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NONDETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
MEMPHIS, TENNESSEE

In the Matter of:	
[redacted]	File No. [redacted]
In removal proceedings	

Immigration Judge Charles E. Pazar

Next Hearing: May 27, 2015 at 8:30 a.m.

RESPONDENT'S MOTION TO SUPPRESS & TERMINATE

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
AT MEMPHIS, TENNESSEE

IN THE MATTER OF:	]	
	]	
	]	FILE [redacted]568-428
[redacted]	]	
Respondent.	]	
	]	

MOTION TO SUPPRESS EVIDENCE AND TERMINATE PROCEEDINGS

COMES NOW the Respondent, by and through the undersigned attorney, and moves this honorable Court to suppress any evidence sought to be introduced by ICE in this matter and terminate these proceedings.

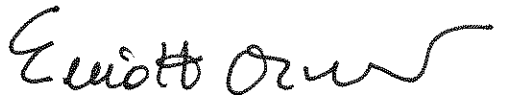
The basis for moving for suppression of evidence and termination of this case is that the [redacted] Police Department initiated a traffic stop against Respondent wholly lacking reasonable suspicion and impermissibly expanded both the scope and duration of the traffic stop to investigate Respondent for civil immigration violations. The officer then apparently summoned ICE to the scene. Two ICE agents arrested Respondent without probable cause and independently as the fruit of an illegal seizure, then attached chains and shackles to his hands, legs, and chest—causing pain—even though Respondent was not a flight risk.

This egregious conduct is explained in the accompanying Memorandum of Law, which is attached hereto and hereby incorporated herein by reference.

The accompanying Declaration of Respondent, Memorandum of Law, and Exhibits are all offered in support of Respondent's Motion to Suppress and Terminate.

Dated: August 20, 2014

Respectfully submitted,



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Attorneys for Respondent

[redacted]

[redacted]

PROOF OF SERVICE

On August 20, 2014, I, Elliott Ozment, served a copy of this Motion to Suppress and Terminate and any attached pages (including Memorandum of Law, Declaration of Respondent, and Exhibits) to Trial Counsel at the following address: USICE Litigation Office, Clifford Davis Federal Office Building, 167 N. Main Street — Room 737A, Memphis, TN 38103 by ☐ overnight courier, ☐ hand-delivery, ☒ first-class mail.

Elliott Ozment
Signature

8/20/2014
Date

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UNITED STATES DEPARTMENT OF JUSTICE
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MEMORANDUM OF LAW IN SUPPORT OF
RESPONDENT'S MOTION TO SUPPRESS & TERMINATE

INTRODUCTION

The Department of Homeland Security's initiation of removal proceedings against Respondent violates his rights under the Fourth and Fifth Amendments to the United States Constitution, including the right to be free from unreasonable seizure and detention, the right to be free from restraints on his liberty without due process of law, and the right to due process and fundamental fairness in immigration proceedings. Consequently, Respondent respectfully moves this honorable Court to suppress the Form I-213 ("Record of Deportable/Inadmissible Alien") the Department wishes to introduce into evidence and terminate these proceedings with prejudice. In the alternative, because Respondent presents a *prima facie* case of egregious Fourth and Fifth Amendment violations, he seeks a *Barcenas* hearing in order to present live testimony and other evidence in support of his claims.

PROCEDURAL HISTORY

Proceedings against Respondent commenced with the service of a Notice to Appear on May 6, 2013, in Jackson, Mississippi.[1] The Department of Homeland Security initiated proceedings against Respondent as a result of his apprehension by the [redacted] Mississippi Police Department and U.S. Immigration and Customs Enforcement, which occurred on the same day.[2]

ICE set Respondent's immigration bond at $13,000 after initially setting the bond at $7,500,[3] and in lieu of bond, ICE transferred Respondent to the Tensas Parish Detention Center in rural Watertown, Louisiana.[4] Three days later, ICE transferred Respondent to another detention facility in Jena, Louisiana.[5]

Then, on May 23, 2013, ICE determined it would no longer require a bond of Respondent and ordered his release on recognizance.[6]

After venue was transferred to the Memphis Immigration Court, undersigned counsel entered an appearance and moved for telephonic representation at the initial master calendar hearing. At the hearing on March 4, 2014, Respondent's counsel denied the allegations in the Notice to Appear and denied the issue of removability, and the Court requested a motion to administratively close Respondent's case based on Fourth Amendment violations. Respondent sent Respondent's Motion to Administratively Close, along with exhibits thereto, to the Court on May 22, 2014. To date, ICE has not responded to the motion, and the Court has not ruled. At the

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1 **Exhibit B**, EARM Case Actions & Decisions; **Exhibit C**, Notice to Appear (Form I-862).
2 **Exhibit D**, Form I-213.
3 *Id.*
4 **Exhibit E**, EARM Custody Actions & Decisions.
5 *Id.*
6 **Exhibit F**, Order of Release on Recognizance (Form I-220A).

same March 4 hearing, the Court set deadlines for filing a motion to suppress and terminate proceedings.

STATEMENT OF FACTS[7]

I. Becoming Lost in [redacted]

The morning of May 6, 2013, Respondent [redacted] then a resident of Mississippi, was a passenger in a vehicle driven by one of Mr. [redacted] coworkers.[8] Mr. [redacted] and his three coworkers—all of whom were of Latino descent and appearance—were in the vehicle traveling from one worksite to the next.[9] Respondent Mr. [redacted] sat in the back seat.[10]

On the way to the next site, however, the driver became lost in the town of [redacted] Mississippi.[11] One of the coworkers used a mobile telephone to call the four workers' boss and asked for instructions on what to do.[12] The workers' boss told them to just pull to the side of the road and inform the boss of their surroundings. The boss said he would then pass by that location and told the workers to follow him when he passes by.[13]

The workers followed their boss's advice, and the driver of the automobile pulled the car off the road near an O'Reilly Auto Parts store.[14] The street off which the workers stopped was

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7 **Exhibit A**, Respondent's Declaration, and all other exhibits, are hereby incorporated by reference.

8 **Exhibit A** at ¶¶ 3-4.

9 *Id.* at ¶ 4.

10 *Id.*

11 *Id.* at ¶ 5.

12 *Id.*

13 *Id.* at ¶ 6.

14 *Id.* at ¶ 7.

small, undivided, and unlined.[15] The car was not blocking the flow of traffic.[16] The driver left the engine running while waiting for the workers' boss to pass by.[17]

II. [redacted] Police Arrive and Detain Respondent for ICE

However, very shortly after pulling to the side of the road and before the boss passed by the vehicle, a police car rolled past the workers' car several times.[18] As the police officer[19] passed the workers several times, he drove by very slowly.[20]

After a few passes, the police officer pulled his cruiser behind the coworkers' vehicle.[21] The officer exited his vehicle and approached the automobile where Respondent Mr. [redacted] was a passenger.[22] The officer immediately demanded that the driver of the vehicle produce a driver's license.[23] The driver then produced some form of identification.[24]

As soon as the officer demanded identification from the driver, the police officer immediately turned to the three passengers—including Mr. [redacted] and demanded that they produce identification too.[25]

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15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.* at ¶ 8.

19 The identity of the [redacted] Police officer involved is not known. Undersigned counsel sent a series of requests to the [redacted] Police Department pursuant to Mississippi's public records statutes, but the [redacted] government has repeatedly stated that no records of the traffic stop exist. *See* **Exhibit G**, Ltr. to [redacted] (April 11, 2014). Should the Court appropriately grant the instant Motion to Suppress and Terminate, Respondent will seek, through the Court's subpoena powers, expedited discovery seeking the officer's identity, in anticipation of a *Barcenas* evidentiary hearing.

20 **Exhibit A** at ¶ 8.

21 *Id.*

22 *Id.* at ¶ 9.

23 *Id.*

24 *Id.* at ¶ 10.

25 *Id.* at ¶ 11.

During this encounter with the police officer, Mr. [redacted] did not feel free to leave.[26] Mr. [redacted] compared the experience to a traffic stop, even though the vehicle was not moving.[27] The [redacted] Police officer spoke only in English, a language that Mr. [redacted] did not proficiently read, write, or understand.[28] Nonetheless, Mr. [redacted] was able to understand some of the police officer's statements and demands.[29] Respondent's native language is Spanish.[30]

The front-seat passenger understood and spoke English more proficiently than the other coworkers, so that passenger helped interpret for the police officer and coworkers.[31]

After collecting identification not only from the driver but also from the three passengers, the police officer asked why the coworkers were on the side of the road.[32] The front-seat passenger replied that the group was lost and were waiting for their boss so they could follow him to the next worksite.[33]

Without further questioning, the officer returned to his police car, parked behind the coworkers' car, where he remained for several minutes with the workers' identification.[34] About 10 minutes later, the officer returned to the vehicle and said words to the effect of, "Wait here."[35]

III. ICE Assumes Custody and Arrests Respondent for Non-Criminal Immigration Violation

After about 20 more minutes, two other officers arrived, at least one of whom wore a uniform with bold lettering reading "ICE."[36] One of the agents then told Mr. [redacted] the other two

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26 *Id.* at ¶ 9.
27 *Id.* at ¶¶ 7, 9.
28 *Id.* at ¶ 9.
29 *Id.* at ¶ 11.
30 *Id.* at ¶ 9.
31 *Id.* at ¶ 13.
32 *Id.* at ¶ 12.
33 *Id.* at ¶ 13.
34 *Id.* at ¶ 14.
35 *Id.* at ¶ 15.

passengers, and the driver words to the effect of, "You are detained by ICE. You are in immigration custody."[37]

The ICE agent, with the help of his partner, handcuffed Mr. [redacted] and put his legs in shackles.[38] The agents bound Mr. [redacted] chest with a chain attached to the other cuffs around his body.[39] As the two ICE agents moved Mr. [redacted] the chains around his body continually tightened against his skin, causing him pain.[40]

The agents placed Respondent and his three coworkers into an ICE van and drove to the Jackson Field Office.[41] In the office, ICE agents processed Respondent and the other workers, after which one agent told Respondent that he would be released if he posted a bond "between $7,000 and $10,000."[42] Not understanding what was going on, Respondent refused to sign any documents for the ICE agents.[43] On the Form I-213, ICE Agent [redacted] manually struck through "$7500" and wrote in its place "$13,000."[45]

In lieu of being able to post bond, ICE transported Respondent to two detention facilities in Louisiana. Mr. [redacted] remained in civil immigration detention until May 23, 2013, when ICE decided to release him on his own recognizance.[46]

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36 *Id.* at ¶ 16.
37 *Id.* at ¶ 17.
38 *Id.* at ¶ 18.
39 *Id.*
40 *Id.* at ¶ 20.
41 *Id.* at ¶ 21; **Exhibit H**, Warrant for Arrest of Alien (Form I-200); **Exhibit D** (listing location as "JAK").
42 **Exhibit A** at ¶ 21.
43 *Id.* at ¶ 21.
44 The full name of Agent [redacted] Badge No. D [redacted] is not known at this time. *See* **Exhibit J**, Motion to Administratively Close, at Exhibit A p. 3 n. 2.
45 *Compare* **Exhibit I,** Dep't of Homeland Sec.'s Submission of Evidence, at Exhibit A, *with* **Exhibit D**.
46 **Exhibit E**; **Exhibit F**.

Sometime before 3:19 p.m. the day of Respondent's arrest, ICE Agent "D. [redacted] created Form I-213, the only evidence the Department of Homeland Security (the "Department" or "DHS") has introduced in this case to establish alienage.[47]

On the form, Agent [redacted] noted that Mr. [redacted] was apprehended at or near [redacted] Mississippi, on May 6, 2013 at 11 a.m.[48] The agent listed the "Method of Location/Apprehension" as "LEA [redacted] and the "Status When Found" as "IN INSTITUTION."[49] Agent [redacted] listed only himself as the apprehending agent.[50] In detailing the encounter, the agent's narrative states:

> On 05/06/2013, Immigration Enforcement Agents encountered [redacted] was encountered [sic] while performing responding [sic] to an assistance call from the [redacted] Police Department. [redacted] was 1 of 4 Subjects in the Van that was pulled over by [redacted] Police. Agents responded to the traffic stop because none of the occupant could [sic] provide valid identification to the Office, nor could they speak English. The Subjects were interviewed by Agent [redacted] as to their legal status in the U.S. . . . Subject is being processed as a NTA with a ~~$7500~~ $13,000. Bond [sic] pending removal proceeding [sic]. Subject refused to sign his Immigration documents.[51]

Neither Respondent nor any other coworker was cited or arrested for any crime.[52]

STATEMENT OF THE ISSUE

Has Respondent carried his *prima facie* burden of demonstrating the Form I-213 the Department of Homeland Security seeks to introduced as evidence should be suppressed, or in the alternative, subject to a *Barcenas* hearing, because the Form is the fruit of egregious violations by the [redacted] Police Department and U.S. Immigration and Customs Enforcement of Respondent's Fourth Amendment rights to be free from unreasonable seizure?

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47 **Exhibit D**; **Exhibit I**.

48 **Exhibit I**.

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*; **Exhibit K**, EARM Crimes ([redacted]) (listing Respondent's criminal status as "NON-CRIMINAL").

LEGAL FRAMEWORK

I. DHS MUST PROVE ALIENAGE BY CLEAR, UNEQUIVOCAL, AND CONVINCING EVIDENCE.

DHS bears the initial burden of proof in removal proceedings. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(c). When the government charges a person with being an alien in the United States who has not been admitted or paroled in violation of INA § 212(a)(6)(A)(i), the Department must first establish the person's alienage. *United States ex. rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923) (holding the government bears the burden of proving alienage in deportation proceedings); INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(c); *Matter of Cervantes-Torres*, 21 I & N Dec. 351, 354 (BIA 1996); *Matter of Chairez-* [redacted] 26 I & N Dec. 349, 355 (BIA 2014). To carry its burden, the government must demonstrate by "clear, unequivocal and convincing evidence that the facts alleged as grounds for [removal] are true." *Woodby v. INS*, 385 U.S. 276, 286 (1966). *See also Zaitona v. INS*, 9 F.3d 432, 434 (6th Cir. 1993); INA § 240(c)(3)(A). Only when the Department carries its burden does the burden shift to the Respondent to demonstrate he or she is lawfully present pursuant to a prior admission, or that he or she is otherwise entitled to remain in the United States. 8 C.F.R. § 1240.8(c). *Matter of Benitez*, 19 I & N Dec. 173, 177 (BIA 1984).

To carry its burden, DHS cannot merely rely on the Notice to Appear. Rather, the Department must submit evidence of alienage. DHS generally carries its burden by submitting a Form I-213, Record of Deportable/Inadmissible Alien. Unless it is facially deficient, bears indications of unreliability, or was obtained through coercion or duress, Form I-213 is "ordinarily sufficient" to establish a "*prima facie* case" that the respondent is an alien. *Matter of Gomez-Gomez*, 23 I & N Dec. 522, 524 (BIA 2002). *See also Matter of Ponce-Hernandez*, 22 I & N Dec. 784, 787 (BIA 1999).

In addition to the I-213, DHS may seek to rely upon the testimony of the Respondent to establish alienage. *See, e.g., Matter of Carrillo*, 17 I & N Dec. 30 (BIA 1979) (allowing adverse inferences to be drawn from Respondent's silence). However, the Board has reasoned that the government may question a respondent only after it presents "some evidence" of the respondent's alienage. *Matter of Tang*, 13 I & N Dec. 695 (BIA 1971). Thus, if the I-213 is inadmissible, suppressed, or otherwise excluded from consideration DHS cannot meet its requirement and seek to rely on the Respondent's testimony. The Respondent has the right to remain silent in the face of government questioning as to his or her alienage. *See, e.g., Kastigar v. United States*, 406 U.S. 441, 444-45 (1972). The Board has held that the government failed to meet its burden when it relied upon a negative inference from the respondent's assertion of his Fifth Amendment privilege to prove alienage. *Matter of Guevara*, 20 I & N Dec. 238 (BIA 1991).

II. SUPPRESSION IS A RECOGNIZED, PROPER REMEDY FOR EGREGIOUS FOURTH AMENDMENT VIOLATIONS.

A. Suppression is a Recognized Remedy for Egregious Fourth Amendment Violations.

Evidence may be suppressed in immigration proceedings when the Respondent can demonstrate it was collected through egregious Fourth Amendment violations. The United States Supreme Court has held the exclusionary rule generally does not apply in civil removal (formerly deportation) proceedings. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). However, the Supreme Court indicated that the exclusionary rule may apply if there are egregious violations of the Fourth Amendment which "transgress notions of fundamental fairness." *Matter of* [redacted], *et al.*, [redacted], *et al.*, (BIA Oct. 2, 2009) (unpub.) (quoting *Lopez-Mendoza*, 468 U.S. at 1032). All but one Justice in *Lopez-Mendoza* believed the exclusionary rule remained

available when agents commit egregious violations of the Fourth Amendment. Justice O'Connor wrote for the plurality:

> [W]e do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.

Id. at 1050-51.

The four dissenting Justices in *Lopez-Mendoza* argued the exclusionary rule should *always* be available in removal proceedings for Fourth Amendment violations. *Id.* at 1051-61 (Brennan, White, Marshall, and Stevens, JJ., dissenting). Accordingly, "it is reasonable to read *Lopez-Mendoza* as showing that eight justices would have applied the exclusionary rule in circumstances where evidence was obtained through an 'egregious' Fourth Amendment violation." *Puc-Ruiz v. Holder*, 629 F.3d 771, 778 n.2 (8th Cir. 2010). *Accord Orhorhage v. INS*, 38 F.3d 488, 493 n.2 (9th Cir. 1984); *Matter of Ramira-Cordova*, No. A21 095 659 (BIA Feb. 21, 1980) (unpublished). *See also Cotzojay v. Holder*, 725 F.3d 172, 183 (2d Cir. 2013) (adopting a flexible, case-by-case approach for egregiousness inquiry, stating, "No single aspect of a constitutional violation elevates its status from merely unreasonable to egregious."); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1115 n. 9 (10th Cir. 2006) (suppression appropriate in cases of egregious Fourth Amendment violation); *Wong Chung Che v. Immigration & Naturalization Svc.*, 565 F.2d 166, 169 (1st Cir. 1977); *Oliva-Ramos v. Attorney General of the United States*, 694 F.3d 259 (3d Cir. 2012) (setting forth own test for suppression and holding suppression appropriate for egregious Fourth Amendment violations).

The Sixth Circuit acknowledged *Lopez-Mendoza*'s possible egregious violations exception in the context of a criminal prosecution for, *inter alia*, illegal reentry in violation of 8 U.S.C. § 1326. *United States v. Navarro-Diaz*, 420 F.3d 581, 587 (6th Cir. 2005). The Court of

Appeals viewed the egregious violations language in *Lopez-Mendoza* as an indication that the "Supreme Court qualified its holding[.]" *Id*. The court then suggested in *dicta* what it might consider an egregious violation. Specifically, the Sixth Circuit implied the defendant may have been able to avail himself of the egregious violations exception if he had been "accosted by the police in a random attempt to determine whether he was an illegal alien." *Id*. *See also Miguel v. INS*, 359 F.3d 408, 411 n.3 (6th Cir. 2004).

B. Suppression is a Recognized Remedy for Widespread Fourth Amendment Violations.

Just as circuit courts have widely acknowledged that the four-justice plurality in *Lopez-Mendoza* and all four dissenters would recognize an exclusionary remedy for egregious Fourth Amendment violations, a recent decision by the Third Circuit makes clear that suppression is also appropriate if, as the Supreme Court put it, "there developed good reason to believe that Fourth Amendment violations by INS officers were widespread." *Oliva-Ramos*, 694 F.3d at 266 (quoting *Lopez-Mendoza*, 468 U.S. at 1050). The "widespread violations" rule is "as much a part of the *Lopez-Mendoza* discussion as 'egregious' violations." *Oliva-Ramos*, 694 F.3d at 279-80. Similarly, the Sixth Circuit's *Navarro-Diaz* opinion read *Lopez-Mendoza's* qualifying language as potentially leading to a different result in cases of widespread violations. *Navarro-Diaz*, 420 F.3d at 587. The *Oliva-Ramos* court cited approvingly to *Navarro-Diaz* to support its holding that widespread constitutional violations by immigration officers could serve as a basis for excluding evidence in immigration court. 694 F.3d at 280-81. *See also Hudson v. Michigan*, 547 U.S. 586, 604 (2006) (Kennedy, J., concurring) (concluding widespread violations of constitutional violations arising from the knock-and-announce procedure would counsel in favor of reassessing the effectiveness of the exclusionary rule's deterrence rationale in that scenario).

C. Suppression is a Proper Remedy in Removal Proceedings.

Suppression is not an improper remedy. Dicta suggesting otherwise is flatly incorrect as a matter of law. This dicta rests on three faulty premises that are categorically foreclosed by Board and Supreme Court precedent. First is the premise that regardless of suppression, it is always possible for DHS to ask the respondent about his or her alienage and manner of entry on cross-examination during his or her removal hearing. To the contrary, *Matter of Tang* requires the government to present evidence of alienage before it can call a respondent to testify. 13 I & N Dec. at 692 ("Upon presenting the evidence that the respondent is an alien, the Service may call upon him to testify . . . ."). If the government's evidence is suppressed or deemed inadmissible, by definition, the government has failed to present evidence, and consequently, it cannot call upon the respondent to testify.

The second fundamentally flawed premise of the "suppression-is-an-improper-remedy" dicta is that the government may carry its burden by relying solely upon the adverse inference drawn from a respondent's silence. *Matter of Guevara*, I & N Dec. 238, 242-44, expressly forecloses this argument:

> If the only evidence necessary to satisfy [DHS's] burden were the silence of the other party, then for all practical purposes, the burden would actually fall upon the silent party from the outset. Under this standard, every deportation proceeding would begin with an adverse inference which the respondent would be required to rebut. We cannot rewrite the [Immigration and Nationality] Act to reflect such a shift in the burden of proof. *Woodby v. INS*, [385 U.S. 276 (1966)].
>
> . . .
>
> In short, if the "burden" of proof were satisfied by a respondent's silence alone, it would be practically no burden at all."

The third flawed premise on which previous dicta relied is that because identity is never suppressible as fruit of the poisonous tree, evidence of alienage is not suppressible, either.

Identity and alienage are two legally distinct concepts. *See, e.g.*, *Matter of Ponce-Hernandez*, 22 I & N Dec. 784 (BIA 1999) (consistently describing "identity" and "alienage" in the disjunctive); *see also Matter of Gomez-Gomez*, 23 I & N Dec. 522 (BIA 2002) (same). A respondent's "identity" does not encompass that respondent's "alienage" any more than a respondent's "identity" encompasses respondent's inadmissibility. This conclusion is confirmed by the fact that eight justices voiced their support for suppression of *alienage* evidence obtained through egregious Fourth Amendment violations in *INS v. Lopez-Mendoza*, notwithstanding the fact that the majority held evidence of *identity* is never suppressible. 468 U.S. 1032 (1984).

Longstanding precedent thus demonstrates that suppression is a recognized and proper remedy for egregious violations of the Fourth Amendment. If it were not, it is difficult to see why the Board has repeatedly remanded suppression cases back to this Court. *See, e.g.*, *Matter of Cervantes-Valerio* (BIA Oct. 2, 2009)(unpublished); *Matter of Jose Zacaria Quinteros*, No. A088 239 850, 2011 WL 5865126 (BIA Nov. 9, 2011) (unpub.).

III. BURDENS OF PROOF IN SUPPRESSION CASES

A. Respondent's Prima Facie Burden

The individual seeking to exclude evidence in a removal proceeding bears the initial burden of proof and must establish a prima facie case that the evidence should be suppressed. *Matter of Toro*, 17 I & N Dec. at 343-44; *Matter of Tang*, 13 I & N Dec. 691 (BIA 1971); *Matter of Tsang*, 14 I & N Dec. 294, 295.[53] "A 'prima facie showing,' as Judge Posner pointed out for the Seventh Circuit, is not a difficult standard to meet: By 'prima facie showing' we understand

[53] Respondent notes that the burden-shifting scheme set forth by the Board in *Matter of Barcenas* is inconsistent with the practice and procedure of motions to suppress in federal courts. Because the Board has offered no compelling rationale for diverging from the general burden of proof in suppression cases recognized by federal and state criminal courts, Respondent expressly reserves the right to challenge *Barcenas*'s allocation of burdens and burden-shifting on a petition for review, should one become necessary.

(without guidance in the statutory language or history or case law) simply a sufficient showing of possible merit to warrant a fuller exploration by the [] court." *In re Lott*, 366 F.3d 431, 432-433 (6th Cir. 2004) (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)). According to Board of Immigration Appeals:

> "Black's Law Dictionary defines 'prima facie' as 'at first sight; on first appearance but subject to further evidence or information. BLACK'S LAW DICTIONARY (7th ed. 1999). 'Prima facie case' is defined as '1. The establishment of a legally required rebuttable presumption' or '2. A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor.' *Id*. Therefore, a prima facie showing is made when the facts asserted, if later proven in a full hearing, would establish eligibility under the statutory standard. *Matter of Coelho*, 20 I. & N. Dec. 464, 473 (BIA 1992) (tying prima facie eligibility to statutory eligibility).
>
> The prima facie eligibility standard does not vary according to the particular substantive burden of proof that is applicable. Rather, it is demonstrated when facts sufficient to sustain the respondent's burden after a hearing are presented in his motion to reopen.

Matter of Velarde-Pacheco, 23 I & N Dec. 253, 262-63 (BIA 2002) (Rosenberg J., concurring). *See also see also In re Grand Jury Proceedings*, 417 F.3d 18, 22-23 (1st Cir. 2005) (describing a *prima facie* showing as "little more than a showing of whatever is required to permit some inferential leap sufficient to reach a particular outcome." (citing Black's Law Dictionary 1228 (8th ed. 2004)).

A motion to suppress must be made in writing and be accompanied by a detailed affidavit providing the factual basis for suppression. *Matter of Wong*, 13 I & N Dec. 820, 822 (BIA 1971). To establish a *prima facie* case, the individual seeking suppression must provide specific, detailed statements based upon personal knowledge; such allegations cannot be general, conclusory, or be based on counsel. *Id*.; *see also Matter of Barcenas*, 19 I & N Dec. 609 (BIA 1988); *Matter of Wong*, 13 I & N Dec. at 821-22; *Matter of Tang*, 13 I & N Dec. at 692. An individual makes out a *prima facie* case when the facts alleged in the affidavit, if taken as true,

could support a basis for excluding the evidence in question. *Matter of Barcenas*, 19 I & N Dec. at 611-12.

If the Respondent's affidavit sets forth a *prima facie* case, his claims *must also be supported by testimony*." *Id.* at 612 (emphasis added). *See also Matter of Benitez*, 19 I & N Dec. 173, 175 (BIA 1984). Because the person's "declaration alone is insufficient to sustain his burden," a hearing is required so that a Respondent who makes out a *prima facie* case for suppression in his affidavit may offer live testimony. *Id.*

B. Responsive Government Burden

Once a respondent makes out a *prima facie* case for suppression, DHS bears the burden of justifying the "manner in which it obtained the evidence." *Barcenas*, 19 I & N Dec. at 611; *Matter of Ramirez*, 17 I & N Dec. 173, 175 (BIA 1980). DHS must put forth this justification in a manner consistent with the procedural and evidentiary rules governing removal proceedings. A respondent in removal proceedings is entitled to examine the evidence and cross-examine witnesses the government deploys against him. INA § 240(b)(4)(B). Consequently, DHS must first make reasonable attempts to produce witnesses for live testimony and cross-examination before submitting affidavits or sworn statements to justify how agents obtained evidence. *See Singh v. Mukasey*, 553 F.3d 207, 212 n.1 (2d Cir. 2009) (noting that the First, Fifth and Ninth Circuits have agreed that the government violates principles of fundamental fairness when it submits an affidavit without first attempting to secure the presence of those potential witnesses for cross-examination); *see also Ocasio v. Ashcroft*, 375 F.3d 105, 107 (1st Cir. 2004) ("One of these outer limits is that the INS may not use an affidavit from an absent witness 'unless the INS first establishes that, despite reasonable efforts, it was unable to secure the presence of witnesses at the hearing.'") (quoting *Olabjani v. INS*, 973 F.2d 1232, 1234 (5th Cir. 1992); *Saidane v. INS*,

129 F.3d 1063, 1065 (9th Cir. 1997)). Federal courts have expressed concern that INA § 240(b)(4)(B)'s purpose would be thwarted "if the government's choice of whether to produce a witness or to use a hearsay statement were wholly unfettered." *See, e.g., Baliza v. INS*, 709 F.3d 1231, 1234 (9th Cir. 1983).

SUMMARY OF THE ARGUMENT

The evidence of alienage ICE has submitted must be suppressed and these proceedings must be terminated because they are the result of egregious violations of the Fourth Amendment. Specifically, an officer of the [redacted] Police Department seized and detained Respondent without probable cause or reasonable suspicion, unconstitutionally enlarged both the scope and duration of the traffic stop, illegally and without reasonable suspicion demanded that Respondent provide identification, and impermissibly detained Respondent solely to verify his and his coworkers' immigration status on the side of a Mississippi road. The two ICE agents who arrested, shackled, and imprisoned Respondent and his coworkers also egregiously violated Respondent's Fourth Amendment right to be free from unreasonable seizures by arresting him based on evidence improperly obtained by the [redacted] Police Department and without probable cause. The Form I-213 the Department wishes to introduce is the fruit of an egregious Fourth Amendment violation and should be suppressed. Therefore, Respondent has adequately satisfied the minimal burden of demonstrating a *prima facie* case of an egregious Fourth Amendment violation, warranting a *Barcenas* evidentiary hearing.

LEGAL ARGUMENT

I. THE FORM I-213 MUST BE SUPPRESSED BECAUSE IT IS THE FRUIT OF AN EGREGIOUS FOURTH AMENDMENT VIOLATION.

A. The [redacted] Police Department Violated Respondent's Fourth Amendment Right to Be Free From Unreasonable Seizure By Conducting a Warrantless Investigatory Detention Unsupported by Reasonable Suspicion.

The Fourth Amendment protects "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. Violations of the Fourth Amendment justify suppression of evidence presumptively derived from official illegality under the "fruit of the poisonous tree" doctrine. *See, e.g., Oregon v. Elstad*, 470 U.S. 298, 305-06 (1985). As the Supreme Court has stated in the criminal suppression context, it is a "familiar proposition that the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality." *Harris v. New York*, 495 U.S. 14, 19 (1990). *See also Wong Sun v. United States*, 371 U.S. 471 (1963).

The [redacted] Police Department officer's conduct violated the Constitution in several ways: First, the expansion of the *Terry* investigative stop to Respondent was unconstitutional. There existed no particularized, articulable facts linking Respondent to any wrongdoing. Second, Mississippi has no such so-called "stop-and-identify" statute. Third, the Supreme Court has held that in states without constitutional "stop-and-identify" laws, a person is not obligated to provide identity information to law enforcement, let alone *proof* of identification. Moreover, the officer impermissibly expanded both the scope and duration of the traffic stop only to investigate Respondent, the passengers, and the driver for suspected immigration violations. ICE then arrested Respondent without probable cause and based on the already illegal seizure by the [redacted] Police. Because the stop of Mr. [redacted] occurred totally outside the bounds of the Fourth

Amendment—unsupported by any suspicion, let alone *reasonable* suspicion—the Court should suppress the evidence against him.

1. Respondent Was 'Seized' Under the Fourth Amendment When a Reasonable Person Would Not Feel Free to Leave, Specifically When the [redacted] Police Officer Initiated the Traffic Stop and Demanded Identification From the Passengers.

The first issue in analyzing a suppression motion under the Fourth Amendment is whether a seizure occurred. *United States v. Saperstein*, 723 F.2d 1221, 1224-25 (6th Cir. 1983). A seizure occurs when a reasonable person, in light of all the circumstances surrounding the incident, would have believed that he or she was not free to leave. *INS v. Delgado*, 466 U.S. 210, 215 (1984); *Dorsey v. Barber*, 517 F.3d 389, 395 (6th Cir. 2008); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Respondent was seized within the meaning of the Fourth Amendment when the officer from the [redacted] Police Department initiated what ICE refers to as a "traffic stop."[54] *State v. Williams*, 185 S.W.3d 311, 316 (Tenn. 2006) (interpreting Fourth Amendment, holding there is "no doubt" that person is seized when officer activates blue emergency lights); *Whren v. United States*, 517 U.S. 806, 809-10 (1996) (detention of individuals during stop of an automobile constitutes a seizure); *Brendlin v. California*, 551 U.S. 249, 258-63 (2007) (unanimous) (traffic stop is seizure and passenger seized during traffic stop may challenge constitutionality of stop); *United States v. Jones*, 562 F.3d 768, 773 (6th Cir. 2009) (collecting cases).

Moreover, Respondent states in his declaration that he did not feel free to leave when the officer first demanded a driver's license from the driver and then immediately demanded identification from Respondent and the other passengers.[55] Mr. [redacted] equated the experience to a

54 *See* **Exhibit I**.

55 **Exhibit A** at ¶ 9.

traffic stop,[56] which the Supreme Court has repeatedly held constitutes a seizure. *United States v. Stepp*, 680 F.3d 651, 661 (6th Cir. 2012) (summarizing and collecting cases and holding that detaining a motorist constitutes a seizure). Based on the totality of the circumstances, *Saperstein*, 723 F.2d at 1225, Mr. [redacted] did not feel free to leave once the [redacted] officer began the stop and at the latest, when he "demanded" identification from the passengers, including himself.[57] The Supreme Court has held that even asking for a passenger's travel ticket, the officer identifying himself as a narcotics agent, and asking the passenger to accompany him to a police room while retaining his ticket and identification, constituted a seizure. *Florida v. Royer*, 460 U.S. 491, 501-02 (1983) ("These circumstances surely amount to a show of official authority such that 'a reasonable person would have believed he was not free to leave.'") (quoting *Mendenhall*, 446 U.S. at 554). Further, notably, Mr. [redacted] recalls that the [redacted] officer "*demanded"* identification from the other passengers and him; the officer did not merely *ask* for identification.[58] The fact that the officer spoke only English also supports the conclusion that Respondent was seized; the totality of the officer's behavior "created a coercive situation" and communicated to Mr. [redacted] that he and all the occupants of the vehicle were "under investigation." *See United States v. Williams*, 525 F. App'x 330, 333-34 (6th Cir. 2013); *United States v. Waldon*, 206 F.3d 597, 603 (6th Cir. 2000). *See also United States v. Peters*, 194 F.3d 692, 697 (6th Cir. 1999) (paradigmatic example of coercive actions giving rise to seizure includes, *inter alia*, use of language or tone of voice indicating compliance with the officer's request will be compelled).

56 *id.*
57 **Exhibit A** at ¶ 9.
58 **Exhibit A** at ¶¶ 9, 11.

2. No Specific, Articulable Facts of Any Traffic Offense or Criminal Activity Justified the Seizure, Rendering the Seizure Unconstitutional *Ab Initio*.

Because a seizure occurred, the next question is whether that seizure was supported by "specific and articulable facts" known to the officer at the time he began the stop, supporting a conclusion of reasonable suspicion. *See Williams*, 525 F. App'x at 334. The requirement that an investigatory seizure be supported by reasonable suspicion—a lower standard than full-blown probable cause—is governed by the bedrock principles of *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968).

"In evaluating the constitutionality of a *Terry* stop," the Court must "engage in a two-part analysis of the reasonableness of the stop." *United States v. Davis*, 430 F.3d 345, 354 (6th Cir. 2005) (internal quotation marks omitted). The first step is to determine whether there was a proper basis for the stop in the first place. *Id.* If the stop was proper, then the Court must determine "whether the degree of intrusion was reasonably related in scope to the situation at hand, which is judged by examining the reasonableness of the officials' conduct given their suspicions and the surrounding circumstances." *Stepp*, 680 F.3d at 661 (quoting *Davis*, 430 F.3d at 354) (internal quotation marks omitted).

Here, there was no proper basis for the stop from the beginning. A car parked along the side of the road, without more, is not suspicious. Here, Mr. [redacted] and his coworkers were on the side of the road only for a brief period of time while waiting for their boss to pass by.[59] No record exists with the [redacted] Police Department that any traffic citation was written, that any traffic violation was even *investigated*, or that any person was investigated or charged with any

[59] **Exhibit A** at ¶ 8 (officer began driving back and forth past workers' car "very shortly after pulling to the side of the road").

local, state, or federal crime.[60] Further, ICE Agent [redacted] Form I-213 narrative, written primarily in the passive voice, does not allude to any state-law violation justifying the stop. Rather, Agent [redacted] states only that Mr. [redacted] "was encountered while performing responding to an assistance call" from the police and that Mr. [redacted] was one of four persons in the vehicle "that was pulled over by [redacted] Police."[61] There simply existed no "particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

Applying the Sixth Circuit's jurisprudence concerning the Fourth Amendment justifications needed to initiate an investigative stop of persons in a parked car, in *United States v. See*, 574 F.3d 309, 313-14 (6th Cir. 2009), the court held that no reasonable suspicion supported the *Terry* stop of a parked car at 4:30 a.m., where the vehicle was parked in a high-crime area with three men in the car, the car's interior light was off, the car was parked in a dimly lit portion of a parking lot, and the car lacked a license plate. The Sixth Circuit concluded that the first three factors were context-based and would apply to any person in the parking lot. *Id.* at 314. The court has similarly held that courts should be cautious of "relying . . . too heavily on these contextual factors" for a variety of reasons. *United States v. Caruthers*, 458 F.3d 459, 467 (6th Cir. 2006). The other factors also did not support a finding of reasonable suspicion. *Id.* Notably, as in *See*, the [redacted] officer "was not responding to a complaint, he did not suspect the men of a specific crime, he had not seen the men sitting in the car for an extended period of time, he was not acting on a tip, he had not seen the men do anything suspicious, and the men did not try to flee upon seeing [the officer] approach." *Id.* As the court similarly held in *See*, all the responding officer knew at the time of the stop was that there was a car parked with men in it. *Id.*

60 **Exhibit G**.

61 **Exhibit J**.

Considering the totality of the circumstances, the [redacted] officer did not have reasonable suspicion that criminal activity was occurring, and the *Terry* stop was therefore improper *ab initio*. *See Id.* at 314-15 (search and arrest subsequent to unlawful *Terry* stop must be suppressed). *See also, e.g., United States v. Williams*, 525 F. App'x 330, 334-35 (6th Cir. 2013).

3. The [redacted] Officer Unconstitutionally Enlarged Both the Scope and Temporal Duration of the Stop.

In a legal traffic stop, "the purpose of the stop is limited and the resulting detention [is] quite brief." *United States v. Noble*, — F.3d —, Nos. 13–6056, 13–6057, 13–6156, 2014 WL 3882493 at *7 (6th Cir. Aug. 8, 2014) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (modifications in original) (citations omitted). The traffic stop and inquiry must be "reasonably related in scope to the justification for their initiation." *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) (quoting *Terry*, 392 U.S. at 29) (internal quotation marks omitted). "The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case," but the duration of the stop, in addition to the scope of the stop, must not be "longer than is necessary to effectuate the purpose of the stop." *Royer*, 460 U.S. at 500.

Moreover, assuming, *arguendo*, that the [redacted] officer somehow did have reasonable suspicion to detain Respondent, the other passengers, and the driver, the scope of the stop should have been limited to issuing a traffic citation or a warning. *United States v. Davis*, 430 F.3d 345, 352 (6th Cir. 2005). Again, there is nothing in the record suggesting that the officer had any reasonable subjective or objective hint—other than the workers' perceived Latino ethnicity—that criminal activity was afoot. *See Royer*, 460 U.S. at 500 ("[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly,

the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time).

Thus, any subsequent detention after the initial stop "must not be excessively intrusive in that the officer's actions must be reasonably related in scope to circumstances justifying the initial interference." *United States v. Hill*, 195 F.3d 258, 264 (6th Cir. 1999), *cert. denied*, 528 U.S. 1176 (2000). When the officer approached the vehicle and turned his attention to Mr. [redacted] and demanded that he produce identification, he had no reasonable suspicion that Mr. [redacted] or anyone else had or was about to commit any criminal activity. He therefore expanded the scope of the stop without reasonable suspicion, *i.e.*, specific, articulable facts particular to Mr. [redacted] supporting a reasonable conclusion that Mr. [redacted] was involved in criminal activity.

Accordingly, a seizure "lawful at its inception can [still] violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). *See also United States v. Jacobsen*, 466 U.S. 109, 124 (1984); *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177, 185-86 (2004) (noting that a "seizure cannot continue for an excessive period of time"). Of course, this assumes that the initial *Terry* detention is based on a lawful purpose, supported by reasonable suspicion. The [redacted] officer's actions in this case were not. In any event, however, the officer—by directing his attention away from the driver and toward the passengers—impermissibly expanded the scope of the stop without any specific, articulable facts supporting his decision.[62] As soon as the officer asked the driver for his license, he "immediately turned to all the passengers, including [Mr. [redacted] and . . . also demanded that [they produce identification[.]"[63] As for the temporal duration

62 *See* **Exhibit A** at ¶¶ 10-11.

63 *Id.* at ¶ 11.

of an investigatory detention, the officer must be diligent and use "means of investigation . . . likely to confirm of dispel [the officer's] suspicions quickly. . . ." *Davis*, 430 F.3d at 354.

In this case, the [redacted] officer did not do anything to dispel his suspicions of *criminal* activity quickly because a reasonably prudent officer would not have suspected Respondent of any crime at all after the driver produced identification. There were no specific and articulable facts to expand the scope of the stop to Mr. [redacted] Neither the Department nor the [redacted] Police have offered any justification for the officer's actions in *immediately*[64] turning to Mr. [redacted] and demanding identification. The only logical reason for expanding the scope of the stop to Respondent was his apparent Latino ethnicity. *See Farm Labor Org. Cmte. v. Ohio State Hwy. Patrol*, 308 F.3d 523, 543-44 (6th Cir. 2002) (expanding scope of investigatory detention under *Terry* must be supported by articulable facts supporting that the person has or is about to engage in criminal activity). In Respondent's case, the [redacted] officer possessed no articulable—let alone reasonable—suspicion of criminal activity to expand the scope of the investigative detention to Respondent Mr. [redacted] *See Terry*, 392 U.S. at 21.

Taking the facts in the Respondent's affidavit as true, *Barcenas*, 19 I & N Dec. at 611-2, the record is clear that the [redacted] officer did not ask any questions or perform any true investigation of the driver or Mr. [redacted] prior to shifting his attention to Respondent and demanding his own identification.[65] Rather, the officer first demanded identification from the driver, then *immediately* turned to Respondent and asked for identification.[66] *See, e.g., United States v. Foster*, 634 F.3d 243 (4th Cir. 2011). No one in the vehicle was suspected of wrongdoing, but even still, a "hunch" of wrongdoing is insufficient for the Fourth Amendment

64 **Exhibit A** at ¶ 11.
65 *See* **Exhibit A**.
66 *Id.* at ¶¶ 10-11.

analysis. *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *United States v. Garcia*, 23 F.3d 1331 (8th Cir. 1994) ("To be reasonable, the suspicion must be more than an 'inchoate and unparticularized suspicion or 'hunch.'"") (quoting *Terry*, 392 U.S. at 27). The officer also failed to develop *any "particularized"* facts about Mr. [redacted] to warrant a search of his person for producing identification. *See United States v. Cortez*, 449 U.S. 411, 418 (1981) ("The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the *particular individual being stopped is engaged in wrongdoing*.") (emphasis added); *United States v. Urrieta*, 520 F.3d 569, 573 (6th Cir. 2008). *See also United States v. Johnson*, 620 F.3d 685, 692-93 (6th Cir. 2010) (to extend scope of stop, officer must have particularized, *non-immigration-related* facts related to that person when, taken together, provide reasonable inference that the person was or is about to engage in criminal activity).

It is well-settled that using race or ethnicity as a proxy for developing reasonable suspicion and tying two people together has no place in our legal system. Moreover, race or ethnicity is not a valid predictor of criminality. *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975). As the Supreme Court reasoned:

> Even if [the agents] saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens.

Id. at 886. *See also Melendres v. Arpaio*, 989 F. Supp. 2d 822, 898-99 (D. Ariz. 2013). Consequently, the only facts available to the officer at the time he shifted his attention from the driver and onto Respondent do not provide the necessary justification for his actions. *See United States v. Bonilla*, 357 F. App'x 693, 698-99 (6th Cir. 2009). *See also United States v. Keith*, 559

F.3d 499, 503 (6th Cir. 2009) (that a person "looked" suspicious and was in location where crime is known to occur insufficient to support finding of reasonable suspicion).

As noted above, the [redacted] officer did not take the time to develop any *particularized* facts that, when taken together, support the inference that Respondent—the passenger—was involved in any criminal activity.[67] Rather than ask questions of either the driver or of Respondent, the officer merely then demanded that Respondent produce his own identification.[68] The officer then asked a singular question about why the workers were on the side of the road, to which the front-seat passenger responded in a way that should have dispelled any suspicion.[69] As soon as Respondent and the other passengers produced their identification, the officer, without any further questioning that might confirm or dispel whatever suspicions he possessed, returned to his patrol car, where he stayed for at least 10 minutes, then returned to the workers' car and said, "Wait here."[70] It is impossible that the officer could have developed sufficient information to provide him with any objective, articulable facts that would have supported expanding the scope of the investigatory detention or of searching Respondent for identification. The [redacted] officer should, at the least, be called upon to justify his actions in this case at a *Barcenas* hearing.

After illegally expanding the scope of the investigatory detention to Respondent, the officer immediately demanded identification from Respondent, without ever asking any questions of Respondent. While an officer may lawfully search a vehicle's *passenger compartment* when he has probable cause (a higher standard than reasonable suspicion) of

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67 What Mr. [redacted] produced as a result of the illegal search and seizure is of no moment to whether a Fourth Amendment violation occurred because the relevant inquiry is of what objective facts were known to the officer at the time of the seizure to justify his behavior. *Post-hoc* rationalizations are not permitted. *See Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990).

68 **Exhibit A** at ¶¶ 7, 9.

69 *Id.* at ¶¶ 12-13.

70 **Exhibit A** at ¶¶ 14-15.

criminal activity, *Arizona v. Gant*, 556 U.S. 332, 346 (2009), the [redacted] officer did not warrantlessly search the passenger compartment, but rather demanded identification from Respondent's *person*.

The Fourth Amendment proscribes all unreasonable searches and seizures, and searches of personal property conducted without prior approval by a judge or magistrate are *per se* unconstitutional, subject to only a few specifically established and well-delineated exceptions. *Horton v. California*, 496 U.S. 128, 144 (1990); *Missouri v. McNeely*, — U.S. —, 133 S. Ct. 1552, 1558 (2013) (same). "Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Id.* (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)). "A decision to invade a possessory interest in property is too important to be left to the discretion of zealous officers 'engaged in the often competitive enterprise of ferreting out crime.'" *Id.* (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)); *Farm Labor Organizing Cmte.*, 308 F.3d at 543-44; *United States v. Place*, 462 U.S. 696, 701 (1983) ("the Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause"). To the extent that a seizure of personal property may be performed with less than full probable cause—and instead with only *particularized* reasonable suspicion—no such particularized information about Mr. [redacted] existed. *See Saperstein*, 723 F.2d at 1231.

As the officer sought to search information contained on Respondent's person, rather than the vehicle's passenger compartment, the automobile exception to warrantless searches does not apply, as the courts have clearly set the boundaries of a warrantless vehicular search to the passenger compartment. *Gant*, 556 at 340-41. None of the "exigent circumstances" that may support a warrantless search are present or applicable here. For example, the courts permit a

warrantless search of personal property in the presence of exigent circumstances such as law enforcement's need to provide emergency assistance to an occupant of a home, *Michigan v. Fisher*, 558 U.S. 45, 47-48 (2009) (per curiam), to engage in "hot pursuit" of a fleeing felon, *United States v. Santana*, 427 U.S. 38, 42-43 (1976), or to render emergency aid and investigate the cause of a burning building, since the evidence may evaporate, *Michigan v. Tyler*, 436 U.S. 499, 509-10 (1978). The imminent destruction of evidence can, in the correct circumstances, provide exigent circumstances justifying a warrantless search. *Cupp v. Murphy*, 412 U.S. 291, 296 (1973). Of course, all claims are exigent circumstances are assessed by view of the totality of the circumstances. *McNeely*, 133 S.Ct. at 1559 (declining to adopt *per se* rule that need for blood draw from body of person accused of driving under influence of alcohol always presents exigent circumstances).

Next, the consent exception to the warrant requirement "recognizes the validity of searches with the voluntary consent of an individual possessing authority." *Georgia v. Randolph*, 547 U.S. 103, 109 (2006). The officer would have needed "voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of the evidence so obtained." *Id.* at 106. In this case, the record does not suggest anyone gave consent—much less *voluntary* consent—to search Mr. [redacted] person or even of the driver's automobile. Because Respondent, who had already been "seized" within the meaning of the Fourth Amendment, was ordered to produce identification, he was not able to give voluntary and knowing consent. *See Dorsey v. Barber*, 517 F.3d 389 (6th Cir. 2008); *see also United States v. Stokely*, 733 F. Supp. 2d 868, 880 (E.D. Tenn. 2010). Most importantly, there is no evidence in the record that claims that the identification card Mr. [redacted] produced was obtained consensually. *See United States v. Hernandez*, 913 F.2d 1506, 1510 (10th

Cir. 1990); *United States v. Mora-Morales*, 807 F. Supp. 2d 1017, 1022 (D. Kan. 2011) (working knowledge of English necessary to establish consent when officer speaks only in English). "If consent is given after an illegal seizure, that prior illegality taints the consent to search." *United States v. Richardson*, 949 F.2d 851, 858 (6th Cir. 1991). Because the officer unlawfully expanded the scope of the investigatory detention to Respondent, the taint of his unlawful action had not yet dissipated, obviating any consent that Respondent could have given. If that were not enough, none of the conversations occurred in a language Respondent could understand.[71] Further, it is the government's burden to demonstrate, by preponderance of the evidence, to show through "clear and positive testimony" that consent was valid. *United States v. Riascos-Suarez*, 73 F.3d 616, 625 (6th Cir. 1996). The government, to date, has not done so. Thus, Respondent turning over his identification card to the officer in the face of the officer's demand should not be confused with consent. *United States v. Worley*, 193 F.3d 380 (6th Cir. 1999) ("acquiescence cannot, of course, substitute for free consent.") (quoting *United States v. Berry*, 670 F.2d 583, 596 (5th Cir. 1982) (*en banc*).

In this case, there is absolutely no evidence that Respondent said anything to the officer. *See Id.* at 386 (equivocal statement that defendant "guesses" officer could search because he has the badge is not voluntary consent). As was dispositive in *Worley*, a search premised on consent requires more than "mere expression of approval;" rather, it requires unambiguous, voluntary, and knowing permission. *See Id. See also United States v. Jones*, 641 F.2d 425, 429 (6th Cir. 1981), *overruled on other grounds by Steagald v. United States*, 451 U.S. 204 (1981), *as recognized by United States v. Hardin*, 539 F.3d 404, 412 (6th Cir. 2008). Moreover, as knowledge of the ability to refuse consent is a relevant factor in the consent analysis, the fact that

[71] **Exhibit A** at ¶¶ 9, 11.

no one on the scene was able to seek permission to search in Spanish also militates against a finding of valid, voluntary consent. *Worley*, 193 F.3d at 387; *Schneckloth*, 412 U.S. at 227; *United States v. Riascos-Suarez*, 73 F.3d 616, 625 (6th Cir. 1996).[72]

The Supreme Court considered the constitutionality of a Nevada law requiring a person to provide his or her name without independent reasonable suspicion in *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cnty*., 542 U.S. 177 (2004). Notably, the Court held that because Mr. Hiibel had no reasonable expectation that his name alone would be used to incriminate him, the name-disclosure requirement did not violate his Fourth or Fifth Amendment rights. *Id.* at 190-91. The Court, however, took great care to limit the scope of its holding, and it explicitly stated that the "narrow scope" of the Nevada law—which required providing an officer with one's *name* but *not identification*—was important to upholding the state statute. *Id.* at 190.[73] Some states, but not Mississippi, have passed laws—to date mostly unchallenged—requiring a person to provide identification in the course of a *valid* investigatory detention. *See, e.g.*, Ala. Code § 15-5-30; Ariz. Rev. Stat. Tit. 13, § 2412; Ark. Code Ann. § 5-71-213; Colo. Rev. Stat. § 16-3-103(1); Del. Code Ann., Tit. 11, §§ 1902, 1321(6); Fla. Stat. § 901.151; Ga. Code Ann. § 16-11-36(b); Ill. Comp. Stat., ch. 725, § 5/107-14; Ind. Code § 34-28-5-3.5; Kan. Stat. Ann. §22-2402(1); La. Code Crim. Proc. Ann., Art. 215.1(A); La. Rev. Stat. 14:108(B)(1)(c); Mo. Rev. Stat. § 84.710(2); Mont. Code Ann. § 46-5-401; Neb. Rev. Stat. § 29-829; Nev. Rev. Stat. §

[72] Even if the officer had some "hunch" that Mr. [redacted] was somehow involved in criminal activity immediately after asking the driver for identification, he did not have authority to search Mr. [redacted] as his investigation showed no reasonable objective indicia of any investigation into criminal wrongdoing particularized to Mr. [redacted] "In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects." *Royer*, 460 U.S. at 499.

[73] The Court accepted the Nevada Supreme Court's limiting construction of the state statute and noted that the Nevada state courts held that a detained person could comply with the statute merely by providing his or her name without producing "credible and reliable" evidence of the veracity of the name, such as an identification card. *Id.* at 177.

171.123; N.H. Rev. Stat. Ann. § 594:2; N.M. Stat. Ann. § 30-22-3; N.Y. Crim. Proc. Law § 140.50; N.D. Cent. Code § 29-29-21; Ohio Rev. Code § 2921.29; R.I. Gen. Laws § 12-7-1; Utah Code Ann. § 77-7-15; Vt. Stat. Ann., Tit. 24, § 1983; Wis. Stat. § 968.24.

First, as described above, the expansion of the *Terry* stop to Respondent was unconstitutional. Second, Mississippi has no such so-called "stop-and-identify" statute. Lastly, the Court held that in states without constitutional "stop-and-identify" laws, a person is not obligated to provide identity information to law enforcement, let alone proof of identification. *See Hiibel*, 542 U.S. at 183 ("In other States, a suspect may decline to identify himself without penalty."). Nothing in the Form I-213 or any other evidence the Department has submitted even attempts to logically justify the conduct resulting in the initiation of removal proceedings against Mr. [redacted]

In a well-reasoned case quite similar to the one before the Court, also involving the demand for identification from a passenger not theretofore involved in any conduct forming the basis for the traffic stop, the First Circuit reasoned that it is "well established that a police officer cannot stop" a person and "demand identification 'without any specific basis for believing he is involved in criminal activity.'" *United States v. Henderson*, 463 F.3d 27, 45 (1st Cir. 2006) (quoting *Brown v. Texas*, 443 U.S. 47, 52 (1979)). The court noted that the officer's demand for identification "expanded the scope of the stop, changed the target of the stop, and prolonged the stop," *Henderson*, 463 F.3d at 46, all without separate, articulable reasonable suspicion concerning Mr. [redacted] Nothing linked Respondent to the driver, whose identification the officer first sought. "There was no particularized reason . . . to launch into an investigation" of Mr. [redacted] *Id.* (vacating conviction and suppressing evidence). *Accord United States v. Dapolito*, No. 2:12-cr-45, 2012 WL 3612602 (D. Me. Aug. 21, 2012) (suppressing evidence).

Respondent was both unlawfully seized, by the extension of the *Terry* stop to him, and unlawfully searched. The [redacted] officer had no reasonable suspicion for launching an investigative detention of Mr. [redacted] and he lacked any indicia of probable cause justifying a warrantless search. ICE arrested and placed Mr. [redacted] into removal proceedings as a direct result of the [redacted] officer's unconstitutional actions, and these removal proceedings undermine Mr. [redacted] right to fundamentally fair proceedings. *See Oliva-Ramos*, 694 F.3d at 270-71 (citing *Lopez-Mendoza*, 468 U.S. at 1050-51).

If the foregoing were not sufficient to evince a Fourth Amendment violation, ICE's own documentation of the stop, which ICE now wishes to introduce as positive evidence against Mr. [redacted] belies the unconstitutionality of ICE's own conduct in addition to that of the [redacted] officer. In the Form I-213, Agent [redacted] writes, "Agents responded to the traffic stop because none of the occupant [sic] could provide valid identification to the Office, nor could they speak English."[74] First, as discussed above, neither ICE nor the [redacted] officer had the right to demand identification from Mr. [redacted] and in any event, his ability to do so is not probable cause. *See* INA § 287(a)(2) [8 U.S.C. § 1357(a)(2)] (requiring ICE agents to have probable cause both that the subject is in the country illegally *and* is likely to escape before a warrant could be obtained). Nor is Mississippi a so-called "stop-and-identify" state. Second, Agent [redacted] written narrative directly conflicts with Respondent's version of events, and it is *Respondent's* declaration that must be believed under the *Barcenas* scheme.[75] Third, the ability or inability to speak English, in any event, is not probative of Respondent's right to be in the United States. *See Farm Labor Organizing Cmte. v. Ohio State Hwy. Patrol*, 308 F.3d 523, 539 (6th Cir. 2002)

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74 **Exhibit I**.

75 *See* **Exhibit A** at ¶¶ 14 (Respondent did provide identification to the officer), 13 (front-seat passenger spoke and understood English fairly well).

("Moreover, we disagree with Trooper Kiefer's contention that the plaintiffs' difficulty speaking English necessarily establishes a valid race-neutral basis for initiating an immigration investigation."); *United States v. Muñoz*, No. CR 12-40092-01, 2012 WL 6012811 at *4 (D. S. Dak. Dec. 3, 2012); *United States v. Manzo-Jurado*, 457 F.3d 928, 936-37 (9th Cir. 2006) ("an individual's inability to understand English," by itself, does not justify even an investigatory stop, let alone a full-blown arrest, "because the same characteristic applies to a sizable portion of individuals lawfully present in this country" and holding that the totality of circumstances did not establish reasonable suspicion that group of workers were illegal immigrants, and reversing denial of motion to suppress).

From beginning to end, the [redacted] and ICE officers violated Respondent's Fourth Amendment rights. These proceedings should therefore be terminated. Not only did the [redacted] officer initiate a traffic stop without reasonable suspicion and unlawfully enlarge the scope of the already unlawful traffic stop, and not only did ICE arrest Respondent based only on the disputed facts that he could not speak English and could not provide valid identification in a state where no such identification is required, but the [redacted] and ICE agents also unlawfully expanded the temporal duration of the stop to detain Mr. [redacted] solely to investigate possible civil immigration violations.

The Supreme Court held firmly and definitively in *Arizona v. United States*, — U.S. —, 132 S. Ct. 2492, 2505-06 (2012), that pursuant to field preemption under the Supremacy Clause, the federal government alone—not the states or their law enforcement agencies—has the exclusive authority to investigate, detain, and arrest individuals for suspected violations of immigration law. When local law enforcement agencies make even brief detention decisions—a

process "entrusted to the discretion of the Federal Government"—they violate the federal comprehensive immigration enforcement and detention scheme Congress created. *Id.* at 2506.

It is not enough that state law enforcement officials merely refrain from acting in a way that the federal government would disagree with; even complementary efforts are forbidden. *Id.* at 2502. "Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards." *Id.*

The touchstone of *Arizona* is simple: "If the police stop someone based on nothing more than possible removability, the usual predicate for a[] [federal immigration] arrest is absent." *Id.* at 2505. The state officer's decision impermissibly interferes with "[t]he federal statutory structure [that] instructs when it is appropriate to arrest an alien during the removal process." *Id.* While it is arguably not unlawful for a state law enforcement officer to merely *communicate* with ICE, it is unlawful for the officer to *detain* a person to verify immigration status. *Id.* at 2509. "Detaining individuals solely to verify their immigration status would raise constitutional concerns." *Id.*

The [redacted] officer expanded the duration of the traffic stop so he could summon ICE to the scene.[76] Specifically, after the officer seized Mr. [redacted] identification, he returned to his patrol car, where he waited for at least 10 minutes. Then, the officer approached the group to tell them, "Wait here." About 20 minutes later, the ICE agents arrived to arrest Mr. [redacted] and his coworkers.[77]

The root of the Supreme Court's admonition that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns," *Arizona*, 132 S. Ct. at 2509, is the well-settled constitutional requirement that the length of an investigatory detention be as short as

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76 **Exhibit A** at ¶¶ 14-16.

77 *Id.*

possible. Inquiries unrelated to the purpose of the traffic stop (or related to reasonable suspicion of *criminal* activity that developed during the stop) may not "*measurably extend the duration of the stop*." *Arizona v. Johnson*, 555 U.S. 323 (2009) (emphasis added); *United States v. Stepp*, 680 F.3d 651, 662-64 (6th Cir. 2012) (six minutes of extraneous questioning of vehicle driver unreasonably prolonged traffic stop beyond its original purposes, and thus continuing to hold occupant past reason for initial stop violated Fourth Amendment unless independent reasonable suspicion of *criminal* activity arose during course of investigation). *See also Muehler v. Mena*, 544 U.S. 93, 101 (2005) ("Mere police questioning does not constitute a seizure unless it prolongs detention of the individual and holding no Fourth Amendment violation where questioning about immigration did *not* prolong stop).

Here, the [redacted] officer was by no means "reasonably diligent in pursuing [his] investigation," *Stepp*, 680 F.3d at 664, where his actions consisted solely of approaching the vehicle, demanding a driver's license of the driver and immediately then demanding identification from the passengers, asking a single question about what the coworkers were doing (to which the worker most proficient in English responded with an innocuous answer that should have dispelled the officer's suspicions),[78] returning to his patrol car for 10 minutes, returning to tell the coworkers only, "Wait here," and then returning to his patrol car for 20 more minutes to wait for ICE to arrive.[79] Therefore, "the delays in this case amounted to an unreasonable expansion of the initial stop." *Stepp*, 680 F.3d at 664. There can be no dispute that the [redacted] officer "measurably" extended the scope of the stop by at least 20 minutes.

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78 **Exhibit A** at ¶¶ 12-13.

79 *See generally* **Exhibit A**.

For all the factual disputes in this case, whether ICE is correct (that Mr. [redacted] could not produce identification)[80] or Respondent is correct (that he did),[81] for purposes of the Fourth Amendment analysis concerning the duration of the traffic stop, it matters not. "[D]etaining passengers to investigate their immigration status once they have either provided or not provided identification runs into the Fourth Amendment." *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 906 (D. Ariz. 2013). "Detaining a *passenger* while running his or her identification through [a] . . . database is not 'reasonably related in scope' to the traffic infraction and therefore requires independent reasonable suspicion." *Id.* (citing *Caballes*, 543 U.S. at 407; *Terry*, 392 U.S. at 20) (emphasis added) (enjoining the Maricopa County Sheriff's Office from using even reasonable suspicion of unauthorized presence to justify investigatory detention or arrest); *Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 464 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1541 (2014) ("Lower federal courts have universally—and we think correctly—interpreted *Arizona v. United States* as precluding local law enforcement officers from arresting individuals solely based on known or suspected civil immigration violations."). In *Santos*, the court held that local law enforcement violated the Fourth Amendment when they seized her after learning she was the subject of a civil immigration arrest warrant. *Id.* at 468.

> The rationale for this rule is straightforward. A law enforcement officer may arrest a suspect only if the officer has " 'probable cause' to believe that the suspect is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). Because civil immigration violations do not constitute crimes, suspicion or knowledge that an individual has committed a civil immigration violation, by itself, does not give a law enforcement officer probable cause to believe that the individual is engaged in criminal activity. *Melendres*, 695 F.3d at 1000–01. Additionally, allowing local law enforcement officers to arrest individuals for civil immigration violations would infringe on the substantial discretion Congress entrusted to the Attorney General in making removability

80 **Exhibit I**.

81 **Exhibit A** at ¶ 14.

> decisions, which often require the weighing of complex diplomatic, political, and economic considerations. *See Arizona v. United States*, 132 S.Ct. at 2506–07.
>
> Although *Arizona v. United States* did not resolve whether knowledge or suspicion of a civil immigration violation is an adequate basis to conduct a brief investigatory stop, the decision noted that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns." *Id.* at 2509. Nonetheless, the Court's logic regarding arrests readily extends to brief investigatory detentions. In particular, to justify an investigatory detention, a law enforcement officer must have reasonable, articulable suspicion that "criminal activity may be afoot." *Terry*, 392 U.S. at 30, 88 S.Ct. 1868. And because civil immigration violations are not criminal offenses, suspicion or knowledge that an individual has committed a civil immigration violation "alone does not give rise to an inference that criminal activity is 'afoot.' " *Melendres*, 695 F.3d at 1001.

Id. at 465.

B. The [redacted] Police Department Officer and ICE's Fourth Amendment Violations Were Egregious, Warranting Suppression, or Alternatively, a *Barcenas* Hearing.

While the Sixth Circuit has yet to define the precise contours of an "egregious" Fourth Amendment violation in the suppression context, the Second Circuit has characterized "egregious" conduct as that which "transgresses notions of fundamental fairness." *Almeida-Amaral v. Gonzalez*, 461 F.3d 231, 235 (2d Cir. 2006). The Ninth Circuit's "bad faith" standard also supports suppression for constitutional transgressions, such as illegal, warrantless home entries and racial profiling, that any reasonable officer would know violates the Constitution. *See Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1018-19 (9th Cir. 2008) (preserving the long-recognized rule that evidence obtained through "bad faith," *i.e.*, intentional constitutional violations, fits the exception to *Lopez-Mendoza* and triggers suppression). The Sixth Circuit has at least suggested a third alternative that could evince a finding of egregiousness, namely, where a person is "accosted by the police in a random attempt to determine whether he was an illegal alien." *United States v. Navarro-Diaz*, 420 F.3d 581, 587 (6th Cir. 2005). An extrajudicial false arrest strikes at the core of the Fourth Amendment's protections against arbitrary incarceration

without judicial warrant. *See also Oliva-Ramos*, 694 F.3d at 279 (describing a non-exhaustive list of factors to be considered in the egregiousness inquiry).

Respondent has made a *prima facie* showing that the [redacted] Police Department and ICE egregiously violated his Fourth Amendment right to be free from unreasonable seizure through a series of illegal actions, all of which individually—but especially in the aggregate—constitute an egregious violation. Specifically, the [redacted] officer's initial seizure—made only after slowly driving past the vehicle, allowing him to notice the race and/or perceived ethnicity of the driver and passengers[82]—was not supported by reasonable suspicion of criminal activity. Then, the officer unlawfully expanded the scope of the initial investigative detention absent particularized, objective facts demonstrating reasonable suspicion, but also by searching Respondent without probable cause. If that were not enough, the officer left Respondent on the side of the road, seized, for approximately 30 minutes while waiting for ICE to arrive,[83] which unlawfully expanded the temporal scope of the stop. *See Oliva-Ramos*, 694 F.3d at 279 (suggesting that egregiousness is satisfied "when the initial stop is particularly lengthy"). The investigative detention here, as noted above, was not reasonable in duration, and the officer was far from diligent in pursuing his course of investigation. Then, ICE arrested Respondent without probable cause, apparently because of Respondent's supposed inability to produce identification and because of the language he used, which, as noted above, does not constitute probable cause. In any event, ICE's seizure of Respondent occurred only because of the [redacted] officer's illegal conduct.

As noted above, the Sixth Circuit has opined that seizing a person "in a random attempt to determine whether he was an illegal alien" might give rise to an egregious violation. *Navarro-*

82 **Exhibit A** at ¶ 8.

83 **Exhibit A** at ¶¶ 14-16.

Diaz, 420 F.3d at 587. The only facts that the officer had at his disposal for investigating Respondent was his apparent race or ethnicity at the time he expanded the scope of the detention to Respondent. After the officer demanded identification from Respondent, the only individualized factors he could have considered were his apparent ethnicity and possibly his use of language (though there is no evidence in the record that the officer even *attempted* to speak with Respondent in any language). The officer's behavior was not based on well-established and clear legal authority, which makes it clear that association with a person who may have violated the law and skin tone are not permissible factors to consider in the Fourth Amendment calculus. Instead, no objective criteria warranted investigating Mr. [redacted] leaving the only explanation for the officer's behavior to be his attempt to cast a net of "guilt by association" over Mr. [redacted] because of impermissible policing factors, such as perceived race or ethnicity, assuming that the driver committed any traffic violation. If the driver did not commit a traffic violation (there is no citation or warning in the record), then of course the entire stop was unlawful. There was simply no suspicion—let alone *reasonable* suspicion—to seize Respondent, demand his identification, and extend the temporal duration of the stop so that the officer could summon ICE agents to arrest him. The second seizure by ICE was similarly not based on probable cause and was itself the fruit of an illegal seizure. The propounding illegalities in this case alone counsel in favor of a finding of egregiousness, but the total lack of *any* reasonable justification for the actions here most strongly demonstrate egregiousness.

This type of policing also clearly demonstrates "bad faith" as required under the Ninth Circuit's formulation of "egregiousness." *See Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449-50 n. 6 (9th Cir. 1994) ("bad faith" evidenced by conduct a reasonable officer should know would violate Constitution) (citing *Matter of Toro*, 17 I & N Dec. at 343). Of course given the well-

settled state of Fourth Amendment jurisprudence concerning investigative *Terry* detentions and expanding the scope of a stop, all the officers involved in Mr. [redacted] case should have been aware of the unconstitutionality of their conduct. Further, the Board recognized in *Toro* that launching an investigative detention of a person because of "Latin appearance" shows bad faith. *Id.* Of course, determining whether police conduct is "egregious" requires a "flexible case-by-case approach." *Oliva-Ramos*, 694 F.3d at 278. In this case, the total absence of authority to investigate Respondent also demonstrates egregiousness. *See also Puc-Ruiz*, 629 F.3d at 779 (suggesting a finding of "egregiousness" might be appropriate in "a case in which police officers invaded private property and detained individuals with *no* articulable suspicion whatsoever") (emphasis in original).

Unfortunately, the actions in this case are highly suggestive of race- or ethnicity-based policing that the courts rightly address with opprobrium. *See Almeida-Amaral*, 461 F.3d at 235 (court may find egregiousness where stop was based on race "or some other grossly improper consideration"). Because the detention by [redacted] (and subsequent arrest by ICE) were not supportable by any reasonable suspicion at all, the Court may rightly conclude that impermissible factors entered into the law enforcement calculus. *See Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 (9th Cir. 1994); *Santos v. Holder*, 486 F. App'x 918, 920 (2d Cir. 2012) (granting in part petition for review and ordering a *Barcenas* hearing).

[redacted] and ICE's conduct in this case is even more "egregious" than that described in *Santos*. There, the respondent's affidavit and supporting exhibits supported the inference that the officer was engaged in race-based policing:

> Santos presented specific factual allegations in his affidavit and evidence, which, taken as true, support his belief that the Massachusetts state trooper who pulled him over did so on account of his race, and that the speeding citation the trooper issued was a mere pretext. According to Santos's sworn declaration: (1) he and the

> passenger he was riding with have "olive-skin" and "dark hair"; (2) he was not speeding; (3) the trooper followed him for more than two miles before pulling him over; (4) the trooper inquired about Santos's immigration status (and that of his passenger) before informing him that he had been pulled over for speeding; (5) the trooper asked Santos how he could afford such an expensive car when he, a state trooper for over 15 years, could not afford that car; (6) the trooper arrested him for unlicensed operation of a motor vehicle, but this charge was never pursued in state court; and (7) the trooper told him that his foreign government-issued license was "fake." These facts, taken as true and viewed in the light most favorable to Santos, provide an objective *prima facie* basis to believe that he was pulled over based on his Hispanic appearance.

Id. at 920. In this case, Mr. [redacted] need not bother negotiating around pretextual considerations because neither Mr. [redacted] nor any other passenger nor the driver was ever charged, cited, or warned for violating any state criminal or traffic law.[84] Like the state trooper in *Santos*, the officer had the opportunity to observe the skin tones of the workers.[85] The officer turned his attention to Mr. [redacted] without any specific, articulable facts supporting any criminality, that is, without reasonable suspicion. And finally, of course, the officer investigated and detained Mr. [redacted] for suspected violations of the civil immigration law. *See Oliva-Ramos*, 694 F.3d at 279 (suggesting case could present an egregious violation when officers detain a person with "*no* reasonable suspicion whatsoever" and condemning a "one-size-fits-all" approach to the egregiousness inquiry).

Because the law enforcement officers in this case had "*no* articulable suspicion whatsoever," aside perhaps from impermissible factors such as race or ethnicity that would only serve to further support a finding of egregiousness here, the evidence must be suppressed. The "characteristics and severity of the offending conduct," being supported on no legal basis at all and contrary to well-settled, established Fourth Amendment law, favors suppression as well. *See Cotzojay*, 725 F.3d at 180. Under yet another formulation of "egregiousness," the complained-of

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84 **Exhibit A** at ¶ 23; **Exhibit K**.

85 **Exhibit A** at ¶ 8.

conduct in Respondent's case is "egregious" because a reasonable officer should have known that an officer cannot detain and search a person without independent reasonable suspicion (for an investigatory detention) or probable cause (for a search and arrest). Respondent has demonstrated a *prima facie* case for suppression, and this Court should hold a *Barcenas* hearing to allow Mr. [redacted] the opportunity to present evidence in support of his affidavit.

If that were insufficient, there are indicia of wanton and unnecessary shows of force in this case, which also favors suppression. *Oliva-Ramos*, 694 F.3d at 279; *Kandamar v. Gonzales*, 464 F.3d 65, 71 (1st Cir. 2006); *Puc-Ruiz*, 629 F.3d at 778-79 ("unreasonable show of force" and "physical brutality" relevant to egregiousness inquiry). Specifically, Mr. [redacted] states in his declaration that he was shackled by the arms and legs with a chain tightly attached to his chest, which caused him physical pain.[86] There was no reason for shackling Respondent in such a restrictive manner, as he posed a low flight risk.[87]

Accordingly, in addition to violating the Fourth Amendment, ICE and the [redacted] officer's violations were also egregious. Respondent has demonstrated a *prima facie* case for suppression, and this Court should hold a *Barcenas* hearing to allow Mr. [redacted] the opportunity to present evidence in support of his affidavit.

II. DHS'S DUE PROCESS AND REGULATORY VIOLATIONS INDEPENDENTLY REQUIRE TERMINATION OF THESE PROCEEDINGS.

Respondent's Fifth Amendment right to fundamental fairness in DHS enforcement action and in immigration court requires termination of these proceedings. Removal proceedings must comport with the Due Process Clause of the Fifth Amendment. *See Galvan v. Press*, 347 U.S. 522, 530-31 (1954); *Bridges v. Wixon*, 326 U.S. 135, 153 (1945). An agency's adherence to its

86 **Exhibit A** at ¶¶ 18, 20.

87 **Exhibit F** (releasing Respondent on his own recognizance once he arrived in Louisiana).

own regulations is a fundamental aspect of due process. *See United States ex rel. Accardi v. Schaughnessy*, 347 U.S. 260 (1954). "The Supreme Court has long recognized that a federal agency is obliged to abide by the regulations it promulgates." *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 545 (6th Cir. 2004) (internal quotation omitted) (citing *Accardi*, 347 U.S. 260). An agency's violation of its own procedural rules requires reversal of the agency's action where the claimant has been "deprived of substantial rights because of the agency's procedural lapses." *Id.* at 547 (citing *Connor v. United States Civil Serv. Comm'n*, 721 F.2d 1054, 1056 (6th Cir. 1983)). Accordingly, when a regulation or procedural rule is promulgated "primarily to confer important procedural benefits upon individuals," such regulations "bestow[] a 'substantial right'" upon the parties before the agency that makes it "incumbent upon agencies to follow their own procedures . . . even where the internal procedures are possibly more rigorous than otherwise would be required." *Id.* (quoting *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538-39 (1970), *Morton v. Ruiz*, 415 U.S. 199, 235 (1975), and *Accardi*, 347 U.S. at 267).

The *Accardi* principle originated in the immigration context, and it is no less applicable in immigration proceedings today. *Matter of Garcia-Flores*, 17 I & N Dec. 325, 328 (BIA 1980). *See also Matter of Carrera-Hernandez*, 21 I & N Dec. 224, 226 (BIA 1996). Thus, the "Board has consistently held that a violation of a regulatory requirement invalidates a [removal] proceeding" where the regulation provides a benefit to the individual in proceedings and the violation prejudiced the interest meant to be protected by the regulation. *Id.* (citing *Matter of Garcia-Flores*, 17 I & N Dec. 325).

8 C.F.R. § 287.12 is not to the contrary. While an agency is free to set internal policies and disclaim liability through regulatory fiat, it is not free to alter Supreme Court jurisprudence with the swipe of a regulatory pen. Several of ICE's regulations, including those dealing with

detention and interrogation of suspected noncitizens, warrantless arrests, and the right to counsel, implicate fundamental constitutional rights. The only conceivable party who could benefit from these regulatory provisions is the individual who is the subject of the enforcement action. Accordingly, DHS's adoption of an administrative disclaimer does not free it from the rule of law and binding precedent.

An individual's Fifth Amendment right to due process is violated when DHS bases the proceedings on violations of its own statutes, regulations, or sub-regulatory rules that affect the fundamental rights of a respondent. *See El Harake v. Gonzales*, 210 F. App'x 482, 485 (6th Cir. 2006). When violations result in substantial prejudice, proceedings must be terminated. *See Villegas de la Paz v. Holder*, 614 F.3d 605, 610 (6th Cir. 2010) (citing *Connor v. United States Civil Serv. Comm'n*, 721 F.2d 1024 (6th Cir. 1983)).

Here, ICE violated its own regulations and policies that were promulgated to protect Respondent's rights, which warrants termination. Specifically, the ICE agents arrested Respondent without probable cause that he was in the country illegally and likely to escape, as is required by 8 C.F.R. § 287.8(c)(2). Accordingly, this Court should terminate these proceedings, or alternatively, schedule a full evidentiary hearing if any material dispute of fact exists.

CONCLUSION

In light of the foregoing, Respondent respectfully requests this Court to suppress any and all evidence against him contained in the Form I-213, and/or terminate these proceedings with prejudice. In the alternative, because he has made a *prima facie* showing that the [redacted] Police Department and ICE egregiously violated his Fourth and Fifth Amendment rights, Respondent respectfully requests a *Barcenas* hearing.

Dated: August 20, 2014

Respectfully submitted,

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DECLARATION OF [redacted]

I, [redacted] declare under penalty of perjury that the following is true and correct, to the best of my knowledge, recollection, and belief. 28 U.S.C. § 1746. Unless otherwise stated, the following statements are made based on my personal knowledge.

1. My true name is [redacted] I am an adult, of sound mind and body, and am in all respects qualified to make the statements herein. I make these statements through an interpreter.

2. I am a resident of Nashville, Tennessee.

3. When I was arrested by ICE and put into removal proceedings, I was living in Mississippi.

4. The morning of May 6, 2013, I was a passenger in an automobile driven by one of my coworkers. In all, there were four men in the vehicle, including me. We all worked together. All four of us were of Latino descent and looked Latino. I sat in the back seat of the vehicle that day.

5. Our boss told us where to go that morning for another project, but the driver of the vehicle became lost in the town of [redacted] Mississippi. Rather than needlessly driving through the town, one of my coworkers used a mobile telephone to call our boss.

6. The boss told us just to pull to the side of the road and tell him where we were. The boss said he would pass by us and that when he does, we should follow behind him.

7. We followed our boss's advice. The driver pulled the car off the road near an O'Reilly Auto Parts store in [redacted] The undivided, unlined street was smaller than a full highway, but we were not blocking the flow of traffic. The driver left the engine running while waiting for the boss to pass by us.

8. However, before the boss arrived and very shortly after pulling to the side of the road, a police car drove by us several times. As he passed us, the police officer drove very slowly. After a few passes, the officer pulled his vehicle behind the one where I was a passenger.

9. The police officer approached the vehicle where I was. He demanded that the driver produce a driver's license. I did not feel as if I could leave because it seemed very much like a traffic stop. The officer spoke only in English, which none of the four of us understood well, as all of our native languages were Spanish.

10. The driver produced some form of identification.

11. The officer immediately turned to all of the passengers, including me, and he also demanded that we produce identification, as best as I could understand in English.

12. Then, the officer asked why we were on the side of the road.

13. The front-seat passenger spoke and understood English better than the rest of us, so he responded to the questioning. The passenger told the officer that we were lost and were waiting for our boss so we could follow him to the next worksite.

14. The officer took all of our identification cards and returned to his police car. He stayed there for several more minutes.

15. After about 10 more minutes, the police officer returned to us in the car and said words to the effect of, "Wait here."

16. About 20 minutes later, two officers arrived. At least one of them wore a uniform that said "ICE" in bold lettering.

17. One ICE agent, who appeared to be of Puerto Rican appearance, said words to the effect of, "You are detained by ICE. You are in immigration custody."

18. That agent, with the help of another ICE agent, attached handcuffs to my hands and put my legs in shackles. A chain was put around my chest, which attached to the other cuffs around my body.

19. The two ICE agents put all four of us into a van.

20. The chain around my body continually tightened against my skin, which caused pain.

21. We were taken to an office. I was processed and given paperwork. I refused to sign the paperwork. The immigration agent in the office told me I could be released if I paid bond.

22. I was transferred to Louisiana where I remained until I was released.

23. I was never charged with a crime related to this.

8-18-104
Date

[redacted]

Certification of Accuracy of Translation and Competence of Translator

I, Amanda Crider, hereby certify that I personally translated the foregoing document for the Declarant from English to Spanish, that my translation in English was a true and accurate translation of the original document, and that I am sufficiently competent in both English and Spanish languages to render such a translation.

8/18/14
Date

Signature of Translator

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