



## PRACTICE ADVISORY<sup>1</sup>

August 1, 2017

### **MOTIONS TO SUPPRESS IN REMOVAL PROCEEDINGS: CRACKING DOWN ON FOURTH AMENDMENT VIOLATIONS BY STATE AND LOCAL LAW ENFORCEMENT OFFICERS<sup>2</sup>**

#### **Introduction**

Increasingly, state and local law enforcement officers are assisting the federal government with immigration enforcement, whether through formal agreements under Section 287(g) of the Immigration and Nationality Act; through participation in the recently renewed Secure Communities Program and the Criminal Alien Program; or through state laws such as SB4 in Texas. The Trump administration encouraged such assistance in the January 25, 2017 Executive Order, [Enhancing Public Safety in the Interior of the United States](#), and in Homeland Security Secretary Kelly's February 20, 2017 implementation memo, [Enforcement of the Immigration Laws to Serve the National Interest](#). These various forms of participation in federal immigration enforcement not only compromise community trust in police, but also increase the potential for confusion and misconduct by state and local law enforcement officers who may not fully understand or respect the limits of their authority to enforce federal immigration law or the proper application of the Fourth Amendment in that context.

This practice advisory, which supplements a prior American Immigration Council practice advisory, [Motions to Suppress in Removal Proceedings: A General Overview](#), deals primarily with Fourth Amendment limitations on state and local immigration enforcement efforts and also briefly addresses Fifth Amendment violations that may arise from the same types of encounters with state or local officers. It also discusses some of the legal issues that may arise when noncitizens in removal proceedings move to suppress evidence obtained as a result of a constitutional violation by state or local law enforcement officers.

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<sup>2</sup> Matthew Price, Jenner and Block LLP, and Melissa Crow were the principal authors of this practice advisory. The authors gratefully acknowledge the assistance of Professor Maureen Sweeney and Stephanie Trader, a rising third-year law student at the University of Maryland Francis King Carey School of Law, with the 2017 update. Rex Chen, Kate Desormeau, Mary Kenney, Michelle Mendez, Robert Pauw, Maureen Sweeney, and Michael Wishnie provided helpful comments on earlier drafts.

To briefly summarize the main themes of this practice advisory, the Supreme Court established in *Arizona v. United States* that state and local officers acting outside of a Section 287(g) agreement<sup>3</sup> cannot carry out stops or arrests based upon a suspicion of a civil immigration violation. At the same time, however, state and local officers may make inquiries concerning the immigration status of individuals they stop for a lawful reason (for example, a traffic violation), so long as such inquiries do not prolong the stop. The precise boundaries of permissible conduct have not yet been defined in the case law; this area of law is very much still in flux.

When state and local law enforcement officers have violated the Fourth Amendment, a noncitizen may move to suppress evidence obtained through that violation. If successful, such a motion would prevent the evidence from being used in removal proceedings against the noncitizen and, in some cases, may result in the termination of proceedings. In *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Supreme Court limited the exclusion of evidence in immigration proceedings to “egregious” or “widespread” violations of the Fourth Amendment by federal immigration officers. *Id.* at 1050-51. However, as discussed herein, there are compelling arguments that evidence obtained through any constitutional violation by state or local officers should be suppressed in removal proceedings and that the limitations in *Lopez-Mendoza* should be reconsidered.

The legal limitations on immigration enforcement by state and local law enforcement officers depend on the legal authority under which they are acting. While the Supreme Court made clear in *Arizona* that state and local officers generally do not have authority to enforce civil immigration law on their own, the same officers may have authority if they are designated officers under a Section 287(g) agreement or are engaged in a joint operation with federal immigration officers. State and local officers operating under a Section 287(g) agreement arguably are subject to the same regulatory requirements as federal immigration officers, and a violation of those requirements should result in termination of the proceedings in some cases.<sup>4</sup> When state and local officers are authorized by statute to carry out specific types of immigration enforcement, they are subject to statutory restrictions under federal law—including but not

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<sup>3</sup> Section 287(g) of the Immigration and Nationality Act authorizes the Attorney General to enter agreements with states and political subdivisions that permit specific state or local officers to perform functions of federal immigration officers. State or local officers acting under such an agreement must receive training concerning the immigration laws and are subject to federal supervision. *See* 8 U.S.C. § 1357(g)(1)-(8).

<sup>4</sup> *See Matter of Garcia-Flores*, 17 I&N Dec. 325, 328-29 (BIA 1980) (holding that evidence obtained in violation of federal regulations could be suppressed if the violated regulation was promulgated to serve “a purpose of benefit to the alien,” and the violation “prejudiced interests of the alien which were protected by the regulation” (quoting *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979))). For a discussion of motions to suppress in removal proceedings based on regulatory violations, see American Immigration Council Practice Advisory, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 15-16.

limited to INA § 287(g).<sup>5</sup> However, the authors are not aware of any case law supporting a motion to suppress based exclusively upon a statutory violation. Finally, state and local law enforcement officers may also be subject to restraints imposed by state constitutional law, state statutes, or departmental policies. However, violations of state law alone ordinarily will not support a motion to suppress in removal proceedings.<sup>6</sup>

## **Part I: Establishing a Fourth Amendment Violation by State or Local Officers**

### **1. May state or local law enforcement officers conduct a civil immigration arrest?**

Generally, no. In *Arizona v. United States*, 132 S. Ct. 2492 (2012), the Supreme Court made clear that “[a]s a general rule, it is not a crime for a removable alien to remain present in the United States. . . . If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.”<sup>7</sup> However, state or local law enforcement officers are permitted to conduct a civil immigration arrest when they are acting under a Section 287(g) agreement and in other “specific, limited circumstances” authorized by Congress.<sup>8</sup>

### **2. May local law enforcement officers arrest an individual for violating a criminal immigration provision, such as illegal reentry?**

In general, the authority of state officers to make arrests for federal crimes is an issue of state law.<sup>9</sup> Applying that principle, some courts have found state officers to be

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<sup>5</sup> See, e.g., 8 U.S.C. §§ 1103(a)(10), 1252c, 1324(c). For more information regarding motions to suppress based on statutory violations, see American Immigration Council Practice Advisory, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 15.

<sup>6</sup> The Supreme Court has held that “when States go above the Fourth Amendment minimum, the Constitution’s protections concerning search and seizure remain the same.” *Virginia v. Moore*, 553 U.S. 164, 173 (2008).

<sup>7</sup> 132 S. Ct. at 2505 (internal citation omitted); see also *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) (holding that suspicion of unlawful presence alone is an insufficient basis for a local police officer to prolong a stop); *Santos v. Frederick County Board of Commissioners*, 725 F.3d 451, 465 (4th Cir. Aug. 17, 2013) (holding that “absent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law”); *United States v. Argueta–Mejia*, 166 F.Supp.3d 1216, 1225 (D.Colo. 2014) (holding that arrest by local officer before consulting with ICE was not in “cooperation” with federal officials within the meaning of Section 287(g)(10) and therefore in violation of the Fourth Amendment).

<sup>8</sup> *Arizona*, 132 S.Ct. at 2507. See also 8 U.S.C. §§ 1357(g)(1); 1103(a)(10), 1252c, 1324(c). Under all of these arrangements, state and local law enforcement officers may perform civil immigration arrests only in accordance with a “request, approval or other instruction from the Federal Government.” 132 S.Ct. at 2507.

<sup>9</sup> *United States v. Di Re*, 332 U.S. 581, 589 (1948).

empowered to make arrests for at least some federal immigration crimes.<sup>10</sup> Some state or local officers may feel encouraged to engage in this type of enforcement by Attorney General Sessions' April 11, 2017 [memo](#) calling for increased federal prosecution of certain immigration-related offenses. However, there is a good argument that state and local officials should not generally be permitted to make arrests for immigration crimes. In *Arizona*, the Supreme Court emphasized that “[f]ederal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation’s borders.”<sup>11</sup> Assuming that federal immigration crimes should be viewed as part of that comprehensive scheme of federal regulation, only federal officers should be permitted to make arrests for those crimes, except when Congress has expressly directed otherwise. For example, in 8 U.S.C. § 1252c, Congress specifically authorized state and local officers to arrest and detain noncitizens unlawfully present in the United States who had previously been convicted of a felony in the United States and had been deported from, or had left, the United States following that conviction. However, state and local officers may only arrest such an individual “*after* [they] obtain appropriate confirmation from [federal officials] of the status of such individual and only for such period of time as may be required for [federal officers] to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.”<sup>12</sup> Given that Congress has expressly authorized state and local arrest authority with respect to only certain types of immigration crimes, it is a fair inference that state and local officers are not permitted to make arrests or detentions for other federal immigration crimes.<sup>13</sup> That is particularly so, given that federal immigration crimes are themselves often dependent upon complex determinations under civil immigration law. In *Arizona*, the Supreme Court appeared to leave open the question of whether the comprehensive federal scheme for regulating immigration would preempt (that is, preclude) state or local enforcement of criminal immigration law, just as it does state or local enforcement of civil immigration law.<sup>14</sup>

Further, even if state or local law enforcement officers did have the power to make an arrest for a criminal immigration violation, unlawful presence alone would not justify such an arrest. The Supreme Court made clear in *Arizona* that “it is not a crime for a removable alien to remain present in the United States,” and the Ninth Circuit has subsequently held that “because mere unauthorized presence is not a criminal matter, suspicion of unauthorized presence alone does not give rise to an inference” of any criminal activity, such as illegal reentry.<sup>15</sup>

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<sup>10</sup> See e.g., *Gonzales v. Peoria*, 722 F.2d 468, 475–476 (9th Cir. 1983), *overruled on other grounds*, *Hodgers–Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999); *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1298-1300 (10th Cir. 1999), *cert. denied*, 528 U.S. 913 (1999).

<sup>11</sup> *Arizona*, 132 S. Ct. at 2502.

<sup>12</sup> 8 U.S.C. § 1252c(a).

<sup>13</sup> See Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1093 (2004) (discussing this argument and relevant legislative history); *but see Vasquez–Alvarez*, 176 F.3d at 1297-1300 (rejecting this argument).

<sup>14</sup> *Arizona*, 132 S. Ct. at 2509.

<sup>15</sup> *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012).

### 3. May local law enforcement officers rely on a “pretext” to pull over a vehicle in order to ascertain the immigration status of one or more of its occupants?

There have been reports from a number of cities of police pulling over vehicles that appear to contain Latino or foreign-born individuals in order to check their immigration status. Local police may identify a reason for the stop – for example, a violation of a traffic law – that appears to be merely a pretext. When an apparently pretextual stop results in removal proceedings, the question is whether the government can introduce evidence (for example, admissions of alienage recorded on an I-213 form) obtained as a direct result of the stop.

The Supreme Court held in *Whren v. United States*, 517 U.S. 806 (1996), that so long as the police have an objectively reasonable basis for conducting a stop or an arrest, the stop or arrest is permissible under the Fourth Amendment. The officer’s subjective motivations are not relevant to the constitutional analysis.<sup>16</sup> Thus, so long as the police officer can identify a lawful basis for the stop, the stop is constitutionally permissible.<sup>17</sup>

However, in the same year that the Court decided *Whren*, it also reaffirmed that the administration of a criminal law on the basis of race or other impermissible classification may violate the Constitution.<sup>18</sup> Additionally, to the extent that the police lack an objective basis for the stop, and therefore violate the Fourth Amendment in making the stop, the subjective motivations of the police in conducting the stop may be relevant in determining whether the Fourth Amendment violation is “egregious,” warranting suppression under the standard of *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).<sup>19</sup> As several Circuits have held, an illegal stop carried out on the basis of race or ethnicity is an “egregious” constitutional violation.<sup>20</sup> At the same time, federal courts and the Board of Immigration Appeals (BIA) are often reluctant to find that police action was based on

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<sup>16</sup> *Whren*, at 813.

<sup>17</sup> See, e.g., *Chavez-Castillo v. Holder*, 771 F.3d 1081 (8th Cir. 2014) (holding that record evidence of speeding represented probable cause, thus justifying traffic stop despite allegations of racial profiling); *Matter of Vanessa Chavero-Linares*, 2014 WL 347698 (BIA January 24, 2014) (finding no Fourth Amendment violation by local police where respondent alleged racial profiling but did not deny that she had been speeding).

<sup>18</sup> *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

<sup>19</sup> For more information on “egregious” Fourth Amendment violations, see American Immigration Council Practice Advisory, *Motions to Suppress in Removal Proceedings: A General Overview*, at 8-10.

<sup>20</sup> See, e.g., *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006); *Puc-Ruiz v. Holder*, 629 F.3d 771, 779 (8th Cir. 2010); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449-50 (9th Cir. 1994); *Ghysels-Reals v. U.S. Att’y Gen.*, 418 Fed. App’x 894, 895-96 (11th Cir. 2011); see also *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980); *Matter of Armando Piscil*, 2012 WL 1495526 \*2 (BIA March 28, 2012) (“If there is evidence that a traffic stop or arrest was based on race, the violation would be considered egregious.”).

race or ethnicity without some proof of race-based statements by the officer or demonstrable disparities in enforcement.<sup>21</sup>

**4. When an individual is stopped for a lawful reason, may local law enforcement officers ask for identification or inquire as to the individual's immigration status?**

Yes, so long as such questioning does not prolong the stop. Mere police questioning concerning identity or immigration status does not by itself constitute a seizure under the Fourth Amendment.<sup>22</sup> However, the law also provides that an officer may not *prolong the duration of a stop* in order to make inquiries into matters unrelated to the justification for the stop, unless there is probable cause of separate criminal activity.<sup>23</sup> The Supreme

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<sup>21</sup> Compare *Matter of Armando Piscil*, 2012 WL 1495526 \*2 (BIA March 28, 2012) (finding a *prima facie* showing of egregiousness based on racial profiling where local officer saw no visible traffic violation, officer taunted driver with threat of deportation, and both officer and department had documented history of racial profiling and excessive force against Latinos) with *Maldonado v. Holder*, 763 F.3d 155, 162 (2nd Cir. 2014) (no finding of race-based enforcement against day laborers where other nearby individuals of the same nationality were not targeted); *Yanez-Marquez v. Lynch*, 789 F.3d 434 (4th Cir. 2015) (finding no evidence in the record that the agents were motivated by racial considerations during the search and seizure of the plaintiff's home and car and subsequent questioning); *Martinez Carcamo v. Holder*, 713 F.3d 916, 923 (8th Cir. 2013) ("bare allegation" of racial profiling insufficient without "articulable facts"); *Aguilar-Hernandez v. Attorney General*, 544 Fed. App'x 67, 69 (3rd Cir. 2013) ("speculation" insufficient to support claim of race-based enforcement); *Matter of Jose Jesus Limon Zuniga*, 2017 WL 1230029 \*2 (BIA February 17, 2017) (finding no egregious violation where respondent "does not identify any speech or overt act to support the claim of racial profiling"); *Matter of Dominguez-Garcia*, 2014 WL 3889583 (BIA June 26, 2014) (arrest not just based on race because traffic charges were filed).

<sup>22</sup> *INS v. Delgado*, 466 U.S. 210 (1984); *United States v. Chagoya-Morales*, \_\_\_ F.3d \_\_\_, 2017 WL 2486022 (7th Cir. 2017) (discussing circuit split on interpretation of *Lopez-Mendoza dicta* on identity evidence but finding no Fourth Amendment violation because police have authority to ask identity of car passengers in a traffic stop). For a general discussion of applicable Fourth Amendment law on searches and seizures, see American Immigration Council Practice Advisory, *Motions to Suppress in Removal Proceedings: A General Overview*, at 13-23.

<sup>23</sup> *Arizona v. Johnson*, 555 U.S. 323, 333 (2009); *Rodriguez v. United States*, 135 S.Ct. 1609, 1614 (2015) (finding Fourth Amendment violation where unrelated drug sniff prolonged stop for seven to eight minutes); see also *United States v. Digiovanni*, 650 F.3d 498, 509 (4th Cir. 2011) (finding Fourth Amendment violation when, following ordinary traffic stop, officer "failed to diligently pursue the purposes of the stop and embarked on a sustained course of investigation into the presence of drugs in the car," which prolonged the stop); *United States v. Everett*, 601 F.3d 484, 495 (6th Cir. 2010) ("if the totality of the circumstances, viewed objectively, establishes that the officer, without reasonable suspicion, definitively abandoned the prosecution of the traffic stop and embarked on another sustained course of investigation, this would surely bespeak a lack of diligence"); *United States v. Peralez*, 526 F.3d 1115, 1121 (8th Cir. 2008) (finding Fourth Amendment violation when police officer engaged in a "blended process" of conducting a routine traffic stop and a drug investigation, where topics concerning

Court has held that “[b]ecause addressing the infraction is the purpose of [a traffic] stop, it may ‘last no longer than is necessary to effectuate th[at] purpose.’ Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.”<sup>24</sup> Prolonging the stop in essence counts as an “extra seizure” that itself needs to be supported by probable cause or reasonable suspicion of criminal activity. Thus, when an officer prolongs a stop by questioning an individual concerning his or her immigration status, there may be a Fourth Amendment violation, since mere unlawful presence is not a crime and does not provide probable cause to justify prolonging a stop.<sup>25</sup>

**5. When an individual is stopped for a lawful reason, may state or local law enforcement officers contact federal agents to determine the person’s immigration status?**

Yes, under the Fourth Amendment, so long as the inquiry does not prolong the detention. Under 8 U.S.C. § 1357(g)(10), state or local officers are authorized to communicate with federal immigration officials regarding a person’s immigration status, even in the absence of any Section 287(g) agreement.<sup>26</sup> However, in *United States v. Arizona*, the Supreme Court also made clear that “[d]etaining individuals solely to verify their immigration status would raise constitutional concerns,”<sup>27</sup> and cited cases standing for the proposition that a stop may not be prolonged for reasons unrelated to suspicion of criminal activity.<sup>28</sup> For example, if local police continue to detain a vehicle’s passengers in order to verify their immigration status with ICE, even when the traffic stop has otherwise been completed, the prolongation of the stop would violate the Fourth Amendment because it would not be justified by probable cause or reasonable suspicion of any criminal violation. Likewise, state or local officers may not unnecessarily prolong a traffic stop, thereby delaying its completion until after an immigration investigation can be conducted.

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the drug investigation more than doubled the length of the stop”); *United States v. Mendez*, 476 F.3d 1077, 1080 (9th Cir. 2007) (police may not prolong stop through questioning unrelated to purpose of stop); *United States v. Griffin*, 696 F.3d 1354, 1362 (11th Cir. 2012) (Fourth Amendment implicated when police questioning unrelated to the purpose of a stop measurably prolongs the stop).

<sup>24</sup> *Rodriguez v. United States*, 135 S.Ct. 1609, 1614 (2015) (internal citations omitted).

<sup>25</sup> *Muehler v. Mena*, 544 U.S. 93, 101 (2005).

<sup>26</sup> In some jurisdictions, state or local rules may limit communication with federal immigration officials. See, e.g., New York City Executive Order No. 41 (2003); Los Angeles Police Dep’t Special Order No. 40 (1979).

<sup>27</sup> 132 S. Ct. at 2509.

<sup>28</sup> *Id.*; see also *Rodriguez v. United States*, 135 S.Ct. 1609 (2015).

**6. May state or local law enforcement officers prolong what began as a lawful traffic stop pending the arrival of a federal immigration officer or at the request of a federal immigration officer?**

The law on this issue is unsettled. On the one hand, it is clear that a state or local officer may not *unilaterally* detain an individual upon suspicion that the individual has committed a civil immigration violation.<sup>29</sup> A state or local officer also may not unilaterally prolong a stop in order to investigate an individual’s immigration status. On the other hand, however, Congress has stated that state officers may “cooperate” with federal officials in “the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.”<sup>30</sup> The precise scope of permissible cooperation has not yet been determined. Examples of clearly permissible cooperation “include situations where States participate in a joint task force with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities.”<sup>31</sup>

Whether permissible cooperation extends beyond these situations to one, for example, in which federal authorities request state or local officers to detain an individual pending their arrival on the scene, has not been decided. One district court observed in *dicta* that testimony that a local officer was instructed by ICE to make an immigration arrest “would suggest that the arrest was lawful,”<sup>32</sup> but courts have not addressed the question directly. Nonetheless, in *Arizona*, the Supreme Court stated, “There may be some ambiguity as to what constitutes cooperation under the federal law; but no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government.”<sup>33</sup> The Supreme Court did not address whether a request, approval, or other instruction from federal officials to detain a noncitizen could justify a state or local officer in doing so.

**7. May state or local law enforcement officers prolong an individual’s detention on the basis of an ICE detainer following an arrest for a violation of state traffic or criminal laws?**

ICE routinely asks state or local authorities to prolong a detention when it issues a detainer requesting that an individual be held for up to 48 hours. 8 CFR § 287.7. The situations under which a detainer may raise Fourth Amendment and statutory questions, and whether a detainer can be distinguished as a constitutional matter from a detention by

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<sup>29</sup> See *United States v. Argueta–Mejia*, 166 F. Supp. 3d 1216, 1225 (D. Colo. 2014) (finding Fourth Amendment violation in arrest by local officer *before* consulting with ICE because it was not in “cooperation” with federal officials within the meaning of Section 287(g)(10)).

<sup>30</sup> 8 U.S.C. § 1357(g)(10)(B).

<sup>31</sup> *Arizona*, 132 S. Ct. at 2507.

<sup>32</sup> *United States v. Argueta–Mejia*, 166 F. Supp. 3d 1216, 1224 (D.Colo. 2014).

<sup>33</sup> *Arizona*, 132 S. Ct. at 2507.



state or local officials at the instruction of ICE or CBP following a traffic stop, have not been fully litigated.<sup>34</sup> Some courts have held that an ICE detainer is a separate Fourth Amendment “event” that would require its own probable cause of criminal activity to prolong a detention by state or local authorities.<sup>35</sup>

**8. Under what circumstances may an encounter with state or local law enforcement officers give rise to a Fifth Amendment violation that might affect the admissibility of evidence in immigration proceedings?**

Both federal courts and the Board of Immigration Appeals have held that involuntary admissions of alienage should be excluded on the basis that they violate the Due Process Clause of the Fifth Amendment.<sup>36</sup> To establish that an admission was made involuntarily, a respondent must demonstrate that it was obtained through duress, coercion or improper action, including but not limited to “physical abuse, hours of interrogation, denial of food or drink, threats or promises, or interference” with an individual’s attempt to exercise his or her rights.<sup>37</sup> The authors are not aware of any decisions where an admission of alienage during an encounter with state or local officers was suppressed on Fifth Amendment grounds. However, numerous courts have analyzed the voluntariness of such admissions, implicitly confirming that the exclusionary rule would apply in the event of duress, coercion or other improper action.<sup>38</sup>

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<sup>34</sup> See generally Christopher N. Lasch, [Federal Immigration Detainers After Arizona v. United States](#), 46 LOY. L.A. L. REV. 629 (2013).

<sup>35</sup> See *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015) (“Because [the detainee] was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes—one that must be supported by a new probable cause justification.”); *Julio Trujillo Santoyo v. United States*, 2017 WL 2896021, \*6 (W.D. Tex. 2017) (finding, based on *Arizona* and *Morales*, that “detention pursuant to an ICE detainer request is a Fourth Amendment seizure that must be supported by probable cause or a warrant.”); *Mendia v. Garcia*, 165 F.Supp.3d 861, 887 (N.D. Cal. 2016) (finding that case law and immigration statutes require that agents have probable cause to believe an individual is unlawfully present before issuing an immigration detainer); see also *United States v. Pacheco-Alvarez*, 227 F.Supp.3d 863, 887-889 (S.D. Ohio 2016) (finding that the plaintiff’s continued detention following a traffic stop required probable cause to believe he was unlawfully present and likely to escape before a warrant could be obtained).

<sup>36</sup> See *Navia-Duran v. INS*, 568 F.2d 803, 810-11 (1st Cir. 1977); *Kandamar v. Gonzales*, 464 F.3d 65, 71 (1st Cir. 2006); *Singh v. Mukasey*, 553 F.3d 207, 215 (2d Cir. 2009); *Bustos-Torres v. INS*, 898 F.2d 1053, 1057 (5th Cir. 1990); *Choy v. Barber*, 279 F.2d 642, 646-47 (9th Cir. 1960); *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980).

<sup>37</sup> See *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). For a more detailed discussion of the circumstances that might warrant suppression of evidence on Fifth Amendment grounds, see American Immigration Council Practice Advisory, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 28-32.

<sup>38</sup> See, e.g., *Ghysels-Reals v. U.S. Atty. Gen.* 418 Fed. Appx. 894, 896 (11th Cir. 2011) (unpublished) (noting that respondent, who was detained by the police during a routine traffic stop, had not presented evidence to show that information obtained “was false or had resulted

## **Part II: Application of the Exclusionary Rule to Constitutional Violations by State or Local Law Enforcement Officers**

### **1. Does the exclusionary rule generally apply in immigration proceedings when state or local officers have obtained evidence in violation of a respondent's constitutional rights?**

Historically, under the “silver platter” doctrine, a federal court could admit evidence that had been illegally obtained by state officers. In *Elkins v. United States*, 364 U.S. 206 (1960), the Supreme Court overturned that doctrine in criminal cases.<sup>39</sup> Nonetheless, while the doctrine has never been explicitly overturned in the immigration context, both federal courts and the BIA have indicated that the exclusionary rule would apply in removal proceedings to Fourth Amendment violations by state and local officers to the same extent as violations by federal officers.<sup>40</sup> In *Martinez-Medina v. Holder*, 673 F.3d 1029 (9th Cir. 2011), the Ninth Circuit presumed that a deputy sheriff’s actions could trigger Fourth Amendment scrutiny for purposes of excluding evidence in immigration court. However, the court ultimately determined that the sheriff’s behavior was not sufficiently egregious to warrant suppression.<sup>41</sup> The Eighth Circuit has likewise

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from coercion or duress”); *Matter of Angel Oswaldo Sinchi-Barros*, A094-072-050, 2011 WL 6706339, \*2 (BIA Nov. 29, 2011) (unpublished) (noting lack of evidence that Minneapolis police had extracted statements relating to alienage by “threats, violence, or express or implied promises sufficient to overbear [the respondent’s] will and critically impair his capacity for self-determination” (internal citations and quotations omitted)); *Angel Israel Ibarra Uruga*, A200-021-409, 2012 WL 3911870 (BIA Aug. 30, 2012) (unpublished) (noting lack of evidence that the respondent’s statement to a Pennsylvania State Trooper had resulted from duress, coercion, or intimidation); cf. *Maria Elena Silva-Rodriguez*, 2014 WL 7691466 (BIA Dec. 23, 2014) (unpublished) (finding no Fifth Amendment violation where respondent had “not alleged that any police officer or immigration official threatened her, mistreated her, or encouraged her to make a false statement.”); *Elenilson Alexander Gutierrez-Landaverde*, A087-686-663, 2013 WL 2613046 (BIA May 30, 2013) (unpublished) (noting that the respondent, who was interrogated by a sheriff’s office operating under a 287(g) agreement, had not established that assertions made in Form I-213 were untrue or obtained by coercion, duress or intimidation).

<sup>39</sup> *Elkins*, 364 U.S. at 223 (holding that “evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant’s immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant’s timely objection ....”).

<sup>40</sup> See, e.g., *Santos v. Frederick County Board of Commissioners*, 725 F.3d at 467.

<sup>41</sup> 673 F.3d at 1034-37. See also *Aguilar-Hernandez v. Attorney General*, 544 Fed. Appx 67 (3rd Cir. 2013) (unpublished) (analyzing actions of local police officer for egregiousness under the Fourth Amendment); *Ghysels-Reals v. U.S. Atty. Gen.* 418 Fed. Appx. 894 (11th Cir. 2011) (unpublished) (concluding that circumstances of traffic stop by police did not warrant exclusion of evidence in removal proceedings); *Santos v. Holder*, 486 Fed. Appx. 918, 920 (2d Cir. 2012) (unpublished) (holding that immigration judge erred in denying motion to suppress

considered whether the actions of a local police officer were sufficiently egregious to compel exclusion.<sup>42</sup> In a number of unpublished cases, the BIA has either affirmed an immigration judge's decision to exclude evidence procured by state or local officers or remanded cases involving allegations of constitutional violations by such officers for additional fact-finding.<sup>43</sup>

**2. Does the exclusionary rule apply in immigration proceedings when state or local officers who engage in unconstitutional conduct are engaged in a joint operation with federal immigration officers or are operating under a Section 287(g) agreement?**

The exclusionary rule applies where an illegal search or seizure was carried out by state or local officers and federal officers participated in some way in the illegal course of conduct. For example, in *Maldonado v. Holder*, the Second Circuit applied the *Lopez-Mendoza* framework to a joint operation involving both ICE officers and local police.<sup>44</sup>

This issue has not yet been decided with regard to officers acting under a Section 287(g) agreement. However, the Immigration and Nationality Act makes clear that, under Section 287(g) agreements, state or local officers are subject to the direction of the Attorney General and “shall be considered to be acting under color of Federal authority,” at least for purposes of civil rights actions.<sup>45</sup> There is a good argument that state and local officers acting under a Section 287(g) agreement should be treated as federal officers for purposes of the exclusion of evidence. While officers charged with enforcing the criminal law of one sovereign may generally have a limited interest in enforcing the civil law of a different sovereign, state or local officers deputized under Section 287(g) “perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States.”<sup>46</sup> That is, by signing such an agreement, states or political subdivisions agree to have their officers take on the role of

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without a hearing when respondent had established a *prima facie* case that Massachusetts state trooper had stopped and arrested him because of his race).

<sup>42</sup> *Chavez-Castillo v. Holder*, 771 F.3d 1081 (8th Cir. 2014) (analyzing egregiousness of local police officer's actions without finding that egregious violation would compel exclusion of evidence).

<sup>43</sup> See, e.g., *Matter of Jairo Ferino Sanchez*, 2016 WL 7032774 (BIA July 11, 2014) (unpublished) (remanding to the immigration judge for fact-finding on the validity of the arrest); *Concepcion Vargas-Lopez, et al.*, A099-577-393, 2009 WL 4639868, \*2 (BIA Nov. 2009) (unpublished) (upholding immigration judge's decision to hold an evidentiary hearing to determine whether an allegedly unlawful seizure and interrogation during a traffic stop by a state officer was an egregious Fourth Amendment violation that warranted suppression of Form I-213).

<sup>44</sup> *Maldonado v. Holder*, 763 F.3d 155 (2nd Cir. 2014). See also *Matter of Maria Elena Silva-Rodriguez*, 2014 WL 7691466 (BIA December 23, 2014) (applying *Lopez-Mendoza* framework to warrantless arrest in joint ICE-local operation).

<sup>45</sup> 8 U.S.C. § 1357(g)(3), (8).

<sup>46</sup> 8 U.S.C. § 1357(g)(1).

enforcing federal immigration law. Because the entire premise of Section 287(g) agreements is that state or local officers will take an interest in assisting in the enforcement of civil immigration enforcement, it is logical that officers acting under such agreements are motivated to obtain evidence to be used in civil immigration proceedings, and that they will be deterred from unconstitutional conduct if evidence obtained through a constitutional violation is excluded from such proceedings. Accordingly, the exclusionary rule should apply in the context of a Section 287(g) agreement or joint local-federal operations.

**3. To the extent that the exclusionary rule applies to evidence obtained through illegal conduct by state or local officers, is it limited to cases involving egregious constitutional violations?**

In addressing motions to suppress evidence seized by state or local officers in the immigration context, federal courts and the BIA have generally assumed that the noncitizen must establish an “egregious” constitutional violation.<sup>47</sup> The evidentiary threshold required to satisfy the “egregiousness” standard is generally quite high.<sup>48</sup>

There are good reasons to conclude that the exclusionary rule should apply with full force in immigration proceedings when a Fourth Amendment violation is committed by state or local officers. In *Lopez-Mendoza*, the Supreme Court limited the exclusionary rule’s application in immigration proceedings to “egregious” violations based on factors that either no longer hold true, or do not apply to state and local police officers. No court has squarely addressed the argument that *Lopez-Mendoza*’s rationale does not apply to state and local officers enforcing immigration law. The Second Circuit refused to apply the full exclusionary rule in a case where this argument was advanced, but in that case, local police and ICE officers had been working together in a joint operation, and the court based its decision, in part, on the fact that federal officers were involved in the arrest.<sup>49</sup>

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<sup>47</sup> See, e.g., *Martins v. Att’y Gen. of United States*, 306 F. App’x 802, 804-05 (3d Cir. 2009) (no egregious violation); *Puc-Ruiz v. Holder*, 629 F.3d 771, 778 (8th Cir. 2010) (same); *Garcia-Torres v. Holder*, 660 F.3d 333, 336-37 (8th Cir. 2011) *cert. denied*, 133 S. Ct. 108 (2012) (same); *Martinez-Medina v. Holder*, 673 F.3d 1029, 1034-35 (9th Cir. 2011) (same); *Ghysels-Reals v. U.S. Att’y Gen.*, 418 Fed. App’x 894, 895-96 (11th Cir. 2011) (same); *Angel Oswaldo Sinchi-Barros*, A094-072-050, 2011 WL 6706339 (BIA Nov. 29, 2011) (unpublished) (same); *Angel Israel Ibarra Uraga*, A200-021-409, 2012 WL 3911870 (BIA Aug. 30, 2012) (unpublished) (same); *Reymundo Alvarez Araceli*, A094-217-297, 2013 WL 3899764 (BIA Jun. 28, 2013) (unpublished) (remanding to permit immigration judge to determine whether evidence of alienage was procured through an egregious violation of respondent’s constitutional rights by a local law enforcement officer).

<sup>48</sup> For a more complete discussion of the egregiousness standard, see American Immigration Council Practice Advisory, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 9-13.

<sup>49</sup> *Maldonado v. Holder*, 763 F.3d 155, 163 (2nd Cir. 2014). The court did also state that a Fourth Amendment violation standing alone could not justify the exclusion of evidence in civil immigration proceedings (presumably regardless of who the arresting officer was), but it did so

Much of the *Lopez-Mendoza* rationale does not apply in a contemporary context of enforcement by a state or local officer. First, the *Lopez-Mendoza* Court emphasized the low rate of formal deportation hearings. In 1984 when *Lopez-Mendoza* was decided, over 97.5% of noncitizens charged with violating the civil immigration laws agreed to leave the United States voluntarily without a formal hearing.<sup>50</sup> The Court also noted that, even where a formal hearing took place, it was rare for noncitizens to challenge the circumstances of their arrests.<sup>51</sup> Relying on these figures, the Court reasoned that “the arresting officer is most unlikely to shape his conduct in anticipation of the exclusion of evidence at a formal deportation hearing.”<sup>52</sup> Today, however, removal hearings are commonplace and motions to suppress are filed much more frequently than in 1984. In 2016, immigration courts opened more than 220,000 removal proceedings,<sup>53</sup> and the frequency with which noncitizens choose voluntary departure has dropped significantly since *Lopez-Mendoza* was decided.<sup>54</sup> Furthermore, a June 2017 Westlaw search of “motion to suppress” in the database of BIA decisions returned 406 cases, more than half of which were decided within the most recent five years. Because the higher percentage of contested hearings means that evidence is more likely to be needed to effectuate a removal, there is a stronger incentive today than there was when *Lopez-Mendoza* was decided for an officer to obtain evidence, even if by illegal means. By the same token, the increase in motions to suppress means that officers are more likely to be aware that evidence could be excluded on the basis of an unconstitutional arrest—an awareness that may serve to deter unconstitutional behavior.

Second, the Court cited as “perhaps the most important” factor guiding its decision the existence of the former Immigration and Naturalization Service’s “comprehensive scheme” for deterring its officers from committing Fourth Amendment violations, including “rules restricting stop, interrogation, and arrest practices.”<sup>55</sup> In light of these apparent administrative protections, the Court expected that the additional deterrent value of applying the Fourth Amendment exclusionary rule would be minimal. However, state and local law enforcement officers who are not operating under a Section 287(g) agreement do not receive federal immigration training. Nor are such state or local officers subject to federal regulations that limit the stop-and-arrest authority of federal immigration officers. There simply is no reason to believe that state and local officers

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citing cases that involved arrests by ICE agents and without engaging the substance of the argument that *Lopez-Mendoza*’s rationale was outdated or did not apply with equal force to arrests by state or local officers. *Id.*

<sup>50</sup> 468 U.S. at 1044.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> U.S. Dep’t of Justice, Executive Office for Immigration Review, [FY 2016 Statistical Yearbook](#), at B1 (March 2017).

<sup>54</sup> See Dep’t of Homeland Security, [Yearbook of Immigration Statistics: 2011](#), Table 39 (indicating that percentage of noncitizens seeking voluntary departure dropped from 97.5% in 1984 to 45% in 2011).

<sup>55</sup> 468 U.S. at 1044-45.

will be any more scrupulous in observing constitutional constraints in the immigration context than in enforcing criminal law generally. Just as the exclusionary rule is needed in the criminal context to deter violations of the Fourth Amendment by state and local officers, it is needed in the immigration context as well.<sup>56</sup>

Third, the Court emphasized “the availability of alternative remedies” like declaratory relief “for institutional practices by INS that might violate Fourth Amendment rights.”<sup>57</sup> Such alternative remedies further reduced the deterrent value of the exclusionary rule. Where state and local officers detain or arrest an individual for suspected immigration violations, however, there is no “agency under central federal control,”<sup>58</sup> that can be held accountable. To the contrary, in 2008, the Bureau of Justice Statistics reported 17,985 different state and local law enforcement agencies.<sup>59</sup> Without a single target for declaratory relief, few tools are available to deter constitutional violations other than the exclusionary rule.

Thus, the *Lopez-Mendoza* Court’s rationale for limiting the application of the exclusionary rule in immigration proceedings should not apply when the constitutional violation is committed by state or local officers.

Finally, *Lopez-Mendoza* suggests that the Court’s “conclusions concerning the exclusionary rule’s value might change if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.”<sup>60</sup> Even if *Lopez-Mendoza*’s limitations on the exclusionary rule were held to apply to state and local officers in general, that conclusion should change if Fourth Amendment violations by state and local officers are widespread. No court has yet ruled on what kind of record evidence might suffice to establish “widespread” violations under *Lopez-Mendoza*. But one court has remanded a case to the BIA to allow a noncitizen to attempt to establish such a record.<sup>61</sup>

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<sup>56</sup> See *United States v. Argueta-Mejia*, 166 F.Supp.3d 1216, 1229 (D.Colo. 2014) (“Law enforcement officials have a duty to understand their authority to arrest individuals for various offenses, and this ruling will reinforce the fact that a Denver police officer must be acting in cooperation with a federal official in arresting a subject on suspicion of an immigration offense.”).

<sup>57</sup> 468 U.S. at 1045.

<sup>58</sup> *Id.*

<sup>59</sup> Brian A. Reaves, Ph.D, *Census of State and Local Law Enforcement Agencies, 2008*, Bureau of Justice Statistics (July 26, 2011).

<sup>60</sup> 468 U.S. at 1050.

<sup>61</sup> See *Oliva-Ramos v. Holder*, 694 F.3d 259, 280-82 (3d Cir. 2012). For more information on the “widespread” exception, see American Immigration Council Practice Advisory, *Motions to Suppress in Removal Proceedings: A General Overview*, at 14.

**4. When state and local officers arrest a noncitizen in violation of the Fourth Amendment and thereafter transfer her to federal officials, can evidence that ICE obtained by exploiting the initial illegal arrest be suppressed?**

In some cases, a Fourth Amendment violation by state or local officers may taint evidence gathered in the course of the arrest as well as any statements made by the respondent or other evidence gathered following a subsequent transfer to ICE. The critical issue is whether the statements resulted from “exploitation of th[e prior] illegality or instead by means sufficiently distinguishable to be purged of the primary taint.”<sup>62</sup> Relevant factors include the length of time since the illegal seizure, the presence of intervening circumstances, and the nature and purpose of the underlying misconduct.<sup>63</sup> If an analysis of these factors reveals that the evidence could not have been obtained but for the illegal conduct, it may be subject to suppression as “fruit of the poisonous tree.”<sup>64</sup> However, evidence that is “independently obtained” may support removal proceedings even where there has been an illegal arrest.<sup>65</sup>

**5. When state and local officers arrest a noncitizen in violation of the Fourth Amendment, and federal officials thereafter learn of the noncitizen through Secure Communities and initiate removal proceedings, can the proceedings be terminated on the ground that they are the direct result of the illegal arrest?**

This remains an open question. Courts and the BIA have disagreed about the extent to which fingerprints and other “identity” evidence acquired in the wake of an illegal arrest should also be excluded.<sup>66</sup> Some courts have held that once a respondent has made a *prima facie* case for suppression, the government has the burden to prove that any evidence subsequently obtained was not obtained by exploiting the original illegality.<sup>67</sup>

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<sup>62</sup> *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (internal quotation omitted).

<sup>63</sup> *United States v. Gross*, 662 F.3d 393, 401-02 (6th Cir. 2011).

<sup>64</sup> *Wong Sun*, 371 U.S. at 487-88; *see also Santos v. Frederick County Board of Commissioners*, 725 F.3d 451, 466 (4th Cir. Aug. 17, 2013) (noting that an ICE detainer does not “cleanse” an unlawful seizure by local law enforcement officials). For a discussion of the fruit-of-the-poisonous-tree doctrine, see American Immigration Council Practice Advisory, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 4-5.

<sup>65</sup> *Garcia-Aguilar v. Lynch*, 806 F.3d 671 at 676 (1st Cir. 2015) (removability established by birth certificate sent to ICE by Mexican consul to facilitate release because not obtained by government “exploitation” of an allegedly unlawful arrest).

<sup>66</sup> For a full discussion of this topic, *see* Eda Katharine Tinto, *Policing the Immigrant Identity*, 68 Fla. L. Rev. 819 (2016). For more information on the suppression of identity-related evidence, see American Immigration Council Practice Advisory, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 2-4.

<sup>67</sup> *Pretzantzin v. Holder*, 736 F.3d 641, 651 (2nd Cir. 2013) (case remanded where government produced no evidence regarding how it obtained later evidence); *United States v. Argueta-Mejia*, 166 F.Supp.3d 1216 (D.Colo. 2014) (fingerprints taken for immigration purposes following unlawful arrest by local officer suppressible in criminal illegal reentry case);

On the other hand, the Board has allowed the introduction of evidence as independently gathered where it was “possible” for DHS to acquire it using only the individual’s name.<sup>68</sup>

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*United States v. Meza*, 2014 WL 201598 (D.Colo. January 17, 2014) (fingerprints suppressed following warrantless ICE home search in criminal illegal reentry case).

<sup>68</sup> *Matter of Armando Piscil*, 2012 WL 1495526, \*3 (BIA March 28, 2012) (suppression denied despite *prima facie* evidence of racial profiling where DHS used name to locate earlier ICE record); *Matter of Sandoval-Rosales*, 2017 WL 1130649 (BIA February 3, 2017) (BIA found evidence to be independent where “it was possible for DHS to have used only the respondent’s name” to find it).