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Lopez-Rodriguez v. Mukasey: The Ninth Circuit's Expansion of the Exclusionary Rule in Immigration Hearings Contradicts the Supreme Court's *Lopez-Mendoza* Decision

I. INTRODUCTION

In *Lopez-Rodriguez v. Mukasey*,[1] the Ninth Circuit faced the issue of whether statements by Lopez-Rodriguez, given to immigration officials after they entered Lopez-Rodriguez's residence without an invitation or warrant, should be suppressed in a civil immigration hearing.[2] The court applied a reasonableness standard to the officers' actions and held that the evidence should be suppressed because the entry was an unreasonable violation of Lopez-Rodriguez's Fourth Amendment rights.[3]

The Ninth Circuit, however, wrongly decided *Lopez-Rodriguez* because the court applied a reasonableness standard that is an overly broad interpretation of Supreme Court precedent.[4] The reasonableness standard is the established rule in the Ninth Circuit for the suppression of evidence in civil immigration cases.[5] This rule has been extrapolated from dicta in the Supreme Court's 1984 *Lopez-Mendoza* decision, which created the bright-line rule that the exclusionary rule, which suppressing evidence obtained in violation of the Fourth Amendment, is not applicable in immigration hearings.[6] However, in dicta supported by four Justices, a plurality allowed for an exception that allows for application of the exclusionary rule in instances of egregious Fourth Amendment

1. 536 F.3d 1012 (9th Cir. 2008).

2. *Id.* at 1013–14. I use the term "immigration hearing" rather than the more narrow term "deportation hearing" because use of the exclusionary rule and the Ninth Circuit standard apply to all immigration hearings and not only the subset of deportation hearings.

3. *Id.* at 1018–19.

4. While several judges voted to grant a rehearing en banc to review this standard, the motion was denied. Lopez-Rodriguez v. Holder, 560 F.3d 1098, 1098–99 (9th Cir. 2009). Due to the change in Attorney General, Holder's name has replaced Mukasey's on the order denying rehearing. *Id.* at 1098.

5. *Lopez-Rodriguez*, 536 F.3d at 1018 (citing Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449 (9th Cir. 1994)).

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

violations.[7] The Ninth Circuit's reasonableness standard is an excessively broad interpretation of the "egregious" dicta from *Lopez-Mendoza*.

II. FACTS AND PROCEDURAL HISTORY

Immigration officers visited the residence of Lopez-Rodriguez on a tip that someone there was using a false birth certificate.[8] Lopez-Rodriguez apparently answered the door, but left the officers standing outside while she went to get her niece, Gastelum, whom the officers suspected was using a false birth certificate with the name Sugeyra.[9] When the niece arrived, the door was slightly open.[10] She looked out at the officers, but did not open the door when they asked for her name.[11] While what happened next was disputed, the immigration judge ("IJ") found that the officers entered the house without obtaining consent—by apparently pushing the door open and walking inside.[12] Once inside, the officers continued questioning the niece who soon admitted that she was using a false birth certificate.[13] The officers arrested Gastelum, and they arrested Lopez-Rodriguez under the suspicion that she was also in the country illegally. While in custody, both admitted to being in the country illegally.[14]

Lopez-Rodriguez filed a motion to suppress the evidence and testimony obtained by the officers, claiming an egregious Fourth Amendment violation had occurred. She claimed her niece's initial admission was given during an egregiously unconstitutional search of her residence; consequently, she argued the arrests were unlawful and statements made while in custody should be suppressed because the exclusionary rule may apply in civil immigration hearings if an egregious Fourth Amendment violation occurred.[15] The IJ found

7. *Id*.

8. *Lopez-Rodriguez*, 536 F.3d at 1013–14.

9. *See id*. at 1014.

10. *Id*.

11. *See id*. at 1014–15.

12. *Id*. at 1015. These facts are not totally clear, as the officers claimed consent was given. However, because the IJ found no consent, the Ninth Circuit only provided Lopez-Rodriguez's version of the facts.

13. *Id*. at 1014.

14. *See id*.

15. I am assuming this was the argument made as the IJ decision is not published. I use the term "egregious" in referring to Lopez-Rodriguez's arguments in part to lay out the

"'some Fourth Amendment problems with the manner of entering and questioning,'" but held that the Fourth Amendment violation was not sufficiently "egregious" to allow suppression.[16] Both Lopez-Rodriguez and Gastelum were ordered to be deported,[17] and on a subsequent appeal to the Board of Immigration Appeals ("BIA"), the IJ's decision was upheld.[18]

III. SIGNIFICANT LEGAL BACKGROUND

In 1984, the Supreme Court decided *INS v. Lopez-Mendoza*, in a five to four decision.[19] This landmark case held that the exclusionary rule is inapplicable in immigration hearings.[20] This section is divided into three parts. First, it provides a summary of *Lopez-Mendoza* and how it opened the door for exceptions to its holding. Second, it addresses the narrow exceptions the First and Second Circuits have established regarding using the exclusionary rule in immigration hearings. Third, it describes the development of the reasonableness standard in the Ninth Circuit—which has opened the door to broad exceptions to *Lopez-Mendoza*.

A. Lopez-Mendoza*: Barring Application of the Exclusionary Rule in Immigration Hearings*

The issue before the Court in *Lopez-Mendoza* was whether an admission of being in the country illegally should be suppressed in an immigration hearing when the admission was obtained following an unlawful arrest.[21]

In *Lopez-Mendoza*, immigration officers obtained permission from the personnel manager of a potato plant in Washington to check for illegal aliens. Sandoval-Sanchez, a defendant in the case,

general law that governs the issue.

16. *Id.* at 1015.

17. *Id.*

18. *Id.* at 1014.

19. 468 U.S. 1032, 1034 (1984).

20. *Id.* at 1050. The specific facts of the case dealt with immigration hearings, which are civil hearings. The Court's holding was broad, however, and included all civil hearings. *Id.* at 1038.

21. *Id.* at 1034. *Lopez-Mendoza* was a consolidation of two Ninth Circuit cases, but the Court dismissed Lopez-Mendoza's case on a technicality. *Id.* at 1039–40. Interestingly, Lopez-Mendoza's case involved a much more egregious Fourth Amendment violation than the other case, where an auto shop owner had refused to allow INS agents to enter his shop, and one agent entered while the other was distracting the owner. *Id.* at 1035–36.

was arrested as a result of this workplace raid.[22] After his arrest, Sandoval-Sanchez admitted that he unlawfully entered the United States.[23] He later argued that his admission should be suppressed in his immigration hearing because he had been illegally arrested.[24] The IJ held that the arrest was legal, but in the alternative, even if it was illegal, that the legality of the arrest had no bearing on evidence in a deportation hearing.[25] The BIA dismissed Sandoval-Sanchez's appeal, concluding "that the circumstances of the arrest had not affected the voluntariness of his recorded admission."[26]

The Ninth Circuit heard the case en banc and reversed the BIA's decision.[27] The court determined that Sandoval-Sanchez had been unlawfully arrested and that the exclusionary rule barred his subsequent admission.[28] The court applied a cost-benefit test from *United States v. Janis*[29] and held that the marginal costs of imposing the exclusionary rule in immigration hearings were "far outweigh[ed]" by the benefits of deterring wrongful acts by INS agents.[30] It also held that alternatives to the exclusionary rule proposed by the BIA were insufficient protections in comparison to the exclusionary rule.[31]

In a five-to-four decision, the Supreme Court reversed the Ninth Circuit.[32] The Court held that the exclusionary rule does not automatically apply in civil deportation hearings because they are

22. *Id.* at 1036–37. The officers did not have a search or an arrest warrant. Lopez-Mendoza v. INS, 705 F.2d 1059, 1061 (9th Cir. 1983).

23. *Lopez-Mendoza*, 468 U.S. at 1037.

24. *Id.* Specifically, his attorney argued that the arrest was unlawful because it was obtained without a warrant, the methods used were unlawful, and Sandoval-Sanchez had never been informed of his right to remain silent. *Lopez-Mendoza*, 705 F.2d at 1060 n.1. During the raid, the agents stood at an entrance to the factory and questioned, in English, anyone who appeared nervous. If a worker could not respond in English, he was asked more detailed questions in Spanish and was arrested if he admitted to being in the United States illegally or if the agents suspected such was the case. The officers did not specifically remember Sandoval-Sanchez's suspicious activities as they arrested thirty-seven plant employees that day. Upon further questioning at the county jail, he admitted to entering the United States illegally. *Lopez-Mendoza*, 468 U.S. at 1036–37.

25. *Lopez-Mendoza*, 468 U.S. at 1037.

26. *Id.* at 1038.

27. *Lopez-Mendoza*, 705 F.2d at 1060–61.

28. *Id.* at 1061.

29. 428 U.S. 433, 453–54 (1976).

30. *Lopez-Mendoza*, 705 F.2d at 1073.

31. *Id.*

32. *Lopez-Mendoza*, 468 U.S. at 1051.

aimed at stopping a "continuing violation of the immigration laws" rather than punishing past transgressions, which is the aim of criminal prosecutions.[33] It based its holding on cost-benefit analysis.[34]

Justice O'Connor wrote for the majority and reasoned that the exclusionary rule's effectiveness in deterring wrongful acts by immigration officers is minimal for two reasons. First, the exclusionary rule does not allow the identity of a person to be suppressed; therefore, deportation would likely be ordered even if the rule were applied because the INS only has to prove identity and lack of documentation.[35] Second, immigration officers are aware that very few respondents ever challenge their arrest.[36] O'Connor concluded that internal INS regulations and the possibility of a declaratory judgment against agency wrongful actions are more likely to positively affect officer actions than the exclusionary rule.[37]

The Court disagreed with the Ninth Circuit regarding the costs of applying the exclusionary rule in immigration proceedings, calling social costs in deportation proceedings both "unusual and significant."[38] These high costs included allowing the commission of an ongoing crime[39] and hampering the INS's efficient hearing process.[40] Specifically regarding workplace raids, Justice O'Connor stated that Fourth Amendment claims, if permitted, would preclude the practice because officers would be forced to create a more complete record of each arrest.[41]

33. *Id*. at 1039.

34. *Id*. at 1041 (citing *Janis*, 428 U.S. at 446).

35. *Id*. at 1043.

36. *Id*. at 1044.

37. *Id*. at 1043–45. O'Connor placed emphasis on the internal INS regulations, in the form of rules, training, and disciplinary actions, which were designed to prevent Fourth Amendment violations. *Id*. at 1044–45.

38. *Id*. at 1046.

39. *Id*. at 1046–47. The Court applied the rule via analogy as it previously had been applied to instances where the exclusionary rule barred prosecution of a crime, but did not mandate that seized objects that are illegal to possess be returned. *Id*. (citing United States v. Jeffers, 342 U.S. 48, 54 (1991); Trupiano v. United States, 334 U.S. 699, 710 (1948)).

40. *Lopez-Mendoza*, 468 U.S. at 1048. O'Connor pointed out that an immigration judge typically holds multiple hearings per day and that neither the agency nor the immigrant's attorney are likely to be well versed in Fourth Amendment law in order to quickly deal with the Fourth Amendment issues. *Id*.

41. *Id*. at 1049–50.

The Court held that these two high costs of condoning an ongoing illegal act and thwarting efficient administration outweigh the low benefit that the exclusionary rule provides in deterring Fourth Amendment violations. Thus, the exclusionary rule should not apply in civil proceedings.[42]

However, Part V of the *Lopez-Mendoza* decision—consisting of one paragraph—stated that the Court did not address "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."[43] This single sentence has given rise to a circuit split regarding what constitutes such an egregious violation.[44]

Part V, which is the last section in the decision and comes after all of the Court's reasoning and holding, is clearly dicta. Furthermore, one Justice, of the five-Justice majority, did not join in this section[45]—thus, as a plurality section, it does not carry the force of law.

B. The Circuit Split: Standards Developed by the First and Second Circuits Regarding Egregious Violations

The First Circuit requires that an immigrant show a Fourth Amendment violation in the form of a clear "threat[], coercion, or physical abuse" to qualify for the egregious exception.[46] In *Kandamar v. Gonzales*, an immigrant challenged numerous aspects of a Department of Homeland Security ("DHS") interview that resulted in deportation proceedings.[47] The First Circuit stated that *Lopez-Mendoza* generally bars suppression in immigration hearings, but the Supreme Court left "a glimmer of hope" that evidence may be suppressed in cases of egregious Fourth Amendment violations.[48] In further defining an egregious violation, the court reasoned that

42. *See id.* at 1050–51.

43. *Id.*

44. Part V also states that the decision does not address widespread abuses by immigration officials. *Id.* However, this Note does not examine this possible exception because my research did not turn up any published cases where an immigrant sought this exception.

45. *Id.* at 1034.

46. Kandamar v. Gonzales, 464 F.3d 65, 71 (1st Cir. 2006).

47. *Id.* at 67.

48. *Id.* at 70 (quoting Navarro-Chalan v. Ashcroft, 359 F.3d 19, 22–23 (1st Cir. 2004)).

there was no evidence of "threats, coercion or physical abuse . . . that would constitute egregious government conduct" and there was no evidence of a forced retention in the DHS interview.[49] The First Circuit has thus established a high bar for application of the egregious exception.

The Second Circuit's rule likely falls somewhere in between the narrow First Circuit exception and the broad Ninth Circuit exception.[50] In *Almeida-Amaral v. Gonzales*, a border patrol officer asked Almeida-Amaral to stop and provide identification as Almeida-Amaral entered a gas station.[51] Almeida-Amaral gave the officer a Brazilian passport and was immediately arrested.[52] The IJ denied the immigrant's motion to suppress based on a suspicionless stop and the BIA sustained the decision.[53]

The Second Circuit established a rule allowing application of the exclusionary rule in immigration proceedings if "the [Fourth Amendment] violation—regardless of its egregiousness or unfairness—undermined the reliability of the evidence in dispute."[54] Thus, the Second Circuit rule is not based on the egregious exception, but seems to be derived from the Court's policy of not suppressing evidence in immigration hearings that is credible.[55] The court held that a suspicionless stop, by itself, was not enough to be egregious, and some additional offending conduct must have occurred.[56] In dicta, the court also stated the bright-line rule, based on Ninth Circuit precedent, that a race-based stop would be an egregious violation.[57] Even though the court relied heavily on Ninth Circuit precedent, it adopted a narrow, race-based exception rather than the Ninth Circuit's broad reasonableness exception.

49. *Id*. at 71–72.

50. *See infra* Part III.C.

51. 461 F.3d 231, 232–33 (2d Cir. 2006).

52. *Id*.

53. *Id*. at 233.

54. *Id*. at 235.

55. Interestingly, this policy was relied upon by the IJ and BIA in *Lopez-Mendoza*, but did not play an important role in the Supreme Court's decision in that case. *See supra* notes 25–26 and accompanying text.

56. *Almeida-Amaral*, 461 F.3d at 235–36.

57. *Id*. Specifically, the court relied on the Ninth Circuit case *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994). For further discussion of *Gonzalez-Rivera*, see *infra* notes 58–66 and accompanying text.

C. The Unreasonable Standard in the Ninth Circuit

The Ninth Circuit has developed a broader exception to *Lopez-Mendoza* than the First and Second Circuits. This exception, which in essence asks whether the actions by peace or immigration officers were unreasonable violations of the Fourth Amendment, all but swallows the rule of barring the exclusionary rule in immigration proceedings.

The Ninth Circuit adopted the unreasonable standard in *Gonzalez-Rivera v. INS*.[58] In this case, an immigration officer claimed he pulled Gonzalez-Rivera over because he "fail[ed] to look at the Border Patrol car; . . . appeared to have a 'dry' mouth; . . . was blinking; . . . and [had a] Hispanic appearance."[59] The IJ suppressed the documents found in the car, holding that the immigration officer stopped Gonzalez-Rivera solely based on race and that such a stop was an egregious Fourth Amendment violation.[60] The BIA reversed, stating that race was not the sole factor.[61] The Ninth Circuit reversed the BIA, concluding that the IJ was correct in deciding that the officer had pulled Gonzalez-Rivera over solely based on his race.[62]

Rather than merely holding, as the IJ did, that a race-based stop is sufficiently egregious for the exclusionary rule to apply,[63] the Ninth Circuit used reasoning from a previous case regarding a civil IRS hearing and established a much broader rule—that any bad faith constitutional violation is egregious.[64] The court then defined a bad

58. 22 F.3d 1441 (9th Cir. 1994). *See generally* Benitez-Mendez v. INS, 760 F.2d 907 (9th Cir. 1985) (amended). The first Ninth Circuit case that addressed the issue, *Benitez-Mendez*, is not discussed because later cases have ignored that early decision. In that case, an immigration officer detained an immigrant in the officer's car while the officer searched the immigrant's vehicle. *Id*. at 908–09. The court simply held that the exclusionary rule no longer applied in civil deportation proceedings. *Id*. at 909–10.

59. *Gonzalez-Rivera*, 22 F.3d at 1446.

60. *Id*. at 1442.

61. *Id*. at 1442–43.

62. *Id*. at 1446–48.

63. This was the rule the Second Circuit adopted based on this case. *See* Almeida-Amaral v. Gonzales, 461 F.3d 231, 234–35 (2d Cir. 2006).

64. In a novel bit of legal footwork, the court sidestepped the fact that the egregious dicta from *Lopez-Mendoza* was not joined by a majority of the Court by arguing that the dissenting Justices surely "would have approved" of weakening the bright-line rule by allowing for an egregious exception. *Gonzalez-Rivera*, 22 F.3d at 1448 n.2. Thus, the Ninth Circuit has concluded that "to the extent such head-counting is a helpful way of reading Supreme Court opinions, there were eight votes on the *Lopez-Mendoza* Court for at least leaving open the possibility that the exclusionary rule might apply to egregious violations." Orhorhaghe v. INS,

faith violation as one where evidence is obtained "by deliberate violations of the fourth amendment, or by conduct a *reasonable officer should have known* is a violation of the Constitution."[65] The court then attempted to narrow this broad rule:

> In applying an objective standard of "bad faith" . . . we emphasize that in the present case we only determine what constitutes a bad faith stop based solely on race . . . and do not purport to be setting forth the standard for determining what constitutes a bad faith constitutional violation in other contexts.[66]

This limiting language, however, failed to deter litigants from seeking additional "unreasonable" exceptions—as *Lopez-Rodriguez* demonstrates.

Merely holding that a race-based stop is an egregious Fourth Amendment violation, and thus is an exception to the *Lopez-Mendoza* rule, would have kept the Ninth Circuit more closely in line with the precedent set by *Lopez-Mendoza*, which possibly allowed for narrow exceptions to be developed as the First and Second Circuits have done. However, the Ninth Circuit chose to use a broad reasonableness standard, which in turn has invited additional litigation as other defendants seek to suppress evidence in immigration hearings.

IV. THE NINTH CIRCUIT'S DECISION IN *LOPEZ-RODRIGUEZ V. MUKASEY*

In *Lopez-Rodriguez v. Mukasey*,[67] the Ninth Circuit added a new egregious exception: Any unconstitutional search of a residence is unreasonable and, therefore, evidence that is a fruit of the search must be suppressed under the egregious exception. In an interesting commentary, the court quoted an earlier decision stating that the egregious language from *Lopez-Mendoza* was a "suggestion" to create such exceptions.[68]

38 F.3d 488, 493 n.2 (9th Cir. 1994) (citing *Gonzalez-Rivera*, 22 F.3d at 1448 n.2). While logical, this argument ignores the fact that a dissenting Justice could have joined section five and given it the power of law. No Justice chose to do so, and the dicta supported by four Justices should not have been heavily relied on as law.

65. *Gonzalez-Rivera*, 22 F.3d at 1449 (quoting Adamson v. Comm'r, 745 F.2d 541, 545 (9th Cir. 1984)) (emphasis added).

66. *Id.*

67. 536 F.3d 1012 (9th Cir. 2008).

68. *Id.* at 1016 (quoting *Orhorhaghe*, 38 F.3d at 493).

In establishing its rule in *Lopez-Rodriguez*, the court first stated the Circuit's established rule that a reasonableness standard is used to determine whether the egregious exception from *Lopez-Mendoza* should apply.[69] It then quoted the Supreme Court's decision in *Payton v. New York*[70] to establish that "[i]t is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable."[71] Thus, the court concluded that any information attained as a result of the nonconsensual entry in this case would be suppressed in a criminal case.[72] It then reasoned that since warrantless and nonconsensual entries are prohibited, any such entry would be unreasonable and "[t]hus, the INS agents' Fourth Amendment violation was 'egregious' under [the] Circuit's controlling interpretation of the term."[73]

Judge Bybee wrote a concurring opinion. He argued that the ruling was in conformity with the current rule of the Ninth Circuit, but raised the concern that the circuit's rule contradicts *Lopez-Mendoza*. He argued the exception was broader than intended and threatened to "swallow up the rule."[74] Judge Bybee also noted the potential circuit split between the broad Ninth Circuit rule and the more narrow rules of other circuits.[75]

The government moved for a rehearing en banc, but in March of 2009, the motion was denied.[76] In a dissent to the denial, authored by Judge Bea and joined by four other judges, Bea argued that the current Ninth Circuit rule clearly contradicts *Lopez-Mendoza* because the reasonableness standard is equivalent to a qualified immunity standard[77]—and qualified immunity is applicable in non-egregious

69. *Id.*; *see supra* Part III.C.

70. 445 U.S. 573, 603 (1980) (holding that the Fourth Amendment prohibits officers from entering a residence to make an arrest without a warrant or consent).

71. *Lopez-Rodriguez*, 536 F.3d at 1016 (quoting Payton v. New York, 445 U.S. 573, 586 (1980)).

72. *Id.* at 1018.

73. *Id.* at 1019 (citing Adamson v. Comm'r, 745 F.2d 541, 545 (9th Cir. 1984)).

74. *Id.* at 1019–20 (Bybee, J., concurring).

75. *Id.* at 1020–21; *see supra* Part III.B.

76. Lopez-Rodriguez v. Holder, 560 F.3d 1098, 1099 (9th Cir. 2009) (Holder's name was substituted for Mukasey's).

77. Pursuant to qualified immunity, government officials performing discretionary functions are immune from liability as long as their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

situations.[78] Bea further criticized the standard because it relies on officer knowledge.[79] He prefers the First and Second Circuit egregious standards that focus on officer conduct, not knowledge.[80]

V. ANALYSIS

Lopez-Rodriguez v. Mukasey widens the circuit split over the egregious exception; consequently, the Supreme Court can be reasonably expected to take up this matter at some point in the future. This section provides three reasons why the Supreme Court should eliminate the egregious exception—especially the Ninth Circuit's version of the rule. First, the circuits that accept an egregious exception ignore the cost-benefit test and the Court's reasoning in *Lopez-Mendoza*. Second, there is a perverse incentive in using the exclusionary rule for ongoing crimes. And third, the Court has taken steps to diminish the importance of the exclusionary rule since *Lopez-Mendoza*.

Each of these three reasons is premised on the fact that the current Ninth Circuit rule encourages the type of time-consuming analysis by immigration judges that the *Lopez-Mendoza* majority sought to avoid.[81] In using cost-benefit analysis, the *Lopez-Mendoza* court did not condone unconstitutional actions by immigration officials; it merely concluded it would be cost prohibitive to use immigration hearings and case-by-case analysis of Fourth Amendment violations, to remedy such actions.[82]

The Ninth Circuit has ignored this reasoning by establishing multiple exceptions to the general rule that evidence should not be suppressed in immigration hearings.[83] Furthermore, *Lopez-Rodriguez* established an entirely new exception. Establishing the "nonconsensual entry of a residence exception" advocated in *Lopez-*

78. *Id*. at 1101 n.7 (Bea, J., dissenting) (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)).

79. *Id*. at 1104–05.

80. *Id*. at 1105–06.

81. INS v. Lopez-Mendoza, 468 U.S. 1032, 1049–50 (1984).

82. *Id*. at 1050.

83. *See supra* Part III.C.

Rodriguez will surely encourage future respondents in immigration hearings to file suppression motions seeking additional exceptions.[84]

A. The First, Second, and Ninth Circuits Ignore the Janis *Cost-Benefit Test and the Court's Reasoning in* Lopez-Mendoza

The bulk of the Supreme Court's *Lopez-Mendoza* decision applied the *Janis* cost-benefit test to determine whether the exclusionary rule is appropriate in immigration hearings. The First, Second, and Ninth Circuits fail to apply the *Janis* test in their cases dealing with an egregious exception to the *Lopez-Mendoza* rule.[85] As this was the basis of the decision in *Lopez-Mendoza*, the lower courts should use the *Janis* cost-benefit test to determine whether exceptions to *Lopez-Mendoza* should be created. Such analysis would allow for more predictability than the broad, current Ninth Circuit rule. If an egregious violation has occurred, then the benefit of excluding evidence from the violation increases due to a desire to prevent such extreme misconduct by immigration agents. Courts should show how the extreme misbehavior would tip the cost-benefit scale and lead to the opposite conclusion the Court reached in *Lopez-Mendoza*.

A probable reason the Ninth Circuit failed to apply the *Janis* test in its case law addressing the egregious exception is that it would be extremely difficult to apply the test and reach a different conclusion than the Court did in *Lopez-Mendoza* without contradicting Justice O'Connor's reasoning in that case.[86] Still, while it would have been difficult, it would not have been impossible if the Ninth Circuit had focused on differentiating the facts of *Lopez-Mendoza*—which only encompassed workplace raids—to *Gonzalez-Rivera* where a specific automobile passenger had been pulled over and targeted. If the Ninth Circuit had applied the test required from *Lopez-Mendoza* it

84. The court could have sought to discourage this with language in *Lopez-Rodriguez* that would discourage respondents in immigration hearings from seeking additional exceptions. However, no such language was used.

85. *See, e.g.*, Lopez-Rodriguez v. Mukasey, 536 F.3d 1012, 1015–16 (9th Cir. 2008). The Ninth Circuit quoted the egregious language from *Lopez-Mendoza*, but limited its discussion to the rest of *Lopez-Mendoza* to the statement: "In *INS v. Lopez-Mendoza*, the Supreme Court held that the Fourth Amendment exclusionary rule does not generally apply in deportation proceedings, where the sole issues are identity and alienage." *Id.* (citing *Lopez-Mendoza*, 468 U.S. at 1034). The Ninth Circuit never mentioned the *Janis* test or cost-benefit analysis.

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

would not have developed such an open-ended rule requiring the time consuming case-by-case analysis the majority sought to avoid in *Lopez-Mendoza*.

B. The Perverse Incentive of Encouraging Lawbreaking by Immigrants in Order to Discourage Officer Misconduct

Having a broad rule that allows immigrants to *seek* use of the exclusionary rule, such as the Ninth Circuit's rule, encourages the filing of frivolous claims. In all likelihood, Justice White, in his *Lopez-Mendoza* dissent, was correct in stating that immigrants will be more likely to utilize the exclusionary rule than subsequent § 1983 civil actions.[87] However, he failed to point out the reason this is the case—an immigrant's desire to remain in the country as long as possible. Those illegally present often have a strong incentive to remain in the country due to personal and family ties to their community and for employment reasons. If they can raise a routine argument in an immigration hearing that may require discovery or prolong an IJ's decision-making process, then it can only be expected that the argument will be raised, whether valid or not given the facts of the situation.[88]

While it could be argued that the same incentive regarding ongoing crimes is applicable in some criminal contexts and the exclusionary rule is still permitted, this argument fails because of the differences between criminal prosecution and civil hearings like immigration hearings. If evidence is suppressed in a criminal context, it can never be used against the accused because once the proceedings end, the matter cannot be retried due to the double jeopardy clause of the Constitution.[89] However, this rule does not apply in immigration hearings.[90] In an immigration hearing, the exact same evidence could be re-gathered immediately after the

87. *Id.* at 1055 (White, J., dissenting).

88. This reasoning admittedly assumes that some attorneys would ignore the ABA Model Rules of Professional Conduct that expressly forbid the filing of motions merely to delay resolution of the issue before the tribunal. MODEL RULES OF PROF'L CONDUCT R. 3.2 (stating that a client does not have a valid interest in delaying resolution of an action); *see also* FED. R. CIV. P. 11(b)(1) (allowing sanctioning of an attorney if a motion is filed with a court for the "improper purpose" of "caus[ing] unnecessary delay").

89. U.S. CONST. amend. V.

90. *Cf.* N.Y. Times v. Sullivan, 376 U.S. 254, 278 (1964) ("And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication.").

immigration judge suppresses the evidence. For example, immigration agents could simply follow the immigrant out of the building, and as long as they could show reasonable suspicion, they could request documentation and seek a confession.[91] The immigrant could then be brought back before the immigration judge based on the exact same claim as before—that her presence was illegal. The fact that immigration officials can bring the same claim in a subsequent action lessens any potential impact of the exclusionary rule.

No judicial system should encourage law breaking. A criminal, once caught, will be reluctant to re-commit the same crime because of the fear of being caught again. There is no such incentive for an immigrant that is not deported due to officer misconduct; instead, the immigrant will simply continue to remain in the country illegally.[92]

C. The Supreme Court Does Not Favor Use of the Exclusionary Rule Over Other Remedies, but This Is Precisely What the Ninth Circuit Rule Does

It is unlikely that the current Supreme Court will uphold cases that expand the exclusionary rule. The Court illustrated its lack of enthusiasm when it comes to the exclusionary rule last session in *Herring v. United States* by stating: "The exclusion of evidence 'has always been our last resort, not our first impulse.'"[93] Much has been written on the exclusionary rule, and this Note does not explore the issue in depth. Suffice it to say that since the publication of Dallin Oaks's oft-cited article on the subject in 1970,[94] the Court has

91. In this hypothetical situation the officers conduct a mere stop. If they could show they had probable cause before or after the stop, they could re-arrest the immigrant and demand documentation.

92. I recognize that criminals who "get off" may be emboldened and commit similar crimes again. Even if this is the case, there is no indication of this at the time of dismissal, and the public can hope that such crimes will not be committed. However, in the case of an undocumented immigrant, after being arrested and before appearing before an IJ, the immigrant has already turned down voluntary departure. It is extremely unlikely that the immigrant will later choose to depart voluntarily after being released from custody.

93. Lopez-Rodriguez v. Holder, 560 F.3d 1098, 1102 (9th Cir. 2009) (Bea, J., dissenting) (quoting Herring v. United States, 129 S. Ct. 695, 700 (2009)).

94. Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) (providing an extensive analysis of the effect of the exclusionary rule on law enforcement and arguing that the rule be abolished and replaced with civil remedies); *see also* Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV.

repeatedly chosen not to increase the use or importance of the exclusionary rule. However, in many instances, like *Herring*, it has limited the rule.[95]

The strongest argument in support of granting the rehearing en banc in *Lopez-Rodriguez* was the fact that it expanded the use of the exclusionary rule. As Judge Bybee alluded to in his *Lopez-Rodriguez* concurrence, if the Supreme Court were to take up the issue it would almost surely strike down the Ninth Circuit rule.[96] As the rule stands, it defines a broad exception to the Court's holding in *Lopez-Mendoza*, and invites further expansion of the exception, which will also expand the use of the exclusionary rule.

VI. CONCLUSION

In *Lopez-Rodriguez*, the Ninth Circuit expanded and further entrenched a rule that fails to follow the Supreme Court's precedent in *Lopez-Mendoza*. In determining whether the egregious exception should apply, thus allowing the suppression of evidence in an immigration hearing, the court relied on the Circuit's reasonable officer conduct standard. The court then used Supreme Court precedent to show that nonconsensual entry of a residence by a peace officer is unreasonable. Combining these two rules, the court held that the immigration officers' entry in *Lopez-Rodriguez* was unreasonable, and therefore, an egregious Fourth Amendment violation.

The Ninth Circuit wrongly concluded that the egregious exception, which is dicta from a plurality section of the Supreme Court's *Lopez-Mendoza* opinion, is a valid basis for developing broad case law and establishing numerous exceptions to *Lopez-Mendoza*. Furthermore, *Lopez-Rodriguez* widens the circuit split on this issue and will hinder immigration enforcement by allowing routine motions seeking suppression due to Fourth Amendment violations. This is exactly what *Lopez-Mendoza* sought to prevent.

The Supreme Court should resolve the circuit split not by merely adopting one circuit's interpretation of the *Lopez-Mendoza*

1365 (2008) ("Oaks's article is the second most cited of those published by *The University of Chicago Law Review* in its seventy-five year history . . . .").

95. *Lopez-Mendoza* is an excellent example of this as the holding barred the exclusionary rule from immigration hearings. 468 U.S. at 1050.

96. Lopez-Rodriguez v. Mukasey, 536 F.3d 1012, 1019–20 (9th Cir. 2008) (Bybee, J., concurring).

exception, but by abandoning the egregious exception altogether. The three key reasons the Court should abandon the egregious exception are (1) any use of the exception should have been based on cost-benefit analysis, which no circuit has done, (2) a perverse incentive underlies using the exclusionary rule for ongoing crimes, and (3) the Court has continually weakened the exclusionary rule while a broad egregious exception strengthens the rule.

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