed they were police) that they were at his home to check on a fire alarm. He let them inside and was soon asked for ID which was in his car. He was questioned, eventually handcuffed, and further interrogated at an ICE office. He asserts that he was never told his rights, that he could contact an attorney, why he had been arrested, or that he was being placed in removal proceedings.
[84] Here, Guerrero-Renovato was stopped by ICE at a gas station and felt he could not leave after being approached and questioned by ICE officers when he admitted he was unlawfully in the United States. He argued that he was arrested solely because he was speaking Spanish and because he is Hispanic. The record suggests that the I-213 indicated that he was approached due to his Hispanic appearance.
[85] Here, Avalos-Casillas was handcuffed before being asked about his immigration status. Although his vehicle was missing a front license plate when he was pulled over, he provided agents a valid driver's license and vehicle registration card. Law enforcement's assertion that there were safety concerns warranting handcuffs were not sufficient and that he was arrested due to his limited English ability and Hispanic appearance. *Id.* at *1. Furthermore, the court rejected DHS's argument that respondent admitted alienage during during hearing: "Although the respondent said "we Mexicans" during his testimony, we agree with the Immigration Judge's conclusion that this statement is insufficient to establish the respondent's alienage because it could have been merely a reflection of the respondent's ethnic affiliation." *Id.* at *2.

Practice Tip: Because a race-based motive is generally found to be egregious if factually demonstrated, practitioners should critically examine law enforcement actions in particular areas or against particular ethnic or racial groups, with careful attention to any circumstances that can demonstrate that there was a race-based motive for their conduct or approach of the non-citizen.

For example:

Emphasize **problematic local law enforcement policies** and information sharing mechanisms, such as task forces that target Central American populations that are suggestive of race-based immigration enforcement.[86] Consider whether based on the circumstances the mere use of a task force alone is suggestive of a race-based motive.

Highlight any **racially or ethnically motivated language** used by law enforcement (verbal or written) (prior, during, or after the interaction) or whether any law enforcement officers were brought to interpret. Query law enforcement about motives and document any language suggestive of a race-based motive. Conversely, consider whether the non-citizen displayed limited English-language ability, spoke Spanish in front of law enforcement, or simply has a Hispanic appearance.

Underscore the **aggravating non-race factors** considered by the courts, such as warrantless raids of peoples' homes, when enforcement takes place during very early or late-night hours, whether law enforcement was armed and their responses were disproportionate to the threat involved, whether children were present, and vulnerable positions of the non-citizen such as pregnancy or that they were asleep.

Stress where immigration enforcement and local law enforcement frequent certain businesses, certain schools, etc., only because they are **meeting places for immigrants** and non-citizens as racially motivated enforcement.

[86] *See* SWEPT UP IN THE SWEEP, *supra* note 3, at 16, 19-21.

II. THE EVIDENCE WAS OBTAINED THROUGH CONDUCT THAT CONSTITUTES A "WIDESPREAD" VIOLATION OF THE FOURTH AMENDMENT AND THEREFORE SHOULD BE EXCLUDED.

Step Three: Even if Not Rising to the Level of "Egregious", was the Fourth Amendment Violation Widespread?

Suppression for widespread Fourth Amendment violations is particularly key in the context of gang-related immigration enforcement, where law enforcement misconduct in violation of the Fourth Amendment is widespread. Indeed, such violations are occurring with growing frequency, particularly in the gang-related immigration enforcement context, as evinced in Specific "Widespread" Practices of Fourth Amendment Violations by Law Enforcement Where Law Enforcement Arrest and Detain Latinx Youth as Part of its Gang Enforcement.

Justice O'Connor stated in the final section of *Lopez-Mendoza* that the Court's "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." *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (internal citations omitted). Effectively, the widespread violations exception delineated by the Supreme Court allows for the exclusion of evidence when there is a widespread practice of Fourth Amendment violations by law enforcement.

The **Third Circuit** is the only circuit court to explicitly acknowledge widespread violations as a basis for suppression. In *Oliva-Ramos*, the court recognized that "widespread" violations were separate grounds for suppression of evidence and quoted from Justice Kennedy's opinion in *Hudson v. Michigan* noting that there would have to be a "consistent pattern" that is more than a single Fourth Amendment violation. *Oliva-Ramos v. U.S. Att'y Gen.*, 694 F.3d 259, 280-81 (3d Cir. 2012).

Practice Tip: In the "widespread" Fourth Amendment context, the first step is to establish that an officer's conduct violated the Fourth Amendment. The next step is to show the violative conduct is pervasive. Although courts have not explicitly held this, a widespread Fourth Amendment violation likely need to not rise to the level of egregious. However, if a practitioner can show that law enforcement's conduct is both egregious and widespread, the suppression argument will be stronger.

Select Circuit Cases

In *Oliva-Ramos*, the **Third Circuit** explicitly stated that widespread violations are "as much a part of the *Lopez-Mendoza* discussion as 'egregious' violations" and "may serve as an independent rationale for applying the exclusionary rule in civil removal proceedings." *Oliva-Ramos,* 694 F.3d at 279-80 ("Rather, determining when widespread violations of the Fourth Amendment may serve as an independent rationale for applying the exclusionary rule in civil removal proceedings is simply a matter of first impression for us. Given the discussion in *Lopez–Mendoza*, we think that most constitutional violations that are part of a pattern of widespread violations of the Fourth Amendment would also satisfy the test for an egregious violation, as discussed above.") (internal citations omitted).

Factors relevant to the widespread inquiry include, *inter alia*:

- the existence of a "consistent pattern" (e.g. pattern of conducting early morning raids),
- the number of affected individuals,
- the frequency and routine nature of the violation. *Id.* at 279-82.

The *Oliva-Ramos* court also characterized "[a]llegations of widespread violations . . . presented previously before this Court," on which it did not explicitly rule, such as:

- "[I]nadequately trained officers"
- Officers relying on "outdated and inaccurate databases" to target individuals through home raids,
- Officers possibly motivated by "inflated quotas" that "drove the programmatic abuses,"
- Programmatic abuses include "'collateral arrests' of persons not targeted by the raids" and "excessive displays of force" and intimidation. *Id.* at 280 n.25.

As of the date of publication of this Practice Note, the **Second Circuit** has not issued a precedential decision regarding the specific application of the "widespread" violation exception raised and left open by the Supreme Court in *Lopez-Mendoza*. Practitioners should rely on *Lopez–Mendoza* and the language in *Oliva-Ramos* to raise similar arguments.

Exhaustion Issues

Practice Tip: A "widespread" violation claim should be administratively exhausted and adequately developed on the record or it will likely be rejected by the appeals court. Practitioners should not wait until appeal to raise the issue of a widespread violation for the first time.

Practitioners should explicitly argue a "widespread" claim in addition to an "egregious" claim before the immigration court if the facts support both theories.

In *Melnitsenko*, the court stated that "before the BIA, Melnitsenko argued only that the alleged Fourth Amendment violation was so egregious as to survive *Lopez-Mendoza*. Accordingly, any argument that the alleged violation is widespread was unexhausted. *See* 8 U.S.C. § 1252(d)(1)." *Melnitsenko v. Mukasey*, 517 F.3d 42, 47 (2d Cir. 2008). The court declined to "exercise any authority to review this unexhausted issue in this case given that . . . it concerns a factual determination that should have been made by the agency in the first instance." *Id.* at 47 n.6. The court noted that "Melnitsenko has not provided any evidence that Fourth Amendment violations such as the ones she experienced are widespread." *Id*. at 47 n.6. Effectively the court established that an alleged widespread constitutional violation could be grounds of evidence in a removal proceeding, but that in the instant case, no widespread violation claim was raised or shown.

In *Pinto-Montoya v. Mukasey* the court noted that it was unable to consider a widespread-violation claim because petitioners had only raised the claim on appeal, but suggested that, had the claim been administratively exhausted, it would have been appropriate for the Court to consider. *Pinto-Montoya v. Mukasey*, 540 F.3d 126, 130 n.2 (2d Cir. 2008) ("In their submissions to the Court, petitioners argue for the first time that Fourth Amendment violations by immigration authorities are so widespread as to make exclusion appropriate in these circumstances. Because they did not raise the issue before the BIA, it has not been exhausted and is therefore not appropriately before us. *See* 8 U.S.C. § 1252(d)(1); *Melnitsenko v. Mukasey*, 517 F.3d 42, 47 (2d Cir. 2008).").

The **Fourth Circuit** in *Yanez-Marquez v. Lynch* also did not analyze whether there was a widespread pattern of alleged constitutional misconduct by ICE because that claim was abandoned**.** *Yanez-Marquez v. Lynch*, 789 F.3d 434, 461 n.13 (4th Cir. 2015) ("Because Yanez abandoned before the BIA her claim that the alleged constitutional violations she experienced were part of a larger, widespread pattern of unconstitutional misconduct by ICE agents, we decline to address the merits of her Fourth Amendment widespread pattern claim. *See Kporlor v. Holder*, 597 F.3d 222, 226 (4th Cir. 2010)"). However, its recognition of a possible widespread claim does not foreclose it.

Tools for Establishing a "Widespread Practice"

To establish there is a practice or pattern of "widespread" Fourth Amendment violations the *court record* should contain ample examples of specific and pervasive "widespread" practices of Fourth Amendment violations by law enforcement. It is essential to document that Fourth Amendment violations are widespread and also to explicitly raise applicable "widespread" Fourth Amendment violation claims at every level of litigation, when appropriate.

Practice Tip: Practitioners should rely on experts, reliable news articles, statistics, including the government's own research and policies, social science research, past cases, and existing law suits to show that violations are widespread and build on past incidents. Encourage judges to make specific findings of fact that demonstrate widespread violations by specifying or citing to news articles (documentation) rather than merely relying on their "own experience with several cases."[87]

Select Law Review Articles and Press

Law review articles and press argue that constitutional violations have become pervasive since the *Lopez-Mendoza* decision and widespread constitutional Fourth Amendment claims should be raised. Many media articles and other sources have highlighted heightened immigration enforcement since 1984 and particularly in recent history. These sources could be submitted to the court in support of a widespread constitutional violation claim.

- 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 ("propos[ing] that constitutional violations by immigration officers have become both geographically and institutionally widespread in the years since Lopez-Mendoza . . . [and] . . . that immigration law and the practice of immigration enforcement have changed fundamentally in the twenty-five years since Lopez-Mendoza was decided, undermining the assumptions on which the majority in 1984 based its arguments against the use of the exclusionary rule");

- Kavitha Surana, *How Racial Profiling Goes Unchecked in Immigration Enforcement*, ProPublica (Jun. 8, 2018),

[87] *See e.g.*, *In re* Valentin Sandoval-Rosales, 2014 WL 7508419 (B.I.A. Nov. 28, 2014) ("We also disagree with the Immigration Judge's implication that the respondent has shown widespread violations. The Immigration Judge noted the news articles the respondent referred to, but he did not cite to them specifically. Rather, he cited to his 'own experience with several cases' as opposed to making specific findings of fact. Inasmuch as the DHS has met its burden to show that the method by which the evidence obtained was not sufficiently egregious to apply the exclusionary rule, the Immigration Judge's exclusion of the DHS's evidence in proving the respondent's alienage was in error.") (internal citations omitted) (unpublished).

https://www.propublica.org/article/racial-profiling-ice-immigration-enforcement-pennsylvania (describing how egregious constitutional violations are now widespread);

- Michael J. O'Brien, "*Widespread" Uncertainty: The Exclusionary Rule in Civil Removal Proceedings*, 81 U. Chi. L. Rev. 1883 (2014) ("examin[ing] examples of widespread-violations exceptions in other Fourth Amendment contexts, discuss[ing] the uncertainty over the widespread-violations question, and draw[ing] a connection between other widespread-violations in Fourth Amendment law[.]").

Expert Documentation of "Widespread" Practice

Practitioners should carefully document and provide evidence of "widespread" Fourth Amendment violations when preparing to make such argument during a suppression hearing. One way of doing so, is by using an expert witness to testify regarding the "widespread" practice at issue. The expert will need to prepare a declaration regarding the "widespread" practices at issue.

Be sure the expert is qualified and experienced and that you know the limits of their knowledge.

- Be sure that the expert is qualified to provide expertise and has extensive experience on the topic at issue.
- If describing the inner workings of law enforcement practices, consider whether the expert has had sufficient exposure or knowledge regarding trainings, manuals, and guidance given to different and specific law enforcement (local, state, federal) on these issues.
- Be mindful of the limits of what your expert knows and does not know.

Have the expert describe aggressive law enforcement policies at issue and how they are problematic and ineffective to their alleged purpose.

- Have the expert describe law enforcement's policies of gang enforcement, whether there is a particular model or system law enforcement uses to identify individuals as gang members, and how commonly such a model is adopted.
- Have the expert articulate how law enforcement relies on these systems or methods, if known, the training received by law enforcement, and the zeal with which these policies and systems are enforced.
- It may be helpful to delineate between local, state, and federal law enforcement.
- For example, this may include the expert describing the problematic and overbroad inclusion criteria in gang databases and in labeling someone as gang affiliated, explaining the deficiencies of social science research relied on by law enforcement, and the lack of evidence that these policies are effective at combatting gang violence in communities. This may also include having the expert emphasize how gang membership alone is not a crime, how the gang label criminalizes friendships in black and brown communities, and how one's

membership in an ill-defined street organization should not be equated with an individual's actual criminal conduct.

The expert should describe and document the discriminatory impact and discriminatory intent of these aggressive law enforcement policies.

- Describe and document how people of color and members of the Latinx community are disproportionately affected by these policies and how these policies are systematically implemented.
- The expert should describe and document any discriminatory intent by law makers and law enforcement to track, target, and police these communities.
- The expert should document and discredit the problematic and aggressive policing tactics used by local and federal law enforcement to tackle gang issues in communities.
- It is important that the expert assert how these law enforcement policies lead to unwarranted discrimination against specific communities.
- Finally, the expert should assess whether the circumstances involving the non-citizen are consistent with a pattern of overbroad and unreliable gang policing and enforcement of Latinx individuals by local, state, and federal law enforcement agencies, informed by flawed models of gang labeling.

Specific "Widespread" Practices

In the following section Specific "Widespread" Practices of Fourth Amendment Violations by Law Enforcement Where Law Enforcement Arrest and Detain Latinx Youth as Part of its Gang Enforcement, this Practice Note provides examples of specific "widespread" practices of Fourth Amendment violations specific to gang enforcement in New York State. These are just some examples of the type of information and data practitioners should collect to establish a widespread practice.

Specific "Widespread" Practices of Fourth Amendment Violations Where Law Enforcement Arrest and Detain Latinx Youth as Part of its Gang Enforcement

A. DHS Uses "Gang Crackdowns" as Pretext to Arrest and Deport Latinx Individuals, Including Re-Detaining Unaccompanied Minors.

1. ***Law enforcement is relying on information arising out of unreliable gang databases to make arrests.***

Unsubstantiated stops, arrests, and prosecutions in reliance on information arising out of various New York gang databases, which are over-inclusive and unreliable, have become widespread.[88]

Gang databases are frequently used to register and identify alleged gang members in New York.[89] For instance, NYPD's gang database "has massively expanded in recent years, even as gang-related crime dropped to historic lows."[90] Increasingly, information in these databases are ending up in the hands of immigration.[91]

Lack of understanding and reassertion of preconceived biases and stereotypes can and has led to lax standards and overinclusion in many gang databases across the country largely based on racial profiling.[92] Nevertheless, jurisdictions in New York State, including Nassau County and Suffolk County maintain their own gang databases, based on their own inclusion criteria, which are presumably similarly over-inclusive and racially disparate.[93]

Gang databases are notoriously inaccurate, overbroad, and unreliable.[94] Database inclusion is based on vague criteria.[95] Gang databases are maintained in New York without adherence to any reasonable suspicion or probable cause standard.[96] Because inclusion in a gang database generally does not require criminality, even those who

---

[88] SWEPT UP IN THE SWEEP, *supra* note 3, at 23-26.
[89] *Id.* at 23.
[90] Alice Speri, *NYPD Gang Database Can Turn Unsuspecting New Yorkers into Instant Felons*, INTERCEPT (Dec. 5, 2018), https://theintercept.com/2018/12/05/nypd-gang-database/.
[91] SWEPT UP IN THE SWEEP, *supra* note 3, at 9, 19, 21.
[92] Emmanuel Felton, *Gang Databases are a Life Sentence for Black and Latino Communities*, PAC. STANDARD (Mar. 2018), https://psmag.com/social-justice/gang-databases-life-sentence-for-black-and-latino-communities.
[93] *See* SWEPT UP IN THE SWEEP, *supra* note 3, at 24.
[94] *Id.*at 23.
[95] *Id.*at 24.
[96] Thomas Nolan, *The Trouble with So-Called "Gang Databases": No Refuge in Sanctuary*, AM. CONST. SOC'Y (June 27, 2018), https://www.acslaw.org/acsblog/the-trouble-with-so-called-gang-databases-no-refuge-in-the-sanctuary.

have never actually engaged in criminal activity and who may not actually be associated with gang-related groups are included.[97]

The NYPD continues to maintain an electronic gang database even though gang membership itself is not a crime, the criteria for inclusion is over-inclusive, and there is no method for challenging inclusion.[98] After it was discovered that the NYPD was keeping personal information on the people who had been subjected to a stop-and-frisk, and after a settlement was reached in the *Lino*, New York's criminal procedure law was amended to prohibit the maintenance of an electronic database of people who were stopped-and-frisked because many of them had not committed any actual crime or infraction. *Lino v. City of New York*, 958 N.Y.S.2d 11 (App. Div. 1st Dep't 2012). Now, the City of New York and other jurisdictions use gang databases to a similar effect.

Law enforcement reliance on inaccurate databases has been held unconstitutional. *Argueta v. U.S. Immigr. & Customs Enf't*, 643 F.3d 60, 63-64 (3d Cir. 2011) ("According to a 2007 report from the DHS Inspector General, the database used to locate fugitive aliens 'in outdated and inaccurate in up to 50% of cases.") ("Specifically, the raids allegedly violated the Fourth and Fifth Amendments to the United States Constitution. Due to the flaws in the database and other deficiencies, the unconstitutional conduct allegedly began even before the team of ICE agents arrived at a particular residence").

All of this is particularly troubling considering immigration courts' and USCIS' overwhelming reliance on assumptions of gang membership based almost entirely on gang database inclusion.[99] Indeed, immigration practitioners have no mechanism to verify or challenge the often erroneous and conclusory information contained therein.[100] Yet, due to the lax evidentiary standards in immigration court such conclusory gang allegations are nevertheless presented and often weighed against the non-citizen.[101]

Indeed, even though information in gang databases is unreliable and based on vague criteria, law enforcement continues to rely on overbroad gang allegations and

---

[97] SWEPT UP IN THE SWEEP, *supra* note 3, at 24 ("[A]n individual not affiliated with any gang, but seen spending time with gang members, regardless of the relationship, and dressed as an urban youth may be included in a database despite no gang membership or plans to commit any crimes.").
[98] *See id.*
[99] Immigr't Legal Resource Ctr., Practice Advisory, *Understanding Allegations of Gang Membership/ Affiliation in Immigration Cases* (Apr. 2017), https://www.ilrc.org/sites/default/files/resources/ilrc_gang_advisory-20170426.pdf; PAIGE AUSTIN ET. AL., STUCK WITH SUSPICION: HOW VAGUE GANG ALLEGATIONS IMPACT RELIEF & BOND FOR IMMIGRANT NEW YORKERS 3, 15 (2019), https://www.nyclu.org/sites/default/files/field_documents/020819-nyclu-nyic-report_0.pdf.
[100] PAIGE AUSTIN ET. AL., STUCK WITH SUSPICION: HOW VAGUE GANG ALLEGATIONS IMPACT RELIEF & BOND FOR IMMIGRANT NEW YORKERS 3, 15 (2019), https://www.nyclu.org/sites/default/files/field_documents/020819-nyclu-nyic-report_0.pdf.
[101] *See* LAILA L. HLASS & RACHEL PRANDINI, DEPORTATION BY ANY MEANS NECESSARY: HOW IMMIGRATION ARE LABELING IMMIGRANT YOUTH AS GANG MEMBERS 14 (Immigr. Legal Res. Ctr. 2018), https://www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf.

information in unreliable databases to perform unsubstantiated arrests that do not satisfy probable cause and, thus, violate peoples' constitutional rights.[102]

2. ***ICE is increasing the use of home raids to arrest persons who were not themselves the targets of a gang-enforcement operation.***

ICE concedes that it has a policy of rounding up everyone in a home, without any particularized suspicion, in order to question everyone about immigration status. *See Oliva-Ramos v. Att'y Gen. of U.S.*, 694 F.3d 259, 281 (3d Cir. 2012)[103].

Practice Tip: Practitioners should analogize to *Oliva-Ramos* and argue that, similarly, in the name of its gang enforcement operations, there is an observable increase of home raids by ICE to make arrests and to round up other individuals in the home besides the "target" of the raid.[104] There is also a troubling increase of workplace raids.[105] Practitioners should seek to obtain information by requesting FOIA requests including "ICE policies, directives, and memoranda regarding collateral arrests made at the suspected location of individuals targeted by ICE."[106]

The *Oliva-Ramos* court noted that the government's withholding of documents (relating to the search and seizure of his home and arrest, relating to the underlying ICE policy for conducting such searches and seizures, and records related to the ICE officers who arrested Oliva-Ramos) impeded Oliva-Ramos's ability to present evidence before the IJ in the first instance concluding that Oliva-Ramos "must be permitted to present evidence to support his contention that the government's conduct falls within the exception the Supreme Court was careful to allow in *Lopez-Mendoza*." *Oliva-Ramos*, 694 F.3d at 273, 282.

Practice Tip: Practitioners should use specific cases that have shown egregious or other Fourth Amendment violations to create the arsenal they use to establish a pattern of widespread violations. For example, in *Zuniga-Perez v. Sessions*, the Second Circuit solely focused on whether the facts made out a prima facie case of an egregious Fourth Amendment violation and not whether the violation was widespread; even so, the alleged facts show that New York State troopers collaborate

---

[102] *See* SWEPT UP IN THE SWEEP, *supra* note 3, at 23-26 (describing the widespread use of gang allegations as a pretext to facilitate racially motivated immigration enforcement).
[103] "Oliva-Ramos argues that ICE conceded that it has a policy of rounding up everyone in a home, without any particularized suspicion, in order to question all of the occupants about their immigration status. The BIA's refusal to even consider that evidence was contrary to Lopez-Mendoza. By turning a blind eye to that evidence, the BIA prevented Oliva–Ramos from potentially demonstrating that the circumstances of his seizure fit within the narrow exception left open in Lopez-Mendoza." Oliva-Ramos, 694 F.3d at 281.
[104] Oliva-Ramos, 694 F.3d at 272.
[105] Sarah Ruiz-Grossman, *ICE Dramatically Increased Workplace Raids of Undocumented Immigrants in 2018*, HUFFPOST (Dec. 11, 2018), https://www.huffpost.com/entry/ice-immigration-arrests-work-undocumented-immigrants_n_5c105b3fe4b0ac537179c247.
[106] Oliva-Ramos, 694 F.3d at 281.

with DHS (given CBP presence) and that law enforcement relies on race-based targeting.[107] With this in mind, practitioners should collect and archive such examples, as each collected incident of a Fourth Amendment violation eventually helps create a pattern to show that unlawful law enforcement conduct is widespread. These collected examples also help undermine the argument that any existing regulations designed to prevent such violations are sufficiently effective at deterring such conduct.

Practice Tip: Practitioners should note and provide support for the claim that ICE has also increased similar raids on other group gathering places to make large scale arrests without any particularized suspicion, such as in neighborhood stores, buildings, parks, etc.[108]

Reliance on reports concerning the frequency of raids or of other law enforcement conduct can be persuasive to a judge. For example, in a warrantless home raid case involving two brothers, an IJ found that the raid was "'part of a widespread practice of warrantless and consentless home raids by ICE agents, resulting in Fourth Amendment violations.' The IJ relied on the Cardozo Immigration Justice Clinic's *report* on the frequency of INS home raids and *various news articles* further examining the topic intimating a loose understanding of 'widespread' as being satisfied by forms of Fourth Amendment violations that have become 'not uncommon.'" Michael J. O'Brien, *"Widespread" Uncertainty: The Exclusionary Rule in Civil-Removal Proceedings*, 81 U. Chi. L. Rev. 1883, 1901 (2014) [109] (internal citations omitted) (emphasis added). Similarly, practitioners should raise the issue of a warrantless home raid, if applicable, and similarly provide evidence and data of the frequency of these raids while also citing to previous IJ decisions.

3. ***Law enforcement makes false accusations of gang allegations.***

There are several examples of law enforcement making *false gang allegations* and practitioners should collect and publicize such incidents when appropriate to help show a "widespread" pattern.

Here are a few examples:[110]

---

[107] Zuniga-Perez v. Sessions, 897 F.3d 114, 126-27 (2d Cir. 2018).
[108] *See* SWEPT UP IN THE SWEEP, *supra* note 3, at 9, 22, 30.
[109] The law review article relies on this citation: *In re* R-C- and J-C-, slip op. at 16-17 (N.Y.C. Immigr. Ct., May 12, 2010).
[110] *See e.g.*, Will Van Sant & Victor Manuel Ramos, *From a Bad Morning at School to ICE Detention*, NEWSDAY (June 14, 2019), https://www.newsday.com/long-island/investigations/ice-detention-minor-1.32338595 ("F.E. admits to 'acting stupid' and not being focused in school before his arrest and detention, but he said being a bad student did not make him a gang member."); *see generally* SEAN GARCIA-LEYS ET AL., MISLABELED: ALLEGATIONS OF GANG MEMBERSHIP AND THEIR IMMIGRATION CONSEQUENCES (Apr. 2016), https://www.law.uci.edu/academics/real-life-learning/clinics/ucilaw-irc-MislabeledReport.pdf.

- In August 2017 a high school junior was picked up in her home in Brentwood, New York by immigration agents after being wrongly accused of being affiliated with MS-13.[111] She was detained because she was "observed at Brentwood High School with other confirmed MS-13 members," and because school officials found marijuana in her locker.[112] The student was released a month later when the judge found that the evidence presented was not enough to substantiate gang membership allegations.[113]

- In February 2018, the New York Civil Liberties Union filed a class action lawsuit on behalf of minors labeled as gang members and held in indefinite detention without probable cause. The lead plaintiff, LVM, was taken from his home in Long Island based on "gang allegations" by law enforcement agents who did not identify themselves, even though he, in reality, had no criminal record or gang involvement.[114]

4. Law enforcement is increasingly profiling Latinx individuals and detaining them.

Statistics show that law enforcement increasing profiling Latinx individuals and detaining them:

- "Immigrant youth detentions in New York have increased dramatically since Trump spotlighted gang violence and MS-13 during his campaign and throughout his first year in office."[115]

- "At least 821 immigrants under the age of 18 currently are detained in New York, according to data from Transactional Records Access Clearinghouse (TRAC). In 2017, 238 young immigrants were detained by immigration authorities — compared to just 31 in 2016."[116]

- "Similar spikes, in both youth detentions and deportations, have been reported nationwide."[117] "The increases occurred at the same time that the U.S. Department of Homeland Security (DHS) and U.S. Department of Justice (DOJ)

---

[111] Sarah Gonzalez, *Undocumented Teens Say They're Falsely Accused of Being in a Gang*, WBUR NEWS (Aug. 17, 2017), http://www.wbur.org/npr/544081085/teens-in-u-s-illegally-say-theyre-falsely-accused-of-being-in-a-gang.
[112] *Id.*
[113] *Id.*
[114] *LVM v. ORR*, N.Y. CIV. LIBERTIES UNION, https://www.nyclu.org/en/cases/lvm-v-orr (last visited June 19, 2019); *see also* Class Action Compl. and Pet. for a Writ of Habeas Corpus, L.V.M. v. Off. Refugee Resettlement, 1:18-cv-01453 (S.D.N.Y. Feb. 16, 2018), https://www.nyclu.org/sites/default/files/field_documents/ecf_1_class_action_complaint_and_petition_for_a_writ_of_habeas_corpus_2018-02-16_00062143xb2d9a_0.pdf.
[115] Nicole Acevado, *Gang Crackdowns Have Increased Arrests, Deportations of Latino, Immigrant Youth, Says Report*, NBC NEWS (May, 16, 2018), https://www.nbcnews.com/news/latino/gang-crackdowns-has-increased-arrests-deportations-latino-immigrant-youth-says-n874766.
[116] *Id.* From the data, it is unclear whether all of these young people are Latinx.
[117] *Id.*

were conducting 'Operation Raging Bull' "to target and dismantle MS-13." The operation culminated in the arrest of 267 people in all of the United States and overseas.[118]

- "According to figures that ICE provided, Matador, which targets other gangs in addition to MS-13, had resulted in 842 arrests. Of the total, ICE said that 385 were MS-13 gang members or affiliates and that 135 of those MS-13 arrests involved a criminal charge, while 250 were for civil immigration law violations."[119]

5. ***Residents in Nassau and Suffolk Counties have been subjected to an excessively high number of patrols, stops, and arrests based on unsubstantiated gang allegations by law enforcement.***

Please refer to Important Note on "Law Enforcement."

In addition to racial profiling, multiple sources confirm that since 2017, instances of ICE and police patrols, stops, and arrests based on unsubstantiated gang allegations have become "widespread" in Nassau and Suffolk Counties on Long Island. Examples of reports, news articles, and legal cases challenging federal, state, and local law enforcement conduct can all be used to support that specific conduct is happening.[120]

- Practitioners should provide support that a given neighborhood, demographic, or community is subjected to excessive tracking and targeting by using current:
- Reports/statistics of widespread gang raids in the area
- Reports/statistics of ICE arrests in the area
- Reports/statistics of false/erroneous gang allegations
- Policies, directives, and memoranda regarding fugitive operations and "collateral" arrests
- References to decisions or filings of law-suits documenting and/or alleging the pervasiveness of specific conduct
- Reliance on outdated and inaccurate databases, e.g. gang databases

This type of documentation should always be sought (though it may not exist) as support to show the specific unlawful action is "widespread."

6. ***Law enforcement is stopping individuals in "high-crime areas" without reasonable suspicion.***

Practitioners can argue that law enforcement are making illegal seizures in "high crime areas." Reports of stops without reasonable suspicion and arrests without probable cause are pervasive on Long Island, especially in locations deemed by law enforcement

[118] *Id.*
[119] Will Van Sant & Victor Manuel Ramos, *From a Bad Morning at School to ICE Detention*, NEWSDAY (June 14, 2019), https://www.newsday.com/long-island/investigations/ice-detention-minor-1.32338595.
[120] *See generally* SWEPT UP IN THE SWEEP, *supra* note 3.

to be "high-crime areas."[121] Even if some neighborhoods of Nassau and Suffolk counties could be considered "high-crime areas," this designation "standing alone, is not enough to support a reasonable, particularized suspicion of criminal activity." *Illinois v. Wardlow*, 528 U.S. 119, 119 (2000) (criminal case) (citing *Adams v. Williams*, 407 U.S. 143, 144, 147-148 (1972)). Thus, an individual's mere presence within the boundaries of certain neighborhoods in Suffolk and Nassau counties is insufficient to establish reasonable basis or probable cause for arrest.

B. Local Law Enforcement's Inappropriate Collaboration with ICE is Widespread.

Please refer to Important Note on "Law Enforcement."

Practitioners should argue that local law enforcement's inappropriate collaboration with ICE is a widespread constitutional violation.

Practitioners should reference *People ex rel. Wells v. DeMarco*, 168 A.D.3d 31 (N.Y. App. Div. 2d Dep't 2018) addressing an aspect of this collaboration in New York State, described below.

1. ICE and local law enforcement have joined *task forces* in an effort to aggressively target gang crime on Long Island.[122]

2. ICE embraces its *collaboration* with local law enforcement to detain and arrests individuals who local law enforcement lack evidence to arrest on non-immigration grounds.[123]

3. In New York State, local and state officers are unlawfully making *civil immigration arrests*.

[121] The term "high-crime areas" is problematic as it suggests that individuals in such areas have different Fourth Amendment protections than they would in other locations in the same town, city, or state; it also represents "a significant shift away from equal constitutional protections for all citizens." Andrew Guthrie Ferguson, *The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587,1589, 1623 (2008) ("Even ignoring the economic, racial, and social inequalities involved, one must hope that police officers are at least correct that it is a high-crime area, and are not using their suspicions of the neighborhood as a proxy for impermissible hunches. The line between constitutional 'reasonable suspicion' and unconstitutional hunches is a difficult one to draw. Using neighborhoods as a means to blur that line must be carefully monitored.").

[122] SWEPT UP IN THE SWEEP, *supra* note 3, at 27 (describing ICE's collaboration with various government entities, particularly local law enforcement).

[123] SWEPT UP IN THE SWEEP, *supra* note 3, at 25-26 (describing how local law enforcement collaborates with ICE when it lacks the evidence to make a criminal arrest).

Recently, in *People ex. rel. Wells v. DeMarco*,[124] a decision that applies *state-wide*,[125] New York's Appellate Division for the Second Judicial Department held that it is unlawful for local or state law enforcement officers, "including police, sheriffs, and corrections officers – to detain people for civil immigration violations because New York law does not authorize them to enforce civil immigration law."[126] This decision establishes that local or state officers may not arrest or detain i.e. seize persons who would otherwise be "free to leave" based only on an ICE detainer and/or ICE administrative "warrant," which are civil in nature and do not confer authority to actually detain anyone.[127] Continuing someone's detention after one is entitled to release (while waiting for ICE/CBP to arrive) constitutes a "new arrest and seizure" under New York law and under the Fourth Amendment.[128] This is "applicable to all stops or detentions by local and state law enforcement officers, including officers holding someone while waiting for ICE or U.S. Customs and Border Protections (CBP) after a car stop or a *Terry* stop."[129] The case is narrowly construed to apply to New York's local and state law enforcement's authority to effectuate civil immigration arrests and not whether federal civil immigration officers have the authority to effectuate such arrests.[130]

In light of the decision, practitioners should carefully review *People ex. rel. Wells v. DeMarco* as to whether New York local or state law enforcement officers are acting outside of their authority and unlawfully enforcing civil immigration law.

---

[124] For more information please refer to NYCLU's Attorney Practice Advisory on the decision describing the case, holding, applicability, and options for clients who have been held on detainers in the past. NYCLU, *Attorney Practice Advisory, Immigration Enforcement in New York After People ex. rel. Wells o.b.o. Francis v. DeMarco* (Dec. 6, 2018), https://www.immigrantdefenseproject.org/wp-content/uploads/NYCLU-Francis-Decision-Practice-Advisory.pdf [hereinafter *Francis Practice Advisory*]. For the memo of law, petition, exhibits and supplemental petition filed by NYCLU, please refer to the NYCLU website on the decision. If you have questions or are aware of noncompliance with the *Francis* decision by local or state law enforcement officers anywhere in New York State, please reach out to NYCLU at detainers@nyclu.org.

[125] "Because there is no contrary holding from another appellate court in New York State, this decision is applicable statewide." *Francis Practice Advisory*, *supra* note 124, at 1; People *ex rel*. Wells v. DeMarco, 168 A.D.3d 31, 39 (N.Y. App. Div. 2d Dep't 2018) ("The issues presented are both novel and significant. Arrest and detention are deprivations of freedom. Where an individual in a state or local correctional facility continues to be held against his or her will despite having served a sentence, it is important, if not vital, if our rule of law is to mean anything, that a court determine whether the continued detention is lawful. It is important as well for the Sheriff to have the benefit of a ruling on the merits so that his conduct may be guided accordingly. There is no New York appellate decision addressing these issues.")

[126] *Francis Practice Advisory*, *supra* note 124, at 1; *see* People *ex rel*. Wells, 168 A.D.3d at 39, 43, 47-49.

[127] People *ex rel*. Wells, 168 A.D.3d at 39-40, 42-43 ("A detainer is not a stand-alone document. It must be accompanied by an administrative arrest warrant. But, even if viewed as a stand-alone document, the detainer does not convey any authority or command to actually detain anyone. It merely requests continued detention of one already detained."); *Francis Practice Advisory*, *supra* note 124, at 1.

[128] People *ex rel*. Wells, 168 A.D.3d at 31, 39-40, 45-46; *Francis Practice Advisory*, *supra* note 124, at 1.

[129] *See Francis Practice Advisory*, *supra* note 124, at 1.

[130] People *ex rel*. Wells, 168 A.D.3d at 31-32, 53.

For example: The court directly addresses the "widespread" practice of using such unlawful detainers head-on in *People ex. rel. Wells v. DeMarco*: "It is evident that this issue is likely to reoccur. As the petitioner points out, and the Sheriff does not refute, nearly 800 detainers were submitted by ICE to the Nassau and Suffolk County Sheriff's offices during 2017. The statistics presented by the petitioner indicate that the number of ICE detainers has increased substantially over the years, suggesting a continuing pattern of growth. While it is not known whether any counties within the Second Judicial Department (or even outside it) other than Suffolk and Nassau have policies similar to the one at issue here, it is readily apparent that hundreds of inmates in just two counties within this Department may well face the application of the policy each year."[131]

For example: Another inappropriate example of cooperation between the police and ICE occurred in November 2017, when a Nassau County police officer stopped a Salvadoran national for failure to signal when changing lanes, a violation punishable by a ticket.[132] During the stop, the police officer discovered the driver's pending order of removal, and two weeks later he was deported.[133] Central American Refugee Center ("CARECEN") and Hofstra Law Clinic filed suit against Nassau County, arguing that the county police department was cooperating with ICE in violation of state law because a state officer has no authority to make civil immigration arrests.[134]

4. ICE uses *detainers* to transfer individuals from local police custody in Nassau and Suffolk counties into immigration custody to begin deportation proceedings.[135]

5. *Arrests by ICE in courthouses* are widespread.[136] On January 10, 2018, ICE issued a formal directive expounding its policy on enforcement actions inside federal, state, and local courthouses specifically stating that its enforcement includes actions against "specific, targeted" non-citizens such as "gang members," individuals with criminal convictions, or people who pose "national security or public safety threats."[137] The directive attributes its policy, at least in part, on the

[131] People *ex rel*. Wells, 168 A.D.3d at 38.
[132] Liz Robbins, *Police on Long Island Are Working Illegally with ICE, Suit Says*, N.Y. TIMES (Nov. 20, 2017), https://www.nytimes.com/2017/11/20/nyregion/nassau-county-undocumented-immigrants-ice.html.
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] IMMIGRANT DEF. PROJECT, ICE OUT OF COURTS CAMPAIGN TOOLKIT (2018), https://www.immigrantdefenseproject.org/wp-content/uploads/IDPCourthouseToolkit.pdf (explaining the problem of ICE in courts and providing legal resources and guidance for practitioners).
[137] U.S. Immigr. & Customs Enf't, Directive No. 11072.1, *Civil Immigration Enforcement Actions Inside* Courthouses (2018), https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf.

lack of cooperation by jurisdictions: "courthouse arrests are often necessitated by the unwillingness of jurisdictions to cooperate with ICE in the transfer of custody of aliens from their prisons and jails."[138]

The widespread practice of courthouse arrests has garnered criticism for potentially deterring members of the undocumented community from paying fines, testifying in trials, seeking justice for crimes committed against themselves or family, all out of fear of being arrested and deported.[139] ICE's courthouse arrests have also been criticized federal agency's overreach of authority.[140] A group of dozens of former state and federal judges is asking ICE to add courthouses to the list of "sensitive locations" where their officers generally do not go.[141]

In New York State, after much advocacy by community groups, the Office of Court Administration (OCA) issued a court directive effective April 17, 2019 implementing the judicial warrant requirement, requiring law enforcement officers to check in when entering courthouses, and requiring OCA staff to notify judges. This rule limits DHS's arrest ability in New York State courts by barring ICE agents from making arrests on state court property absent a warrant issued by a federal judge. However, this court rule does not protect individuals journeying to and from courthouses from being intercepted by ICE.

To issue this directive, the OCA relied on an 80-page report *Safeguarding the Integrity of Our Courts: The Impact of ICE Courthouse Operations in New York State* by the ICE Out of Courts Coalition documenting how widespread ICE's dependence on the State's court system as its preferred venue for surveilling and detaining immigrant New Yorkers has become. It also details the full breadth of the negative impact of ICE courthouse operations on the administration of justice and the equal access to justice in New York State.

For a helpful resource on how ICE expanded arrest and surveillance operations in New York's courts refer to Immigrant Defense Project's (IDP) *The Courthouse Trap: How ICE Operations Impacted New York's Courts in 2018*.[142] Some key

---

[138] *Id.*

[139] Chris Nichols, *Does ICE Have Unlimited Authority to Make Courthouse Arrests?*, POLITIFACT (Sep. 4, 2018), https://www.politifact.com/california/article/2018/sep/04/does-ice-have-unlimited-authority-make-courthouse-/.

[140] *Id.*

[141] Matthew S. Schwartz, *Judges Ask Ice to Make New York Courts Off Limits to Immigration Arrests*, NPR News (Dec. 13, 2018), https://www.npr.org/2018/12/13/676344978/judges-ask-ice-to-make-courts-off-limits-to-immigration-arrests (letter from judges included as link in article) ("Judges simply cannot do their jobs – and our justice system cannot function effectively – if victims, defendants, witnesses, and family members do not feel secure in accessing the courthouse . . . ICE's reliance on immigration arrests in courthouses instills fear in clients and deters them from seeking justice in the a court building.").

[142] *See generally* IMMIGRANT DEFENSE PROJECT, THE COURTHOUSE TRAP: HOW ICE OPERATIONS IMPACTED NEW YORK'S COURTS IN 2018 (Jan. 2019), https://www.immigrantdefenseproject.org/wp-content/uploads/TheCourthouseTrap.pdf (documenting trends including an escalation in the use of force

findings are that ICE courthouse operations increased again in 2018, rising 17% in comparison to 2017, and 1700% in comparison to 2016.[143]

Additionally, refer to *Brief of Amicus Curiae Immigrant Defense Project in Support of Respondent's Motion to Terminate Proceedings* created by NYU School of Law and IDP in support of seeking termination when an individual is arrested by ICE in courts.[144]

Practice Tip: Given the extensive documentation regarding *courthouse arrests* and the implementation of recent issuance of court directives, practitioners should properly document and raise "widespread" Fourth Amendment for any clients facing removal due to a courthouse arrests.

C. Latinx Individuals are Stopped, Searched and Arrested Solely Based on Appearance, for Quality of Life Offenses, and Other Minor Offenses More Frequently than White People

1. ***Stopping vehicles and questioning occupants solely based on their appearance is prohibited.***

Police officers routinely use the myriad of violations contained in the traffic code as a pretext to stop motorists to investigate crimes entirely unrelated to traffic safety.[145] In *Whren* the Supreme Court provided virtual *carte blanche* for police to subjectively and *pre-textually* stop motorists due to traffic law violations, many of which are vague and disregarded by drivers with impunity. *See Whren v. United States*, 517 U.S. 806 (1996) (criminal case) (legitimizing the practice of using minor traffic violations as a reason to stop a person in order to investigate suspicious activity). Such subjectively greatly increases the risk of illegal racial profiling.[146]

In *Brignoni-Ponce*, the Supreme Court definitively held that the Fourth Amendment *prohibits Border Patrol agents from stopping a vehicle and questioning its occupants*

---

and brutal tactics, increased surveillance, targeting of vulnerable immigrants, that no courts are off limits and ICE is extending operations outside of NYC, court officer involvement, derailing criminal cases, failure to abide by its own regulations).

[143] *Id.* at 6.

[144] *Brief of Amicus Curiae Immigrant Defense Project in Support of Respondent's Motion to Terminate Proceedings*, *In re* [Redacted], https://www.immigrantdefenseproject.org/wp-content/uploads/Courthouse-Arrests-Amicus-FINAL-COMPILED.pdf.

[145] Jonathan Blanks, *Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy*, 66 Case W. Res. L. Rev. 931, 932, 935-36 (2016) (describing how pretextual stops rest on legal fictions, impact black Americans, and how law enforcement use deception to elicit cooperation) ("One conceptual pitfall when applying procedural justice to a pretextual stop is that the stop itself is based on an officer's hunch that very often has a racial component.").

[146] *See* Andrew Wolfson, *"Driving while Black": Lawyer Says He Was Racially Profiled in Luxury Car*, COURIER JOURNAL (Jan. 25, 2019), https://www.courier-journal.com/story/news/crime/2019/01/25/kentucky-lawyer-pulled-over-driving-while-black/2467585002/.

solely on their appearance. *Brignoni-Ponce*, 422 U.S. 873, 886-887 (1975) ("In this case, the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants. We cannot conclude that this is furnished reasonable grounds to believe that the three occupants were aliens . . . Even if [the officers] saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and, even in the border area, a relatively small proportion of them are aliens. The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone, it does not justify stopping all Mexican-Americans to ask if they are aliens.") (criminal case). The roving patrol justified stopping a car and questioning its occupants because they believed the occupants were "illegal aliens" because they "appeared to be of Mexican descent." *Brignoni-Ponce*, 422 U.S. at 874-75. The officers stated that they made this determination solely on the occupants' physical appearance. *Id.* at 885.

The Supreme Court made clear that *race* could not be the only factor in determining whether someone is allowed to be legally seized or not. *Id.* at 886 ("this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country."). The court suggested a totality of the particular circumstances analysis in which law enforcement could consider, "the characteristics of the area, . . . usual patterns of traffic on the particular road, and previous experience with alien traffic . . ." *Id.* at 884-85, 885 n. 10. While Mexican ancestry may be considered a relevant factor in determining whether or not someone might be in the country illegally, it cannot be the only factor to justify the stop. *Id.* at 885, 887.

Practice Tip: Depending on the fact specific circumstances relating to a vehicular stop, practitioners should examine criminal and immigration caselaw that have analogous fact patterns to assess the validity of the stop, arrest, or related search. Practitioners should consider revisiting *Brignoni-Ponce* to challenge the underlying rationale for the notion that appearance consistent with Mexican ancestry can even in part can be a relevant factor in determining whether someone is lawfully in the United States.

2. ***Arrests for minor quality of life offenses is disproportionately correlated with race, pointing towards widespread bias in policing.***

Please refer to Important Note on "Law Enforcement."

Data shows a strong correlation between race and being charged with a stop-and-frisk-type offense e.g. resisting arrest, obstruction of government administration, etc., which rely heavily on the discretion of the officers, who may be biased.[147]

Persons of color make up less than one third of the Nassau County population, but make up two thirds of those charged with obstruction of government administration.[148] Persons of color were arrested at nearly five times the rate for whites on Long Island (4.73 compared to 1 out of 1,000), according to an analysis of police and court records from the years 2005-2016.[149]

Long Island authorities fail to check for patterns of racial inequality in arrests and convictions: "[f]or six years, Nassau County police failed to properly report the number of Hispanic arrests to the state."[150]

3. ***Law enforcement is far more likely to pull over, search, arrest and African Americans, Latinx individuals, and other minorities than their white counterparts.***

Statistics from the Department of Justice Investigation show a consistent pattern of African Americans, Latinx individuals, and other minorities far more likely to be pulled over, be searched, be arrested, and wind up behind bars than their white counterparts.[151]

Nassau County statistics regarding "stop and frisk" offenses, the most common of those being marijuana possession, which rose to its highest arrest level in more than a decade, expose a high level of racial bias in whom is charged and convicted of such offense.[152] "Government studies nationally show little difference in marijuana usage between whites and nonwhites."[153] Yet records show that Long Island rate of arrests for possession of marijuana is nearly quadruple for minorities than for whites — 5 arrests for 10,000 whites, 20 arrests for 10,000 nonwhites.[154] Between 2005 and 2016, blacks and Latinx individuals "made up 60 percent of marijuana possession arrests – twice their percentage of the population" in Nassau County.[155]

Testimonials from Latinx individuals from Long Island corroborate that stops for minor infractions are racially motivated. For example, one states "officers will pull someone

---

[147] Thomas Meir and Ann Choi, *Unequal Justice: Nonwhites Nearly 5 Times as Likely as Whites to Be Arrested on Charges Typically Resulting from Traffic Stops, Records Show*, NEWSDAY (Oct. 19, 2017), https://projects.newsday.com/long-island/unequal-justice-part-1/ (comprehensive analysis of racial disparity issues based on Long Island police arrest and court data provided by Division of Criminal Justice Services) (options to see all data from Jan. 2005 through Dec. 2016, methodology, and analysis of how outcomes differ by race available as links in article).
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] Meir & Choi, *supra* note 147.
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*

over for something very minor – a broken taillight, or the headlight is not working or something of that nature."[156] Further, "[w]here otherwise the officer may look away, so to speak, and not bother . . . when they see that it's a person of color or Latino, that's the basis for to stop . . . and invariably it snowballs."[157]

Individual cases of racial profiling by law enforcement on Long Island are often reported in the media.

> **For example:** On November 30, 2016 in Garden City, a village in Nassau County within the town of Hempstead, Ronald Lanier, a retired Nassau County Sherriff and military veteran, was entering a supermarket a few blocks away from his home when he was suddenly grabbed from behind and tackled to the ground.[158] Two Garden City police officers, George Byrd and John Russell, were allegedly looking for a black man who was suspected of another crime, and the officers simply took into their custody the first black man they saw.[159] According to Mr. Lanier, the officers cursed at him and beat him before throwing him to the ground, and even when he was on the ground they continued to verbally abuse him.[160] The police eventually caught the man who actually committed the crime and Mr. Lanier was released without any apology or police report being filed.[161]

There is discriminatory enforcement on the part of ICE and black immigrants are disproportionately vulnerable to deportation.[162] According to data from 2016, although only 7 percent of non-citizens are black, they make up 20 percent of those facing deportation on criminal grounds.[163]

---

[156] *Id.*
[157] *Id.*
[158] Stacy Sager, *Retired Correction Officer Claims Racial Profiling in Mineola Grocery Store Takedown*, ABC7 EYEWITNESS NEWS (June 1, 2017), http://abc7ny.com/news/retired-officer-claims-racial-profiling-in-grocery-store-takedown/2061178/.
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] Jeremy Raff, *The 'Double Punishment' for Black Undocumented Immigrants*, ATLANTIC (Dec. 30, 2017), https://www.theatlantic.com/politics/archive/2017/12/the-double-punishment-for-black-immigrants/549425.
[163] *Id.*

Motion to Terminate Due to Regulatory Violations by DHS

Overview of Regulatory Violations

III. EVIDENCE WAS OBTAINED THROUGH CONDUCT THAT CONSTITUTES A REGULATORY VIOLATION PURSUANT DHS INTERNAL REGULATIONS AND THEREFORE REMOVAL PROCEEDINGS SHOULD BE TERMINATED.

Standard for Termination of Removal Proceeding due to Regulatory Violation(s)

In the context where Latinx community members are arrested and are facing overbroad and unsubstantiated gang allegations, it is important to consider potential regulatory violations by DHS as another independent basis to move for termination. Besides the U.S. Constitution and various provisions of the Immigration and Nationality Act (INA), federal regulations codified at 8 C.F.R. § 287 impose limitations on DHS conduct. This is a separate argument from a motion to suppress.

The Accardi Doctrine

Rules promulgated by a federal agency, which regulate the rights and interests of others, are binding. *See Columbia Broadcasting Sys. v. United States*, 316 U.S. 407, 418 (1942). The principle that agencies must be bound by their own rules is fundamental.[164] *United States ex rel. Accardi v. Shaughnessy*, the Supreme Court vacated a deportation order and held that Mr. Accardi was entitled to a new removal hearing because the proceeding below violated the agency's own rules. 347 U.S. 260, 268 (1954) (holding an administrative agency must adhere to its own regulations);[165] *see also Montilla v. I.N.S.*, 926 F.2d 162, 167 (2d Cir. 1991) (rejecting the prejudice test where the IJ was required to have non-citizen state on the record whether or not he desires representation, but the non-citizen was unresponsive; finding where the violated agency regulation governs individual interests, the *Accardi* doctrine requires reversal irrespective of whether a new hearing would produce the same result.).

[164] Rodney A. Smolla, *The Erosion of the Principle that the Government Must Follow Self-Imposed Rules*, 52 FORDHAM L. REV. 472, 473 (1984) (arguing that mainstream principles of constitutional administrative law require courts to reinvigorate the precept that an agency must follow its own rules).
[165] Here, the Court held that it will not review and reverse the manner in which discretion was exercised by the board, but rather "regards as error the Board's alleged failure to exercise its own discretion, contrary to existing valid regulations." United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954).

Practice Tip: In deciding what test the Second Circuit would adopt in evaluating agency's failure to or to adequately to abide by its own regulation, *Montilla* rejected the prejudice test (the harmless error analysis) as used in the Ninth Circuit and instead expressly adopted the *Accardi* doctrine, which insists on scrupulous adherence to agency regulations, interpreting it to hold that "[t]he failure of the [BIA] and of the Department of Justice to follow their own established procedures [constituted] reversible error" and that, "even without proof of prejudice to the objecting party, this doctrine has continued vitality, particularly where a petitioner's rights are affected."[166] *Waldron* reduced *Montilla* to apply only to cases implicating fundamental rights derived from federal statutes or the Constitution.[167]

Thus, in analyzing the scant case law relating to specific regulations, practitioners must be wary of how different circuits approach whether an agency's violative conduct alone requires reversal or termination. Also, it is important to assess each specific regulation because some circuits declined to apply the prejudice test simply because the regulatory right specifically at issue may have been too fundamental to be circumscribed by the prejudice test.[168]

In the Second Circuit, removal proceedings must be terminated when DHS violates its own internal regulations that affect the fundamental rights of a respondent; *Waldron* appeared to clarify that *Montilla* applies only to cases implicating fundamental rights derived from federal statutes or the Constitution. *See Waldron v. I.N.S.*, 17 F.3d 511, 517-18 (2d Cir. 1993) (where immigrant was not given notice of his privilege to contact diplomatic consular of his country, court held that violations of regulations, which "affect fundamental rights" necessarily render "challenged proceeding[s] invalid")[169]; *but see Maldonado v. Holder*, 763 F.3d 155, 163-64 (2d Cir. 2014) (non-egregious violations of internal agency regulations such as 8 C.F.R. §§ 287.8(b), (c) are not bases to terminate proceedings); *Rajah v. Mukasey*, 544 F.3d 427, 446 (2d Cir. 2008) (pretrial regulatory violations of 8 C.F.R. §§ 287.3 and § 287.8 cannot result in suppression of evidence or termination of proceedings where violations were harmless and nonegregious). Thus, the Second Circuit specifically distinguishes between regulations that are "promulgated to protect a fundamental right derived from the Constitution or a

[166] Singh v. U.S. Dep't of Justice, 461 F.3d 290, 296 (2d Cir. 2006) (internal citations and quotations omitted).
[167] Waldron v. I.N.S., 17 F.3d 511, 517-18 (2d Cir. 1993); Rajah v. Mukasey, 544 F.3d 427, 446 (2d Cir. 2008).
[168] *See e.g.*, Castaneda-Delgado v. I.N.S., 525 F.2d 1295, 1300 (7th Cir. 1975); Yiu Fong Cheung v. I.N.S., 418 F.2d 460, 464 (D.C. Cir. 1969) (same).
[169] *See* Waldron v. I.N.S., 17 F.3d 511, 518 (2d Cir. 1993) ("[W]hen a regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute, and the INS fails to adhere to it, the challenged deportation proceeding is invalid and a remand to the agency is required. This may well be so even when the regulation requires more than would the specific provision of the Constitution or statute that is the source of the right.").

federal statute" and those, which are "merely provisions created by agency regulations." *Waldron*, 17 F.3d at 518.

The Prejudice Test

For circuits that have adopted the prejudice test, when the government violates its own regulation, a non-citizen's deportation proceeding must be terminated, so long as there is a showing that the (1) the regulation that was not adhered to serves a "purpose of benefit to the [non-citizen]," and (2) the violation prejudiced the non-citizen's "interests in such a way as to affect potentially the outcome of the[ ] deportation proceeding." *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979); *In re Garcia-Flores,* 17 I. & N. Dec. 325, 328 (B.I.A. 1980); *see also Chuyon Yon Hong v. Mukasey*, 518 F.3d 1030, 1036 (9th Cir. 2008) (applying the *Garcia-Flores* test to evaluate whether the government violated a regulation in an immigration case where there was an allegation regarding the use of nonpublic information).

Practice Tip: Although the prejudice test is generally presented as a two-part test, practitioners must not neglect to establish that the regulation at issue was not adhered to in addition to establishing that the regulation served a purpose benefit to the non-citizen and that the violation prejudiced the outcome of the non-citizen's deportation proceeding.

Practitioners should argue that once the non-citizen establishes a prima facie regulatory violation based on the prongs above, the burden shifts to DHS to defend the constitutionality of its actions and justify the manner in which the evidence was obtained. *In re Barcenas*, 19 I. & N. Dec. 609, 611 (B.I.A. 1988)[170]; *see Cotzojay v. Holder*, 725 F.3d 172, 178 (2d Cir. 2013)[171].

Ideally, the non-citizen should provide "concrete evidence" that the violation had the potential for affecting for affecting the outcome of the proceeding. *Shahandeh-Pey v. I.N.S.*, 831 F.2d 1384, 1389 (7th Cir. 1987) (finding that the opportunity to present countervailing evidence may have had a potential effect on the outcome despite Mr. Shahandeh's drug convictions). Additionally, courts will consider whether a finding of removability arose prior to the regulatory violation. *In re Garcia-Flores* 17 I. & N. Dec. 325, 328-29 (B.I.A. 1980) *superseded by statute on other grounds as stated in Samayoa-Martinez v. Holder*, 558 F.3d 897, 902 (9th Cir. 2009); *see also United States v. Caldreon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979).

[170] Here, on appeal, the respondent contended that evidence against him should be suppressed because of an alleged violation of INS regulations, but the court found the contention to be without merit for failure to come forward with proof establishing a *prima facie* case. *In re* Barcenas, 19 I. & N. Dec. 609, 611 (B.I.A. 1988).

[171] Here, separate arguments were raised regarding the admissibility of the evidence under the Fifth Amendment and DHS regulations, but due to the court's decision to remain, those arguments were not reached.

If the regulation is constitutionally required, prejudice is presumed. *In re Garcia-Flores*, 17 I. & N. Dec. at 329 ("Where compliance with the regulation is mandated by the Constitution, prejudice may be presumed. Similarly, where an entire procedural framework, designed to insure [sic] the fair processing of an action affecting an individual is created but then not followed by an agency, it can be deemed prejudicial.") (internal citations omitted).

Practice Tip: Practitioners should remember that when a regulation is constitutionally required, prejudice is presumed.[172] Emphasize that the regulation at issue is constitutionally mandated and that DHS's violative conduct runs afoul of the Constitution and is directly contrary to the regulation.

Select Circuit Cases

The **Third Circuit** has held that certain types of regulatory violations do not require a showing of prejudice. *See Leslie v. Att'y Gen.*, 611 F.3d 171, 178-81 (3d Cir. 2010) (holding invalidation of removal order is required where agency violated rules and regulations promulgated to protect a respondent's constitutional or statutory rights, even if no prejudice to respondent can be demonstrated)[173] ("For the sake of emphasis we repeat: we hold that when an agency promulgates a regulation protecting fundamental statutory or constitutional rights of parties appearing before it, the agency must comply with that regulation. Failure to comply will merit invalidation of the challenged agency action without regard to whether the alleged violation has substantially prejudiced the complaining party.").

The **Second Circuit** has held that regulatory violations occurring during a deportation hearing that affect fundamental rights derived from the Constitution or federal statutes require such termination, even without a showing of prejudice. *Montilla*, 926 F.2d at 170 (requiring termination even when the regulatory violation caused no prejudice); *Waldron v.I.N.S.*, 17 F.3d at 518 (clarifying that *Montilla* applies only to cases implicating fundamental rights derived from federal statutes or the Constitution). However, the Second Circuit has not decided whether a harmless and nonegregious regulatory violation occurring *during* a hearing requires termination, as opposed to a harmless, nonegregious, *pre-hearing* violation. *Rajah*, 544 F.3d at 446-47.

Furthermore, the Second Circuit has held that while not all violations are a kind or degree that require suppression of evidence or termination of proceedings with or

[172] Below, under specific regulations, please find cases indicating which regulation are constitutionally required.

[173] Here, the regulation at issue required the IJ to inform the non-citizen of the availability of free legal services which protects the fundamental right to counsel at removal hearings under 8 C.F.R. § 1240.10(a)(2)-(3). *Id.* at 182-83. The Third Circuit held it is "imperative that the IJ comply scrupulously with these regulations, promulgated to ensure the fundamental fairness of the process by which aliens are removed" granting the petition for review, vacating the order of the Board, and remanding for further proceedings. *Id.*

without prejudice, the court "may assume, without deciding, that a regulatory violation or violations [is] so egregious as to shock the conscience [that] would call for invalidation of deportation orders with prejudice to the renewal of deportation proceedings against a petitioner whose rights were violated." *See Rajah v. Mukasey*, 544 F.3d 427, 446 (2d Cir. 2008)[174]; *see Santos v. Holder*, 486 F. App'x 918, 921 (2d Cir. 2012) (unpublished) (holding pre-hearing regulatory violations including 8 C.F.R. §§ 287.3(a), 292(b) regarding the requirement of separate arresting and examining officers, and the right to counsel, 8 C.F.R. § 236.1(e) regarding the right to communicate with consular officers, 8 C.F.R. § 287.6(a) submitting the Form I-213 without authentication were not such as to warrant termination of removal proceedings).

Practice Tip: Practitioners should always explore whether any regulatory violations occurred during arrest and or in initiation of removal proceedings separate and apart from their suppression analysis.

Select Regulations and Cases Supporting Agency Violation of Internal Regulations

Practice Tip: Not all of the cases cited below are "termination" cases, but the facts could support a termination argument as well.

8 C.F.R. §§ 287.8(c)(2)(i)-(ii) (probable cause, warrantless arrest).
DHS arrested respondent without probable cause or an arrest warrant in violation of 8 C.F.R. § 287.8(c)(2)(i)-(ii).

Compliance with 8 C.F.R. § 287.8(c)(2) is mandated by and coextensive with the Fourth Amendment, which provides that no person may be arrested absent probable cause to believe that the person has engaged in illegal activity. U.S. Const. amend. IV; *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979); *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979); *Florida v. Royer*, 460 U.S. 491, 507-08 (1983) (plurality opinion). Regulations relating to the arrest and detention of aliens are promulgated in order to benefit the alien. This regulation mirrors the Fourth Amendment, which protects against unreasonable searches and seizures.

Practice Tip: Practitioners should consider whether the non-citizen was arrested absent individualized reasonable suspicion of being unlawfully in the United States.

[174] *Rajah*'s holding was limited to "non-egregious, harmless" pre-hearing violations. 544 F.3d at 446-47. The court of appeals expressly left open the possibility that "violations so egregious as to shock the conscience would call for invalidation of the deportation orders with prejudice," and that pre-hearing regulatory violations may warrant termination without prejudice with a showing of "prejudice that may have affected the outcome of the proceeding, conscience-shocking conduct, or a deprivation of fundamental rights." *Id.*

- *Tejeda-Mata v. I.N.S.*, 626 F.2d 721, 725 (9th Cir. 1980) ("[t]he phrase 'has reason to believe' has been equated with the constitutional requirement of probable cause.").

- *See Orhorhaghe v. I.N.S.*, 38 F.3d 488, 497 (9th Cir. 1994) (finding that a "Nigerian-sounding name," lack of name in INS computer records of lawful entries into the United States, and a professional contact telling an INS agent of suspicion of participating in a fraudulent credit card scheme are insufficient to show rational basis for believing someone was an illegal alien or to seize and interrogate an individual).

- *See United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) (finding that apparent Mexican ancestry and presence in an area where "illegal aliens" frequently travel are not enough to justify a seizure by immigration officials).

Practice Tip: This dovetails with race-based seizure in the suppression context. If practitioners suspect this was a race-based or race-motivated stop, both arguments should be raised. However, practitioners should articulate concrete facts to support why the stop was race-based or race-motivated. Race-based words by DHS tend to be a persuasive indicator of such motive.

Thus, removal proceedings must be terminated because DHS violated its own internal regulations that affected the fundamental rights of a respondent.

8 C.F.R. § 287.8(a)(1) (non-deadly force).
Officer used unreasonable and disproportionate force during respondent's interrogation, arrest, and detention in violation of 8 C.F.R. § 287(a)(ii).

8 C.F.R. § 287.8(a)(2) (deadly force).
Officer used unreasonable and disproportionate force likely to cause death or serious physical injury during respondent's interrogation, arrest, and detention in violation of 8 C.F.R. § 287(a)(2).

8 C.F.R. § 287.8(b) (interrogation and detention not amounting to arrest).
Officer detained respondent and subjected respondent to interrogation while restraining Respondent's freedom, who was not under arrest, to walk away in violation of 8 C.F.R. § 287.8(b)(1). Officer detained and questioned respondent absent reasonable suspicion in violation of 8 C.F.R. § 287.8(b)(2).

- 8 C.F.R. § 287.8(b)(1) provides: "Interrogation is questioning designed to elicit specific information. An immigration officer, like any other person, has the right to ask questions of anyone as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away."

- 8 C.F.R. § 287.8(b)(2) provides: "If the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning."

- "There is no dispute" that there was prima facie showing of a § 287.8(b)(2) violation when non-citizen was detained solely on the basis of his Latino appearance and hence, without "reasonable suspicion," as required by the regulation. *Sanchez v. Barr*, 919 F.3d 1193, 1198 (9th Cir. 2019) (denying rehearing en banc) ("Because he has met his initial burden of showing a racially motivated detention, we ordered a narrowly tailored remedy: Sanchez's removal proceedings would be terminated, but only if the Government cannot meet its burden of rebutting Sanchez's prima facie showing on remand.").[175]

- Because *Sanchez v. Barr* illustrates the types of tensions that may arise in the context of pushing for termination due to regulatory violations, practitioners should read the entire order and accompanying statement by Judge O'Scannlain, which is a scathing criticism of termination proceedings due to certain regulatory violations. In turn, Judge Paez criticizes Judge O'Scannlain's statement, stating it "attempts to obscure the core issue – the egregious regulatory violation—with the smokescreen of the exclusionary rule." In response, Judge Paez chooses to "firmly reiterate a few points in response to errors in Judge O'Scannlain's statement[,]" and after describing the Supreme Court's long-lasting concern for regulatory violations that implicate fundamental rights, explains that 8 C.F.R. § 287(b)(2) reflects the Fourth Amendment guarantee against unreasonable searches and seizures; the regulation was promulgated for the benefit of immigration petitioners.[176]

---

[175] Here, "the Coast Guard detained Sanchez and his three companions, including a 14-month-old child, after they called 911 for assistance when they were stranded on a fishing trip from Channel Islands Harbor. Without reasonable suspicion, the Coast Guard contacted Customs and Border Protection to report 'the possibility of 4 undocumented worker[]aliens,' which ultimately led to Sanchez's arrest, interrogation and removal proceedings. Looking to past cases involving regulatory violations, we joined the Second Circuit to hold that petitioners like Sanchez may be entitled to termination of their removal proceedings without prejudice for egregious regulatory violations." *Id.* at 1194-95.

[176] Sanchez *v. Barr*, 919 F.3d 1193, 1194-96 (9th Cir. 2019). Judge Paez goes on to write: "[y]et, Judge O'Scannlain insists that we have no authority to address the Government's egregious violation of § 287.8(b)(2) and opines that the remedy we ordered would do nothing but delay Sanchez's 'inevitable removal.' This completely misses the essence of Sanchez's claim and the harm he seeks to remedy. There is more at stake than the outcome of a single case. *See* Montilla, 926 F.2d at 170. 'Careless observance by an agency of its own administrative processes weakens its effectiveness in the eyes of the public because it exposes the possibility of favoritism and of inconsistent application of the law.' *Id.* at 169 (citing McKart v. United States, 395 U.S. 185, 195, 89 S. Ct. 1657, 23 L.Ed.2d 194 (1969)). In the context of this case, slap-on-the-wrist repudiations that permit the agency to pick up where it left off despite racial profiling do little to safeguard individuals in this country from immigration enforcement practices that 'teeter[ ] on the verge of 'the ugly abyss of racism.' Maldonado, 763 F.3d at 174 (Lynch, J., dissenting) (quoting Korematsu v. United States, 323 U.S. 214, 233, 65 S. Ct. 193, 89 L.Ed. 194 (1944) (Murphy, J., dissenting)). In such circumstances, termination without prejudice may be appropriate

- Section 287.8(b)(2) directly mirrors the Fourth Amendment's reasonable suspicion and seizure requirements. "Because § 287.8(b)(2) reflects the Fourth Amendment right against unreasonable searches and seizures. . .the regulation was promulgated for the benefit of immigrant petitioners."[177]

- *See Perez Cruz v. Barr*, No. 15-70530, 2019 WL 2454850 (9th Cir. June 13, 2019) (finding a violation of § 287.8(b)(2) when ICE detained a non-citizen incidental to the execution of a valid search warrant during a work place raid). The *Summers* exception permitting brief detention without reasonable suspicion incidental to searches does not apply "[w]here 'a safe and efficient search' is not the primary purpose of the officers' actions[.]" *Id.* at *9. Under these circumstances "*Summers's* justification for bypassing the Fourth Amendment's traditional protections disappears, just as the justifications for doing so disappear—and so bypass of the usual Fourth Amendment requisites become impermissible—in inventory and administrative search cases." *Id.* (citing *Bailey v. United States*, 568 U.S. 186, 200 (2013)). "Because the agents violated 8 C.F.R. § 287.8(b)(2), Perez Cruz is entitled to suppression of the evidence gathered as a result of that violation." *Id.* at *12 (internal citations omitted).

8 C.F.R. § 287.8(c)(2)(iii)(A-B) (identification, stating reason for arrest).
Officer failed to identify himself or herself as an immigration officer authorized to execute an arrest and failed to state that respondent is under arrest and the reason for the arrest in violation of 8 C.F.R. § 287.8(c)(2)(iii).

- Officers must comply with this regulation once it is "practical and safe" to do so. However, if agents question non-citizens in an environment controlled by the agency or extensively, absent a compelling reason, a regulatory violation is presumed. *Rajah v. Mukasey*, 544 F.3d 427, 444 (2d Cir. 2008).

8 C.F.R. § 287.8(c)(2)(iv) (warrantless administrative arrest).
Officer failed to abide by procedures set forth in 8 C.F.R. § 287.3 (disposition of cases of aliens arrested without a warrant) when making a warrantless arrest of a non-citizen administratively charged with being in the United States in violation of the law in violation of 8 C.F.R. § 287.8(c)(2)(iv).

8 C.F.R. § 287.8(c)(2)(v) (procedures surrounding criminal arrest).
Officer arrested respondent without advising the person of the appropriate rights as

---

because it forces the agency to begin anew—a remedy that properly recognizes the tainted nature of the initial detention and, one hopes, encourages agency compliance in the future . . . As a final point, Judge O'Scannlain trots out a parade of horribles that are unsubstantiated and, at best, hypothetical. As the opinion emphasized, termination without prejudice is a remedy 'reserved for truly egregious cases' of immigration enforcement. Sanchez, 904 F.3d at 655. Any fears that this remedy will spur crafty lawyers across the country to disrupt removal proceedings are belied by the fact that the Second Circuit recognized this very remedy in 2008 and there have been no such harebrained schemes since." *Id.* at 1196.

[177] Sanchez, 919 F.3d at 1195 (internal citations omitted).

required by law at the time of the arrest, without assuring warnings were given in a language respondent understands, and without acknowledgment that respondent understood in violation of 8 C.F.R. § 287.8(c)(2)(v) and failed to document on appropriate DHS forms and made part of arrest record that person had been advised of his or her rights in violation of 8 C.F.R. § 287.8(c)(2)(v).

8 C.F.R. § 287.8(c)(2)(vi) (unnecessary delay).
Having been arrested and charged with a criminal violation, respondent was not timely brought before a United States magistrate judge and was subjected to unnecessary delays in violation of 8 C.F.R. § 287.8(c)(2)(vi).

Practice Tip: For individuals who may be facing federal charges for a crime, but instead have been subjected to immigration detention and have not been timely brought to face criminal charges, practitioners should consider an argument under this regulation. Pracitioner should consider collaborating with non-citizen's federal defender, when appointed or hired.

8 C.F.R. § 287.8(c)(vii) (coerced statements).
Officer attempted to coerce respondent into making self-incriminating statements using threats, coercion, physical and sexual abuse, in violation of 8 C.F.R. § 287.8(c)(vii). Determining whether there was coercion is a fact-specific inquiry; regulatory language prohibits coercive conduct motivated by eliciting a waiver or statement, whether or not the conduct succeeds. *Rajah v. Mukasey*, 544 F.3d 427, 445 (2d Cir. 2008).

Practice Tip: Consider combining arguments that a non-citizen's rights were violated under 8 C.F.R. § 287.8(c)(vii) (coerced statements) and under 8 C.F.R. § 287.3 (governing warrantless arrests). Often when a non-citizen has a claim under 8 C.F.R. § 287.3 due to DHS's misinformation about a non-citizen's rights, DHS's failure to advise the non-citizen of the reasons for the arrest or about the non-citizen's right to be represented, or when DHS has otherwise violated custody procedures, the violation coincides with potentially incriminating involuntary statements by the non-citizen in violation of 8 C.F.R. § 287.8(c)(vii).

For example, in conducting a fact-specific inquiry to determine if there was coercion in *Rajah v. Mukasey*, the court relies on *In re Garcia*, 17 I. & N. Dec. 319, 320 (B.I.A. 1980), *Navia-Duran v. I.N.S.*, 568 F.2d 803, 810 (1st Cir. 1977), and *Bong Youn Choy v. Barber*, 279 F.2d 642, 647 (9th Cir. 1960). *Rajah,* 544 F.3d at 444. The questioning in these cases involves conduct deemed coercive, such as marathon questioning or misinformation as to their rights. *Id.* at 445. A seven-hour long interrogation with two interruptions and minimal information regarding the purpose of the interrogation, despite no explicit threats and no misinformation has been found to be coercive. *Id*. Notably, these cases explicitly refer to 8 C.F.R. § 287.3 and not 8 C.F.R. § 287.8(c)(vii).

8 C.F.R. § 287.3 (warrantless arrests)

Officer violated regulation 8 C.F.R. § 287.3 governing warrantless arrests by failing to abide by the specified notification and information procedures and by the custody procedures to which the non-citizen was entitled, including certain notifications and information.

Practice Tip: Notably, unlike the previous version of this regulation as considered in *In re Garcia-Flores* and *Navia-Duran* below, the current version of the regulation requires that certain warnings be given (except in the case of a non-citizen subject to expedited removal) where a non-citizen has been "arrested without warrant *and placed in formal proceedings*."[178] (emphasis added).

The due process principles articulated in these older cases should still apply. A close reading of *In re Garcia-Flores* and *Navia-Duran* suggest that while the procedures under 8 C.F.R. § 287.3 were violated, ultimately what mattered most was that due to the officer's violative conduct the non-citizen's statements were not voluntary.[179] Presumably, practitioners can continue to use *In re Garcia-Flores* and *Navia-Duran* to help illustrate what circumstances give rise to a coercive environment pursuant 8 C.F.R. § 287.8(c)(vii).

Indeed, because the regulatory violation combined with the involuntary nature ultimately led to the termination of proceedings in *In re Garcia-Flores*, practitioners should remember to highlight all relevant facts.

The following cases involve 8 C.F.R. § 287.3, but potentially implicate an analysis under 8 C.F.R. § 287.8(c)(vii) because they resulted in self-incriminating statements that were induced by DHS for procedural violations and misinformation to the non-citizen.

- *In re Garcia-Flores*, 17 I. & N. Dec. 319, 320 (B.I.A. 1980)[180] (terminating proceedings after concluding that respondent's confession conceding alienage was involuntary because non-citizen was misinformed about his rights, his attempts to contact his lawyer were interfered with, and due to substantial time

[178] Samayoa-Martinez v. Holder, 558 F.3d 897, 902 (9th Cir. 2009); 8 C.F.R. § 287.3(c).
[179] *In re* Garcia-Flores, 17 I. & N. at 320; Navia-Duran, 568 F.2d at 809-10.
[180] Although this case involves 8 C.F.R. § 287.3, the issue concerned the statements by the non-citizen, which were deemed involuntary due to DHS's conduct in violation of § 287.3. Here, the non-citizen "stated that his numerous requests to call his attorney were ignored and that he finally made his admissions and requested prehearing voluntary departure only after having 'lost hope' of being able to speak with her." *In re* Garcia, 17 I. & N. Dec. 319 at 320. The court found that respondent "did present a prima facie case that the admissions reflected on the Form I-213 and the Form I-273 (the only documents evincing his deportability) were involuntarily given. His testimony, which was adopted by the immigration judge as his statement of facts, reflected that, after his arrest, he was led to believe that his return to Mexico was inevitable, that he had no rights whatsoever, that he could not communicate with his attorney (his attempts to do so being actively interfered with), and that could be detained without explanation of why he was in custody. His uncontradicted testimony was that he admitted his alienage to the officers in question only after a significant period in custody had elapsed, and after he had given up all hope of speaking with her." *Id.*

in custody in violation of § 287.3) (interpreting previous provision of 8 C.F.R. § 287.3).

- *Navia–Duran v. I.N.S.*, 568 F.2d 803, 810 (1st Cir. 1977)[181] (terminating proceedings after concluding that respondent's statements were involuntary because they were given by non-citizen arrested in the middle of the night, who was actively misinformed about her rights under 8 C.F.R. § 287.3 and threatened with imminent deportation) (interpreting previous provision of 8 C.F.R. § 287.3).

  The language in *Navia-Duran* is particularly powerful:

  > If the INS had complied with its own regulation, then Ms. Navia-Duran would have been aware of her right to a deportation hearing, for the warnings required by the regulation clearly imply the existence of a superior decisionmaker. Had she been made fully aware of her rights, the atmosphere of coercion would have vanished, for the appellant might then have taken Agent Constance's "fair deal" offer with a grain of salt.
  >
  > Instead, the picture presented here is one of an overzealous immigration agent seeking to intimidate an alien in order to effectuate deportation without the procedural niceties of a hearing. It appears to us that the agent actively misinformed the appellant and that her statement emanated from fear, ignorance, and agency-cultivated miscomprehension of her rights. Repeatedly told that she had "no choice" and that she must leave "immediately" or "in two weeks," Ms. Navia-Duran was induced to believe that Agent Constance controlled her fate. Isolated from her friends, inexperienced in American justice, taken from her home to a strange office late at night, Ms. Navia-Duran can not [sic] be said to have spoken freely and voluntarily when she admitted her alienage.

  Id. (internal citations omitted).

Practice Tip: Practitioners should note that in *In re Garcia* and *Navia-Duran*, the respondents' statements were the sole evidence presented and the inadmissibility of their statements rendered any existing deportation order unsupported.

[181] The non-citizen "was entitled to information about the rights specified in 8 C.F.R. § 287.3." Navia–Duran v. I.N.S., 568 F.2d 803, 810 (1st Cir. 1977).

- *Samayoa-Martinez v. Holder*, 558 F.3d 897, 902 (9th Cir. 2009)[182] (noting that as of March 1997 the revised regulation changed the timing of the information requirement to "after" the non-citizen is "placed in formal proceedings" and holding that there was no violation of 8 C.F.R. § 287.3) ("INS's obligation to notify the alien of his rights does not attach until the alien has been arrested and placed in such proceedings.").

- *Singh v. Mukasey*, 553 F.3d 207, 216 (2d Cir. 2009)[183] (remanding to BIA for further review after fact-specific inquiry finding respondent's statement suppressible because it was undermined by the conditions of the custodial interrogation, lengthy detention, lack of sleep, persistent questioning, not being informed of right to speak with attorney and that statements could be used against him, or that he was in danger of removal).

- *In re E-R-M-F & A-S-M*, 25 I. & N. Dec. 580 (B.I.A. 2011) (holding that non-citizens arrested without warrant need not receive certain notifications and information until after removal proceedings have been initiated by the filing of a Notice to Appear ("NTA")).[184]

---

[182] Here, the court found that "[b]ecause INS did not violate § 287.3(c) when it obtained information from Samayoa before notifying him of his procedural rights under immigration law" the court "need not reach Samayoa's argument that this lack of notice made his statements to the border patrol involuntary." Samayoa-Martinez v. Holder, 558 F.3d at 902. However, the "IJ found that Samayoa's statements were made voluntarily, and substantial evidence supports this determination." *Id.*

[183] Here, the court found that given the procedures employed in the case, the lack of reliability of Singh's statement is substantially undermined and that his statement should have been suppressed. **Although the issue here is suppression and not termination**, the analysis relies on interpreting the regulations regarding disposition of cases of non-citizens arrested without warrant. First, the statement was unreliable due to the conditions of the interrogation, which undermine the statement. Singh was held by immigration officers for at least four to five hours, in a place where armed, uniformed officers were circulating; he was being pressured by an officer repeatedly statin that Singh would be send to jail; Singh broke down crying during the interrogation which took place "during the wee hours of the morning;" he had not slept for approximately twenty-four hours by the time he was released; he never read the statement he was asked to sign and it contained admissions he never made; officer admitted that the interrogating officers try different approaches to get the answers sought. Second, Singh was subjected to custodial interrogation when he made his statements. Third, it is unclear when, if ever, Singh was informed about his right to speak with an attorney, that his statements could be used against him, or that he was in danger of removal himself pursuant 8 C.F.R. § 287.3(c). Fourth, the officer did not recall whether she saw Singh sign the statement and could not remember Singh being informed of his rights at least until a few hours had already passed. Finally, the government violated 8 C.F.R. § 287.3(a) when the same officer who interrogated Singh also arrested him and the record did not show there was no other qualified officer to examine Singh.

[184] Practitioners should refer to American Immigration Council's Practice Advisory for a thorough analysis of *In re E-R-M-F & A-S-M*, 25 I. & N. Dec. 580 (B.I.A. 2011). American Immigration Council, *Motions to Suppress in Removal Proceedings: A General Overview* (Aug. 1, 2017).

Practice Tip: Notwithstanding some of these interpretations of 8 C.F.R. § 287.3(c), there is a strong logical argument that certain advisals and information should be provided *prior to* the initiation of removal proceedings as various notices or information would otherwise be rendered irrelevant.

- *Rajah v. Mukasey*, 544 F.3d 427, 444-445 (2d Cir. 2008)[185] analyzes 8 C.F.R. § 287.3(a). ("It is not clear which party bears the burden of showing whether there was an officer, other than the arresting officer, available to conduct the examination. Putting the burden on the agency seems unreasonable. Demonstrating that all officers were otherwise occupied would require that the agency record in great detail and contemporaneously the actions of every officer at a given location during every working period. Putting the burden on the alien also seems unreasonable. Arrested aliens cannot learn of the idleness of immigration officers. In any event, we need not determine where the burden lies because we may assume, for purposes of argument, that this regulation was violated with respect to all of the petitioners.")

8 C.F.R. § 287.8(f) (consent to enter) (valid search warrant).

Where respondent was arrested without a proper search warrant or consent in violation of 8 C.F.R. § 287.8(f)(2). 8 C.F.R. § 287.8(f)(2) requires officers to obtain consent from "the owner or other person in control" of site and requires notation in their report that consent was given and, if possible, by whom consent was given. Under 8 C.F.R. § 287(f)(4) officers may enter "open fields" or areas of business accessible to the public without a warrant or consent. However, this is limited to entry. 8 C.F.R. § 287.8(f)(2) mirrors the Fourth Amendment, which requires that government agents obtain a warrant or consent before entering a person's home. *Camara v. Municipal Court*, 387 U.S. 525, 540 (1967)[186]; *Payton v. New York*, 445 U.S. 573 (1980)[187].

---

[185] Here, at issue is 8 C.F.R. § 287.3(a), which provides that "an alien arrested without a warrant of arrest . . . will be examined by an officer other than the arresting officer. If no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay, the arresting officer, if the conduct of such examination is a part of the duties assigned to him or her, may examine the alien."

[186] Here, the Supreme Court found that administrative searches by municipal health and safety inspectors constitute significant intrusions upon interests protected by the Fourth Amendment, and such searches, when authorized and conducted without warrant procedure, lack traditional safeguards which the Fourth Amendment guarantees to individuals. *Id.* The Court considered health and public safety issues, but also considered factors such as that there was no emergency demanding immediate access and that inspectors had made three trips to the building to obtain appellant's consent to search, yet no warrant was obtained. *Id.*at 540.

[187] Here, the Supreme Court deals with two companion cases both dealing with entries into homes made without the consent of any occupant. *Id.* at 583. In *Payton*, the police used crowbars to break down the door and in *Riddick*, although his 3-year-old son answered the door, the police entered before Riddick had an opportunity either to object or to consent." *Id.* In both cases, there was entry without an arrest warrant, both arrests were for serious felonies – murder and armed robbery – both occurred during daylight hours. Both entries were made under a New York law allowing police to enter to make a felony arrest and neither defendant contends statutory requirements were not met. *Id.* at 617-18. Nevertheless, the Court

8 C.F.R. § 287.9 (criminal search warrant and firearms policies).
Officer failed to obtain a search warrant prior to conducting a search in a criminal investigation and no exception to the warrant requirement applied (consent of person to be searched, exigent circumstances, SILA, and border searches) in violation 8 C.F.R. § 287.9(a).

Officer in using a firearm failed to adhere to the standards of conduct set forth in 8 C.F.R. § 287.8(a)(2) in violation 8 C.F.R. § 287.9(b).

Special Considerations for Young People

Many unaccompanied minors have fled gang violence and poverty to come to the United States. Federal authorities have identified a small number of individuals who came to the United States as unaccompanied minors as "suspected" or "confirmed" gang members. Nevertheless, federal officials have attempted to link the large population of unaccompanied minors broadly with gang violence. As a result, Latinx youth is increasingly targeted for arrest and removal. As minors, there are specific regulations that apply to them and practitioners should investigate if any of these were violated by ICE in the process of arresting them.

Please note that there are many special regulations that protect the rights of young people, not listed below. If practitioners represent individuals who are minors or where minors when they arrived in the United States, they should consider looking at additional regulations that go beyond what is discussed below.

Select Regulations Protecting the Rights of Young People

Practice Tip: Practitioners should argue that these regulations are specifically designed to protect vulnerable populations and thus any violation of them implicate fundamental rights and prejudice young immigrants.

8 C.F.R. §§ 236.3(h) & 1236.3(h) (notice of rights and disposition for juveniles)
Officer failed to give to and explain to respondent his Notice of Rights and Disposition (Form I-770) at the time of his apprehension in violation of 8 C.F.R. §§ 236.3(h) & 1236.3(h). These regulations apply to all children under the age of 18, including children apprehended with a parent or those deemed "unaccompanied alien children."[188]

concluded that New York's statute authorizing warrantless arrests and searches violated the Fourth Amendment prohibition against unreasonable searches and seizures. *Id.* at 602-03.

[188] An "unaccompanied alien child" ("UAC") is defined as a child who is under 18 years old, who has no lawful immigration status in the United States, and who has either no parent or legal guardian in the United States "available to provide care and physical custody." 6 U.S.C. § 279(g)(2).

The Second Circuit held that the agency's failure to make proper service under the circumstances did not implicate child's fundamental rights and child was not prejudiced by the agency's actions, where child's parents filed change of venue, child was represented by counsel, child sought asylum and withholding before the IJ and was denied. *Nolasco v. Holder*, 637 F.3d 159, 164 (2d Cir. 2011). However, the court notes that in a different factual circumstance where a child is prevented from a meaningful opportunity to participate in her removal proceedings, this could implicate the minor's fundamental rights. *Id.* For instance, citing to *Mejia-Andino* may have warranted a different finding. There, the BIA held that removal proceedings were properly terminated because service of NTA failed to meet notice requirements and no attempt was made to serve parents who resided in the United States and thus were subject to an *in absentia* removal order. *In re Mejia-Andino*, 23 I. & N. Dec. 533 (B.I.A. 2002). Practitioners should consider focusing on any facts that indicate that the child's meaningful opportunity to participate in his removal proceedings was jeopardized.

Practice Tip: Practitioners should consider their client's age at the time of apprehension to assess if an argument for termination exists under these regulations.

Select Comprehensive Resources Applicable to Young People

For a more comprehensive overview, regulations, case law, and sample motions that apply to young people in immigration proceedings, please refer to:

- M. Aryah Somers, *Children in Immigration Proceedings: Child Capacities and Mental Competency in Immigration Law and Policy*, Vera Inst. for Justice (May 2015), https://cliniclegal.org/sites/default/files/children_in_immigration_proceedings_-_child_capacities_and_mental_competency_in_immigration_law_and_policy.pdf.

- Helen Lawrence, Kristen Jackson, et al., *Strategies for Suppressing Evidence and Terminating Removal Proceedings for Child Clients*, Vera Inst. for Justice (May 2015), https://cliniclegal.org/sites/default/files/strategies_for_supressing_evidence_and_terminating_removal_proceedings_for_child_clients_with_appendices.pdf.