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# The Egregious Violation Exception In Immigration Proceedings: How To Resolve The Circuit Split With A Totality Of Circumstances Approach

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THE EGREGIOUS VIOLATION EXCEPTION IN IMMIGRATION PROCEEDINGS: HOW TO RESOLVE THE  
CIRCUIT SPLIT WITH A TOTALITY OF CIRCUMSTANCES APPROACH  
Hetal Mistry

I. INTRODUCTION

On March 26, 2007, several armed and uniformed ICE officers arrived at a two-story New Jersey apartment building at 4:30 a.m.<sup>1</sup> They rang the entrance buzzer to the apartment incessantly.<sup>2</sup> One of the residents, Clara, opened the door to the building fearing there was an emergency.<sup>3</sup> She saw five or six ICE officers coming up the stairs.<sup>4</sup> As they approached the door, they showed her an administrative warrant they had for her sister, Maria.<sup>5</sup> The officers asked Clara to verify her immigration status to which she stated she was a legal permanent resident (“LPR”).<sup>6</sup> Then they asked to enter the apartment at which time Clara allowed them to enter, even though Maria was not there.<sup>7</sup> At the time, Clara was unaware of the fact that she could refuse to let them enter and was under the impression that the warrant gave the officers the right to enter the apartment even if Maria had not been there.<sup>8</sup> Several other people, along with Clara’s brother, Erick Oliva-Ramos, lived in this apartment.<sup>9</sup> Once in the apartment, the officer ordered everyone to the living room.<sup>10</sup> One of the ICE officers stood by the entrance to the apartment, so that no one could leave.<sup>11</sup> At no point did the officers identify who they were, much less show a badge, or indicate why they were there to the rest of the residents.<sup>12</sup> The only

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<sup>1</sup> *Oliva-Ramos v. Attorney General of the U.S.*, 694 F.3d 259, 261 (3d Cir. 2012).

<sup>2</sup> *Id.* at 261-262.

<sup>3</sup> *Id.* at 262.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Oliva-Ramos*, 694 F.3d at 262.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

indication the residents had that these were immigration officers were the green ICE uniforms that the officers were wearing.<sup>13</sup> The officers asked everyone about Maria and her legal status and then began to question them about their nationalities and identities.<sup>14</sup> They did not allow the residents to stand or leave the door closed when using the bathroom.<sup>15</sup> One officer ordered Oliva-Ramos to get his identification documents, which indicated that he was a Guatemalan citizen, and not lawfully present in the United States.<sup>16</sup> When he followed orders and retrieved his documents, an officer arrested Oliva-Ramos.<sup>17</sup> Although Oliva-Ramos argued that the identification documents should be suppressed as a fruit of an illegal search pursuant to the exclusionary rule, the judge allowed them and ordered him deported from the United States.<sup>18</sup>

Over the past three decades, there has been controversy among the Federal Circuit Courts on whether the exclusionary rule is applicable in immigration proceedings. While the exclusionary rule is clearly applicable in criminal proceedings, courts have long held that immigration is not punishment and therefore the same constitutional protections are not guaranteed in immigration proceedings.<sup>19</sup> Courts have also divided over what conduct violates the Fourth Amendment in the context of immigration proceedings.<sup>20</sup>

In 1984, the Supreme Court in *INS v. Lopez Mendoza*<sup>21</sup> first addressed the issue of whether the exclusionary rule was applicable to a civil deportation hearing.<sup>22</sup> In *Lopez Mendoza*,

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<sup>13</sup> *Oliva-Ramos*, 694 F.3d at 262.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 263.

<sup>16</sup> *Id.* at 262.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 264.

<sup>19</sup> *See, e.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580, 593 (1952) (“Deportation is not a punishment but a refusal by the government not keep noncitizens whose presence is hurtful in the country.”); *Fong Yue Ting v. United States*, 149 U.S. 698, (1893) (The court discusses that deportation proceedings are not punishments for a crime committed but rather whether they have complied with the conditions to remain in the country); *Carlson v. Landon*, 342 U.S. 524, 537(1952) (“Deportation is not a criminal proceeding and has never been held to be punishment.”).

<sup>20</sup> *See* Elizabeth A. Rossi, *Revisiting INS v. Lopez-Mendoza: Why the Fourth Amendment Exclusionary Rule Should Apply in Deportation Proceedings*, 44 COLUM. HUM. RTS. L. REV. 477 (2013).

<sup>21</sup> 468 U.S. 1032 (1984).

after an unlawful arrest, the petitioner made an admission to his unlawful presence in the United States.<sup>23</sup> The court held that the exclusionary rule *generally* does not apply in deportation proceedings, making illegally obtained evidence admissible against the noncitizen.<sup>24</sup> At arriving at this conclusion, the court, however, left a narrow opening that would allow the exclusionary rule to apply in two situations in immigration proceedings.<sup>25</sup> The first exception where the exclusionary rule would apply is when INS officers committed widespread violations of the Fourth Amendment.<sup>26</sup> The court would also allow the exclusion of illegally obtained evidence in situations of “egregious violations of Fourth Amendment or other liberties that might transgress notion of fundamental fairness and undermine the probative value of the evidence obtained.”<sup>27</sup>

After the decision in *INS v. Lopez-Mendoza*, lower federal courts did not know how to apply the two exclusionary rule exceptions in removal proceedings. As a result, the United States Court of Appeals has split regarding the meaning of “egregious” within the exception for egregious Fourth Amendment violations.<sup>28</sup> Currently, the Circuit Courts are divided between a conduct-based approach and a bad-faith approach. The conduct-based approach does not only focus on the ICE officer and the severity of the alleged violation, but also focuses on the probative value of the evidence.<sup>29</sup> On the other hand, the bad faith approach is a broader view that requires the noncitizen only to prove either that the actions by the ICE officers were deliberate or that they should have known was in violation of the Fourth Amendment, focusing

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<sup>22</sup> *Id.* at 1034.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 1050.

<sup>25</sup> *Id.* at 1035.

<sup>26</sup> *Id.*

<sup>27</sup> *Lopez-Mendoza*, 468 U.S. at 1050.

<sup>28</sup> *See supra* note 26.

<sup>29</sup> Christine L. Vigliotti, *Gonzalez-Rivera v. Ins: An Unwarranted Application of the Exclusionary Rule to Civil Deportation Hearings*, 40 VILL. L. REV. 1133, 1169 (1995).

primarily on the violation.<sup>30</sup> Without a uniform test between all circuits, noncitizens will be more susceptible to removability in certain areas of the country.<sup>31</sup> The Third Circuit, in *Oliva-Ramos v. Attorney General of the United States*, developed a workable and practical standard that incorporated certain conduct developed from other circuits in one variation of the conduct-based approach that if adopted by all courts will resolve this evidentiary issue.<sup>32</sup>

This comment will argue that the conduct-based totality of circumstances standard, used in *Oliva-Ramos*,<sup>33</sup> is the correct standard that will help courts interpret when the egregious violation exception applies in removal proceedings. Part II will provide background of the exclusionary rule and its application to removal hearings.<sup>34</sup> Part III will discuss the various approaches that the circuits have used, including the totality of circumstances conduct based test employed *Oliva-Ramos*. Part IV will analyze why the Third Circuit approach is the correct approach. Lastly, part V will conclude that in order for courts to apply a uniform standard to the egregious violation exception, they should apply the standard set forth in *Oliva-Ramos*.

## II. BACKGROUND: THE EXCLUSIONARY RULE AND ITS APPLICATION TO REMOVAL HEARINGS

### *A. The Exclusionary Rule*

The exclusionary rule is a judicially created evidentiary doctrine derived from the Fourth Amendment<sup>35</sup> that requires that “all evidence obtained by searches and seizures in

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<sup>30</sup> *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994).

<sup>31</sup> See Generally Irene Scharf, *The Exclusionary Rule in Immigration Proceedings: Where it was, Where it is, Where it May Be Going*, 12 SAN DIEGO INT’L L.J. 53, 69 (2010).

<sup>32</sup> *Oliva-Ramos v. Attorney General of the U.S.*, 694 F.3d 259, 259 (3d Cir. 2012).

<sup>33</sup> *Id.*

<sup>34</sup> See Part II.

<sup>35</sup> U.S. CONST. amend. IV. (“The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

violation of the Constitution . . . [be] inadmissible in court.”<sup>36</sup> This rule applies to all subsequent evidence or “fruits” that are obtained or derive from the original illegal conduct by law enforcement.<sup>37</sup> In order for the evidence to be deemed admissible during a search or seizure, the conduct by law enforcement must be justified by probable cause.<sup>38</sup> An officer has probable cause when the known facts and circumstances would warrant a reasonable person to believe that there is evidence of wrongdoing.<sup>39</sup>

The primary purpose of this rule is to deter unlawful conduct by the police and “effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.”<sup>40</sup> It is, however, not a personal constitutional right for the victim whose privacy has been breached.<sup>41</sup> In order to challenge the admissibility of illegally obtained evidence, a defendant must have suffered from a constitutional violation.<sup>42</sup> This challenge is usually a pretrial motion to suppress evidence and if defendant is successful, then the illegally obtained evidence will be inadmissible at trial.<sup>43</sup> This will further ensure that the defendant is given a fair trial under their due process rights.<sup>44</sup>

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<sup>36</sup> *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

<sup>37</sup> *Wong Sun v. United States*, 371 U.S. 471, 475 (1963).

<sup>38</sup> *Kyllo v. United States*, 533 U.S. 27, 31 (2001).

<sup>39</sup> *Id.*

<sup>40</sup> *United States v. Calandra*, 414 U.S. 338, 347 (1974); *See also United States v. Janis*, 428 U.S. 433 (1976).

<sup>41</sup> *Id.*

<sup>42</sup> Matthew S. Mulqueen, *Rethinking the Role of the Exclusionary Rule in Removal Proceedings*, 82 *St. JOHNS'S L. REV.* 1157, 1162 (2008).

<sup>43</sup> *Id.*

<sup>44</sup> *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

## *B. Immigration Proceedings in Contrast to Criminal Proceedings*

Unlike the criminal proceedings, the Constitution does not *explicitly* provide for the power to regulate immigration.<sup>45</sup> Rather, through the plenary power doctrine, immigration is regulated by the legislative and executive branches with the judicial branch having a very limited role.<sup>46</sup> Even though it gives Congress the authorization to control the naturalization process, immigration law has developed through the various statutes and regulations created by both the legislative and executive branches.<sup>47</sup> The plenary power doctrine provides great judicial deference when it comes to Congressional regulation of immigration.<sup>48</sup> Unfortunately, for noncitizens, because of this power, they are not afforded the same protections of the Constitution as an American citizen.<sup>49</sup> Noncitizens are still, however, afforded limited due process rights.<sup>50</sup> They have the “privilege” of having counsel; however, the government will not provide one for them in case they cannot afford one.<sup>51</sup> They do however, have the right to “examine all the

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<sup>45</sup> Denise M. Fabiano, *Immigration Law--Flores v. Meese: A Lost Opportunity to Reconsider the Plenary Power Doctrine in Immigration Decisions*, 14 W. NEW ENG. L. REV. 257, 258 (1992).

<sup>46</sup> *Id.*

<sup>47</sup> Jon Feere, *Plenary Power: Should Judges Control U.S. Immigration Policy?*, (February 2009), <http://www.cis.org/plenarypower>.

<sup>48</sup> See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)(noting that decisions made by the legislature to exclude noncitizens are conclusive upon the judiciary); See also *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892)(also affirming that the executive branch’s immigration decision is final and the judiciary was not second guess their decision); *Matthews v. Diaz et al.* 426 U.S. 67 (1976)( emphasizing that the Legislature or Executive are “of a character more appropriate” to address the issues of immigration).

<sup>49</sup> See *Kleindienst v. Mandel et al.*, 408 U.S. 753 (1972) (Court upheld the exclusion of revolutionary Marxist because this was a characteristic that Congress has forbidden using the plenary power limiting the noncitizen’s first amendment rights); *Matthews*, 426 U.S. at 67 (Noncitizens had to be admitted in this country for 5 years before they can receive Medicare.); See generally Jon Feere, *Plenary Power: Should Judges Control U.S. Immigration Policy?*, (February 2009), <http://www.cis.org/plenarypower>.

<sup>50</sup> See *Yamataya v. Fisher* 189 U.S. 86 (1903) (The respondent must be given notice of deportation and the opportunity to be heard in order to satisfy due process in deportation hearings.) See generally *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103 (1927) (stating that deportation without a fair hearing is a denial of due process); *Kwock Jan Fat v. White*, 253 U.S. 454 (1920) (reversing a decision upholding the exclusion of a United States citizen of Chinese descent due to the failure of the examining inspector to include testimony of three witnesses favorable to the petitioner in the record of proceedings).

<sup>51</sup> 8 U.S.C. §1229a(b)(4)(A)(2000)(This is unlike criminal proceedings where the defendant has the right to an attorney and if they cannot afford one, one will be appointed to them.).

evidence against [them], present evidence on [their] own behalf, and cross examine witnesses presented by the Government.”<sup>52</sup>

Immigration deportation proceedings are different from the criminal justice system. Unlike criminal proceedings, deportation proceedings are purely civil in nature.<sup>53</sup> These proceedings are meant, “to determine the noncitizen’s eligibility to remain in this country, not to punish an unlawful entry.”<sup>54</sup> The noncitizens’ unlawful entry is only necessary to look at to see if it affects his right to remain in this country.<sup>55</sup> The purpose of these proceedings is to “put an end to a continuing violation of the immigration laws.”<sup>56</sup>

The immigration judge’s only power is to order deportation.<sup>57</sup> Because this is a civil proceeding, various safeguards that are given in the criminal context are not applicable in this proceeding.<sup>58</sup> For one, although the noncitizen “must be given a reasonable opportunity to be present at the proceeding,” if they fail to appear, the proceeding may continue with or without their presence.<sup>59</sup> In a criminal proceedings on the other hand, a failure to appear will not continue their proceeding unless a waiver of appearance has been executed.<sup>60</sup> The burden of proof also significantly varies between both proceedings.<sup>61</sup> In deportation proceedings, the

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

<sup>53</sup> *INS v. Lopez Mendoza* 468 U.S. 1032, 1038 (1974). *But see* Anita Ortiz Maddali, *Padilla v. Kentucky: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?* 61 AM. U. L. REV. 1, 30 (2011) (“Deportation involves both civil and criminal elements, making it appear quasi-criminal.”); Patricia J. Schofield, *Evidence in Deportation Proceedings*, 63 TEX. L. REV. 1537, 1568 (1985) (“Deportation hearings should be recognized as the quasi-criminal proceedings that they in fact are.”).

<sup>54</sup> 8 U.S.C. §§ 1302, 1306, 1325.

<sup>55</sup> 8 U.S.C. §§ 1251, 1252(b).

<sup>56</sup> *Lopez-Mendoza*, 468 U.S. at 1039.

<sup>57</sup> *Id.*

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

<sup>59</sup> 8 U.S.C. §1252(b).

<sup>60</sup> *See generally* Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1458 (2009).

<sup>61</sup> Matthew S. Mulqueen, *Rethinking the Role of the Exclusionary Rule in Removal Proceedings*, 82 ST. JOHN’S L. REV. 1157, 1164-1166 (2008).



government has the burden to show only identity and alienage.<sup>62</sup> Then, the burden shifts to the noncitizen to prove their lawful entry.<sup>63</sup> In the criminal context the government is required to prove beyond a reasonable doubt; however, in the immigration context the Board of Immigration Appeals only requires clear, unequivocal and convincing evidence.<sup>64</sup> The immigration judge's decision to deport the noncitizen "needs only to be based on reasonable, substantial and probative evidence" offered by the Government at the hearing.<sup>65</sup> The evidence of the alienage and deportability of the noncitizen is usually gathered at the time of the arrest in a Form I-213, Record of Deportable Noncitizen.<sup>66</sup>

If at the time of arrest the evidence was obtained through an illegal search and seizure, it is crucial to the noncitizen that this evidence be excluded from the hearing.<sup>67</sup> Since immigration proceedings require a lower burden of proof for the Government, these documents would more likely have the noncitizen deported than if they were not admitted into evidence.<sup>68</sup> As a result, these people would be torn from their homes, separated from their families, and snatched away from their employment.<sup>69</sup>

### *C. ICE's Home Raid Operations*

As a response to the September 11, 2001 terrorist attacks, the U.S. Immigration and Customs Enforcement ("ICE") was created under the newly established Department of Homeland Security.<sup>70</sup> These terrorist attacks further increased the need to tighten security

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<sup>62</sup> 8 U.S.C. § 1361.

<sup>63</sup> *Id.*

<sup>64</sup> *INS v. Lopez Mendoza* 468 U.S. 1032, 1039 (1974).

<sup>65</sup> 8 U.S.C. §1252(b)(4).

<sup>66</sup> *See Martinez-Camargo v. INS*, 282 F.3d 487, 489 (7th Cir. 2002).

<sup>67</sup> *Mulqeen*, *supra* at 1165.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1177.

<sup>70</sup> *Who Joined DHS*, U.S. Department of Homeland Security, <http://www.dhs.gov/who-joined-dhs>; *Id.* at 1174-1176.

measures on immigration, as the hijackers were all immigrants.<sup>71</sup> ICE was designed to enforce the immigration law, which includes the detention, removal, intelligence and investigation.<sup>72</sup> The department's main focus in enforcement is on high priority targets, as such the department engages in home raid operations.<sup>73</sup>

These raids, however, must be conducted pursuant to the constitutional requirements in the Fourth Amendment.<sup>74</sup> Under the Fourth Amendment, people have the right to be protected “in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>75</sup> Additionally, warrants are only to be issued “upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.”<sup>76</sup> In order to justify many searches and seizures, a warrant must be issued in advance from a neutral and detached magistrate.<sup>77</sup> Unlike arrests in public, searches or arrest in the home, do require a warrant, unless the officer has fit into one of the exceptions.<sup>78</sup> Among those exceptions, include the property owner's valid consent to search.<sup>79</sup>

Notwithstanding these Constitutional mandates, immigrants allege that the ICE raids are being conducted in such a way as to violate their constitutional rights.<sup>80</sup> The number of raids by ICE officers has “grown dramatically” in the recent years and with it arose much controversy.<sup>81</sup>

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<sup>71</sup> *Identity and Immigration Status of 9/11 Terrorists* (2011), FEDERATION FOR AMERICAN IMMIGRATION REFORM, available at <http://www.fairus.org/issue/identity-and-immigration-status-of-9-11-terrorists>.

<sup>72</sup> *Id.*

<sup>73</sup> Bess Chiu et al., CARDOZO IMMIGRATION JUSTICE CLINIC, *Constitution on ICE: A Report on Immigration Home Raid Operations 3* (2009) [hereinafter Cardozo Immigration Justice Clinic], available at [http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC\\_ICE-Home-Raid-Report%20Updated.pdf](http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-Raid-Report%20Updated.pdf).) at 6.

<sup>74</sup> *Id.*

<sup>75</sup> U.S. CONST. amend. IV.

<sup>76</sup> *Id.*

<sup>77</sup> *United States v. Chadwick*, 433 U.S. 1, 10-12 (1977).

<sup>78</sup> *Kyllo v. United States*, 533 U.S. 27, 31 (2001).

<sup>79</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

<sup>80</sup> Nathan Treadwell, *Fugitive Operations and the Fourth Amendment: Representing Immigrants Arrested in Warrantless Home Raids*, 89 N.C. L. REV. 507 (2011).

<sup>81</sup> *Id.* at 511.

The widespread pattern of behavior included warrantless search of the premises, lack of consent from residents before entry, and forceful entry.<sup>82</sup> Consequently, courts have seen an increase in pretrial suppression motions and have been trying to interpret the Supreme Court decision of *I.N.S. v. Lopez - Mendoza*<sup>83</sup> to see if the exclusionary rule would apply in removal proceedings.<sup>84</sup>

#### *D. INS v. Lopez Mendoza*

Until 1984, there was very little case law for the immigration judges to determine the applicability of the exclusionary rule to immigration proceedings. Then the Supreme Court of the United States granted certiorari in *INS v. Lopez Mendoza* to determine “whether an admission of unlawful presence in this country made subsequent to an allegedly unlawful arrest must be excluded as evidence in a civil deportation hearing.”<sup>85</sup> In this case, the Supreme Court consolidated two cases where the respondents were arrested at their place of employment when the INS investigators impermissibly questioned the respondents.<sup>86</sup> The court held that the evidence obtained from the INS officers was admissible in civil deportation hearing.<sup>87</sup> The court did not conclude that the exclusionary rule does not apply to all removal hearings, but that it would be inapplicable in most situations.<sup>88</sup> The court did, however, suggest that the exclusionary rule would apply narrowly and in two particular situations.<sup>89</sup> The first situation, in immigration proceedings, where the exclusionary rule would apply is called the widespread violation test.<sup>90</sup> This requires there to be a “good reason to believe that the Fourth Amendment violations by INS

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<sup>82</sup> *Id.*; See *supra* note 73.

<sup>83</sup> *INS v. Lopez Mendoza*, 468 U.S. 1032 (1984).

<sup>84</sup> Nathan Treadwell, *Fugitive operations and the Fourth Amendment: Representing Immigrants Arrested in Warrantless Home Raids*, 89 N.C. L. REV. 507, 527 (2011).

<sup>85</sup> *Lopez Mendoza*, 468 U.S. at 1051.

<sup>86</sup> *Id.* at 1035-1037.

<sup>87</sup> *Id.* at 1051.

<sup>88</sup> *Id.* at 1050-1051.

<sup>89</sup> *Id.* at 1050.

<sup>90</sup> *Id.* at 1050.

officers were widespread.”<sup>91</sup> The second situation is the egregious violations test, which requires that the “egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.”<sup>92</sup>

The court did a cost benefit analysis of excluding reliable evidence from a deportation proceeding to arrive at the holding.<sup>93</sup> The benefit of allowing the evidence to be excluded if obtained in violation of the constitution would be to deter future unlawful police conduct.<sup>94</sup> The Court noted, however, that there is a low deterrence value in the application of the exclusionary rule in deportation proceedings.<sup>95</sup> In addition, the Court noted that there are “unusual and significant” societal costs.<sup>96</sup> The Court’s main concern was that immigration judges are not well versed in the Fourth Amendment, and applying the exclusionary rule would cause unnecessary delays and “inordinate amount of time spent on such cases at all level [will cause] an adverse impact on the effective administration of immigration laws.”<sup>97</sup> The court noted that the INS already has taken “sensible and reasonable steps” towards deterring INS officers from violating the Fourth Amendment.<sup>98</sup> Thus, in weighing the costs and benefits, the court held that the balance weighs against applying the exclusionary rule in civil deportation proceedings.<sup>99</sup>

In this case, four Justices wrote strong dissents arguing for general applicability of the exclusionary rule in civil deportation proceedings. Justice White wrote the strongest dissent articulating that the exclusionary rule should apply in deportation proceedings and that the

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<sup>91</sup> *Lopez Mendoza*, 468 U.S. at 1050.

<sup>92</sup> *Id.* at 1050-1051.

<sup>93</sup> *Id.* at 1042.

<sup>94</sup> *Id.* at 1043-1044.

<sup>95</sup> *Id.* at 1046.

<sup>96</sup> *Id.* at 1046.

<sup>97</sup> *Lopez Mendoza*, 468 U.S. at 1048-1049.

<sup>98</sup> *Id.* at 1050.

<sup>99</sup> *Id.* at 1050.

majority had an “incorrect assessment of the cost and benefits.”<sup>100</sup> In his dissenting opinion he stated how the cost and benefits in the deportation setting do not differ “in any significant way” from the criminal setting.<sup>101</sup> As for the deterrent value, Justice White explained that the INS agents and police officers essentially have the same mission to use the evidence in the proceedings and that the “civil deportation proceedings are to INS agents what criminal trials are to police officers.”<sup>102</sup> Justice White concluded that the exclusionary rule should apply but only when “evidence has been obtained by deliberate violations of the Fourth Amendment or by conduct a reasonably competent officer would know is contrary to the Constitution.”<sup>103</sup> Justice Brennan agreed with Justice White and found that the basis of and importance of the exclusionary rule is derived from the Fourth Amendment itself, not because it had a deterrence value.<sup>104</sup> Further Justice Marshall also agreed that the exclusionary rule should apply to at least some extent in deportation proceedings because “there is no other way to achieve the twin goals of enabling the judiciary to avoid the taint of the partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct- that the government would not profit from its lawless behavior.”<sup>105</sup> Lastly, Justice Stevens agreed with Justice White’s dissent.<sup>106</sup> These four justices agreed that the exclusionary rule should apply in deportation proceedings at least to some extent.

### III. THE EGREGIOUS VIOLATIONS EXCEPTION CIRCUIT SPLIT

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<sup>100</sup> *Lopez Mendoza*, 468 U.S. at 1052. (White, J., dissenting).

<sup>101</sup> *Id.* at 1060. (White, J., dissenting).

<sup>102</sup> *Id.* at 1054. (White, J., dissenting).

<sup>103</sup> *Id.* at 1060. (White J., dissenting).

<sup>104</sup> *Id.* at 1052. (Brennan, J., dissenting) (“The Government of the United States bears an obligation to obey the Fourth Amendment; that obligation is not lifted simply because the law enforcement officers were agents of the immigration and Naturalization Service, nor because the evidence obtained by those officers was to be used in civil deportation hearings.”).

<sup>105</sup> *Id.* at 1060-1061 (Marshall, J., dissenting).

<sup>106</sup> *Lopez Mendoza*, 468 U.S. at 1061. (Stevens, J., dissenting).

Due to *INS v. Lopez-Mendoza*, the immigration judge can only apply the exclusionary rule in two situations. The “egregious” violations exception involves conduct by INS officers that is in violation of the Fourth Amendment that would weaken the value of the evidence obtained and “transgress notions of fundamental fairness.”<sup>107</sup> The courts have split on exactly what situations would be considered “egregious” and have essentially left two types of positions. The first approach is developed by the First and Second Circuits which apply a conduct-based analysis that focuses on the conduct of the INS agents and whether it was egregious or not.<sup>108</sup> This approach uses a list of factors to determine if the INS agent’s conduct rises to a level of egregious.<sup>109</sup> The second approach is led by the Ninth Circuit, which uses a bad faith approach that analyzes whether the officer’s actions were reasonable or not.<sup>110</sup>

#### *A. Majority: Conduct Based Approach*

The conduct based approach is supported by the First, Second, Eighth and Eleventh Circuits. This approach focuses mainly on the conduct of the officers and uses certain factors to determine if the officer’s actions in arresting the noncitizen rises to level an “egregious”.

The First Circuit addressed this issue in *Kandamar v. Gonzales*.<sup>111</sup> Here, the noncitizen overstayed his visa and was issued an National Security Entry-Exit Registration System (“NSEERS”) notice, which was a notice of registration only given to certain young males from designated countries indicating that they had to appear and interview before the Department of

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<sup>107</sup> *Id.* at 1050-1051.

<sup>108</sup> Kate Mahoney, *What to do when the constable blunders? Egregious Violations of the Fourth Amendment in Removal Proceedings*, IMMIGRATION LAW ADVISOR, (Sept. 2012), <http://www.justice.gov/eoir/vll/ILA-Newsletter/ILA%202012/vol6no8.pdf>.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> 464 F.3d 65 (1st Cir. 2006).

Homeland Security.<sup>112</sup> At this interview, the Department of Homeland Security officer concluded that the noncitizen be put into removal proceedings for overstaying his visa and there he was ultimately determined removable.<sup>113</sup> At the removal hearing, Kandamar made a motion to suppress the evidence obtained in the DHS interview because it was a denial of his due process and equal protection rights, but the Immigration Judge (“IJ”) denied this motion.<sup>114</sup> In this case, he challenged the denial of the motion to suppress and the First Circuit Court affirmed the denial.<sup>115</sup> Here, the Court first determined there is an egregious violation when the government uses “threats, coercion, or physical abuse”<sup>116</sup> The court concluded that this interview did not rise to that level because it neither asked Kandamar to leave, told him to leave or restrain him from leaving in any way.<sup>117</sup> Therefore, there was no denial of Kandamar’s due process or equal protection rights.<sup>118</sup> Kandamar next argued to suppress his passport because it constituted as a seizure and was fundamentally unfair.<sup>119</sup> The court held that because he suffered no prejudice from the seizure of the passport, that it did justify the reversal of the removal order.<sup>120</sup> Further, the court addressed *Lopez Mendoza* stating, “evidence will be excluded if the circumstances surrounding a particular arrest and interrogation would render use of the evidence obtained thereby fundamentally unfair and in violation of due process requirements of the Fifth Amendment.”<sup>121</sup> Thus, the court determined the type of conduct that would constitute an egregious violation, which set a relatively high standard for the noncitizen to meet.

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<sup>112</sup> *Id.* at 67.

<sup>113</sup> *Id.* at 68.

<sup>114</sup> *Id.* at 69.

<sup>115</sup> *Id.* at 74.

<sup>116</sup> *Id.* at 71.

<sup>117</sup> *Kandamar*, 464 F.3d at 72.

<sup>118</sup> *Id.* at 71.

<sup>119</sup> *Id.* at 74.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 70. (citing *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 22-23)(Internal citations omitted).

The most notable case that adopted this approach arose from the Second Circuit. In *Almedia-Amaral v. Gonzales*,<sup>122</sup> the noncitizen was a minor who was found by a border patrol agent just as he was crossing into the United States through Texas.<sup>123</sup> He was subsequently asked to stop and provide identification.<sup>124</sup> The noncitizen provided the agent with a Brazilian passport and was then arrested and taken into custody for not having a U.S. Passport.<sup>125</sup> While in custody, he gave a statement that he later sought to suppress arguing that since he was an unaccompanied minor his statement was in violation of the Fourth Amendment.<sup>126</sup> The motion to suppress was denied by the IJ and BIA.<sup>127</sup> Here, the court found that the conduct of the agent was not so egregious to warrant suppression of the evidence.<sup>128</sup> According to the Second Circuit, to warrant an exclusion of evidence in a deportation proceeding, the record of evidence must establish either (1) an egregious violation occurred, which was fundamentally unfair, *or* (2) regardless of the egregiousness, the violation “undermined the reliability of the evidence in dispute.”<sup>129</sup> The court offered two situations in which the egregious violation had occurred was fundamentally unfair.<sup>130</sup> The first situation is based on the validity of the stop and the “characteristics and severity of the offending conduct.”<sup>131</sup> The court explained that if the officer were to stop the noncitizen for no reason at all and if the seizure was not severe, then it would not constitute an egregious violation.<sup>132</sup> The second situation that the Second Circuit addressed that would be egregious would be if it were based on “race or some other grossly improper

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<sup>122</sup> 461 F.3d 231 (2nd Cir. 2006).

<sup>123</sup> *Id.* at 232.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 233.

<sup>127</sup> *Id.*

<sup>128</sup> *Almedia-Amaral*, 461 F.3d at 235.

<sup>129</sup> *Id.* at 235.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*



consideration”, even though the seizure itself was not severe.<sup>133</sup> Although the court pointed out these two situations, it was in no way intended to be an exhaustive list of circumstances.<sup>134</sup> Additionally, the court further explained that the seizure itself would be severe or unreasonable “when the initial stop is particularly lengthy [or] there is show or use of force.”<sup>135</sup> This circuit has given other courts guidance on how to interpret the small opening left by *Lopez Mendoza* with a workable test.

The Eighth Circuit also adopted a conduct-based approach. In 2010, in *Puc-Ruiz v. Holder*,<sup>136</sup> the noncitizen was arrested in a restaurant where he worked when the local police entered the premises without a warrant.<sup>137</sup> The police justified their warrantless entry with a suspicion that a local ordinance was being violated.<sup>138</sup> When officers asked for identification, the noncitizen provided a valid license.<sup>139</sup> After being taken to the police station for violation of the ordinance, ICE officials were contacted and two interviews were conducted that revealed the noncitizen to be removable for being an undocumented foreign national.<sup>140</sup> *Puc-Ruiz* argued that the evidence obtained from his arrest at the restaurant should be suppressed because the police arrested him without probable cause and therefore the use of any evidence obtained would be fundamentally unfair.<sup>141</sup> The court did not agree with *Puc-Ruiz* and held that “arresting noncitizen without probable cause was not sufficiently egregious to require suppression of evidence obtained as result of that arrest.”<sup>142</sup> Here, the court noted that for the conduct to be considered egregious, there needs to be more than just a violation, but the conduct does not need

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<sup>133</sup> *Almedia-Amaral*, 461 F.3d at 235.

<sup>134</sup> *Id.* at fn2.

<sup>135</sup> *Id.* at 236.

<sup>136</sup> 629 F.3d 711 (8th Cir. 2010).

<sup>137</sup> *Id.* at 775.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 777.

<sup>142</sup> *Puc-Ruiz*, 629 F.3d at 774.

to be limited to just physical brutality.<sup>143</sup> In arriving at this conclusion, the court used the standard derived from the Second Circuit determining the police officers did not use an unreasonable show or use of force nor did Puc-Ruiz claim that the arrest was based on race.<sup>144</sup> Further, the court mentioned that in this case there was at least some articulable suspicion to justify the warrantless entry because the information about the ordinance violation was a given tip.<sup>145</sup>

The Eleventh Circuit is the final circuit to employ the conduct based approach. In *Ghysels-Reals v. U. S. AG*,<sup>146</sup> a noncitizen was detained after a routine traffic stop.<sup>147</sup> The noncitizen argued that the stop was unlawful and as a result, the evidence obtained from the stop should be suppressed.<sup>148</sup> Here, the court concluded that the traffic stop did not rise to a level of egregious that would warrant a suppression of the evidence.<sup>149</sup> The court explained that the noncitizen was not subjected to any “abuse, force, racial profiling or *other* conduct that rises to the level required for exclusion.”<sup>150</sup> The court used some of the factors that the Second Circuit developed in its interpretation. Similarly, it also left open the possibility that there is other conduct that would be egregious and the court did not want to limit that possibility.

### *B. Minority: Bad Faith Approach*

The Ninth Circuit developed the bad faith approach, which places a lower burden on the noncitizen to prove egregious conduct on the part of the officer in comparison to the conduct-

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<sup>143</sup> *Id.* at 778.

<sup>144</sup> *Id.* at 778-779.

<sup>145</sup> *Id.* at 779.

<sup>146</sup> 418 Fed. Appx. 894 (11th Cir. 2011).

<sup>147</sup> *Id.* at 895.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

based approach. This standard was first created in *Gonzalez-Rivera v. INS*.<sup>151</sup> Gonzalez was arrested after failing to show proper documentation at a traffic stop.<sup>152</sup> Gonzalez alleged that he was stopped “solely on the basis of his Hispanic appearance” and wanted to suppress the evidence obtained in the illegal stop.<sup>153</sup> The court concluded that this was a race-based stop, which was egregious and warranted a suppression of the evidence.<sup>154</sup> In arriving at this conclusion, the court articulated an objective bad faith standard.<sup>155</sup> Under this standard, a violation occurs when “evidence is obtained by deliberate violation of the fourth amendment or by conduct a reasonable officer should have known is in violation of the Fourth Amendment.”<sup>156</sup> The court further elaborated on the conduct the police officer should have known in *Martinez-Mendoza v. Holder*.<sup>157</sup> Here, the court determined that the bad faith standard also includes an analysis to see if the agents are “acting against an unequivocal doctrinal backdrop.”<sup>158</sup> The court explained here, that a search would violate a noncitizen’s Fourth Amendment right because the government cannot show proper entry into the noncitizen’s premises from defendant’s silence or objection to entry.<sup>159</sup> Therefore, an egregious violation would still occur because the officer’s, even if they did not know, they should have known that entering into the noncitizen’s home without a warrant, consent or exigent circumstances would violate the noncitizen’s Fourth Amendment rights.<sup>160</sup> Hence, the bad faith standard developed by the Ninth Circuit involves bad faith conduct by the police officer that the officer either deliberately committed or should have known it was in violation of the Fourth Amendment.

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<sup>151</sup> 22 F.3d 1441 (9th Cir. 1994).

<sup>152</sup> *Id.* at 1443.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 1452.

<sup>155</sup> *Id.* at 1449.

<sup>156</sup> *Id.* (citing *Adamson v. C.I.R.*, 745 F.2d 541, 545 (9th Cir. 1984)) (Internal citations omitted).

<sup>157</sup> 673 F.3d 1029 (9th Cir. 2011).

<sup>158</sup> *Id.* at 1035.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

Further, this test has been seen by both supporters of the test as well as critics as an objective standard that relies on what the reasonable officer would have done in the same situation rather than the officer's subjective intent.<sup>161</sup> This would make the test an easier standard for the noncitizen to satisfy because they only have to prove a violation on the part of the officer, instead of what the actual officer was thinking at the time of the violation. Unlike the conduct-based test, the minimal threshold is much lower. In the conduct-based test, in addition to proving that the violation occurred, the noncitizen also has to show one of the aggravating factors set forth by that Circuit. The Ninth Circuit is the only court that has adopted this standard and ironically has also granted more suppression motions than the circuits that have adopted the conduct based approach.<sup>162</sup> It is questionable whether there is a correlation between this specific approach and successful suppression motions than, but it is worth noting.

Other courts have criticized this approach. The Eighth Circuit in *Garcia-Torres v. Holder*,<sup>163</sup> in a footnote, declined to adopt the bad faith standard. The Court reasoned that it would “eviscerate Lopez-Mendoza insofar as the Fourth Amendment prohibits only unreasonable searches and seizures and the Ninth Circuit’s standard applies whenever a reasonable officer should have known his conduct was illegal.”<sup>164</sup> Essentially, this standard would completely disregard the rule set forth in *Lopez Mendoza*.<sup>165</sup> Although this approach would have a lower burden of proof for the noncitizen, that burden is too low. With the need for increased security measures after the September 11<sup>th</sup> terrorist attacks, a reasonable standard needs to be set, which will balance both the security risks as well the noncitizen’s constitutional

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<sup>161</sup> Kate Mahoney, *What to do when the constable blunders? Egregious Violations of the Fourth Amendment in Removal Proceedings*, Immigration Law Advisor, (Sept. 2012), <http://www.justice.gov/eoir/vil/ILA-Newsletter/ILA%202012/vol6no8.pdf>.

<sup>162</sup> See generally *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008) (holding that the ICE agents that entered without consent to the noncitizen’s home constituted as an egregious violation.).

<sup>163</sup> 660 F.3d 333 (8th Cir. 2011).

<sup>164</sup> *Id.* at 337 n.4.

<sup>165</sup> Mahoney, *supra*.

rights.<sup>166</sup> The Third Circuit also criticized this rule and explained that this standard would create “routine invasions of the constitutionally protected privacy rights of the individual.”<sup>167</sup> Not only have other circuit courts criticized this approach, but also the Circuit Court Judges within the circuit have deemed this standard as “qualified immunity from civil liability for constitutional violations by Government officials.”<sup>168</sup>

### *C. Remaining Circuits and lack of standards*

The Fifth and Seventh Circuits have addressed the issue of the interpretation of the egregious violation, but without specifically developing a standard. The Seventh Circuit merely addressed one specific circumstance and set of facts that it deemed not be egregious.<sup>169</sup> In this particular situation, there was an alleged warrantless arrest during which agents aggressively handcuffed and yelled at the noncitizen telling him “sign the f\*\*\*ing papers claiming he did not have any rights.”<sup>170</sup> Here, the court concluded that very minor physical abuse along with “aggressive questioning” employed by the agents against the noncitizen would not rise to a level of egregious conduct that would violate the Fourth Amendment.<sup>171</sup> The court explained that verbal commands to instruct a person to sign papers would not be a search or seizure to trigger the protections of the Fourth Amendment.<sup>172</sup> The court, additionally noted that handcuffing an uncooperative and resisting noncitizen also does not constitute as egregious behavior that the

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<sup>166</sup> See generally Patricia Medige, *Immigration Issues in A Security-Minded America*, 33 COLO. LAW. 11, 11(2004).

<sup>167</sup> *Oliva Ramos v. Attorney General of the United States*, 694 F. 3d 259, 277 (3rd Cir. 2012).

<sup>168</sup> Kate Mahoney, *What to do when the constable blunders? Egregious Violations of the Fourth Amendment in Removal Proceedings*, IMMIGRATION LAW ADVISOR, (Sept. 2012), <http://www.justice.gov/eoir/vll/ILA-Newsletter/ILA%202012/vol6no8.pdf> (citing *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1020 (9th Cir. 2008) (Bybee, J., concurring)).

<sup>169</sup> *Gutierrez-Berdin v. Holder*, 618 F.3d 647 (7th Cir. 2010).

<sup>170</sup> *Id.* at 650.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

*Lopez-Mendoza* Court anticipated.<sup>173</sup> Therefore, the Seventh Circuit’s interpretation of egregious behavior is something higher than mere handcuffing or aggressive verbal commands.<sup>174</sup> Besides, this one case, the Seventh Circuit has provided no other guidance on how to analyze conduct that would egregious.

Lastly, the Fifth Circuit has attempted to define a clear standard, but has yet to develop a workable standard. In *Gonzalez-Reyes v. Holder*,<sup>175</sup> the court determined that “the test for admissibility of evidence in a removal proceeding is whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the noncitizen of due process of law.”<sup>176</sup> Here, the noncitizen alleged that he was deprived of due process because he did not know of his right to remain silent or his right to retain counsel.<sup>177</sup> The court held that a Miranda warning denial is not egregious because they are not required in the immigration and more specifically the deportation context.<sup>178</sup> The Fifth Circuit also addressed this issue more recently in *Torres-Hernandez v. Holder*.<sup>179</sup> Here, the noncitizen moved to suppress in the information contained in Form I-213 on account of coercion and duress.<sup>180</sup> The Court denied the motion noting that there was no coercion by the officers that would be considered to be egregious.<sup>181</sup> The main focus of the court, however, was on the accuracy of the evidence obtained by the officers rather than the conduct employed to receive the information.<sup>182</sup> This approach by the Fifth Circuit, relating to the accuracy of the evidence in relation to an egregious violation, is not one that has been addressed by other courts, nor has it been addressed by the Fifth Circuit again

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> 313 F.App’x 690 (5th Cir. 2009).

<sup>176</sup> *Id.* at 695. (citing *Bustos-Torres v. INS*, 898 F.3d 1053, 1055 (5th Cir. 1990)).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> 482 F. App’x. 931, 932 (5th Cir. 2012).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 931.

<sup>182</sup> *Id.* at 932.

*D. Correct Approach: Totality of Circumstances Conduct Based Approach*

*Oliva Ramos v. Attorney General of the United States* was a case of first impression in the Third Circuit addressing the issue of whether the exclusionary rule applied in removal proceedings.<sup>183</sup> As mentioned in the beginning of this comment, ICE officers forced their way into the New Jersey apartment and demanded identification papers from Olivia-Ramos.<sup>184</sup>

Oliva-Ramos argued that the evidence should be suppressed because “the ICE agents failed to obtain proper consent to enter the apartment.”<sup>185</sup> Additionally, Oliva-Ramos argued that they arrested him without a warrant and probable cause, or reasonable suspicion.<sup>186</sup> The court ultimately allowed Oliva-Ramos to reopen his proceedings.<sup>187</sup> The Third Circuit, however, acknowledged that it had not yet considered what situations would constitute an egregious violation.<sup>188</sup> The court analyzed the Ninth Circuit’s bad faith approach, but concluded that would be a difficult standard to work with.<sup>189</sup> The court reasoned that “focusing only on [the officer’s] good faith would permit conduct that may be objectively reasonable based on directives of the Department of Homeland Security, but nevertheless result in routine invasions of the constitutionally protected privacy rights of the individuals.”<sup>190</sup>

After rejecting the Ninth Circuit approach, the court adopted the conduct-based test developed by the Second Circuit with a slight modification.<sup>191</sup> In order for the evidence to be a “result of the egregious violation within the meaning of *Lopez Mendoza*, . . . the record evidence [must establish] either (a) that a constitutional violation that was fundamentally unfair had

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<sup>183</sup> *Oliva Ramos v. Attorney General of the United States*, 694 F. 3d 259, 261 (3rd Cir. 2012).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 274.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 275.

<sup>189</sup> *Oliva-Ramos*, 694 F.3d at 277.

<sup>190</sup> *Id.* at 275.

<sup>191</sup> *Id.*

occurred, or (b) that the violation – regardless of its unfairness – undermined the reliability of the evidence in dispute.”<sup>192</sup> When applying this test, the court explained that whether or not there was probative value to the evidence, it should not be part of the inquiry.<sup>193</sup> Based on this exception, the court remanded the case back to the BIA to determine “whether the ICE agents violated Oliva-Ramos’s Fourth Amendment rights and whether those violations were egregious.”<sup>194</sup> Additionally the court also stated that when addressing this standard, it must be a “flexible case by case approach” that is based around several factors.<sup>195</sup> However, unlike most other courts, this court listed several factors that the BIA should consider when arriving at its conclusion.<sup>196</sup> These factors include: (1) whether the noncitizen can establish intentional violations of the Fourth Amendment by the officers, (2) “whether the seizure itself was so gross or unreasonable in addition to being without a plausible legal ground,” (3) “whether improper seizures, illegal entry of homes or arrests incurred threats, coercion or physical abuse,” (4) “the extent to which the agents report the unreasonable show of force,” and (5) whether any seizure or arrests were based on race or perceived ethnicity.”<sup>197</sup> Furthermore, consistent with the other circuits following the conduct-based approach, the Third Circuit suggested that “the characteristics and severity of the police conduct” should be relevant to the inquiry.<sup>198</sup>

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 278.

<sup>194</sup> *Id.* at 279.

<sup>195</sup> *Oliva-Ramos*, 694 F.3d at 279.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* (citing *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2nd Cir. 2006)).



#### IV. OLIVA-RAMOS IS THE CORRECT APPROACH TO RESOLVE THE CIRCUIT SPLIT

The standard that the Third Circuit developed is the correct approach that should be adopted by all the circuits. It will bring uniformity among all the circuits because this approach ties together the ideas of the circuits behind the conduct-based approach and it is the most practical approach in relation to public policy.

##### *A. Uniform approach incorporating the Other Circuits*

This approach taken by the Third Circuit has incorporated the ideas from several other circuits that also follow the conduct-based approach. First, the Third Circuit adopted the Second Circuit test with a slight modification: the Second Circuit required “a violation” whereas in Third Circuit required a “constitutional violation” to be fundamentally unfair.<sup>199</sup> Therefore, the Second and Third Circuits both agreed that the probative value of evidence is not required.<sup>200</sup> The Third Circuit also used the characteristics and severity of the conduct situation as one of the factors that could be egregious.<sup>201</sup> Next, the Third Circuit Court addressed some of the factors listed in the First Circuit, which include “threats, coercion, or physical abuse.”<sup>202</sup> The Court also included factors from the Eighth Circuit, which include “physical brutality and unreasonable show or use of force.”<sup>203</sup> The Third Circuit took all these factors and made it into one inquiry of factors that should be considered, but again emphasized as with the other court, that it is not a list of

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<sup>199</sup> *Id.*

<sup>200</sup> *Oliva-Ramos*, 694 F.3d at 278.

<sup>201</sup> *Id.* at 279.

<sup>202</sup> *Id.* (Citing *Kandamar v. Gonzales*, 464 F.3d 65, 71 (1st Cir. 2006).

<sup>203</sup> *Id.* (citing *Puc-Ruiz*, 629 F.3d 711, 778-779 (8th Cir. 2010).

exhaustive factors.<sup>204</sup> As a result, the Third Circuit Court created a totality of circumstances test for the conduct-based approach.<sup>205</sup>

Additionally, by incorporating all the circuits' different factors into one inquiry, the court also noted that this would make it more of an individualized test, which would be based on a case-by-case approach.<sup>206</sup> Essentially this will allow the respondent to feel as if the system is individualized to them and giving them a fair hearing instead of a predetermined judgment.

Further, by incorporating all the factors from other circuits, the Third Circuit decision is “instructive” for practicing attorneys.<sup>207</sup> In a practice advisory issued shortly after this case, it stated that the opinion would be “useful to practitioners litigating the exception for the first time.”<sup>208</sup> Therefore, not only will this case bring uniformity to all the judges hearing this case, but it will also allow practicing attorneys a guideline on how to approach their own cases and clients and provide for effective client representation.<sup>209</sup> Without this uniformity, clients may feel it necessary to move to a different jurisdiction that could increase their likelihood of success in immigration proceedings.<sup>210</sup> As a practical matter for both judges and attorneys, this approach provides the most guidance on how to determine if an egregious violation occurred.

Even though it has been argued that this standard is “likely to breed unpredictability and may lead to arbitrary results”, it provides a combination of factors for the courts as well as

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<sup>204</sup> *Id.* at 279.

<sup>205</sup> *Id.*

<sup>206</sup> *Oliva-Ramos*, 694 F.3d at 278-279.

<sup>207</sup> See *Understanding Oliva-Ramos v. Attorney General and the Applicability of the Exclusionary Rule in Immigration Proceedings*, PRACTICE ADVISORY, (November 30, 2012) [http://www.law.nyu.edu/sites/default/files/ECM\\_PRO\\_074309.pdf](http://www.law.nyu.edu/sites/default/files/ECM_PRO_074309.pdf).

<sup>208</sup> *Id.*

<sup>209</sup> Irene Scharf, *The Exclusionary Rule in Immigration Proceedings: Where It Was, Where It Is, Where It May Be Going*, 12 SAN DIEGO INT'L L.J. 53, 84 (2010).

<sup>210</sup> *Id.*

practicing attorneys to consider.<sup>211</sup> Since this is a case-by-case approach, these factors will help to predict what types of behaviors by officers will be considered violations on the egregious spectrum. Although this approach is not perfect, it provides the most realistic approach to determining what an egregious violation is.

### *B. Practical under Public Policy*

In allowing the exclusionary rule to apply in deportation proceedings, many undocumented non-citizens' Fourth Amendment rights will be protected.<sup>212</sup> This decision will allow for the noncitizens to “seek redress for constitutional grievances.”<sup>213</sup> Among the population in the United States, immigrants are the most vulnerable and the ones that are taken advantage the most.<sup>214</sup> The immigrant population is more likely to have less education than others and have less financial resources to even consider hiring counsel.<sup>215</sup> Additionally, most immigrants also lack the knowledge of the U.S. legal system and their rights.<sup>216</sup>

The Department of Homeland Security also has its own constitutional requirements that provide Fourth Amendment protections for a non-citizen noncitizen.<sup>217</sup> These constitutional requirements apply to ICE's conduct in home raids, which include seeking a judicial warrant before entering a home, rather than just an administrative warrant.<sup>218</sup> However, the administrative warrant can be sufficient if there is informed consent by the occupant of the

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<sup>211</sup> Elizabeth A. Rossi, *Revisiting Ins v. Lopez-Mendoza: Why the Fourth Amendment Exclusionary Rule Should Apply in Deportation Proceedings*, 44 COLUM. HUM. RTS. L. REV. 477, 511 (2013).

<sup>212</sup> Lauren Bowman, *The Third Circuit Adopts the Exclusionary Rule in Immigration Proceedings*, (February 26, 2013), <http://www.jlpp.org/2013/02/26/the-third-circuit-adopts-the-exclusionary-rule-in-immigration-removal-proceedings>.

<sup>213</sup> *Id.*

<sup>214</sup> Cardozo Immigration Justice Clinic at 25.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 5. (Some of the protections require a judicial warrant to enter home, warrantless arrests when there is probable cause, reasonable suspicion for seizure of the person, etc.)

<sup>218</sup> *Id.*

residence.<sup>219</sup> According the DHS manual, during a home raid if consent is given, the ICE agent may ask questions about the intended target, or other people they encounter in the home.<sup>220</sup> An ICE agent, however, may not detain an occupant unless he or she has a “reasonable suspicion based on specific articulable facts, that the person being questioned is a noncitizen in the United States.”<sup>221</sup> The data collected by this clinic shows that the ICE agents “failed to obtain lawful consent to enter homes in violation of the Constitution in a large percentage of cases.”<sup>222</sup> This proves that the ICE agents need to be deterred. If the exclusionary rule is not applicable, then the agents will continue to violate the constitution knowing that the unlawfully obtained evidence from the arrest will be applicable to the deportation proceeding.

The Third Circuit decision is considered by many to be a victory because it will create awareness to the public of the unconstitutional policies employed by ICE.<sup>223</sup> For example, in 2008, ICE agents used a gun to threaten a nine-year old boy and his parents while his mother was showering.<sup>224</sup> Their extreme policing procedures have also included a tremendous form of humiliation by forcing a resident to stand in his underwear before his brother, sister in law and children while the agents conducted a warrantless search of their home.<sup>225</sup> As seen in *Oliva-Ramos*, the agents did not at first allow the Clara to use the bathroom or retrieve any feminine products when she began menstruating during the raid and when they finally allowed her to she was forced to the door open with an ICE agent standing right outside the door.<sup>226</sup> These tactics used by ICE agents are not only violations of the noncitizen’s Fourth Amendment rights, but

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<sup>219</sup> *Id.*

<sup>220</sup> Cardozo Immigration Justice Clinic at 7.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 9.

<sup>223</sup> *Id.*

<sup>224</sup> Nina Bernstein, *Report says Immigration Agents Broke Laws and Agency Rules in Home Raids*, N.Y. TIMES, July 22, 2009.

<sup>225</sup> *Id.*

<sup>226</sup> *Oliva-Ramos v. Attorney General of United States*, 694 F.3d 259 (3<sup>rd</sup> Cir. 2012).

they are violent, intrusive and humiliating.<sup>227</sup> Further, most of these intrusions occurred before 7:00 a.m. and involved a display of weapons.<sup>228</sup>

In 2009, students in the Cardozo Immigration Justice Clinic at the Cardozo School of Law conducted a report on immigration home raid operations, which brought greater awareness to these extreme policing procedures employed by ICE agents.<sup>229</sup> The report found that ICE agents have an established a pattern of widespread misconduct during home raids which include illegal entry of homes without legal authority, seizure of non-targeted individuals, illegal search of homes, and seizure based on race or ethnicity<sup>230</sup> and limited English proficiency.<sup>231</sup> In their study, the data collected showed that most arrests by ICE agents were for collateral arrests as opposed to the targeted arrests in which they sought initial entry.<sup>232</sup> Further this report indicates that the number of suppression motions overall have increased since 2006 when ICE created new performance expectations and increased their home raid operations.<sup>233</sup> This recent rise in suppression motions is an indicator of a pattern of illegality that ICE agents use in home raid operations.<sup>234</sup> Although these numbers suggest that ICE agents are merely trying to meet a quota, there is much more at stake for the noncitizen they arresting. Not only are their Fourth Amendment rights violated, but their risk of being separated from their families, losing their livelihood, and being sent back to a country with fewer opportunities is highly increased by these agent's policing strategies. The method employed by the Third Circuit will heighten the

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<sup>227</sup> Nathan Treadwell, *Fugitive Operations and the Fourth Amendment: Representing Immigrants Arrested in Warrantless Home Raids*, 89 N.C. L. REV. 507, 517 (2011).

<sup>228</sup> Cardozo immigration Justice Clinic.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 12. (Data collected in New Jersey shows that 66% of targeted arrests were for Latinos and 87% of collateral arrests were for Latinos.).

<sup>231</sup> *Id.* at 1.

<sup>232</sup> *Id.* at 11. (The data collected in New Jersey shows that 63% of arrests were not for the intended target but those that the agents happened to encounter during the home raid.).

<sup>233</sup> *Id.* at 13.

<sup>234</sup> Cardozo immigration Justice Clinic at 14.

awareness of the severity of the misconduct by taking into consideration every step that affected the immigrant.

Critics argue that without the exclusionary rule applicable to deportation proceedings, “many ICE violations will go unpunished”<sup>235</sup> and will “undermine the traditional crime fighting mission of local law enforcement agencies.”<sup>236</sup> Some believe that this decision will “go a long way in reigning in the extreme policing strategies” that ICE uses.<sup>237</sup> In hindsight, the efforts of ICE to tighten the security in the realm of immigrant after the September 11<sup>th</sup> attacks will be lost by the methods employed by the agents. Even though now is the time that immigration enforcement should be stricter, it does not mean that it has to be at the hands of the immigrant. By analyzing the totality of circumstances, ICE officers will be more aware of their extreme policies and will now know the extent to which they can conduct these raids. This will prove to be a deterrent for the ICE officers because they care about prosecutions and convictions.<sup>238</sup> Further, this will be likely to improve the agency’s and local law enforcement’s relationship with immigrant communities.<sup>239</sup>

## V. CONCLUSION

After *INS v. Lopez-Mendoza*, the Court left a small opening to allow for the exclusionary rule to apply in very limited circumstances. One of these circumstances included egregious violations and it is with that that the circuit courts have struggled to interpret today. Fortunately,

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 26.

<sup>237</sup> 3 *Cir: Exclusionary rule applies in removal proceedings* (last accessed on Sept. 20, 2013), <http://crimmigration.com/2012/10/02/3-cir-exclusionary-rules-applies-in-removal-proceedings.aspx>.

<sup>238</sup> Matthew S. Mulqueen, *Rethinking the Role of the Exclusionary Rule in Removal Proceedings*, 82 ST. JOHN’S L. REV. 1157, 1185 (2008).

<sup>239</sup> Cardozo immigration Justice Clinic at 25. (Local police typically accompany ICE agents in these raids and agents often identify themselves as “police” when conducting these raids. By having less extreme measures, immigrant communities may feel less threatened.)

the Third Circuit rendered an instructive decision in *Oliva-Ramos* that will resolve the circuit split. The correct standard that should be used is the totality of circumstances conduct based approach with the following test: “the record evidence [must establish] either (a) that a constitutional violation that was fundamentally unfair had occurred, or (b) that the violation – regardless of its unfairness – undermined the reliability of the evidence in dispute.”<sup>240</sup> This decision incorporates all the relevant factors the circuit courts used within the conduct-based approach. Further, this decision has implicated practical considerations in spreading the awareness of the extreme ICE policing strategies and providing Fourth Amendment protection to undocumented non-citizens. Lastly, the opposing bad faith approach is not a workable standard that any court should consider. The federal circuits should have a uniform standard and adopt the test and reasoning of the Third Circuit. This will allow for noncitizens in different circuits to be treated equally and not be advantaged because their circuit has adopted a lower standard to prove egregious conduct of the officer.

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<sup>240</sup> *Oliva-Ramos v. Attorney General of the United States*, 694 F.3d 259, 277 (3rd Cir. 2012).