Where to Draw the Line: The Egregiousness Standard in the Application of the Fourth Amendment in Immigration Proceedings and the Racial Profiling Exception

*Stephanie Groff**

Introduction

In the early morning of September 19, 2006, a large group of men gathered in Kennedy Park, Danbury, Connecticut, seeking work as day laborers.[1] Unbeknownst to these individuals, the Danbury Police Department (DPD) and Immigration and Customs Enforcement (ICE) agents began arriving at the park with the intention of carrying out a sting operation.[2] The purported purpose of the planned sting operation was to enforce certain minor traffic violations and jaywalking offenses that had allegedly been committed by those gathering in Kennedy Park; in reality, the operation was simply targeting individuals who appeared to be "illegals" based on their race and Ecuadorian nationality.[3] In search of employment, some entered an unmarked vehicle driven by an undercover DPD officer.[4] Instead of a jobsite, the individuals were taken to an abandoned parking lot where officers placed them under arrest without explanation.[5] Unable to call their families or seek assistance, these men were detained and questioned for hours until they reluctantly admitted their nationality and immigration status.[6]

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* George Mason University School of Law, Juris Doctor Candidate, May 2016; University of Maryland, B.A., 2013. I would like to thank my parents, Mark and Julie for their love and encouragement. I would also like to thank everyone on George Mason's Civil Rights Law Journal for their support.

1 Maldonado v. Holder, 763 F.3d 155, 158 (2d Cir. 2014).

2 *Id.*

3 *See id.* at 165, 172 (Lynch, J., dissenting).

4 *Id.* at 158 (majority opinion).

5 *See id*.; Brief for Petitioners at 7-8, Maldonado v. Holder, 763 F.3d 155 (2d Cir. 2014) (No. 10-3259), ECF No. 318, [hereinafter Brief for Petitioners].

6 *Maldonado,* 763 F.3d at 158, 163-64 n.5.

This is the factual background of *Maldonado v. Holder,* a recent case before the U.S. Court of Appeals for the Second Circuit, where confessions were extracted as a result of racial profiling and the deception of authorities.[7] Both the presiding Immigration Judge and the Board of Immigration Appeals found that the laborers had not met their burden to suppress the evidence obtained through the sting and did not find the operation and the detainment as a whole to be unconstitutional.[8] On appeal, a split three member panel of the Second Circuit strayed from the Court's own precedent and held that the agents and state officials who arrested the laborers did not commit any egregious violations of the Fourth Amendment that could support the suppression of the incriminating statements during the removal proceeding.[9]

When aliens[10] are arrested or detained either by a state or federal official based on race or ethnicity, one of the aliens' few options is to attempt to apply the Fourth Amendment's exclusionary rule to have certain aspects of the government's evidence suppressed.[11] Although the Supreme Court ruled in the landmark case *INS v. Lopez-Mendoza* that the exclusionary rule does not generally apply to civil deportation proceedings, a plurality of the Court left open whether exclusion might nevertheless be required for unspecified "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness."[12] Many federal circuit courts, however, have struggled with the rule discussed by the plurality in *Lopez-Mendoza* and have differed in their interpretation of what constitutes

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[7] *See id.* at 172, 174 (Lynch, J., dissenting).

[8] *See id.* at 158, 161 (majority opinion).

[9] *See id.* at 159-60, 163, 165; *see also* Cotzojay v. Holder, 725 F.3d 172, 182-83 (2d Cir. 2013); Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006).

[10] *See Alien*, BLACK'S LAW DICTIONARY 87 (10th ed. 2014)

> Alien [refers to s]omeone who resides within the borders of a country but is not a citizen or subject of that country; [or] a person not owing allegiance to a particular country. In the United States, an alien is a person who was born outside the jurisdiction of the United States, who is subject to some foreign government, and who has not been naturalized under U.S. law.

Id. The term "illegal alien" will not be used in this paper because the term implies culpability of a person for being present within a country but without status.

[11] *See* U.S. CONST. amend. IV.; Mapp v. Ohio, 367 U.S. 643, 655 (1961) (finding that evidence obtained by an unconstitutional search or seizure is inadmissible in a state criminal proceeding).

[12] *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984). This piece will refer to this standard as the egregious standard.

egregious violations.[13] For example, the Second, Third, and Ninth Circuit have held that an egregious violation may be found if the stop was based on race, nationality, or other grossly improper considerations.[14] Under the *Lopez-Mendoza* standard and interpretations set forth by the Board of Immigration Appeals, the burden to prove an egregious violation, however, is placed on the alien, who typically is not readily in possession of the relevant evidence necessary to prove a successful case.[15]

The United States' immigration system is inherently discriminatory, based on a sovereign nation's right to determine who can and cannot enter or be present in the country.[16] The United States conducted 315,943 removals in the 2014 fiscal year alone, but this number only represents a small percentage of those illegally present in this country.[17] The lack of consistency by the judiciary in interpreting the parameters of the "egregious" exception, however, has led to nearly an unsustainable burden for those aliens who have in fact encountered an egregious constitutional violation.[18] Clarifying *Lopez-Mendoza*'s exception of egregious violations to include instances that were clearly based on impermissible racial profiling will help ensure that those impacted by such conduct will be afforded an evidentiary hearing on their case.[19] Both the Second and Ninth Circuits have worked to establish this standard, but have struggled to find a consistent application of the rule.[20] Inconsistent interpretations of what constitutes an

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13 *See* BACKGROUND *infra* Part C.

14 *See, e.g.*, *Cotzojay*, 725 F.3d at 180-83; Oliva-Ramos v. U.S. Att'y Gen., 694 F.3d 259, 278-79 (3d Cir. 2012); *Almeida-Amaral*, 461 F.3d at 235-36; Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449, 1452 (9th Cir. 1994); Orhorhaghe v. INS, 38 F.3d 488, 497 (9th Cir. 1994).

15 *See Lopez-Mendoza*, 468 U.S. at 1039; Garcia, 17 I. & N. Dec. 319, 321 (B.I.A. 1980).

16 *See* Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) (citing S.B. 1070, an Arizona statute that authorizes law enforcement officers to arrest a person without first obtaining a warrant if "the officer has probable cause to believe . . . [that the person] has committed any public offense that makes the person removable from the United States"); *see also* Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1, 7 (2005).

17 U.S. IMMIGR. & CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT, FISCAL YEAR 2014, 1, 7 (2014), *available at* https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf; *see also Arizona*, 132 S. Ct. at 2500.

18 *See* BACKGROUND *infra* Part C.

19 *See Lopez-Mendoza*, 468 U.S. at 1050-51.

20 *See* Almeida-Amaral v. Gonzales, 461 F.3d 231, 235-36 (2d Cir. 2006); Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449 (9th Cir. 1994). *But see, e.g.*, Maldonado v. Holder, 763 F.3d 155, 159-60, 165 (2d Cir. 2014).

unconstitutional reliance on race, ethnicity, or national origin open the door for racial profiling abuses in immigration enforcement activities throughout the United States.

This Comment argues that immigration seizures that are based substantially on racial profiling should presumptively constitute "egregious" Fourth Amendment violations, because racial profiling as the only basis for such arrests should not be tolerated. Racial profiling alienates law-abiding citizens from law enforcement and causes law enforcement to lose credibility and respect among the people they are sworn to serve and protect. In addition, this Comment will argue that the "egregious" exception should be further clarified by the U.S. Supreme Court at the first available opportunity in order to establish clear limits on racial profiling in immigration prosecutions, and resolve an inconsistent application within the circuit courts. If cases such as the Second Circuit's opinion in *Maldonado v. Holder* are allowed to stand, the ability of any alien to establish racial profiling as a basis to suppress evidence could become illusionary, for the inequitable burden-shifting framework places an impossible burden on aliens and leaves evidence to support suppression out of the control of those who were seized.[21]

Part I will first briefly provide background on suppression motions and the Fourth Amendment's exclusionary rule, and provide an overview of the nature of civil court immigration proceedings. Next, Part I will discuss the Supreme Court's decision in *INS v. Lopez-Mendoza*, and the various lower courts' interpretations of the exclusionary rule as applied to immigration proceedings, especially in terms of the Court's failure to apply the egregious exception when presented with evidence of racial profiling. Part II will then argue that immigration seizures based substantially on racial profiling should presumptively constitute egregious Fourth Amendment violations, since racial targeting should not be tolerated as the basis of presumption of illegal status. Part II will also stress the need for the Supreme Court to revisit these standards under *Lopez-Mendoza*, to provide clarity, especially for a race-based inquiry. Part II will then discuss the exclusionary process in immigration proceedings as a whole, and how the administrative nature of the proceedings should not provide a basis for condoning egregious constitutional violations. Finally, Part II will argue that the use of race as a basis for suspicion in immigration

21 *See Maldonado*, 763 F.3d at 168, 170 (Lynch, J., dissenting).

enforcement leads to various Fourth Amendment violations, which should be prevented at an enforcement level.

I. BACKGROUND

Immigration removal proceedings are an administrative process governed by guidelines and rules under both the Immigration and Nationality Act (INA) and Title 8 of the Code of Federal Regulations: Aliens and Nationality.[22] As civil actions, removal proceedings differ from criminal proceedings, but certain constitutional protections are nevertheless afforded to aliens.[23] The extent to which constitutional protections are afforded to those placed in removal proceedings vary, and the risk associated with racial profiling in these proceedings has been exacerbated by vague standards that have emerged from U.S. Supreme Court precedent.[24]

Section A of this Part provides a brief summary of motions to suppress and the Fourth Amendment's Exclusionary Rule. Section B provides an overview of immigration proceedings, in order to provide background on the distinguishing factors leading to the exclusionary rule in this process. Section C will review the Supreme Court case of *INS v. Lopez-Mendoza*, the foundational case for a motion to suppress in immigration proceedings, and the various interpretations of this case, both from the Board of Immigration Appeals and various U.S. circuit courts.

A. *Motion to Suppress and the Fourth Amendment's Exclusionary Rule*

A motion to suppress is used to prohibit evidence that has been unlawfully obtained by the government.[25] In many cases, a successful

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[22] *See generally* Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1537 (2012). The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) removed "deportation" and "exclusion" proceedings from the Immigration and Nationality Act, and replaced it with "removal" proceedings, though throughout this Comment, I will switch between the two depending on the date the decision was released. For statutes and regulations relating to alien removal proceedings, see 8 U.S.C. §§ 1225-29, 1534-35 (2012); 8 C.F.R. §§ 239.1-240.21, 318.1, 1003.1-42, 1239.1-1241.33 (2014).

[23] *Lopez-Mendoza*, 468 U.S. at 1038.

[24] *See Developments in the Law – The Law of Immigrant Rights & Immigration Enforcement*, *The Role of the Exclusionary Rule in Removal Hearings*, 126 HARV. L. REV. 1633, 1638 (2013).

[25] *Motion to Suppress*, BLACK'S LAW DICTIONARY 1172 (10th ed. 2014).

motion to suppress can prevent the government from meeting its required burden of proof, and may lead to the exclusion of various forms of evidence.[26]

The exclusionary rule is a judicially created remedy to preclude the Government from introducing evidence it obtained by violating the defendant's constitutional rights.[27] In applying the exclusionary rule, the court seeks to prevent further government misconduct, and weighs the cost of excluding evidence against the benefit of deterring future governmental misconduct.[28] Courts have recognized that two constitutional provisions, the Fourth Amendment and the Due Process Clause of the Fifth Amendment, may serve as the basis for a motion to suppress.[29] Specifically, the Fourth Amendment of the United States Constitution protects:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[30]

In order for a Fourth Amendment violation to occur, a "search" or a "seizure" must occur.[31] In *Katz v. United States*, the Supreme Court defined a search as any government action that violates an individual's reasonable expectation of privacy.[32] In *Brendlin v. California*, the Supreme Court found that a seizure occurs when a government agent intentionally terminates or restrains a person's freedom of

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26 AM. IMMIGR. COUNCIL, MOTIONS TO SUPPRESS IN REMOVAL PROCEEDINGS: A GENERAL OVERVIEW 1-2 (2015). A motion to suppress may target any evidence the government attempts to introduce, whether physical, documentary, or testimonial. *Id. See also* United States v. Janis, 428 U.S. 433, 442-43 (1976); Cotzojay v. Holder, 725 F.3d 172, 183 (2d Cir. 2013).

27 *Exclusionary Rule*, BLACK'S LAW DICTIONARY 688 (10th ed. 2014).

28 *See* Illinois v. Krull, 480 U.S. 340, 352-53 (1987) (citing United States v. Leon, 468 U.S. 897, 907 (1984)).

29 AM. IMMIGR. COUNCIL, *supra* note 26, at 1-2. Although the Fifth Amendment is an important aspect in certain immigration proceedings, this Comment focuses on the application of the exclusionary rule under the Fourth Amendment to removal proceedings based on racial profiling. These constitutional amendments limit the degree that the INA can authorize immigration officers to investigate and arrest noncitizens for purposes of initiating removal proceedings.

30 U.S. CONST. amend. IV.

31 *See* Michigan v. Fisher, 558 U.S. 45, 47 (2009) (per curiam).

32 Katz v. United States, 389 U.S. 347, 353 (1967).

movement.[33] The Court has also held that a seizure occurs any time a law enforcement agent makes an arrest or when a government agent acts in such a manner that a "reasonable person" would not feel free to leave or end the encounter.[34]

If a motion to suppress is filed, the court must determine the reasonableness of the officer's actions in relation to the search or seizure.[35] With regard to the Fourth Amendment, there is a presumption of reasonableness to searches or seizures carried out pursuant to a warrant issued by a neutral magistrate.[36] If a warrant is not obtained, the court may evaluate whether an exception may still apply, making the search or seizure reasonable.[37] The test for reasonableness is also judged against how the officer acted in light of the objective facts available to him and not based on their subjective intentions with regard to the respondent.[38]

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[33] Brendlin v. California, 551 U.S. 249, 254 (2007) (citing Florida v. Bostick, 501 U.S. 429, 434 (1991)); *see also* United States v. Mendenhall, 446 U.S. 544, 553 (1980).

[34] *Mendenhall*, 446 U.S. at 554. In *Mendenhall* the Court identified factors of a Government seizure:

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Id. See also Almeida-Amaral v. Gonzales, 461 F.3d 231, 236 (2d Cir. 2006) (finding a seizure occurred when the border patrol officer commanded the respondent to stop, even though no physical conduct took place).

[35] *See* AM. IMMIGR. COUNCIL, *supra* note 26, at 15.

[36] *See* Minnesota v. Dickerson, 508 U.S. 366, 372 (1993) (quoting Thompson v. Louisiana, 469 U.S. 17, 19-20 (1984)).

[37] *See* Chimel v. California, 395 U.S. 752, 762-63 (1969) (the Court determined that the evidence an arresting officer obtains from a warrantless search of a person incident to arrest is admissible against the arrestee in a criminal proceeding because the search was reasonable for ensuring the officer's physical safety); Terry v. Ohio, 392 U.S. 1, 38 (1968) ("[A] search without a warrant is, within limits, permissible if incident to a lawful arrest . . . . "). For warrantless search exceptions at the United States borders and ports-of-entry, see United States v. Flores-Montano, 541 U.S. 149, 152-53 (2004); United States v. Martinez-Fuerte, 428 U.S. at 543 (1976); Almeida-Sanchez v. United States, 413 U.S. 266, 274 (1973). For administrative search exceptions, see INS v. Delgado, 466 U.S. at 212, 239 (1984).

[38] Brigham City v. Stuart, 547 U.S. 398, 404 (2006); *see also Katz*, 389 U.S. at 361 (Harlan, J., concurring).

B. *Immigration Proceedings and the Application of the Exclusionary Principle*

Administrative proceedings relating to immigration in the United States are governed by guidelines and rules under both the Immigration and Nationality Act (INA) and Title 8 of the Code of Federal Regulations: Aliens and Nationality.[39] Section 1240.10 of Title 8 of the Code of Federal Regulations sets the baseline for hearings in immigration proceedings, detailing the steps that immigration judges must take during their first encounter with an alien in court.[40] The INA also establishes the authority of immigration officers, who are constrained by various provisions.[41] For example, § 287 sets out the conditions under which the immigration officers may investigate, search for, and arrest individuals that they believe are in this country illegally.[42] This regulation provides that the officer must first obtain a warrant, if sufficient time exists, before they may arrest a person they suspect is in the country illegally.[43] However, the Supreme Court recently held in *Arizona v. United States* that federal immigration law preempts certain conflicting state laws, and that the federal government as a sovereign nation has "broad, undoubted power over the subject of immigration and the status of aliens."[44]

In immigration proceedings, an alien must respond to their notice to appear and detail whether they admit or deny the factual allegations and the charges of removability.[45] If denied by the alien, the immigration judge "shall receive evidence as to any unresolved issues, except that no further evidence need be received as to any facts admitted during the pleading."[46] At this point in the proceedings, if a motion to suppress is desired by the alien, the alien must come forward with his or her evidence, which is usually testimony and a sworn affidavit.[47]

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39 Immigration and Nationality Act of 1952; 8 U.S.C. §§ 1225, 1229 (2012); 8 C.F.R. §§ 239.1-240.21, 318.1, 1003.1-42, 1239.1-1241.33 (2014).

40 8 C.F.R. § 1240.10 (2014).

41 *Id.* §§ 287.1-12.

42 *Id*. § 287.5.

43 *Id.* § 287.3.

44 *See* Arizona v. United States, 132 S. Ct. 2492, 2498 (2012).

45 8 C.F.R. § 1240.10 (2014).

46 *Id.* § 1240.10(a)(4).

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

In many immigration proceedings, the exclusionary rule allows for an evidentiary hearing to determine if the conduct of the state or federal officers requires suppression of evidence.[48] There is no question that the Fourth Amendment protects persons in the United States, but its application to persons who are in this country in a status or non-status position is less clear.[49] If a motion to suppress is successful in the removal process, it could lead to the termination of proceedings, since more often than not the respondent alien seeks to exclude the government's identity related evidence, a threshold issue under the federal regulations.[50]

In ruling on motions to suppress in immigration proceedings, judges apply a reasonableness standard.[51] The reasonableness standard in immigration proceedings is determined by the totality of the circumstances, with certain clear indicators of unreasonableness.[52] In *United States v. Brignoni-Ponce*, the Supreme Court held that apparent Mexican ancestry alone cannot provide a "reasonable suspicion" of alienage, much less unlawful status.[53] Although unreasonable searches or seizures do not guarantee the suppression of evidence in immigration proceedings, the Supreme Court, the Board of Immigration Appeals, and various federal circuit courts have found the exclusionary rule to apply in certain circumstances in the context of immigration proceedings.[54]

C. INS v. Lopez-Mendoza *and Federal Court Interpretations of the Fourth Amendment in Immigration Proceedings*

Although the Immigration and Nationality Act and Code of Federal Regulations do not address whether the Fourth Amendment is applicable in immigration proceedings,[55] the Supreme Court in *INS v. Lopez-Mendoza* set forth the basic principle that the exclusionary rule

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48 INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984).

49 *See* Elizabeth A. Rossi, *Revisiting* INS v. Lopez-Mendoza*: Why the Fourth Amendment Exclusionary Rule Should Apply in Deportation Proceedings*, 44 COLUM. HUM. RTS. L. REV. 477, 534-35 (2013).

50 8 C.F.R. § 1240.8 (2014).

51 *Lopez-Mendoza*, 468 U.S. at 1039-40.

52 Florida v. Bostick, 501 U.S. 429, 438-39 (1991).

53 Brignoni-Ponce, 422 U.S. 873, 886-87 (1975).

54 *See infra* Part I.C.

55 *See* Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1537 (2012); 8 C.F.R. §§ 1.1-499.1, 236-40, 1001.1-1337.1 (2014).

would not generally apply to removal proceedings.[56] However, this decision recognized an exception to the general principle, certain "egregious" conduct that could prompt the use of the exclusionary rule in immigration proceedings.[57] Unfortunately, the Court's vague language concerning this exception has led to a number of varying interpretations by the Board of Immigration Appeals and the federal circuit courts as to the meaning and scope of the "egregious" exception.[58]

1. *INS v. Lopez-Mendoza*

In 1984, the Supreme Court held in *INS v. Lopez-Mendoza* that the Fourth Amendment's exclusionary rule did not apply in deportation proceedings, as a result of the "civil nature of the proceeding" and how "various protections that apply in the context of a criminal trial do not apply in a deportation hearing."[59] In *Lopez-Mendoza*, the two aliens were both citizens of Mexico who were summoned to two separate deportation proceedings where they challenged the "regularity of those proceedings on grounds related to the lawfulness of their respective arrests by officials of the Immigration and Naturalization Service (INS)."[60]

Justice O'Connor's plurality opinion in favor of the government explained that the Court's holding was necessary to ensure a functioning immigration system and noted that immigration proceedings allow for a "streamlined determination of eligibility to remain in this country, nothing more."[61] The Court explained that in criminal proceedings, "statements and other evidence obtained as a result of an unlawful, warrantless arrest are suppressible if the link between the

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

57 *Id.*

58 *See* AM. IMMIGR. COUNCIL, *supra* note 26, at 6-14.

59 *Lopez-Mendoza*, 468 U.S. at 1038-39.

60 *Id.* at 1034. The Immigration and Naturalization Service (INS) was an agency within the Department of Justice, but dissolved in 2003 with the creation of the Department of Homeland Security. *See Our History*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/about-us/our-history (last visited Sept. 1, 2015). S*ee also* U.S. CITIZENSHIP & IMMIGR. SERVS., OVERVIEW OF INS HISTORY 11 (2012), *available at* http://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf.

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

evidence and the unlawful conduct is not too attenuated."[62] Yet, in terms of immigration proceedings, the Court believed that the exclusionary rule's application up until that point had been "less clear."[63] Justice O'Connor looked to the Court's previous decision in *United States v. Janis*, a case dealing with taxes and the Internal Revenue Service, to discuss the framework used to analyze the application of the exclusionary rule in non-criminal proceedings.[64] Under *Janis*, the Supreme Court established a balancing test to weigh the social benefits against the likely costs of using the exclusionary rule in administrative proceedings dealing with taxing, in order to formulate an accurate rule for applying the Fourth Amendment.[65]

Justice O'Connor recognized that "regardless of how the arrest of an illegal alien is effected, deportation will still be possible when evidence not derived directly from the arrest is sufficient to support deportation."[66] Next, the Court looked to the effects on the arresting officer and the way they would shape their conduct in light of potential exclusionary aspects as well as the potential negative social costs.[67]

The Court also stressed the Immigration and Nationality Services' own "comprehensive scheme for deterring Fourth Amendment violations by its officers."[68] Here, Justice O'Connor stressed the INS's comprehensive scheme for suspicion of illegal alienage and that the regulation requires that "no one be detained without reasonable suspicion of illegal alienage," and this reasonable suspicion also applies to an arrest, "unless there is an admission of illegal alienage or other strong evidence thereof."[69] She stressed the training of various immigration officers and their instruction on the Fourth Amendment, while also admitting that the INS cannot guarantee that constitutional violations will not occur.[70] In concluding, the Supreme Court held that "the deterrent value of the exclusionary rule in deportation proceedings is undermined by the availability of alternative remedies for insti-

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62 *Id.* at 1040-41. *See also Attenuation Doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014); Wong Sun v. United States, 371 U.S. 471, 491 (1963) (citing Nardone v. United States, 308 U.S. 338, 341 (1939)).

63 *Lopez-Mendoza*, 468 U.S. at 1041.

64 *Id.* at 1041 (citing United States v. Janis, 428 U.S. 433, 446 (1976)).

65 *Id.* at 1042 (citing United States v. Janis, 428 U.S. 433, 447-48 (1976)).

66 *Id.* at 1043.

67 *Id.* at 1044.

68 *Id.*

69 INS v. Lopez-Mendoza, 468 U.S. 1032, 1044-45 (1984).

70 *Id.* at 1045.

tutional practices by the INS that might violate Fourth Amendment rights."[71] The Court did note that its view on the exclusionary rule could change, if there was reason to believe INS violations were widespread.[72]

In balancing the deterrent values and costs of the exclusionary rule, the Court recognized the respondents' legitimate concerns about the Fourth Amendment's role in providing a "safeguard" to ethnic Americas, in particular those of Hispanic descent.[73] Yet, Justice O'Connor believed that the application of the exclusionary rule in civil deportation proceedings would provide no remedy for wrongs, and that the use of the exclusionary rule would not contribute to the protection of Fourth Amendment rights of all persons.[74] In furthering the Court's justification, Justice O'Connor added that the social costs of a continuing violation of immigration law would outweigh that of the benefits of a wholesale application of the Fourth Amendment in immigration proceedings.[75]

The Court's plurality opinion finally stated, "[w]e do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative values of the evidence obtained."[76] The Court cited *Rochin v. California*, in which it analyzed conduct by officers that could possible reach the egregious exception, finding the conduct in *Rochin* to have "shock[ed] the conscience."[77] The Court in *Rochin* found that forcing a stomach pump to find illegal capsules of morphine against the will of the defendant violated the Due Process clause of the Fourteenth Amendment.[78]

2. The Board of Immigration Appeal's Interpretation of the Exclusionary Rule

After the Supreme Court delivered its opinion in *Lopez-Mendoza,* the Board of Immigration Appeals (Board) struggled with the "egregious" standard when applying the Fourth Amendment exclu-

71 *Id.*
72 *Id.* at 1050.
73 *Id.* at 1046.
74 *Id.* at 1050.
75 INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984).
76 *Id.* at 1050-51.
77 *Id.* (citing Rochin v. California, 342 U.S. 165, 171 (1952)).
78 Rochin v. California, 342 U.S. 165, 166 (1952).

sionary rule to immigration proceedings.[79] Prior to the *Lopez-Mendoza* decision, the Board held in *Matter of Sandoval* that the Fourth Amendment should not apply in any immigration proceedings, but could be applied to subsequent criminal prosecutions.[80] This decision limited the application of the exclusionary rule in proceedings, based on a necessity for balancing the societal costs, and the Board stressed that it would not bring about a different result, since the Government will usually be able to "establish [deportability] by clear, convincing, and unequivocal evidence."[81]

A year later, in the case *Matter of Toro*, the Board also held that "to be admissible in deportation proceedings, evidence must be probative and its use fundamentally fair so as to not deprive respondents of due process of law as mandated by the [F]ifth [A]mendment."[82] The Board itself struggled to find the balance and application of the exclusionary rule in immigration proceedings, and while a case-by-case analysis for each alien is applicable in certain settings of immigration law, the Board struggled to apply this in the context of exclusionary rule.[83]

Another pre-*Lopez-Mendoza* decision by the Board, *Matter of Garcia*, helped to establish the prima facie case framework of the exclusionary rule in immigration proceedings.[84] The Board stressed that while it did not believe the Fourth Amendment exclusionary rule applied in civil deportation proceedings, "[e]ven were that not the case, we would find that this respondent had not come forward with a prima facie showing that his arrest was unlawful."[85] The Board then analyzed the record, in which the alien had established that his admissions were made involuntarily and under pressure.[86] Since the government had not presented any contrary evidence, the alien's admissions prompted the Board to find the "requirements of due process warrant their exclusion from the record."[87] While in the past the Board hesitated with the reviews of the exclusionary rule, here, because the alien set forth enough evidence to establish a prima facie case of a constitu-

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79 *Lopez-Mendoza*, 468 U.S. at 1050-51.
80 Sandoval, 17 I. & N. Dec. 70 (B.I.A. 1979).
81 *See id.* at 83.
82 Toro, 17 I. & N. Dec. 340, 343 (B.I.A. 1980).
83 *See id.* at 343-44.
84 *See* Garcia, 17 I. & N. Dec. 319, 321 (B.I.A. 1980).
85 *Id.*
86 *Id.* at 320-21.
87 *Id*. at 321.

tional violation, the burden shifted to the government to disprove the testimony and alien's evidence.[88] If the government could not meet this burden, the evidence could be suppressed.[89]

However, after the Supreme Court handed down its decision in *Lopez-Mendoza*, the Board clarified the required framework for presenting evidence as an alien.[90] The Board held in *Matter of Barcenas* that when an alien wanted to challenge the admissibility of a document in immigration proceedings, "the mere offering of an affidavit [was] not sufficient to satisfy [this] burden.[91] The Board stated that testimony must be used to prove the alien's case detailing the actions taken by the officers that amount to an unreasonable search or seizure.[92] If the Board was satisfied with the alien's evidence, a hearing would be granted to again gather further information for the possibility of excluding evidence from the search or seizure.[93] Thereafter, the burden shifted to the government to establish the legality of the actions of their officers.[94]

3. Federal Courts' Interpretations of *INS v. Lopez-Mendoza's* "Egregious" Exception and a Race-Based Exception

Federal courts have also differed in the application of the exclusionary rule in immigration proceedings. Many look to the Supreme Court's decision in *Lopez-Mendoza*, as well as to various Board inter-

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88 *Compare id.* (where the Board terminated the respondent's deportation proceeding after finding he presented a prima facie case for excluding his involuntary admissions, which was the Government's only evidence demonstrating the respondent's alien status), *with* Sandoval, 17 I. & N. Dec. 70, 82-83 (B.I.A. 1979) (where the Board found that the respondent failed to establish that the Government's "misconduct by Service officers relating to violations of . . . [his] Fourth Amendment rights" could be "addressed" in a civil deportation proceeding).

89 *See* Garcia, 17 I. & N. Dec. 319, 321 (B.I.A. 1980) (finding that the Government failed to rebut the respondent's prima case when it did "not come forward with any contrary evidence" demonstrating that the respondent's admissions were involuntary).

90 Barcenas, 19 I. & N. Dec. 609, 611 (B.I.A. 1988) (quoting Burgos, 15 I. & N. Dec. 278, 279 (B.I.A. 1975)) (the Board "observe[d] that '[o]ne who raises the claim questioning the legality of the evidence must come forward with proof establishing a prima facie case before the Service will be called on to assume the burden of justifying the manner in which it obtained the evidence.'").

91 *Id.* at 611.

92 *Id.* ("If the affidavit is such that the facts alleged, if true, could support a basis for excluding the evidence in question, then the claims must also be supported by testimony.").

93 *Id.*

94 *See id.*

pretations for guidance.[95] As a result of the plurality opinion in *Lopez-Mendoza* and the Court's recognition of an egregious exception to the exclusionary rule in immigration proceedings, the circuit courts have struggled to understand the ruling and consistently apply its holding to their own decisions.[96] While various circuit courts have interpreted *Lopez-Mendoza* to allow for the application of the exclusionary rule for "egregious" violations, only a few courts have held that violations based solely on race and ethnicity could constitute egregious behavior.[97]

The Ninth Circuit clarified the Supreme Court's holding in *Lopez-Mendoza* in a tax case, *Adamson v. C.I.R.*, finding that deliberate "bad faith violations" of Fourth Amendment rights, "or by conduct that a reasonable officer should know is in violation of the Constitution" amounts to an egregious violation.[98] *Adamson* also found that an egregious violation need not involve "physical brutality", even with the Supreme Court's decision in *Rochin*.[99] The Ninth Circuit stressed the importance of the exclusionary rule and how its primary function was to preserve judicial integrity, which cannot be counterbalanced by violations of "basic constitutional rights."[100]

In *Gonzalez-Rivera v. INS*, the Ninth Circuit further clarified the effect of *Lopez-Mendoza* in immigration proceedings when it held, "we have long regarded racial oppression as one of the most serious threats to our notion of fundamental fairness and consider reliance on the use of race or ethnicity as shorthand for likely illegal conduct to be

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95 *See* Oliva-Ramos v. Att'y Gen. of U.S., 694 F.3d 259, 265, 273-75 (3d Cir. 2012); Almeida-Amaral v. Gonzales, 461 F.3d 231, 234-35 (2d Cir. 2006); Gonzalez-Rivera v. INS, 22 F.3d 1441, 1445, 1448 (9th Cir. 1994); Orhorhaghe v. INS, 38 F.3d 488, 492-93 (9th Cir. 1994).

96 *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984); *Oliva-Ramos*, 694 F.3d at 270-72; *Almeida-Amaral*, 461 F.3d at 236-37; *Gonzalez-Rivera*, 22 F.3d at 1448-49; *Orhorhaghe*, 38 F.3d at 493.

97 *See Lopez-Mendoza*, 468 U.S. at 1050-51; *Oliva-Ramos*, 694 F.3d at 279; *Almeida-Amaral*, 461 F.3d at 235-37; *Gonzalez-Rivera*, 22 F.3d at 1452; *Orhorhaghe*, 38 F.3d at 498, 503.

98 *See* Adamson v. C.I.R., 745 F.2d 541, 545-46 (9th Cir. 1984).

99 *Id.* at 545, n.1 (citing Rochin v. California, 342 U.S. 165, 166, 172 (1952)). In *Adamson*, the Ninth Circuit determined that physical force was not a necessary element for finding that the Government committed an egregious violation of the respondent's Fourth Amendment rights. In the opinion, Judge Boochever explained that "[a]lthough *Rochin* involved physical brutality that the [Supreme] Court said 'shocks the conscience,' we do not believe the *Lopez-Mendoza* Court's citation to *Rochin* was meant to limit 'egregious violations' to those of physical brutality." *Id.*

100 *Id.* at 546.

'repugnant under any circumstances.'"[101] The court did not accept the government's scheme for deterring Fourth Amendment violations by its officers and found that the government's arguments on their use of racial and ethnic targeting were not supported or legally justifiable.[102] The Ninth Circuit also recognized subconscious racial stereotyping in the decision making process and how these racial violations led to its determination that the "officers' conduct in this case constituted a bad faith, egregious constitutional violation that warrants the application of the exclusionary rule."[103] In this case, the officer arrested the alien based only on his Hispanic appearance, and the court concluded that this constituted egregious behavior that violated the respondent's Fourth Amendment rights.[104]

In *Orhorhaghe v. INS*, the Ninth Circuit further held that arrests based solely on a "foreign-sounding" name also constituted egregious behavior unacceptable under the Fourth Amendment, expanding the exception in *Lopez-Mendoza*.[105] Although the Ninth Circuit accepts the egregious exception, every encounter or potential seizure by an officer does not automatically constitute a violation, and the Supreme Court's rationale of "reasonableness" is still used as a guiding principle for officers' conduct.[106]

The Third Circuit discussed the Supreme Court's "egregious" exception in *Oliva-Ramos v. Attorney General of United States*, finding that the exclusionary rule may apply if the alien shows that an egregious violation of the Fourth Amendment or other liberties might transgress notions of fundamental fairness and undermine the value of the evidence obtained from the search or seizure.[107] In the removal proceedings, Olivia-Ramos testified on his own behalf about the raid and his arrest and examination at the ICE office, with supporting affi-

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101 Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449 (9th Cir. 1994) (citing U.S. v. Martinez-Fuerte, 428 U.S. 543, 571, n.1 (1976)) (Brennan, J., dissenting).

102 *Id.* at 1450-51.

103 *Id.* at 1450, 1452.

104 *Id.*

105 Orhorhaghe v. INS, 38 F.3d 488, 502-03 (9th Cir. 1994) ("On the facts of this case, we have little difficulty in determining that the immigration agents committed egregious Fourth Amendment violations. The agents targeted Orhorhaghe for investigation simply because he had a 'Nigerian-sounding name.'").

106 Martinez-Medina v. Holder, 673 F.3d 1029, 1034 (9th Cir. 2011) (citing Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449 (9th Cir. 1994)).

107 Oliva-Ramos v. Att'y Gen. of U.S., 694 F.3d 259, 275 (3d Cir. 2012) (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984)).

davits, in order to meet the Fourth Amendment prima facie burden required by the Board.[108] The government, by contrast, presented only the testimony of the arresting ICE officer, who did not remember any specifics about the apprehension.[109]

The Third Circuit rejected the Board's reading of *Lopez-Mendoza*, finding that its interpretation of only permitting suppression of evidence based on "fundamentally unfair" circumstances did not follow the plurality decision of the Supreme Court.[110] The court critiqued the Immigration Judge for not first determining if the agents violated Olivia-Ramos's Fourth Amendment rights, and whether those violations prompted the *Lopez-Mendoza* exception for egregiousness or widespread violations.[111] The Third Circuit highlighted that eight of the nine justices would apply the egregious exception rule, thus setting forth the possibility of the exclusionary rule's application in removal proceedings where an alien shows "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."[112] The court took the opportunity to consider what would constitute an egregious violation, stating, "[t]hese cases demonstrate that there is no one-size-fits-all approach to determining whether a Fourth Amendment violation is egregious."[113] The court set forth various examples, including "whether any seizures or arrests were based on race or perceived ethnicity."[114]

At times, the Second Circuit has also accepted the "egregious" exception of the exclusionary rule in immigration proceedings but has had difficulties applying its own standards.[115] For example, in *Almeida-Amaral v. Gonzales*, a 17-year-old citizen of Brazil attempted to exclude evidence of his passport and statements to a border patrol officer.[116] Almeida-Amaral had been approached by a patrol officer at a gas station along a highway in southern Texas in

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108 *Id.* at 264; *see also* Barcenas, 19 I. & N. Dec. 609, 611 (B.I.A. 1988); Garcia, 17 I. & N. Dec. 319, 321 (B.I.A. 1980).

109 *Oliva-Ramos*, 694 F.3d at 264.

110 *Id.* at 274-75.

111 *Id.* at 275.

112 *Id.* (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984)).

113 *Id.* at 279.

114 *Id.*

115 *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984); Almeida-Amaral v. Gonzales, 461 F.3d 231, 234-35 (2d Cir. 2006).

116 *Almeida-Amaral*, 461 F.3d at 232.

2003.[117] The officer instructed him to stop and requested identification, in response to which Almeida-Amaral produced his Brazilian passport.[118] The Second Circuit explained that the *Lopez-Mendoza* decision authorized the exclusion of evidence for egregious violations either because the violation "transgress[ed] notions of fundamental fairness" or the violation "undermine[d] the probative value of the evidence obtained."[119] The Second Circuit interpreted *Lopez-Mendoza's* exception, finding that there needed to be an egregious violation that was fundamentally unfair or the violation, regardless of the egregiousness, needed to undermine the reliability of the evidence in dispute.[120] With regard to the specific facts of Almeida-Amaral's stop, however, the Second Circuit found that there was no merit to the contention that the border patrol's inquiry undermined the probative value of the evidence, and thus suppression was not warranted on that ground.[121]

The Second Circuit then discussed whether the agent's stop "transgress[ed] the notions of fundamental fairness."[122] The court set out two guiding principles for deciding whether a petitioner has suffered an egregious violation of his constitutional rights.[123] First, "the egregiousness of a constitutional violation cannot be gauged solely on the basis of the validity of the stop, but must also be based on the characteristics and severity of the offending conduct."[124] The stop then may not in itself constitute an egregious violation, but if the seizure meets the threshold for being "sufficiently severe," it can constitute egregious behavior.[125]

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."[126] The court then found that the stop

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117 *Id.* at 232.

118 *Id.*

119 *Id.* at 234 (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984)) ("As a result, it could be read as saying that proof of both prongs-*i.e.,* evidence of fundamental unfairness *and* diminished probative value-was needed to justify exclusion. This, however, is plainly not what the Court intended.").

120 *Id.* at 235.

121 *Id.*

122 Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006) (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984)).

123 *Id.* at 235.

124 *Id.*

125 *Id.*

126 *Id.*

in this case did not amount to an egregious violation under the first prong, since nothing in the record amounted to a severe stop.[127]

As its second guiding principle, the Second Circuit stated that, "even where the seizure is not especially severe, it may nevertheless qualify as an egregious violation if the stop was based on race (or some other grossly improper consideration)."[128] Again, the court believed that Almeida-Amaral was unable to offer any proof other than his own intuition to show that race had played a role in the agent's decision to question him.[129] While the evidence must be viewed in a light most favorable to the alien, the Second Circuit believed that the basic premise under the Ninth Circuit's *Gonzalez-Rivera* decision was missing in that race did not play a strong enough role, and a Fourth Amendment violation constituting egregious behavior did not occur.[130] Although upholding the Board's decision that the Fourth Amendment should not apply in this instance, the Second Circuit set forth similar standards to the Ninth Circuit's for inquiring into egregious exceptions in the instance where the violation occurred as a result of race or other grossly improper considerations.[131]

Moreover, the Second Circuit more recently held in *Cotzojay v. Holder* that "'a flexible case-by-case approach' is warranted, under which the threat or use of physical force is one relevant, but not dispositive, consideration."[132] *Cotzojay* involved a native and citizen of Guatemala who sought review of the Board and Immigration Judge's decision to deny his motion to suppress the government's evidence of alienage and the subsequent removal order.[133] The Immigration Judge found that Cotzojay failed to establish a prima facie case of non-consensual warrantless entry into his home by ICE officers and that their alleged conduct amounted to an egregious Fourth Amendment violation.[134] While this case dealt with a warrantless entry into the alien's home versus a race-based prima facie case, the Immigration Judge did

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127 *Id.* at 236-37.

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

129 *Id.* at 237.

130 *Id.* at 237 (citing Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449-50 (9th Cir. 1994)).

131 Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449 (9th Cir. 1994).

132 Cotzojay v. Holder, 725 F.3d 172, 182 (2d Cir. 2013) (citing Oliva-Ramos v. Att'y Gen. of U.S., 694 F.3d 259, 278-79 (3d Cir. 2012)).

133 *Id.* at 177.

134 *Id.* at 183.

not believe that the Cotzojay's rights were violated, and the Board affirmed.[135]

The Second Circuit held that the alien had established a prima facie case for suppression, at which point it became the government's burden to establish that its agents secured consent prior to conducting the search.[136] The court held that the Immigration Judge and Board erred in finding that the alien did not show an egregious Fourth Amendment violation requiring suppression, since they rested their decision on "an erroneous view of what government conduct is required before a Fourth Amendment violation may be classified as egregious."[137] Using *Almeida-Amaral*, the Second Circuit discussed the two primary principles to find an egregious violation.[138] The court noted that although they had never found an egregious violation based on severity alone, remand in this case was necessary to re-analyze the factual findings and evidence on that issue.[139]

The decisions in *Almeida-Amaral* and *Cotzojay* have provided the Second Circuit a conceptual framework to analyze the egregious exception,[140] but the court has struggled to follow its own binding precedent.[141] As discussed in the Introduction, in *Maldonado v. Holder*, the Second Circuit held that both ICE officers and local officials did not commit any egregious violations during a sting which took place in Danbury, Connecticut in 2006.[142] On September 19th, 2006, aliens were among individuals gathered in Kennedy Park, in Danbury, Connecticut, to seek work as day laborers.[143] The Danbury Police and ICE and Immigration Customs conducted a sting operation in the area, in which undercover officers acting as work providers in unmarked vehicles picked up the aliens and transported them to a parking lot to be arrested.[144] In 2008, the Immigration Judge denied the aliens' motions to suppress evidence concerning their alienage,

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135 *See id.* at 178.

136 *Id.*

137 *Id.* at 179.

138 Cotzojay v. Holder, 725 F.3d 172, 180 (2d Cir. 2013) (citing Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006)).

139 *Id.* at 183-84.

140 *See id.* at 180; Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006).

141 *See, e.g.*, Maldonado v. Holder, 763 F.3d 155, 160 (2d Cir. 2014).

142 *See id.* at 164.

143 *Id.* at 158.

144 *Id.*

based on a lack of a prima facie case.[145] In July of 2010, the Board denied the aliens' motion to reopen proceedings, even in the face of new evidence concerning the officers' agenda that had been produced in the aliens' civil rights suit against ICE and Danbury's mayor.[146]

The Second Circuit upheld the Board and the Immigration Judge's decision in a two to one decision, in which the majority referenced the Supreme Court's decision in *Lopez-Mendoza* and how the "exclusionary rule does not apply to civil deportation proceedings," in part because "a deportation hearing is intended to provide a streamlined determination of eligibility to remain in this country, nothing more."[147] The court left open whether exclusion might nevertheless be required for unspecified "egregious violations of Fourth Amendment or other liberties that might transgress motions of fundamental fairness."[148] The Second Circuit recognized that in their holding in *Almeida-Amaral*, the "exclusion of evidence is appropriate if 'record evidence establishe[s] . . . that an egregious violation that was fundamentally unfair had occurred.'"[149] The court reiterated their two prong exception standard: the first exception arises if an individual is subjected to seizures with no justification at all, and only when the "seizure is sufficiently severe."[150] Second, the seizure may qualify as egregious "if the stop was based on race or some other grossly improper consideration."[151] The majority recognized that in *Almeida-Amaral*, they were unable to "explore how severe an abuse must be to be egregious, what it means for a stop to be based on race, and what other considerations are grossly improper."[152] Thus, the egregiousness

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145 *Id.*

146 *Id.*; *see also* Barrera v. Boughton, No. 3:07CV1436 (RNC), 2010 WL 1240904, at *1 (D. Conn. Mar. 19, 2010) (the Plaintiff day-laborers filed a twenty-six claim civil rights suit against the Mayor of Danbury, the Danbury Police Department, and ICE agents for "improperly target[ing] them based on race, ethnicity, and perceived national origin, arrested them without probable cause and made arrests in retaliation for the plaintiffs' exercise of protected speech and association in a public place." In the Complaint, the Plaintiffs allege that Danbury police officers and ICE agents conspired to conduct an unlawful campaign by knowingly making illegal civil immigration arrests and engaging in impermissible discriminatory law enforcement, out of frustration with the arrival of the new immigrants to Danbury).

147 Maldonado v. Holder, 763 F.3d 155, 159 (2d Cir. 2014) (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984)).

148 *Id.* (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984)).

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

150 *Id.*

151 *Id.*

152 *Id.*

test, according to the majority, must be truly demanding and "transgress notions of fundamental fairness."[153]

The *Maldonado* majority, when analyzing the facts of the framework set by *Cotzojay v. Holder*, found that the alien's affidavits did not suggest a prima facie case of egregious constitutional violations and therefore, "could [not] support a basis for excluding the evidence."[154] In the alien's affidavits, they stated that the majority of those in Kennedy Park were Latino.[155] Many of the aliens described how they were unable to use their phones, and while they entered the vehicle without duress, they were handcuffed and arrested on illegitimate charges.[156] The court held that these affidavits did not support a finding of an egregious constitutional violation, since the court found that none of the officers' conduct was sufficiently severe in nature to constitute an egregious violation.[157] Looking to the second prong under the egregiousness test set forth by *Almeida-Amaral,* the court stated, "[n]othing in Petitioners' account suggests that they were gathered by the authorities, let alone that they were selected by the authorities on the basis of race. They self-selected on the basis of their willingness to seek and accept day labor."[158] Nevertheless, the aliens argued that the burden-shifting framework deprived them of their right to due process, as a result of the inability to obtain the necessary evidence of an egregious violation without a hearing to explore the circumstances of the arrest and the motivations of the officers who arrested the aliens.[159] The majority upheld the denial of a request for a hearing on the basis that it would be a bigger burden than necessary on the immigration system, thereby concluding that the aliens' constitutional challenge would not hold.[160]

The dissent in *Maldonado* believed that the majority incorrectly applied the exclusionary rule and strayed from the Second Circuit's interpretation of *Lopez-Mendoza* by dismissing the aliens' request for an evidentiary hearing based on the egregious conduct of race and

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153 Maldonado v. Holder, 763 F.3d 155, 159 (2d Cir. 2014) (citing Cotzojay v. Holder, 725 F.3d 172, 182 (2d Cir. 2013).

154 *Id.* at 160.

155 *Id*.

156 *Id.*

157 *Id.*

158 *Id.* at 161.

159 Maldonado v. Holder, 763 F.3d 155, 161 (2d Cir. 2014).

160 *See id.* at 162-63 (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1049-50 (1984)).

national origin violations.[161] However, the dissent did agree with the majority that the respondent bears the burden of coming forth with evidence to support a prima facie case of an egregious Fourth Amendment violation.[162]

The dissent argued that the aliens' evidence, if found to be true, provided that a multi-year harassment campaign focused on Danbury's Hispanics had been taking place, especially targeting its Ecuadorian residents.[163] As a result, this brought about the aliens' arrest without legal justification, but instead based on their ethnicity, national origin, and status as day laborers, which in turn could arguably be considered egregious.[164] The dissent critiqued the majority's opinion which held that even if a hearing occurred, the aliens would not be able to prove an egregious violation because the law enforcement's reliance on status as a supposed Latino day laborer, "when shuffled together with the supposed experience of local law enforcement and a free-floating governmental interest in traffic safety, was not grossly improper."[165] Thus, a result like this deprives persons placed in removal proceedings of the basic level of "fundamental fairness that the Constitution demands."[166]

The dissent further argued that the majority opinion in *Maldonado* created an "insuperable barrier" for aliens to obtain an evidentiary hearing as a result of their "cramped definition" of the egregiousness standard and an inconsistent application with past Second Circuit precedent.[167] According to the dissent, while the "ostensible reason for this targeted enforcement was traffic safety, the record did not reflect that any such efforts were undertaken to control day laborers at nearby Minas Carne, a different location that was more heavily frequented by the city's better-assimilated Brazilian immigrant population."[168] The dissent stressed that if *Cotzojay* had been "properly applied, the framework would serve to maintain the proper functioning of the nation's immigration enforcement system while

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161 *Id.* at 168 (Lynch, J., dissenting).

162 *Id.* at 167.

163 *Id.* at 168.

164 *See id.*

165 Maldonado v. Holder, 763 F.3d 155, 168 (2d Cir. 2014) (Lynch, J., dissenting).

166 *Id.*

167 *Id.*

168 *Id.* at 168-69.

protecting the constitutional rights of those who become ensnared in removal proceedings."[169]

Finally, the dissent maintained that it was not a crime to be a removable alien present in the United States, citing to the Supreme Court's recent immigration decision in *Arizona v. United States*, in which the majority opinion varied from the past notion set forth by Justice O'Connor in *Lopez-Mendoza*.[170] Stopping someone based on nothing more than the possibility of their removal was thus unlawful, and there "is no suggestion in this record that either the undercover officer or the arresting officers in the parking lot knew anything at all about any of the petitioners who entered the car other than that they were willing to engage in casual labor."[171] The dissent strongly contended that allowing law enforcement officials to target a specific area on improper considerations, such as ethnicity and national origin, then claiming that the individuals volunteered themselves for arrest by allegedly committing a traffic violation, would "condone ethnic harassment."[172] According to the dissent, the solicitation of work was, in itself, constitutionally protected speech, and thus, the majority's ruling set out no limits to potential seizures based only on occupational status.[173]

II. ANALYSIS

Fourth Amendment search and seizure violations that are based on racial profiling should presumptively constitute an "egregious" violation under the Supreme Court's decision in *INS v. Lopez-Mendoza*.[174] Racial profiling, or targeting someone based on their physical appearance, whether it is the color of their skin or their ethnicity, should not be the only basis for an immigration official or local

169 *Id.* at 170.

170 *Id.* at 172 (citing Arizona v. United States, 132 S. Ct. 2492, 2505 (2012)).

171 Maldonado v. Holder, 763 F.3d 155, 172 (2d Cir. 2014) (Lynch, J., dissenting).

172 *Id.*

173 *Id.* at 173; *see also* Kristina M. Campbell, *The High Cost of Free Speech: Anti-Solicitation Ordinances, Day Laborers, and the Impact of "Backdoor" Local Immigration Regulations*, 25 GEO. IMMIGR. L.J. 1, 1-2 (2010) (day laborers' "successes that have resulted from challenging state and local anti-solicitation law[s for being unconstitutional under the First Amendment] . . . [have failed] to provide them with a meaningful remedy." This is "[b]ecause day laborers are perceived to be undocumented immigrants, [and] anti-solicitation ordinances and other laws targeting day laborers are really 'backdoor' attempts by state and local governments to regulate immigration.").

174 INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984).

officer's decision to stop or arrest an individual.[175] Without further justification for suspicion, racial profiling such as this in immigration enforcement leads to the unlawful detainment of aliens who should be afforded protections under the U.S. Constitution and principles of basic fairness.[176] Regardless of the proceeding, an arrest based solely on racial profiling should trigger an "exclusionary rule" hearing to allow proof that the aliens were targeted and harassed.[177] The Supreme Court's "egregious" exception should be clarified so that the circuit courts and the Board of Immigration Appeals can enforce clear limits on racial profiling in such prosecutions and resolve inconsistent applications of the law.[178]

Section A of this part evaluates the standard set by *Lopez-Mendoza* and the broad scope it set forth for interpretations under the "egregious" exception. It argues that the Supreme Court needs to revisit these standards to provide clarity, especially for a race-based inquiry. Section B discusses the exclusionary process in immigration proceedings as a whole, and how the administrative nature of the proceedings should not constitute a justification for allowing constitutional violations. Finally, Section C questions the use of race in enforcement of immigration, for it is the unconstitutional tactics of enforcement that prompt the need for the exclusionary rule in immigration proceedings.

A. *Revisiting* Lopez-Mendoza *and Redefining the Egregiousness Standard in Terms of Race*

The color of someone's skin should never be the basis of legal targeting in the United States because it goes against fundamental principles of our Constitution.[179] Clear racial profiling and targeting based on nationality should also not be tolerated by our federal government and state officers, especially when it is the only basis for their inquiry.[180] While the immigration system in the United States is inherently discriminatory in nature, there is still no justification for the

175 *See Maldonado*, 763 F.3d at 167-71 (2d Cir. 2014) (Lynch, J., dissenting).

176 *See id.* at 170; BACKGROUND *supra* Part I.A.

177 *See Maldonado*, 763 F.3d at 172 (Lynch, J., dissenting); *see also* United States v. Brignoni-Ponce, 422 U.S. 873, 875 (1975): Garcia, 17 I. & N. Dec. 319, 321 (B.I.A. 1980).

178 *See Lopez-Mendoza*, 468 U.S. at 1050-51.

179 *See* BACKGROUND *supra* Part I.A.; *see also Brignoni-Ponce*, 422 U.S. at 878.

180 *See* Almeida-Amaral v. Gonzales, 461 F.3d 231, 235-36 (2d Cir. 2006); Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449-50 (9th Cir. 1994).

targeting of individuals solely on the basis of race.[181] We live in a country comprised of people from all walks of life and all corners of the globe, with different backgrounds, cultures and skin colors.[182] Immigration seizures based substantially on racial profiling should presumptively constitute egregious Fourth Amendment violations because racial profiling should not be tolerated as the basis of presumption of illegal status.

The Supreme Court's 1984 decision in *Lopez-Mendoza* established vague standards relating to the applicability of the Fourth Amendment in immigration proceedings and has led to a confusing circuit split which has allowed for the potential use of racial profiling.[183] Justice O'Connor's focus on ensuring the streamlined nature of the immigration system is a reference to the administrative process of removal proceedings, but this does not justify the use of racial profiling or other unconstitutional tactics to detain aliens.[184] The plurality opinion also discussed the possibility of a change in focus for a "widespread violation," which could allow for the application of the Fourth Amendment in immigration proceedings.[185] While racial profiling in immigration has not yet reached a "widespread violation," its mere existence and clearly unconstitutional essence should at least trigger an exclusionary hearing.[186]

Under *Janis*, the Court tried to weigh the social benefits against the likely costs of using the exclusionary rule in administrative proceedings; and concerning immigration proceedings, the *Lopez-Mendoza* Court ruled that the social costs of a continuing violation of immigration law would outweigh that of the Fourth Amendment benefits.[187] While the Court recognized the Fourth Amendment's role in allowing for a "safeguard" to ethnic Americans, in particular those of

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181 Mucchetti, *supra* note 16 (citing U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES 4 (2003)).

182 PEW RES. CTR., MULTIRACIAL IN AMERICA: PROUD, DIVERSE AND GROWING IN NUMBERS (2015) *available at* http://www.pewsocialtrends.org/files/2015/06/2015-06-11_multiracial-in-america_final-updated.pdf.

183 *Lopez-Mendoza*, 468 U.S. at 1049; Rossi, *supra* note 49, at 534 (arguing that the discrepancies among the federal circuit courts threaten due process and promote a broken system, which can only be repaired by mandating adherence to the Fourth Amendment's reasonableness requirement in immigration cases).

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

185 *Id.* at 1050.

186 *Id.* at 1050-51; *see also* Garcia, 17 I. & N. Dec. 319, 321 (B.I.A. 1980).

187 *Lopez-Mendoza*, 468 U.S. at 1041-42; United States v. Janis, 428 U.S. 433, 448-49 (1976).

Hispanic decent, the plurality opinion downplayed the Amendment's role, stating that the exclusionary rule would provide "no remedy for completed wrongs."[188] However, this is an outdated view because when the exclusionary rule is used in immigration proceedings, it allows aliens a path to protect their rights under the Constitution, whether or not they are present in the United States legally or illegally.[189] The persuasiveness of the plurality opinion in *Lopez-Mendoza* has been diminished by the Supreme Court's *Arizona v. United States* decision, where Justice Kennedy held that as a "general rule, it is not a crime for a removable alien to remain present in the United States."[190] Thus, simply being present in the United States without a legal status does not automatically render an alien removable.[191]

Although only four justices joined the portion of the *Lopez-Menendez* opinion that recognized a possible use of the exclusionary rule in deportation proceedings for "egregious" conduct, the four dissenters all argued that the exclusionary rule should always apply in deportation hearings.[192] Thus, it is fair to say that at the time of the decision, there was a majority of justices who believed that the exclusionary rule could apply in deportation proceedings, at least with regard to "egregious violations."[193] The Supreme Court in *Lopez-Menendez* did not define "egregious," and it has been held by many circuit courts that the plurality's citation to the Court's *Rochin* decision did not define the threshold, but instead was simply a citation to one example where enforcement was taken too far.[194] The uncertainty of what constitutes an egregious constitutional violation has created judicial confusion, and "[p]redictability and uniformity in judicial deci-

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188 *Lopez-Mendoza*, 468 U.S. at 1045-46.

189 *See* Cotzojay v. Holder, 725 F.3d 172, 181 (2d Cir. 2013); Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449 (9th Cir. 1994) (citing Adamson v. C.I.R., 745 F.2d 541, 545 (9th Cir. 1984)).

190 Arizona v. United States, 132 S. Ct. 2492, 2505 (2012) (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984)); *see also* AM. IMMIGR. COUNCIL, *supra* note 26, at 21 (stating that "the law is less developed regarding what, if any, justification immigration officers must have to request" documentation of citizenship).

191 *See* 8 U.S.C. §§ 1182(a)(6)(A)(i), 1227(a)(1) (2012).

192 Oliva-Ramos v. Att'y Gen. of U.S., 694 F.3d 259, 274-75 (3d Cir. 2012).

193 *Id.* at 274.

194 *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984); *cf.* Rochin v. California, 342 U.S. 165, 190-91 (1952) (stating that coerced confessions are inadmissible as evidence because they "offend society's sense of fair play and decency.").

sions are fundamental to due process," especially in terms of peoples' lives in immigration proceedings.[195]

Over time, many circuit courts and the Board of Immigration Appeals have recognized the validity of the egregiousness exception, but there are obvious inconsistencies present among interpretations of *Lopez-Mendoza*.[196] Only a few circuit courts have recognized that a search or seizure based only on race can constitute an egregious violation of the Fourth Amendment, and the lack of unanimity on this issue allows for the possibility of racial and ethnic profiling in immigration enforcement.[197] The reasonableness approach courts use as a basis must be applied with a higher standard when racial profiling is utilized, as was held in the Supreme Court's *United States v. Brignoni-Ponce* decision.[198] In *Brigoni-Ponce*, the Court held that apparent Mexican ancestry alone cannot be the only indication of a reasonable suspicion of illegal status and alienage.[199] This monumental decision allows for the possibility of the exclusion of evidence obtained only as a result of racial profiling in terms of the egregiousness exception, but still many circuits have struggled to recognize or apply their own established exceptions.[200]

The Ninth and Second Circuits are the two circuits that have dealt directly with the egregious exception and have established race as a

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195 Rossi, *supra* note 49, at 534 (quoting Irene Scharf, *The Exclusionary Rule in Immigration Proceedings: Where It Was, Where It Is, Where It May Be Going*, 12 SAN DIEGO INT'L L.J. 53, 82 (2010)).

196 BACKGROUND *supra* Part I.C.

197 *Oliva-Ramos*, 694 F.3d at 278-79; Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006); Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449 (9th Cir. 1994); Orhorhaghe v. INS, 38 F.3d 488, 497 (9th Cir. 1994).

198 *See* United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975).

199 *Id.* at 885-86.

200 *Compare Gonzalez-Rivera*, 22 F.3d at 1445-46 (using subjective impressions such as skin color as facts to support an officer's claim of "reasonable suspicion" can constitute an egregious violation), *with* Martinez-Medina v. Holder, 673 F.3d 1029, 1034-35 (9th Cir. 2011) (interacting with sheriff was consensual and did not violate Petitioners' Fourth Amendment rights, and thus the court denied the motion to suppress). *Compare* Cotzojay v. Holder, 725 F.3d 172, 178-79 (2d Cir. 2013) (holding that once an affidavit and sworn testimony of personal knowledge is given, the burden must shift to the Government to show it did not violate the Fourth Amendment), *and Almeida-Amaral*, 461 F.3d at 235 ("[E]xclusion of evidence is appropriate . . . if record evidence established either (a) that an egregious violation that was fundamentally unfair had occurred, or (b) that the violation – regardless of its egregious unfairness – undermined the reliability of the evidence in dispute."), *with* Maldonado v. Holder, 763 F.3d 155, 162 (2d Cir. 2014) (listing three divergent interests to be considered in determining egregiousness: "the rights of petitioner, the realities and constraints of field work in this area, and the purposes of our civil immigration system").

clear trigger.[201] In *Gonzalez-Rivera*, the Ninth Circuit rejected the government's overt use of racial profiling and recognized that this deviation from reasonableness constituted not only an egregious violation, but required the use of the exclusionary rule.[202] Instead of adopting weak justifications for abuse of Fourth Amendment principles, the Ninth Circuit correctly highlighted the insidious aspects of racial profiling and oppression.[203] This strong standard established by the Ninth Circuit has set it apart from its sister circuits after the *Lopez-Mendoza* decision, and recognizes that an alien, whether in this country legally or illegally, should not be targeted because of their race or ethnicity.[204] The Ninth Circuit's approach should serve as a benchmark for future jurisprudence in this area.

The Second Circuit in *Almeida-Amaral* and *Cotzojay* has also recognized that the Supreme Court's decision in *Lopez-Mendoza* authorized the exclusion of evidence for egregious violations either because the violation "transgress[ed] notions of fundamental fairness" or the violation "undermine[d] the probative value of the evidence obtained."[205] While both prongs of the exception do not need to be proven or established, the Second Circuit set forth two guiding principles to determine if the stop "transgress[ed] the notions of fundamental fairness."[206] First, the court must look to the severity and conduct surrounding the stop, in order to gauge the egregiousness and potential constitutional violation.[207] If the stop reaches the point where it becomes "sufficiently severe," it can constitute egregious behavior.[208]

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[201] *See e.g.*, *Almeida-Amaral*, 461 F.3d at 235 (the Second Circuit identified two principles that bear "on whether [the] petitioner suffered an egregious violation of his constitutional rights. First, the egregiousness of a constitutional violation . . . must [ ] be based on the characteristics and severity of the offending conduct." The Court explained that "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." The second principle was that "even where the seizure is not especially severe, it may nevertheless qualify as an egregious violation if the stop was based on race (or some other grossly improper consideration)."); *Gonzalez-Rivera*, 22 F.3d at 1450 (the Ninth Circuit determined that an egregious constitutional violation would arise, such as in the case at bar, where it was "established that the stop was based solely on [Petitioner] Gonzalez's race, [thus making] the government's action [ ] analogous to a facial racial classification.").

[202] *See Gonzalez-Rivera*, 22 F.3d at 1450-51.

[203] *See id.* at 1449.

[204] *Id.* at 1448-49.

[205] *See Cotzojay*, 725 F.3d at 180; *Almeida-Amaral*, 461 F.3d at 235.

[206] *Almeida-Amaral*, 461 F.3d at 235.

[207] *Id.*

[208] *Id.*

Under the second guiding principle, a Fourth Amendment seizure, even if not severe, could qualify as an egregious violation if the stop was based on race or another grossly improper consideration.[209] By singling out this exception, the court has recognized that race plays a strong role in the analysis of an egregious exception and the application of the exclusionary rule in immigration proceedings.[210] The facts in *Almeida-Amaral* did not support a race-based exception, but by carefully setting forth the standards to be applied in any "egregious" analysis, the Second Circuit's opinion is a strong reminder that the use of racial profiling in immigration proceedings is highly suspect.[211]

Recently, however, in *Maldonado*, a split Second Circuit strayed from their precedent, and allowed the use of racial profiling and ethnic targeting, thus denying the constitutional rights that should be afforded to those present within the borders of the United States.[212] As espoused by the dissent, *Maldonado* involved an instance of clear racial profiling, but without the elements of extreme duress and harsh treatment.[213]

The majority opinion in *Maldonado* represented an absolute disregard for the evils of targeting based on racial and ethnic profiling, leading to an unconstitutional result and inability for the aliens to receive justice.[214] The majority misapplied and dismissed their own precedent under *Cotzojay* and *Almeida-Amaral*, which set forth an egregious exception if the seizure was only based on race or another grossly improper consideration.[215] Instead, the majority justified the seizure by claiming the aliens themselves willfully got in the car and thus could be illegally arrested.[216] While minor traffic violations were used as a justification, the majority's complete disregard for the role that racial and ethnic profiling played in the sting operation allowed the Fourth Amendment violation to go unremedied.[217]

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209 *Id.* at 235-36.

210 *See id.* at 236.

211 *Id.* at 237.

212 *See* Maldonado v. Holder, 763 F.3d 155, 167 (2d Cir. 2014).

213 *Id.* at 167-68 (Lynch, J., dissenting).

214 *Id.* at 164-65 (majority opinion).

215 *Id.* at 159 (citing Cotzojay v. Holder, 725 F.3d 172, 183 (2d Cir. 2013); Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006)).

216 *See id.* at 160 ("they were self-selected").

217 *Id.* at 165.

The targeting of the Ecuadorian community in *Maldonado* met the threshold standard for establishing an egregious violation as set forth in the Second Circuit's decision in *Almeida-Amaral*.[218] By not adhering to the two-prong test set forth in that case, but instead relying upon weak excuses to racially profile the aliens, the Second Circuit effectively established a different framework that allows for racial targeting and promotes inequality and racism.[219] The dissent in *Maldonado* correctly pointed out that the solicitation of work is recognized as constitutionally protected speech, highlighting the hypocrisy of the majority's "self-selection" theory, in which citizens and aliens alike could be subjected to unlawful searches and seizures based on their occupational status, let alone circumventing the right to freedom of speech.[220] The dissent also pointed to the lack of evidence, that the aliens had not violated any traffic ordinances or criminal laws, and noted that this weak government justification could not even be reached without an evidentiary hearing on the matter.[221] The flawed arguments presented by the majority should not have outweighed the diminished rights of the aliens, whose community had already suffered racial targeting.[222]

By ignoring the federal government and local police's joint effort sting based on racial and ethnic targeting,[223] the majority created a standard that arguably will be detrimental to the immigration system in the Second Circuit, and if applied in other circuits, detrimental to the immigration system as a whole. The *Maldonado* dissent correctly criticized the majority opinion's failure to acknowledge that the police had targeted the Ecuadorian community over the Brazilian community on more than one occasion.[224] The Second Circuit's reasoning in *Maldonado* in dismissing the motion for suppression after the City of Danbury targeted an ethnic population should not be acceptable

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218 *See* Maldonado v. Holder, 763 F.3d 155, 170 (2d Cir. 2014) (Lynch, J., dissenting) (citing Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006)).

219 *Id.* at 167-68.

220 *Id.* at 173 (citing Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 945 (9th Cir. 2011)) (en banc); Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993) (finding that begging is a form of constitutionally protected speech).

221 *Maldonado*, 763 F.3d at 172, 172 n.5.

222 *See* Barrera v. Boughton, No. 3:07CV1436 (RNC), 2010 WL 1240904, at *1 (D. Conn. Mar. 19, 2010).

223 *Maldonado*, 763 F.3d at 165-66.

224 *Id.* at 172-73 (Lynch, J., dissenting); *see also* Barrera v. Boughton, No. 3:07CV1436 (RNC), 2010 WL 1240904 (D. Conn. Mar. 19, 2010).

under *Lopez-Mendoza*,[225] and cannot be justified as a way of backing up or supporting the streamlined nature of the administrative system. A cost benefit analysis that would allow local and federal officers to adopt racial profiling schemes that target entire immigrant communities while leaving other immigrant communities alone should never outweigh the enforcement of fundamental Fourth Amendment principles.[226]

Not only should the Second Circuit revisit their decision in *Maldonado v. Holder* and grant an *en banc* review, the Supreme Court, if presented with an appropriate petition for *certiorari*, should step in and take action to help clear the pathway against racial profiling by revisiting the role that the Fourth Amendment should play in immigration proceedings. Completely overruling *Lopez-Mendoza* may not necessarily be required, but in terms of preventing racial profiling as a justification for presumed illegal status, the Supreme Court should step in and set a clear precedent in terms of the "egregious" exception and a race-based trigger.[227] The Second Circuit's decisions in *Cotzojay* and *Almeida-Amaral* and Ninth Circuit's jurisprudence should be used by the Supreme Court as a basis for clarification.[228]

A case-by-case analysis as utilized in *Cotzojay* is the most practicable way to support any egregiousness standard, and if the Supreme Court were to clearly adopt such standards, our immigration system would benefit.[229] The reasoning in *Lopez-Mendoza* discussing a balancing test should also be revisited.[230] If those who are targeted are unable to seek suppression through an evidentiary hearing, our whole system will continue its illegal profiling methods.[231] The standards in *Lopez-Mendoza* are outdated, as our immigration system has undergone significant changes and the Supreme Court's views on the supremacy of our federal immigration system have evolved since that decision.[232] Revisiting this standard is necessary to prevent egregious

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225 BACKGROUND *supra* Part I.3.

226 *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1041-42 (1984).

227 *See also* Rossi, *supra* note 49, at 534.

228 *See* Cotzojay v. Holder, 725 F.3d 172, 180 (2d Cir. 2013); Almeida-Amaral v. Gonzales, 461 F.3d 231, 235-37 (2d Cir. 2006). *See also* BACKGROUND *supra* Part I.3.

229 *Cotzojay*, 725 F.3d at 182-83.

230 *Lopez-Mendoza*, 468 U.S. at 1041-42.

231 *See* Mucchetti, *supra* note 16, at 7.

232 *See* Arizona v. United States, 132 S. Ct. 2492, 2505 (2012).

Fourth Amendment violations from occurring due to racial and ethnic profiling.[233]

B. *The Current Burden of Proof Required to Invoke the Exclusionary Rule in Immigration Proceedings is Nearly Impossible for Aliens to Meet*

The justifications for the rejection of the Fourth Amendment in administrative proceedings discussed by the decision in *Lopez-Mendoza* and highlighted by the Second Circuit's *Maldonado* decision also needs to be reconsidered because of the unfair burdens it places upon aliens.[234] Although immigration administrative proceedings and criminal proceedings differ, the "streamline" excuse to allow unconstitutional government activity in the administrative context should no longer be tolerated.[235] With the burden-shifting framework in an exclusionary hearing, aliens are put at a disadvantage in supporting their motions to suppress, especially when information to support their motion is often in the sole possession of the government; this imbalance approaches a Due Process violation of law.[236]

The U.S. Constitution extends certain protections not only to citizens, but also to those within its borders.[237] While many aliens enter the United States either legally or illegally, it is not a crime to be present within the borders; aliens should not be automatically treated as devoid of all rights.[238] An alien placed in criminal proceedings is afforded the same protections as a citizen in the United States and has the opportunity to suppress evidence if illegally obtained.[239] In *Lopez-Mendoza*, the Court explained that in criminal proceedings, "statements and other evidence obtained as a result of an unlawful, warrantless arrest are suppressible if the link between the evidence

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233 BACKGROUND *supra* Part I.C.

234 *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1048-49 (1984); Maldonado v. Holder, 763 F.3d 155, 161-62 (2d. Cir 2014).

235 *See Maldonado*, 763 F.3d at 159 (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1034, 1039 (1984)).

236 *See* U.S. CONST. amend. V; *Maldonado*, 763 F.3d at 161-62.

237 *See* AM. IMMIGR. COUNCIL, *supra* note 26, at 1.

238 *See* Arizona v. United States, 132 S. Ct. 2492, 2507 (2012).

239 *See* AM. IMMIGR. COUNCIL, *supra* note 26, at 1. *See also* United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (in dicta, a majority of the justices indicated that they would hold the Fourth Amendment applies to searches of illegal aliens conducted within the United States).

and the unlawful conduct is not too attenuated."[240] The Court found, however, that with regard to administrative immigration proceedings, the exclusionary rule's application had been "less clear" and eventually held that it should not apply in such proceedings, other than in the presence of egregious constitutional violations.[241]

When discussing the exclusionary rule in immigration proceedings courts often stress the distinction between criminal proceedings and strictly administrative proceedings, maintaining that the exclusionary rule does not necessarily apply to the latter, unless certain exceptions and thresholds are met.[242] Yet, various courts have strayed from this strict distinction in immigration proceedings if the question turns on interpreting certain aspects that stray away from the Fourth Amendment.[243] For example, if an alien is placed in immigration proceedings as a result of a deportability or inadmissibility criminal charge, the Board and various circuit courts rely on premises of crimi-

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240 INS v. Lopez-Mendoza, 468 U.S. 1032, 1040-41 (1984) (citing Wong Sun v. United States, 371 U.S. 471, 487 (1963)).

241 *Id.* at 1041.

242 *Id.* (citing United States v. Janis, 428 U.S. 433, 446 (1976)).

243 *See* Cotzojay v. Holder, 725 F.3d 172, 181 (2d Cir. 2013) ("[T]he applicability of the Fourth Amendment does not compel the availability of the exclusionary rule in civil deportation proceedings."); Oliva-Ramos v. Att'y Gen. of the U.S., 694 F.3d 259, 274 (3d Cir. 2012) ("[T]he exclusionary rule should apply to some extent in removal hearings." Specifically, the "Fourth Amendment law provides for the suppression of evidence obtained as a result" of the Government's "egregious and/or widespread" unconstitutional conduct, such as here where ICE agents "failed to obtain proper consent to enter the [Petitioner's] apartment, that they arrested him without warrant, and without probable cause, and they seized him without reasonable suspicion."); Puc-Ruiz v. Holder, 629 F.3d 771, 778 (8th Cir. 2010) ("What constitutes an 'egregious' Fourth Amendment violation under *Lopez-Mendoza* is a matter of first impression for this Court." The Eighth Circuit noted that "[w]hile 'egregious' violations are not limited to those of physical brutality [this court cannot] conclude that the police conduct [in arresting respondent without probable cause] rise[s] to the level of an 'egregious' Fourth Amendment violation."); Lopez-Rodriguez v. Mukasey, 536 F.3d 1012, 1018-19 (9th Cir. 2008) ("[T]he INS agents' Fourth Amendment violation was 'egregious'" because "reasonable officers would not have thought it was lawful to push open the door to petitioners' home simply because [Petitioner] Gastelum did not 'tell them to leave or that she did not want to talk to them.'"); Almeida-Amaral, 461 F.3d 231, 235-36 (2d Cir. 2006) (although the agent's conduct in stopping the Petitioner without reasonable suspicion infringed on his Fourth Amendment rights, the agent's conduct did not constitute an egregious violation to warrant suppression of Petitioner's Brazilian passport and statement because the Petitioner failed to establish that the agent stopped him based on his race or other improper grounds); Gonzalez-Rivera v. INS, 22 F.3d 1441, 1451-52 (9th Cir. 1994) (the court applied the exclusionary rule having found that "the Border Patrol officers stopped [Petitioner] Gonzales solely on the basis of his Hispanic appearance," and that such race-based stop is an egregious constitutional violation).

nal law to interpret the predicate conviction in relation to the Immigration and Nationality Act.[244]

In a recent decision, the Board held that the Supreme Court ruling in *Descamps v. Holder*, discussing criminal statutory interpretation, did not provide a "distinction between the criminal and immigration contexts" and that various circuit courts have held that this recent approach to statutory divisibility would apply in "removal proceedings in the same manner as in criminal sentencing proceedings."[245] The Board then held that it would apply criminal interpretations to administrative immigration decisions and followed the Supreme Court's approach.[246] Thus, the *Lopez-Mendoza* argument for a strong distinction between criminal and civil procedures has diminished over time,[247] and courts should not be allowed to pick and choose which criminal practices to start applying to immigration proceedings and which to exclude. This leads to an unfair practice and standards throughout the country, while increasing the potential for continued racial profiling.

In terms of the exclusionary rule in immigration proceedings, the Board's framework has set forth an almost impossible burden for an alien to meet, allowing due process and Fourth Amendment violations to fester and flourish.[248] Both the Board's decisions in *Garcia* and *Barcenas* show the difficulties the Board has had in establishing a burden-shifting framework for the exclusionary rule.[249] In criminal proceedings, it is the government's burden to prove that the defendant is guilty.[250] However, in immigration proceedings, the burden is placed on the alien to provide enough evidence to meet the various standards of the court's interpretations of what constitutes "egregious" conduct.[251] Yet, in many instances, such evidence is not readily available to the alien who can only present what they personally know or can

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244 *See* 8 U.S.C. §§ 1182, 1227 (2012).

245 Chairez-Castrejon, 26 I. & N. Dec. 349, 354 (B.I.A. 2014) (citing Descamps v. United States, 133 S. Ct. 2276, 2287 (2013)). *See also* Mellouli v. Lynch, 135 S. Ct. 1980, 1986 (2015); Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013).

246 *Chairez-Castrejon*, 26 I. & N. Dec. at 354.

247 *See Mellouli*, 135 S. Ct. at 1986; *Moncrieffe,* 133 S. Ct. at 1684; INS v. Lopez-Mendoza, 468 U.S. 1032, 1040-41 (1984).

248 *See* Maldonado v. Holder, 763 F.3d 155, 171-72 (2d. Cir 2014) (Lynch, J., dissenting).

249 *See* Barcenas, 19 I. & N. Dec. 609, 611 (B.I.A. 1988); Garcia, 17 I. & N. Dec. 319, 321 (B.I.A. 1980).

250 AM. IMMIGR. COUNCIL, *supra* note 26, at 2; BACKGROUND *supra* Part I.A.

251 AM. IMMIGR. COUNCIL, *supra* note 26, at 29.

establish.[252] More often than not, the limited evidence the alien is in possession of and can produce is far from being enough to prove the potential illegal conduct of the government.[253]

In *Maldonado*, the aliens had the burden to establish a prima facie case for an evidentiary hearing to see if the evidence of their alienage could be suppressed.[254] The majority held that they had not provided enough evidence, but the required evidence was completely out of their control and outside their limited means to obtain.[255] The government, in situations like these, maintains the evidence, such as the plan of the sting, potential targets, methods, intent, overall treatment, etc.[256] Thus, the burden on the aliens is too high, such that it is nearly impossible for many to establish the requisite prima facie case, thereby allowing racial profiling and ethnic targeting to continue within our immigration system.[257] This will prompt an unconstitutional violation of the alien's Fourth and Fifth Amendment rights, for the alien will most likely be unable to provide testimony that will establish the true probable cause of the arresting or immigration officer.[258] In the criminal context, the burden lies with the government to prove that its conduct did not exceed the threshold to require suppression.[259] The heightened burden placed on aliens in administrative immigration proceedings promotes unwarranted searches and seizures by immigration officials and opens a floodgate for race-based

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252 *Maldonado*, 763 F.3d at 161.

253 *Id.* at 171 (Lynch, J., dissenting).

254 *Id.* at 161 (majority opinion).

255 *Id.*

256 *See id.* at 161.

257 *See id.* at 165; *see also* Garcia, 17 I. & N. Dec. 319, 321 (B.I.A. 1980).

258 *See* Maldonado v. Holder, 763 F.3d 155, 170-71 (2d Cir. 2014) (Lynch, J., dissenting). Justice Lynch argued that the majority's stringent evidentiary standard for the petitioner to establish a prima facie claim of an egregious Fourth Amendment violation is unreasonable because the standard requires the petitioner to provide evidence that is not within his personal knowledge nor able to obtain.

> [E]vidence regarding the intentionality of a violation, the officers' motivation in conducting the raid at issue, and whether the petitioner's race, or ethnicity were a motivating factor for the governmental action would not and could not be within the petitioner's knowledge at the prima facie stage. But such evidence would be critical to proving that their arrest was without plausible legal grounds or based on a grossly improper consideration, factors suggestive of an egregious Fourth Amendment violation.

Id. at 171 (citing Cotzojay v. Holder, 725 F.3d 172, 182 (2d Cir. 2013)).

259 Mapp v. Ohio, 367 U.S. 643, 656-58. *See also* AM. IMMIGR. COUNCIL, *supra* note 26, at 2; BACKGROUND *supra* Part I.A.

warrantless violations.[260] The streamlined process of administrative proceedings should no longer be a justifiable excuse to tolerate clearly unconstitutional actions, and not only should the Supreme Court re-examine this standard, the circuit courts and the Board should as well.

C. *Racial Profiling in Immigration Enforcement as a Whole*

In order for an alien to prompt use of the exclusionary rule, an illegal search or seizure must have occurred during the enforcement action.[261] Courts attempt to prevent further government misconduct by use of the exclusionary rule, and in applying a cost and benefit analysis the court recognizes the potential need to deter future government misconduct.[262] While INA § 287 governs the role of immigration officers in investigating potential illegal aliens, illegal actions by immigration officers are not uncommon.[263] Problems are exacerbated when state forces, untrained in the particulars of immigration enforcement, use primarily race-based suspicions in making immigration arrests.[264] State officers do have a right to arrest an alien based on federal violations, for example if an alien has entered illegally, but there are limits to the scope of their authority.[265] The Supreme Court recently held in *Arizona v. United States* that, "state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances."[266] In *Arizona v. United States*, the Supreme Court recognized the growing fear of the use of state law enforcement and the potential for constitutional violations in immigration enforcement, in contrast to the *Lopez-Mendoza* plurality, which praised the former INS's "comprehensive scheme for deterring Fourth Amendment violations by its officers."[267]

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260 *See* Brief for Petitioners, *supra* note 5, at 61 ("[T]he BIA's interpretation . . . frustrates the Fourth Amendment by encouraging federal agents to prefer warrantless arrests, contrary to constitutional preference and congressional intent.").

261 BACKGROUND *supra* Part I.A.

262 BACKGROUND *supra* Part I.A.

263 8 U.S.C. § 1357; *see also ACLU Announces Settlement in Lawsuit over Warrantless Raid by U.S. Immigration Agents and Nashville Police*, ACLU (July 27, 2015), https://www.aclu.org/news/aclu-announces-settlement-lawsuit-over-warrantless-raid-us-immigration-agents-and-nashville-0.

264 *See* Kristina M. Campbell, *(Un)Reasonable Suspicion: Racial Profiling in Immigration Enforcement After* Arizona v. United States, 3 WAKE FOREST J.L. & POL'Y 367, 388-89 (2013).

265 *See* 8 U.S.C. § 1325(a)-(b) (2012).

266 Arizona v. United States, 132 S. Ct. 2492, 2507 (2012).

267 *Id.* at 2507-08; INS v. Lopez-Mendoza, 468 U.S. 1032, 1044 (1984).

The dissent in *Maldonado* relied on Justice Kennedy's majority opinion in *Arizona v. United States*, stressing that it is not a crime for an alien, legal or illegal, to remain in the United States, and that reasonable suspicion cannot amount to the use of racial targeting.[268] Under *Arizona*, the Court may have opened the door to possible racial profiling abuses when it upheld Section 2(B) of the Arizona statute, known as the "Show Me Your Papers Law."[269] This provision allows for anyone that law enforcement officials believe to be an undocumented immigrant to produce documentation of their lawful status or United States citizenship.[270] It is possible state and local officials may see this as a justification to use race as a sole basis for questioning of immigration status.[271] The majority in *Arizona* stressed, however, that "it would be inappropriate to assume Section 2(B) will be construed in a way that creates a conflict with federal law," and that if violations occurred, the Court would be willing to revisit Section 2(B).[272]

The racial and ethnic profiling conducted by the state, local and federal officers in *Maldonado* was part of a "multiyear effort to combat what some Danbury officials and residents viewed as a growing influx of undocumented immigrants."[273] Yet, the majority relied on the aliens' minor traffic violations and status as day laborers to override the substance of the aliens' affidavits, which were submitted with their request for an exclusionary hearing.[274] The dissent in *Maldonado* recognized that the only intuition that the undercover officers in the parking lot sting had were that the aliens were willing to engage in constitutionally protected speech as day laborers and that they appeared Hispanic.[275] With the possibility of misguided training and violations by federal and state officials in immigration enforcement, the likelihood of racial and ethnic profiling grows. Although the Second Circuit has held that the use of race as the only basis of suspicion can constitute an egregious constitutional violation,[276] its unwilling-

268 *See* Maldonado v. Holder, 763 F.3d 155, 172 (2d. Cir 2014) (Lynch, J., dissenting) (citing Arizona v. United States, 132 S. Ct. 2492, 2505 (2012)).

269 *See Arizona*, 132 S. Ct. at 2509, 2510.

270 Campbell, *supra* note 264, at 388.

271 *Id.* at 389.

272 *Arizona*, 132 S. Ct. at 2510.

273 Maldonado v. Holder, 763 F.3d 155, 168 (2d Cir. 2014) (Lynch, J., dissenting).

274 *Id.* at 168, 173; Campbell, *supra* note 264, at 389.

275 *Maldonado*, 763 F.3d at 173.

276 *See* Almeida-Amaral, 461 F.3d 231, 235 (2d Cir. 2006).

ness to even require a suppression hearing under the facts in *Maldonado* calls into question the validity of the current system of immigration enforcement.[277]

With the possibility of these violations afoot, revisiting *Lopez-Mendoza* will shed necessary light on the egregious exception, especially with regard to race related suppression. While the Ninth and Second Circuits have attempted to clarify their interpretations of the egregious exception in terms of race, consistency is lacking, and it has created confusion not only within their circuits but also across other federal circuit courts.[278] Although the immigration system is inherently discriminatory in nature,[279] racial profiling as the sole basis of immigration enforcement should not be tolerated.

CONCLUSION

Racial profiling in the context of immigration enforcement and in relation to the Fourth Amendment should be considered egregious. Profiling and targeting individuals based solely on their physical appearance and race is unconstitutional. The Second Circuit in *Maldonado* ignored its own precedent and its decision could lead to an increase in unconstitutional racial profiling and targeting. Moreover, the confusion resulting from the egregiousness exception under

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277 *See Maldonado*, 763 F.3d at 167; *Almeida-Amaral*, 461 F.3d at 235.

278 *Compare* Martinez-Medina v. Holder, 673 F.3d 1029, 1031-35 (9th Cir. 2011) (the Court denied the Petitioners' motion to suppress deeming the Government conduct to be a consensual encounter when the sheriff, who responded to gas station owner's call of suspicious Hispanic males loitering outside the establishment, seized the Petitioners after they failed to respond to sheriff's request for their "green cards"), *with* Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449-52 (9th Cir. 1994) (the Court suppressed evidence obtained from stop based solely on the Petitioner's Hispanic appearance because race-based consideration constitutes "an egregious constitutional violation."). *Compare* Maldonado v. Holder, 763 F.3d 155, 161 (2d Cir. 2014) ("Nothing in [the] Petitioners' account suggests that they were gathered by the authorities, let alone that they were selected by the authorities on the basis of race. They self-selected on the basis of their willingness to seek and accept day labor."), *with* Cotzojay v. Holder, 725 F.3d 172, 182 (2d Cir. 2013) (the Court deemed the Government's conduct to be an egregious violation when ICE agents seized evidence about the Petitoner's alienage by "[b]reaking into [his] home at 4:00 a.m. without a warrant or any legitimate basis."), *and* Almeida-Amaral v. Gonzales, 461 F.3d 231, 235-37 (2d Cir. 2006) (although the "arresting agent . . . had no valid reason or suspicion to justify" stopping the Petitioner who had "been walking into the gas station parking lot [located near the Mexican border] at 2:11 a.m[,]" the illegal seizure was not also "particularly lengthy" nor had any "show or use of force" to qualify the Government conduct as "sufficiently severe to be deemed egregious under *Lopez-Mendoza*.").

279 *See Maldonado*, 763 F.3d at 167-74 (Lynch, J., dissenting); ANALYSIS *supra* Part. II.

Lopez-Mendoza needs to be revisited by the Supreme Court for clarification. In light of an ever-changing immigration system, challenges based on race and ethnic targeting by local police and federal officials should be addressed directly. Those present within our country's boundaries deserve an easier path to an evidentiary hearing and justice than the legal system currently affords, not only for purposes of fundamental fairness, but also to uphold the established American standards which those who come to our country dream and desire to make their own.