UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1175

UNITED STATES OF AMERICA,
Appellee,

v.

Leovijildo MITRA-HERNANDEZ,
Appellant.

ON APPEAL FROM THE JUDGMENT OF THE U.S. DISTRICT COURT, MIDDLE DISTRICT OF PENNSYLVANIA, No. 1:19-CR-0067

BRIEF OF AMERICAN IMMIGRATION COUNCIL AND NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT UNDER FRAP 26.1

I, Emma Winger, attorney for amici curiae, certify that the American Immigration Council and the National Immigration Project of the National Lawyers Guild are non-profit organizations that do not have any parent corporations or issue stock and, consequently, there exists no publicly held corporation which owns 10% or more of stock.

DATED: March 28, 2022 */s/ Emma Winger*

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I. INTRODUCTION[1]

This case arises from Immigration and Custom Enforcement (ICE) agents' unlawful detention of Leovijildo Mitra Hernandez based on his perceived ethnicity and nationality. *United States v. Mitra-Hernandez*, No. 20-1175, 2022 WL 205419, at *3 (3d Cir. Jan. 24, 2022) (Nygaard, J., dissenting). This unlawful detention yielded evidence central to Mr. Mitra-Hernandez's subsequent prosecution for illegal reentry under 8 U.S.C. § 1326. The criminal exclusionary rule, a crucial deterrent to unlawful law enforcement conduct, generally bars the use of unlawfully obtained evidence. *See United States v. Calandra*, 414 U.S. 338, 347 (1974). Yet, in *United States v. Bowley*, this Court created a sweeping exception—a broad zone where the criminal exclusionary rule does not apply—for all evidence deemed related to "identity." 435 F.3d 426, 430-31 (3d Cir. 2006), *as amended* (Feb. 17, 2006). Under this Court's *Bowley* rule, in order to suppress the evidence central to his case, Mr. Mitra-Hernandez had to show not only that ICE agents had violated his Fourth Amendment rights, but also that the violation was "egregious." *Id.* at 431.

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than amici curiae, its members, and its counsel contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

Mr. Mitra Hernandez's experience is not unique. ICE routinely engages in unlawful, unconstitutional arrests, having no meaningful deterrent as a result of the *Bowley* rule. Nor is a meaningful deterrent available through civil removal proceedings, because of the limits on the exclusionary rule in that context.

As Mr. Mitra-Hernandez argues, this Court should overrule the *Bowley* exception as it is based on a flawed understanding of the Supreme Court's precedents on the exclusionary rule, and in particular of *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984)—a case declining to generally expand the criminal exclusionary rule into the *civil* removal proceedings context. *See* Appellant's Petition for Rehearing En Banc and By Panel, ECF No. 50. As four other courts of appeals have concluded, "*Lopez-Mendoza* reaffirmed a long-standing rule of personal jurisdiction; it did not create an evidentiary rule insulating specific pieces of identity-related evidence from suppression." *Pretzantzin v. Holder*, 736 F.3d 641, 647-48 (2d. Cir. 2013) (citing cases from the Fourth, Eighth, and Tenth circuits).

Amici write to highlight the consequence of the *Bowley* decision on immigration enforcement—both criminal and civil.[2] The *Bowley* rule has a disparate impact on individuals subjected to immigration-related criminal prosecutions. *See Bowley*, 435 F.3d at 430 (citing cases, each involving a § 1326

[2] A statement of amici is attached as Appendix A.

prosecution); *Mitra-Hernandez*, 2022 WL 205419, at *10–11 (citing cases). This is unsurprising, because a person's identity and their prior deportation order are the key elements necessary for conviction under § 1326. *See United States v. DeLeon-Rodriguez*, 70 F.3d 764, 766 (3d Cir. 1995). As a result of the flawed *Bowley* rule, ICE and other law enforcement agencies engaged in criminal immigration enforcement are uniquely relieved of the risk that their unconstitutional arrests based on perceived nationality and ethnicity will carry any consequence in a subsequent prosecution.

Since its origins, the criminal exclusionary rule has functioned to hold government agencies accountable for Fourth Amendment violations. This Court should restore the exclusionary rule's crucial deterrent role by overruling *Bowley.*

II. THIS COURT SHOULD REVERSE THE FLAWED *BOWLEY* RULE, AS IT HAS REMOVED ANY MEANINGFUL DETERRENT AGAINST RAMPANT UNCONSTITUTIONAL CONDUCT BY ICE.

A. ICE Engages in Widespread Race-Based and Unconstitutional Enforcement Practices That Require a Deterrent.

The primary purpose of the criminal exclusionary rule is to deter law enforcement agencies from engaging in unlawful conduct. *Calandra*, 414 U.S. at 347. By abandoning this rule in prosecutions under 8 U.S.C § 1326, the Court's *Bowley* decision removed an essential protection against unconstitutional conduct by ICE. This is alarming because the agency has substantial influence over who

gets prosecuted for illegal reentry, and it regularly engages in constitutional violations rooted in racial prejudice.[3] ICE's unlawful conduct is apparent in the racial profiling inherent in its habitual unconsented and warrantless home searches and arrests; workplace raid practices; and routine race-based targeting of U.S. citizens.

As an initial matter, ICE, and DHS more generally, exert significant control over who gets prosecuted for illegal entry and reentry, the most prosecuted offenses in federal courts. U.S. Dep't of Justice, Bureau of Justice Statistics, NCJ 251772, *Federal Justice Statistics, 2016 – Statistical Tables* 10 (Dec. 2020), https://bit.ly/3qB9ftH. Reentry prosecutions typically result from referrals by ICE and CBP. Prosecutors decline only 0.7% of entry and reentry case referrals, while they decline 16.4% of all federal offenses. *Id*. at 12. ICE's virtually unrestricted authority over who gets prosecuted for illegal reentry heightens the dangers of the lack of a meaningful deterrent against unconstitutional conduct.

ICE regularly engages in unlawful warrantless arrests and unconsented home searches that violate the Constitution. One study, based on data from the year that *Bowley* was decided, found that ICE agents in New Jersey entered homes without

[3] The illegal reentry scheme itself is irrevocably rooted in racial animus, so much so that at least one federal court has held that the statute violates the Equal Protection Clause of the Fifth Amendment. *United States v. Carrillo-Lopez*, No. 3:20-cr-00026-MMD-WGC, 2021 WL 3667330, at *5-18 (D. Nev. Aug. 18, 2021) (analyzing the racist origins and disparate impact of the statute).

consent, in violation of the Constitution, in a quarter of all cases. Bess Chiu et al., *Constitution on ICE: A Report on Immigration Home Raid Operations*, Cardozo Immigration Justice Clinic 10 (2009), bit.ly/3wcIXBJ. The same study found that Latinas/os made up 90% of all "collateral" arrests—arrests of individuals who are not the intended targets of an enforcement action—where ICE officers did not give any basis for detaining the individual. *Id*. at 12. And ICE arrests significantly more Latinas/os in collateral arrests than as actual targets of home arrests. *Id*. These numbers point to a practice of racial profiling, which is not limited to that period or to New Jersey. *See*, *e.g*., Settlement Agreement and Release, *Castañon Nava v. DHS*, No. 18-cv-3757-RRP (N.D. Ill. Nov. 30, 2021), ECF No. 146-1, *available at* https://bit.ly/3Le7aM1 (settlement of case alleging ICE agents racially profiled undocumented immigrants in Latina/o neighborhoods in Chicago).

One context where ICE's unconstitutional racial profiling is particularly stark is workplace raids. A typical example occurred during a 2017 ICE raid at a poultry plant in Lancaster County, Pennsylvania. ICE officers separated Latina/o employees from white employees for questioning and specifically asked the former to point them to more Latina/o workers. *See* Kavitha Surana, *How Racial Profiling Goes Unchecked in Immigration Enforcement,* ProPublica (June 8, 2018), bit.ly/3qxkgML. Similarly, in a 2018 raid of a Tennessee meat packing plant, ICE officers did not detain any white employees and instead detained only Latina/o

workers, whom they subjected to racial slurs and physical violence. *See* Catherine E. Shoichet, *ICE Berated Latino Workers with Racial Slurs and Used Excessive Force in Raid, Lawsuit Claims*, CNN (Feb. 21, 2019), https://cnn.it/3MYqcYo. These are not isolated incidents. *See*, *e.g.*, Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. Rev. 307 (2009) (surveying incidents of racial profiling in workplace raids including a 2008 Iowa raid where an ICE agent put an employee in a separate line, one for undocumented persons, because they had "Mexican teeth").

Racial profiling is so entrenched within ICE that the agency has repeatedly targeted, detained, and even deported U.S. citizens simply because of their appearance, name, or native language. *See, e.g.*, *Lyttle v. United States*, 867 F. Supp. 2d 1256, 1266, 1269-70 (M.D. Ga. 2012) (describing ICE's deportation of a U.S. citizen with diminished mental capacity to Mexico). One study estimates that between 2003 and 2011, ICE detained or deported more than 20,000 U.S. citizens. Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 Va. J. Soc. Pol'y & L. 606, 608, 654 (2011) (explaining that DHS's toleration and concealment of "[w]idespread, unlawful racial and ethnic profiling" is one key cause of the deportation of U.S. citizens). Another study estimates that between 2006 and 2017, ICE wrongfully issued 19,873 requests to detain U.S. citizens. David J. Bier, *U.S. Citizens Targeted by ICE: U.S. Citizens*

Targeted by Immigration and Customs Enforcement in Texas, CATO Institute 2 (Aug. 29, 2018), https://bit.ly/3DbIktk. ICE's own figures establish that the agency may have deported up to 70 U.S. citizens between 2015 and 2020. U.S. Gov't Accountability Off., GAO-21-487, *Immigration Enforcement: Actions Needed to Better Track Cases Involving U.S. Citizenship Investigations* 24 (July 20, 2021), https://www.gao.gov/assets/gao-21-487.pdf/. U.S. citizens have also been unlawfully arrested and charged with illegal reentry. In 2018 alone, the most recent year where government data is available, prosecutors charged 28 U.S. citizens under the statute. U.S. Dep't of Justice, Bureau of Justice Statistics, NCJ 252647, *Non-U.S. Citizens in the Federal Criminal Justice System, 1998-2018* 6 (Nov. 2021), bit.ly/37WGMIn.

Myriad accounts of U.S. citizens targeted by ICE demonstrate the agency's widespread use of racial profiling. Examples include citizens like Peter Brown, a Black Philadelphia-born Florida resident who was mistaken for a Jamaican national and detained for three weeks, and Jilmar Ramos-Gomez, a Latino veteran born and raised in Michigan who was detained by ICE for three days despite having a U.S. passport. *See* Greg Allen, *ICE Detained the Wrong Peter Brown*, NPR (Dec. 18, 2018), https://n.pr/3u3q4OR; Alex Horton, *Police Knew a War Veteran Was a U.S. Citizen. ICE Detained Him Anyway.*, Wash. Post (Nov. 14, 2019), https://wapo.st/3iC4kEA. Similar examples abound. *See*, *e.g.*, Paige St.

John & Joel Rubin, *ICE Held an American Man in Custody for 1,273 Days. He's Not the Only One Who Had to Prove His Citizenship*, L.A. Times (Apr. 27, 2018), https://lat.ms/3tG2cC4.

Under *Bowley*, individuals subjected to this unconstitutional conduct have limited recourse to pursue suppression of unlawfully obtained evidence when they are prosecuted for illegal reentry. This gives ICE little incentive to adhere to constitutional safeguards. Absent any meaningful deterrence, ICE's pattern of unconstitutional conduct will continue to infect § 1326 prosecutions. This Court should reverse the flawed *Bowley* rule because the criminal exclusionary rule is necessary to deter ICE from violating the Constitution.

B. Given the Restrictions on the Exclusionary Rule in Civil Removal Proceedings, the *Bowley* Rule Leaves Immigration Enforcement Agencies Unchecked.

Nor is there a substitute deterrent in civil removal proceedings, where the exclusionary rule does not apply, unless the noncitizen can show that the Fourth Amendment violation was "egregious" or a pattern of "widespread" violations. *Oliva-Ramos v. Att'y Gen. of U.S.*, 694 F.3d 259, 275 (3d Cir. 2012) (quoting *Lopez-Mendoza*, 468 U.S. at 1051). And even those who have been subjected to an egregious constitutional violation or can show a pattern of widespread constitutional violations face significant obstacles to suppressing the resulting evidence in immigration court.

A person in removal proceedings has the burden to show prima facie grounds for suppression in order to receive an evidentiary hearing, even in the case of a warrantless arrest. *Yoc-Us v. Att'y Gen. United States*, 932 F.3d 98, 112 (3d Cir. 2019) (citing *Matter of Tang*, 13 I&N Dec. 691, 692 (BIA 1971)). The person must meet this burden without the benefit of meaningful discovery. *See Matter of Benitez*, 19 I&N Dec. 173, 174 (BIA 1984) ("[T]he Federal Rules of Civil Procedure are not applicable in deportation proceedings, and there is no requirement that a request for discovery be honored."). *See also* Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 Brook. L. Rev. 1569, 1569-72, 1581–84 (2014) (describing the limited documents produced by DHS just 15 days in advance of any hearing and observing the standard DHS practice to withhold most evidence for use only as rebuttal). To make a case for suppression, a noncitizen must generally rely on limited, and often heavily redacted, written records produced by a Freedom of Information Act request of their immigration file, or seek an administrative subpoena, where the noncitizen must show both necessity and exhaustion. 8 C.F.R. §§ 1003.35(b)(2), 1208.12(b), 1240.69, 1287.4(a)(2)(ii)(B); *see, e.g.*, *In Re: Mohammad M. Qatanani, et al.*, No.: AXXX XX3 969, 2014 WL 2919274 (BIA May 13, 2014) (reversing New Jersey immigration judge issuance of a subpoena for records, because immigration court subpoena power is "limited in nature").

The obstacles to obtaining suppression are further exacerbated by the lack of access to counsel in removal proceedings, where respondents have no right to appointed counsel. *See* 8 U.S.C. § 1362. A recent study shows that only 37% of noncitizens in removal proceedings had representation. Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*,American Immigration Council (Sept. 2016), at 4 [hereinafter "*Access to Counsel*"], https://bit.ly/AIC_Eagly. That number drops drastically—to 14%—for detained individuals, which includes likely many noncitizens following a § 1326 conviction. *Id.*; *see also Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2285 (2021) (concluding that noncitizens subject to reinstated removal orders—the basis of a § 1326 conviction—are subject to mandatory detention). The lack of representation severely limits a noncitizen's ability to raise, much less win, claims for relief in removal proceedings, like motions to suppress evidence. *See Access to Counsel* at 19-20 (noting that only 3% of detained noncitizens without counsel applied for relief).

Given the obstacles described above, courts have declined to suppress evidence in removal proceedings notwithstanding evidence of racially discriminatory motive—conduct recognized in theory to meet the "egregiousness" standard, *Oliva-Ramos*, 694 F.3d at 279. *See, e.g.*, *Puc-Ruiz v. Holder*, 629 F.3d 771, 775, 779 (8th Cir. 2010) (declining to suppress evidence where Puc-Ruiz was arrested with "five other Mexican nationals" and ICE was contacted from the

police station after Puc-Ruiz showed a valid U.S. driver's license during a warrantless search); *Corado-Arriaza v. Lynch*, 844 F.3d 74, 75-76, 78 (1st Cir. 2016) (declining suppression where Corado-Arriaza was handcuffed and questioned after showing a Guatemalan driver's license that proved he was not the individual the officers were seeking); *In Re: Roger Nigel Ramjattan*, No.: AXXX XX6 017, 2014 WL 3795454 (BIA June 13, 2014) (declining suppression where Mr. Ramjattan asserted: (1) the officer only conducted a traffic stop after pulling alongside Ramjattan—who describes himself as "dark-skinned"—and peering back at him; (2) the officer did not provide the basis for the traffic stop—a peeling registration sticker—until after Ramjattan admitted he did not have a green card; and (3) after checking Ramjattan's immigration status, the officer asked: "If I came to your country and stayed, would you like it?"). As a result, any substitute deterrent to unlawful conduct by ICE officers through suppression in civil immigration proceedings exists in theory, but not in practice.[4]

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[4] ICE officers are similarly unlikely to face consequences through remedial damages actions, especially as courts have restricted the availability of a *Bivens* remedy for Fourth and Fifth Amendment violations. *See, e.g.*, *Tun-Cos v. Perrotte*, 922 F.3d 514, 523-28 (4th Cir. 2019) (declining to recognize Fourth and Fifth Amendment *Bivens* claims for ICE's unconstitutional search and seizure and discrimination); *Xiaoxing Xi v. Haugen*, No. CV 17-2132, 2021 WL 1224164, at *13–14 (E.D. Pa. Apr. 1, 2021) (collecting cases declining to permit Fourth and Fifth Amendment *Bivens* claims post-*Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017)).

III. CONCLUSION

The *Bowley* rule is not only contrary to Supreme Court precedent but also eliminates an essential deterrent to unlawful, unconstitutional, and discriminatory conduct by ICE. The Court should grant rehearing en banc to eliminate the *Bowley* exception to the exclusionary rule.

Respectfully submitted,

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DATED: March 28, 2022

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4), because it contains 2,592 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 2016, is proportionately spaced, and has a typeface of 14 point.

Additionally, pursuant to Third Circuit Local Appellate Rule 31.1(c), I certify that the text of the brief filed with the Court via CM/ECF is identical to the text of the paper copies. I further certify that a virus detection program - Malwarebytes - has been run on the electronic file and that no virus was detected.

/s/ Emma Winger

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that pursuant to Third Circuit Local Appellate Rule 46.1(e), I am admitted to the bar of the United States Court of Appeals for the Third Circuit.

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APPENDIX A

STATEMENTS OF INTERESTS OF AMICI

The **American Immigration Council** is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council regularly litigates and advocates around issues involving the intersection of criminal and immigration law.

The **National Immigration Project of the National Lawyers Guild** (NIPNLG) is a nonprofit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure a fair administration of the immigration and nationality laws. NIPNLG provides legal training to the bar and the bench on removal defense and the immigration consequences of criminal convictions. NIPNLG has participated as amicus in several significant immigration-related cases, including 8 U.S.C. § 1326 cases, before the Supreme Court, the courts of appeals, and the Board of Immigration Appeals.

Collectively, amici have a direct interest in ensuring that immigration enforcement comports with the Constitution.

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2021, I electronically filed the foregoing amici brief of the American Immigration Council and the National Immigration Project of the National Lawyers Guild with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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