No. 16-2330

United States Court of Appeals for the Fourth Circuit

JAIRO FERINO SANCHEZ,

Petitioner,

v.

JEFFERSON SESSIONS III,

Respondent.

On Petition for Review of a Decision of the Board of Immigration Appeals

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, AND ACLU OF MARYLAND AS *AMICI CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 16-2330 Caption: Jairo Sanchez v. Jefferson Sessions III

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Immigration Council
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Matthew E. Price Date: March 27, 2017

Counsel for: American Immigration Council

CERTIFICATE OF SERVICE

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I certify that on March 27, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Sejal Zota Date: March 27, 2017

Counsel for: NIPNLG

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Pursuant to FRAP 26.1 and Local Rule 26.1,

American Civil Liberties Union of Maryland
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Nicholas Steiner Date: March 27, 2017

Counsel for: ACLU of Maryland

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I certify that on March 27, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Nicholas Steiner (signature) March 27, 2017 (date)

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STATEMENT REGARDING CONSENT

Counsel contacted the parties to seek their position regarding *Amici Curiae*'s participation. Petitioner consented, and the government takes no position.[1]

INTEREST OF *AMICI CURIAE*

The American Immigration Council ("Council") is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just 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 has a substantial interest in the issues presented in this case, which implicate the scope of state and local law enforcement officers' authority to enforce federal immigration law and the use of motions to suppress in removal proceedings to prevent the admission of unlawfully obtained evidence.

The National Immigration Project of the National Lawyers Guild ("NIPNLG") is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws.

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *Amici* state that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *Amici Curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

The NIPNLG provides legal training to the bar and bench on the rights of noncitizens and is the author of *Immigration Law and Defense* and three other treatises.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The American Civil Liberties Union of Maryland (ACLU-MD) is a statewide affiliate of the national ACLU. Since its founding in 1931, the ACLU-MD has been deeply committed to ensuring that citizens and noncitizens alike receive the due process protections afforded to them by the Constitution, and seek redress for civil liberty violations committed by government officials.

Below, *Amici* focus only on selected issues that justify reversal and termination of removal proceedings, although the remaining issues raised in Petitioners' brief also warrant that relief.

SUMMARY OF ARGUMENT

On May 22, 2009, Maryland Transportation Authority Police ("MDTAP") Officer Peter Acker stopped a Hispanic man named Jose Badillo. AR4. Badillo was driving a car owned by Juventino Davila. AR4. Acker directed Badillo to contact Davila and instruct Davila to come retrieve his car from the scene of the stop. AR4. Petitioner Jairo Ferino-Sanchez drove Davila, along with a third

companion, to the location of the stop. AR4. Prompted only by the fact that Acker observed the three men speaking Spanish, AR522, AR529, Acker refused to return Davila's keys and engaged in "increasingly 'aggressive' questioning" about the immigration status of the three men, in particular, whether they were "illegal or legal." AR4. Acker then "ordered [Petitioner] out of the vehicle; searched, handcuffed, [and] detained him; drove him to a police station; and ultimately handed [him] over to Immigration and Customs Enforcement ('ICE') officials." AR4. The only basis for the arrest was suspicion of a civil immigration offense. AR1087-89. Acker testified that he did not inform Petitioner of his *Miranda* rights, something Acker tesetified he would have done if he had suspected Petitioner of a criminal offense. AR548.

Under well-established Fourth Amendment law, police may not conduct an investigative seizure without reasonable articulable suspicion that an individual is engaged in *criminal* activity, and may not carry out an arrest without probable cause that a crime has been committed. *See, e.g.*, *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004); *Terry v. Ohio*, 392 U.S. 1, 21, 30 (1968). Accordingly, this Court has held that state and local law enforcement officers are precluded "from arresting individuals solely based on known or suspected civil immigration violations." *Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 464 (4th Cir. 2013).

The Board of Immigration Appeals ("BIA") therefore assumed, correctly, that Petitioner's arrest violated the Fourth Amendment. Nevertheless, it affirmed the Immigration Judge's ("IJ's") decision refusing to suppress evidence obtained as a result of the arrest. According to the BIA, the exclusionary rule applies only "where the challenged evidence has been obtained by *egregious* violations of the Fourth Amendment." AR4 (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1042-50 (1984) and *Yanez-Marquez v. Lynch*, 789 F.3d 434 (4th Cir. 2015)). The BIA then went on to hold that, under this Court's ruling in *Yanez-Marquez v. Lynch*, 789 F.3d 434 (4th Cir. 2015), the Fourth Amendment violation was not "egregious." AR5. The BIA acknowledged that one important factor in determining whether a Fourth Amendment violation is egregious is "whether the violation was based on racial considerations." AR4-5. But the BIA rejected Petitioner's argument that he had been "racially profiled." AR5. Instead, the BIA upheld the IJ's finding that Petitioner's "allegation of racial profiling is speculative," AR5; that "Officer Acker had legitimate, safety reasons to inquire about [Petitioner's] identity at a traffic stop," AR5; and that he and his passengers "were acting in a nervous, suspicious manner." AR5.

This Court should make clear that the exclusionary rule applies with full force in civil immigration proceedings with respect to evidence obtained through a constitutional violation committed by state or local law enforcement officers. To

be sure, the Supreme Court held in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), that the exclusionary rule generally does not apply in civil removal proceedings where *federal immigration officers* violated the Fourth Amendment. That case, however, is not controlling where state or local officers committed the constitutional violation, and the rationale of the Supreme Court's decision strongly supports applying the exclusionary rule in such circumstances. The Department of Homeland Security is currently seeking to enlist the help of state and local law enforcement officers in the enforcement of civil immigration law. *See Enhancing Public Safety in the Interior of the United States*, Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017). The facts of this case, among others, have shown that the deterrent effect of the exclusionary rule is needed to ensure that such state and local officers demonstrate the necessary respect for constitutional rights.

Moreover, even if the exclusionary rule applies in civil immigration proceedings only when a state or local officer's violation of the Fourth Amendment is "egregious," *Lopez-Mendoza*, 468 U.S. at 1050-51 (plurality op.), suppression was still required in this case. This Court, along with other Circuits to have considered the question, all agree that an illegal seizure conducted for reasons of race constitutes an "egregious" violation of the Fourth Amendment. That is exactly what happened here. Petitioner simply gave Davila a ride to the scene of the stop to allow Davila to retrieve his vehicle. There was no reason for Acker to

interrogate or detain Petitioner at all. Nevertheless, Acker subjected Petitioner and his companions to repeated and hostile questioning about their immigration status—by Acker's own admission, solely because he overheard them converse in Spanish. Tens of millions of Americans speak Spanish as a first language. Acker's detention of Petitioner was a clear case of illegal racial profiling. Accordingly, the IJ and BIA erred in refusing to grant Petitioner's motion to suppress.

ARGUMENT

I. The Fourth Amendment Bars State and Local Officers From Detaining Persons on Suspicion of a Civil Immigration Violation.

The only articulated reason for Petitioner's detention was the suspicion that Petitioner had violated the civil immigration laws. *See* AR4; *see also* AR548 (Acker testimony that if he were detaining Petitioner for a criminal violation, he would have read Petitioner his *Miranda* rights); AR1087-89 (listing "Immigration Violation" as the "original incident, offense or charge" leading to the arrest on the Incident Report). However, this Court has made clear that the Fourth Amendment does not permit state and local law enforcement officers to detain individuals on suspicion of a civil immigration violation. *Santos*, 725 F.3d at 464.[2] As this Court has explained, "The rationale for this rule is straightforward. A law

[2] There is an exception for state and local officers granted the powers of federal immigration officers under 8 U.S.C. § 1357(g), but that exception does not apply here.

enforcement officer may arrest a suspect only if the officer has 'probable cause' to believe that the suspect is involved in criminal activity. Because civil immigration violations do not constitute crimes, suspicion or knowledge that an individual has committed a civil immigration violation, by itself, does not give a law enforcement officer probable cause to believe that the individual is engaged in criminal activity." *Id.* at 465 (citation and internal quotation marks omitted). Thus, as the Supreme Court has noted, "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns." *Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012); *id.* at 2505 ("As a general rule, it is not a crime for a removable alien to remain present in the United States."). Accordingly, as the BIA acknowledged, Petitioners' detention violated the Fourth Amendment.

II. The Exclusionary Rule Should Fully Apply in Immigration Proceedings When State and Local Officers Violate the Fourth Amendment.

The BIA assumed that there was no lawful authority for Petitioner's arrest, and did not dispute Petitioner's argument that his arrest therefore violated the Fourth Amendment. Nevertheless, the BIA refused to apply the exclusionary rule on the ground that the Fourth Amendment violation was not "egregious." That test comes from a plurality opinion in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), which declined to apply the exclusionary rule in civil immigration proceedings to Fourth Amendment violations by *federal immigration officers*. *Id.* at 1041-42 (observing that, unlike *United States v. Janis*, 428 U.S. 433, 447 (1976), the case at

bar concerned federal, not state, officers). The plurality noted in *Lopez-Mendoza* that "we do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *Id.* at 1050-51. This Circuit and others have subsequently held that the exclusionary rule *does* apply to "egregious" violations of the Fourth Amendment by federal immigration officers. *Yanez-Marquez*, 789 F.3d at 450 (holding that "we are in agreement with those courts that have concluded that the rule applies to egregious violations of the Fourth Amendment" and collecting cases).

The BIA's holding in this case simply assumes that the framework set forth in *Lopez-Mendoza* to govern constitutional violations by federal immigration officers applies with equal force to constitutional violations by state and local officers. AR4. No decision by the Supreme Court or this Court holds as much, however, and that assumption was erroneous. The decision whether to apply the exclusionary rule in a category of cases requires the Court to strike a balance between the benefits of deterring police misconduct and the costs of suppressing evidence. Neither the Supreme Court nor this Court has struck that balance with respect to excluding evidence in civil immigration proceedings obtained through unconstitutional conduct by state and local officers. There is strong reason to

strike the balance differently here than the Supreme Court did in *Lopez-Mendoza* when addressing constitutional violations by federal immigration officers.

A. This Court Should Not Apply *Lopez-Mendoza* to Allow the Admission in Civil Immigration Proceedings of Evidence Obtained Through Fourth Amendment Violations by State and Local Officers.

The exclusionary rule plays a vital role in protecting the Fourth Amendment rights of persons in the United States. Its purpose is not to "cure the invasion" of rights after a Fourth Amendment violation occurs. *United States v. Leon*, 468 U.S. 897, 906 (1984) (quotation marks omitted). Instead, its "prime purpose is to deter future unlawful police conduct." *United States v. Calandra*, 414 U.S. 338, 347 (1974). To be sure, there are societal costs to suppressing evidence of wrongdoing. *See, e.g.*, *Davis v. United States*, 564 U.S. 229, 237 (2011) ("It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence."). In recognition of these costs, courts apply a balancing framework to decide the circumstances in which the exclusionary rule should apply. The exclusionary rule applies only where the benefits of deterrence outweigh the costs. *Herring v. United States*, 555 U.S. 135, 141 (2009) (citing *Leon*, 468 U.S. at 910).

Application of the exclusionary rule is "especially appropriate" where constitutional violations are likely to recur. *United States v. Edwards*, 666 F.3d 877, 886 (4th Cir. 2011). The unauthorized enforcement of civil immigration laws by untrained state and local officers is just such a context. In many states,

including Maryland, local and state police forces are engaged in immigration enforcement. Sometimes this engagement is authorized by a Section 287(g) agreement[3] (as in the case of the Frederick County Sheriff's Office); but other times, as here, it is not. *See, e.g.*, Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. Pa. J. Const. L. 1084, 1104 (2004); Erika Butler, *Bel Air Police detain woman walking, question her immigration status*, BALTIMORE SUN, (Jan. 27, 2017) (involving a recent case of a law enforcement agency unauthorized to perform immigration enforcement, questioning a woman regarding her immigration status).[4] The involvement of state and local law enforcement officials in immigration enforcement will likely increase under the Trump Administration, which has issued an Executive Order calling for expanded state, local, and federal cooperation in immigration enforcement. *See Enhancing Public Safety in the Interior of the United States*, Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

As noted above, *Lopez-Mendoza* does not address the applicability of the exclusionary rule in immigration proceedings to evidence obtained through constitutional violations by state and local officers who lack authority to enforce

[3] *See* 8 U.S.C. § 1357(g).

[4] *Available at* http://www.baltimoresun.com/news/maryland/harford/aegis/ph-ag-immigration-0127-20170126-story.html.

immigration laws. The Supreme Court's rationale in that case illustrates precisely why the exclusionary rule *must* apply in such circumstances.

In balancing the costs and benefits of applying the exclusionary rule, the Court first considered the degree to which exclusion would deter officer misconduct. The Court reasoned that the deterrent benefit of the exclusionary rule was particularly strong in the immigration enforcement context because so few arrests of immigrants "are intended or expected to lead to criminal prosecutions." *Lopez-Mendoza*, 468 U.S. at 1042-43. Since "the arresting officer's primary objective, in practice, will be to use evidence in the civil deportation proceeding," not a criminal proceeding, the officer was unlikely to be deterred by the prospect that evidence might be suppressed in a criminal proceeding. *Id.* at 1043. The Court's reasoning is equally true today: only a fraction of immigration apprehensions result in criminal charges. In 2016, there were approximately 70,000 criminal immigration prosecutions.[5] Yet there were more than 800,000 civil immigration enforcement actions initiated that year.[6] Therefore, applying the exclusionary rule only in criminal proceedings will have little deterrent effect.

[5] Transactional Records Access Clearinghouse, *Immigration Now 52 Percent of All Federal Criminal Prosecutions* (Syracuse Univ., Nov. 28, 2016), http://trac.syr.edu/tracreports/crim/446/.

[6] U.S. Dep't of Homeland Security, Office of Immigration Statistics, *DHS Immigration Enforcement: 2016*, at 3 (Dec. 2016), https://www.dhs.gov/sites/default/files/publications/DHS%20Immigration%20Enforcement%202016.pdf.

Indeed, this case demonstrates precisely why the exclusionary rule is needed in civil immigration proceedings to deter state law enforcement officials from violating constitutional rights—Petitioner was not even suspected of any criminal activity, but was instead detained simply for speaking Spanish. AR4; AR522; AR529.

Nevertheless, the Court in *Lopez-Mendoza* identified a number of factors that, in its view, reduced the deterrent value of applying the exclusionary rule. These factors, however, either no longer hold true, or do not apply to state and local police officers.

First, the Court cited as "perhaps the most important" factor guiding its decision the existence of the former Immigration and Naturalization Service's ("INS's") "comprehensive scheme" for deterring its officers from committing Fourth Amendment violations, *Lopez-Mendoza*, 468 U.S. at 1044, including "rules restricting stop, interrogation, and arrest practices." *See id.* at 1044-45; *see also* 8 C.F.R. § 287.8(b)-(c) (rules governing stops and arrests by immigration officers). In light of these apparent administrative protections,[7] the Court expected that the

[7] In fact, notwithstanding these protections, DHS often fails to investigate complaints alleging abuses by federal immigration officers. *Cf.* Daniel E. Martinez et al., American Immigration Council, *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse* May. 2014, at 1 (analyzing more than 800 complaints lodged with DHS alleging abuse by Border Patrol officers between 2009 and 2012 and finding that the agency had taken no action against the alleged perpetrator of abuse in 97% of cases in which a formal decision

additional deterrent value of applying the Fourth Amendment exclusionary rule would be minimal.

State and local law enforcement officers who are not operating under a Section 287(g) agreement do not receive federal immigration training, however, thereby increasing the risk that they will commit constitutional violations in conducting immigration-related investigations. Nor are state or local officers subject to federal regulations that limit the stop-and-arrest authority of federal immigration officers. Nor are they subject to federal supervision and discipline. State and local officers are not bound by the federal government's "comprehensive scheme" to avoid Fourth Amendment violations, and there simply is no reason to believe that they will be any more scrupulous in observing constitutional constraints in the immigration context than in enforcing criminal law generally. Thus, just as the exclusionary rule is needed to deter unconstitutional police conduct in the criminal context, so too it is needed to deter such conduct in the immigration context.

Second the Court emphasized the "practical" consideration that it was very rare for noncitizens to litigate the circumstances of their arrests. *Lopez-Mendoza*, 468 U.S. at 1044. Indeed, it noted that, in more than half a century, there had been

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was issued), http://www.americanimmigrationcouncil.org/sites/default/files/research/No%20Action%20Taken_Final.pdf.

fewer than fifty BIA proceedings in which a noncitizen had challenged evidence on Fourth Amendment grounds. *Id.* 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." *Id.* Today, however, litigation over the circumstances of arrest has become common, despite the *Lopez-Mendoza* rule that makes it hard for non-citizens to prevail.[8] Thus, an officer is now more likely to be deterred by the prospect of having evidence excluded from a removal proceeding.

Finally, the Court emphasized declaratory relief was available to address the validity of "institutional practices by the INS that might violate Fourth Amendment rights." *Id.* at 1045. The Court hypothesized that the availability of such a remedy further reduced the need for the exclusionary rule.[9] However, where state and local officers detain or arrest an individual for suspected immigration violations, there is no "agency[ ] under central federal control," *id.*, that can be held accountable. To the contrary, there are approximately *18,000* state and local law

[8] A Westlaw search in the BIA database for the term "motion to suppress" produces 394 hits, 153 of which were in the last three years.

[9] As the large number of motions to suppress in immigration proceedings demonstrates, however, the availability of declaratory relief is insufficient to deter unauthorized constitutional violations in specific cases.

enforcement agencies nationwide.[10] Civil damages actions against the violating officer also do not provide an effective deterrent. A noncitizen who is removed abroad, and who may have limited English skills, will have great practical difficulty litigating a Section 1983 civil rights damages action from afar, and the fear of such suits is unlikely to deter an officer from violating a noncitizen's constitutional rights.

Thus, the *Lopez-Mendoza* Court's rationale for discounting the deterrent value of the exclusionary rule as to *federal immigration officers* plainly does not apply to violations by *state and local law enforcement officers*.

The Court in *Lopez-Mendoza* next considered the societal costs that would result from applying the exclusionary rule in removal proceedings to evidence obtained by federal officers in violation of the Constitution. The Court was primarily concerned that applying the exclusionary rule would require the courts to close their eyes to ongoing criminal offenses. *See Lopez-Mendoza*, 468 U.S. at 1047 ("The constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime. When the crime in question involves unlawful presence in this country, the criminal may go free, but he should not go free within our borders.").

[10] *See* U.S. Dep't of Justice, *Census of State and Local Law Enforcement Agencies, 2008*, at 2 (July 2011), https://www.bjs.gov/content/pub/pdf/csllea08.pdf.

However, as noted above, and as the Supreme Court has more recently made clear, unlawful presence alone is not a continuing criminal act, contrary to the suggestion in *Lopez-Mendoza*. *See Arizona*, 132 S. Ct. at 2505 ("As a general rule, it is not a crime for a removable alien to remain present in the United States."); *see also Santos*, 725 F.3d at 464 (same).

The Supreme Court and this Court have also recognized that allowing the continued presence of removable noncitizens is not necessarily inconsistent with federal immigration policy. *Arizona*, 132 S. Ct. at 2499 ("Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime…. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission."); *Santos*, 725 F.3d at 465 (federal discretion in enforcement of immigration law critical because enforcement "require[s] the weighing of complex diplomatic, political, and economic considerations").

Indeed, the Immigration and Nationality Act and its implementing regulations enumerate several circumstances in which removable noncitizens may obtain permanent resident status, and the Department of Homeland Security ("DHS") regularly exercises discretion to refrain from initiating removal

proceedings. *See, e.g.*, 8 U.S.C. § 1229b (cancellation of removal); *id.* § 1255 (adjustment of status); Deferred Action for Childhood Arrivals ("DACA"), https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca. Thus, *Lopez-Mendoza*'s analogy to a continuing criminal offense is no longer apt.

Moreover, suppression in the immigration removal context carries lower social costs than in the criminal context, where suppression might allow continued criminal activity that poses a danger to the public, but for which double jeopardy would preclude prosecution. *See Lopez-Mendoza*, 468 U.S. at 1046 ("Presumably no one would argue that the exclusionary rule should be invoked to … compel police to return contraband explosives or drugs to their owner if the contraband had been unlawfully seized."). There is no double jeopardy bar to reinitiating removal proceedings. If the government does choose to prioritize the removal of a particular immigrant, it may reinitiate proceedings, supported by lawfully obtained evidence. *Matter of Perez-Lopez*, 14 I. & N. Dec. 79, 80-81 (BIA 1972).

The Court in *Lopez-Mendoza* was also concerned that the exclusionary rule would create documentary and administrative burdens for immigration officers. *See Lopez-Mendoza*, 468 U.S. at 1049. For example, because immigration officers frequently conduct mass arrests, the Court feared that it would be burdensome to expect them to document the circumstances of each individual arrest. *Id.* at 1049-

50. This concern does not apply to state or local officers because they lack authority to engage in large-scale immigration raids except through formal cooperation with the federal government. *See Arizona*, 132 S. Ct. at 2506-07. And because state and local officers not formally cooperating with the federal government are only authorized to make arrests on the basis of suspected *criminal* activity, they should already be complying with the documentary and administrative burdens that concerned the *Lopez-Mendoza* Court.

In sum, *Lopez-Mendoza*'s holding is limited to immigration proceedings in which federal immigration officers violated the Fourth Amendment. The Court's rationale for declining to apply the exclusionary rule in *Lopez-Mendoza* simply does not apply to situations in which the evidence is obtained through a constitutional violation by state or local officers. To the contrary, in light of the significant differences between the training and administrative regulations governing federal immigration officers on one hand, and state or local police officers on the other, the benefits of deterrence decidedly outweigh the social costs of applying the rule. Accordingly, the exclusionary rule should apply in immigration removal proceedings to evidence obtained through Fourth Amendment violations by state or local police officers, whether egregious or not.

B. The Supreme Court's Decision in *United States v. Janis* Does Not Preclude Applying the Exclusionary Rule in Civil Immigration Proceedings Where State or Local Law Enforcement Officers Engaged in Unconstitutional Conduct.

In *Janis*, the Supreme Court refused to apply the exclusionary rule in a federal civil tax proceeding where the evidence in question had been unlawfully obtained by state law enforcement officers. *United States v. Janis*, 428 U.S. 433, 459-60 (1976). That decision, however, does not undermine the argument for applying the exclusionary rule in the very different context of immigration removal proceedings.

In *Janis*, local police executed a search warrant to find evidence of illegal bookmaking. After the search, police arrested two individuals, who were charged with violating local gambling laws. *Id.* at 436-37. Police also provided the evidence to the Internal Revenue Service. *Id.* at 436. The evidence found during the search was suppressed in state criminal proceedings because the affidavit in support of the warrant was inadequate. *Id.* at 437-38. Civil litigation regarding the tax liabilities resulting from the illegal gambling operation also followed. *Id.* at 438.

As in *Lopez-Mendoza*, the *Janis* Court engaged in a balancing test to determine whether the exclusionary rule should apply. *See Lopez-Mendoza*, 468 U.S. at 1041 ("[T]he Court recognized in *Janis* that there is no choice but to weigh the likely social benefits of excluding unlawfully seized evidence against the likely

costs."). The Court held that although the evidence was acquired through an unconstitutional search, the evidence should not be suppressed in civil tax proceedings. *Janis*, 428 U.S. at 454.

Janis identified three reasons for reaching that conclusion. However, the Court's rationale is inapplicable to immigration removal proceedings, and in fact demonstrates why the exclusionary rule *should* apply in such proceedings to evidence obtained through a state or local officer's constitutional violation.

First, *Janis* stated that the exclusionary rule had limited deterrent value because a state court had already suppressed the evidence in question in a state criminal proceeding. Therefore, the local officers had already been "punished" by the suppression of the evidence. *Id.* at 448. The possibility of such "punishment" through state criminal proceedings is absent in the immigration context, however. Obviously, there is no state-law parallel to a civil immigration proceeding. And, moreover, as the Court held in *Arizona*, states may not impose parallel criminal sanctions corresponding to federal immigration violations. *Arizona*, 132 S. Ct. at 2502 ("Permitting the State to impose its own penalties for the federal [immigration] offenses here would conflict with the careful framework Congress adopted."). Thus, the *only* proceeding in which immigration-related evidence will be used is a federal proceeding.

Second, *Janis* noted that because the disputed evidence would also be excluded in federal criminal proceedings, "the entire criminal enforcement process, which is the concern and duty of these officers, is frustrated." *Janis*, 428 U.S. at 448. In the Court's view, this minimized the potential deterrent effect of extending the exclusionary rule to civil tax proceedings. But in the immigration context, criminal prosecutions are relatively rare. As noted above, only a small fraction of immigration arrests result in federal criminal prosecutions. *See supra* nn.5-6 and accompanying text. Thus, civil removal proceedings – not criminal prosecutions – are the principal concern of officers conducting immigration-related arrests or investigations.

Third, the Court assumed that local officers would have little interest in the outcome of federal proceedings – civil or criminal – and therefore suppression in the federal civil proceeding would be unlikely to deter any unconstitutional conduct by local officers. *Janis*, 428 U.S. at 458 ("[T]he imposition of the exclusionary rule sought in this case is unlikely to provide significant, much less substantial, additional deterrence. It falls outside the offending officer's zone of primary interest."); *id.* at 454-56.

Although it is easy to understand why a police officer would have little concern for an individual's federal tax liability, the same cannot be said for an individual's immigration status. Unlike in the realm of taxation, many states have

shown an acute interest in enforcing federal immigration law and are forcing local law enforcement officers to make immigration a priority. For example, South Carolina requires its police officers to make efforts to determine individuals' immigration status, and its legislature is working to pass a bill that would create a department specifically tasked with enforcing immigration law. S.C. Code Ann. § 17-13-170; H.B. 3318, 122d Gen. Assemb., Reg. Sess. (S.C. 2017). Other states have enacted similar laws. *See also* Ariz. Rev. Stat. Ann. § 11-1051(B) (requiring police to investigate the immigration status of certain persons); Ala. Code § 31-13-12; Ga. Code Ann. § 17-5-100(b) (authorizing police to investigate a person's immigration status if probable cause exists that the individual has committed a crime). State legislatures in North Carolina, Virginia, and many other states across the country are also introducing bills to punish jurisdictions that attempt to limit state and local law enforcement officers' efforts to enforce immigration law. H.B. 113, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017); H.B. 2000, 2017 Gen Assemb., Reg. Sess. (Va. 2017); H.B. 2121, 53d Leg., 1st Reg. Sess. (Ariz. 2017); H.B. 37, 154th Gen. Assemb. Reg. Sess. (Ga. 2017).

The federal government also encourages state and local cooperation in immigration enforcement. States and local law enforcement agencies have become heavily involved in the mechanics of federal immigration enforcement through the DHS Secure Communities Program, which was reactivated on January 25, 2017,

after having been suspended since 2014.[11] The Secure Communities Program requests the assistance of state and local law enforcement agencies in identifying immigrants in jails who are deportable under immigration laws. The executive order that reactivated the Secure Communities Program also encourages local law enforcement agencies to enter 287(g) agreements, which deputize local officers to enforce immigration law. Additionally, "Congress has obligated ICE to respond to any request made by state officials for verification of a person's citizenship or immigration status." *Arizona*, 132 S. Ct. at 2508 (citing 8 U.S.C. § 1373(c)). As a result, immigration enforcement has increasingly fallen within the "zone of primary interest," *Janis*, 428 U.S. at 458, of state and local policing.

The risk that state and local officers will engage in unlawful and unconstitutional conduct is increased when Section 287(g) agreements authorize some, but not all police officers, to engage in immigration enforcement; and the Secure Communities Program seeks cooperation from all state and local law enforcement agencies—thereby blurring the lines between activity appropriate for federal immigration officers but illegal for state and local law enforcement officers.

This case provides a clear example of these dangers. MDTAP's primary concern in detaining Petitioner was not the enforcement of any state or municipal

[11] *See* https://www.ice.gov/secure-communities.

law. There is no evidence Petitioner committed, or could be reasonably suspected of having committed, any crime. AR3-4. Rather, MDTAP's sole interest was Petitioner's suspected immigration status – as demonstrated by Acker's incident report, which described the offense precipitating the arrest as "immigration violation." AR1089. Acker did not ask for Davila's vehicle registration; instead, he asked solely about Davila and Petitioner's immigration status. AR468-80; AR521-28; AR1069-78. But MDTAP is not part of any Section 287(g) agreement, and its officers are not deputized to enforce federal immigration law.

Applying the exclusionary rule gives state and local law enforcement officers who are *not* deputized to act as federal immigration officers the necessary incentive to avoid unlawful conduct. There would be a substantial deterrent effect from applying a bright-line exclusionary rule in removal proceedings to evidence obtained through illegal conduct by such officers. As discussed above, those benefits strongly outweigh any social costs resulting from exclusion. *See supra*, Part II.A. Accordingly, under the framework articulated in *Janis*, the exclusionary rule should apply in cases like this one.

III. The Exclusionary Rule Should Apply in This Immigration Proceeding Because the Evidence At Issue Was Obtained Through an Egregious Violation of the Fourth Amendment.

Even if *Lopez-Mendoza* were applied to violations of the Fourth Amendment by state and local officers, suppression would still be required in this case because

the Fourth Amendment violation was "egregious." *Yanez-Marquez*, 789 F.3d at 450. Among the factors that this Court has identified in considering whether a constitutional violation is egregious is "whether the violation was based on racial considerations." *Id.* at 460-61. Other Circuits agree that seizures "based on race" are paradigmatically egregious violations of the Fourth Amendment. *See, e.g.*, *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 237 (2d Cir. 2006); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1447-48, 1452 (9th Cir. 1994); *Ghysels-Reals v. U.S. Att'y Gen.*, 418 F. App'x 894, 895-96 (11th Cir. 2011) (summary op.); *Oliva-Ramos v. Att'y Gen. of U.S.*, 694 F.3d 259, 279 (3d Cir. 2012).

In *Gonzalez-Rivera*, for example, a traffic officer obtained evidence that a Latino man lacked authorization to reside in the United States after stopping his vehicle. *Gonzalez-Rivera*, 22 F.3d at 1443. After determining that the officer's non-race-based justifications for the stop (including that the man "appeared to be nervous," *id.* at 1444) failed to supply reasonable suspicion, the Ninth Circuit determined that evidence of alienage was obtained pursuant to an unlawful race-based seizure and should be suppressed. *Id.* at 1447, 1452.

It is hard to imagine a clearer record for a race-based seizure than this case. Petitioner, who arrived at the scene after police directed Davila to come collect his car, was initially detained without any justification whatsoever. AR3-4. When Acker approached the vehicle Petitioner was driving, he knew only that a

passenger of Petitioner's was acquainted with Badillo, a Latino male, and had lent Badillo his car. Acker had no reasonable suspicion that Petitioner was engaged in any unlawful activity.

But after reaching the vehicle, Acker heard Petitioner and his companions speak Spanish, and by his own admission, that prompted him to embark upon "aggressive" questioning about their immigration status. As Acker testified: "[A]s soon as everybody stopped speaking English, we realized there was going to be a real problem." AR529; AR522 ("[A]s soon as [Davila] went to Spanish and told me he could not speak English very well, I asked for ID from everybody in the vehicle."). Acker's decision to investigate Petitioner and his companions because they spoke Spanish is tantamount to racial profiling. *Cf. Hernandez v. New York*, 500 U.S. 352, 371 (1991) (plurality opinion) ("It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.").

Moreover, Acker made racially tinged comments to Petitioner and disparaged immigrants. He asserted that "you are taking jobs from other people," AR1072; told Badillo that he "could tell [me] that [your] name was 'Pedro' [and] [I] wouldn't know any better," AR1082; asked, "What are you doing here? This is not your country," AR1082; and referred to Mr. Badillo as a "Spanish guy."

AR1083. As Petitioner's expert rightly concluded, "[M]y opinion is that because of the physical appearance of Mr. Sanchez and the others that were stopped … it's clearly racially base[d].… And then he goes right to the questioning of their immigration status. There is nothing else other than their physical appearance and the fact that they're speaking Spanish." AR186; *see also Santos v. Holder*, 486 F. App'x 918, 920 (2d Cir. 2012) (summary op.) (failure to pursue purpose of encounter before inquiring into immigration status probative of race-based stop); 486 F. App'x at 920 (remark that foreign identification card looked fake probative of race-based stop).

Accordingly, statements about Petitioner's immigration status should be suppressed as the result of an egregious Fourth Amendment violation. *See, e.g.*, *Yanez-Marquez*, 789 F.3d at 460-61; *Gonzalez-Rivera*, 22 F.3d at 1452.

Moreover, a number of other factors identified in *Yanez-Marquez* as salient to a constitutional violation's "egregiousness" are present in this case. First, "the Fourth Amendment violation was intentional." *Yanez-Marquez*, 789 F.3d at 460. The government has offered no evidence at all that Acker's investigation was motivated by anything other than an interest in establishing a civil immigration violation, which he should have known was not a permissible basis for a seizure. Indeed, when Acker was asked, "And do you have any legal authority to enforce

Federal civil Immigration violations?" he responded, "No, ma'am, that's why we detain them." AR548.

Second, for the same reason, "the violation was unreasonable in addition to being illegal." *Yanez-Marquez*, 789 F.3d at 460. Police officers are trained that they may only make an arrest when they have probable cause of *criminal* activity. There has never been any allegation in this case that probable cause existed. Accordingly, it was plainly unreasonable for Acker to have arrested Petitioner.

Third, there was "coercion." *Id.* Acker had summoned Davila to retrieve his vehicle, but refused to give the keys to Davila until he and his companions, including Petitioner, answered questions about their immigration status. AR522.

Fourth, Acker not only lacked a warrant, he had "no articulable suspicion for the … seizure whatsoever." *Yanez-Marquez*, 789 F.3d at 460. By Acker's own admission, the only basis for the investigative seizure was the fact that Petitioner and his companions were speaking Spanish. Indeed, Acker's investigation focused solely on the trio's immigration status.

Fifth, the seizure was also "particularly lengthy," during which Petitioner was placed under arrest and moved to two separate locations. *Id.*; *cf. Rodriguez v. United States*, 135 S. Ct. 1609 (2015) (holding an investigative delay of "seven to eight minutes" to be unconsitutional when it was unrelated to the original purpose of the law enforcement encounter). Specifically, Acker confiscated Davila's

vehicle, and Petitioner was transported first to the MDTAP Dundalk Marine Terminal Station, and then to downtown Baltimore. The total length of that detention was three and a half hours. AR134.

Thus, under this Court's decision in *Yanez-Marquez*, there can be no question that Acker's Fourth Amendment violation was "egregious." Accordingly, the evidence derived from that violation should be suppressed.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for review and reverse the agency's decision, with instructions to terminate removal proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7), I certify that this brief complies with the type-volume limitation because this brief contains 6,356 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman size 14.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March 2017, a true and correct copy of the foregoing Brief of the American Immigration Council and the National Immigration Project of the National Lawyers Guild as *Amici Curiae* In Support of Petitioner was served on all counsel of record in this appeal via CM/ECF.

I further certify that on March 27, 2017, I caused one copy of the foregoing Brief of the American Immigration Council as *Amicus Curiae* to be delivered via overnight mail to the Clerk of the United States Court of Appeals for the Fourth Circuit.

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