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**NOT DETAINED**

**IN THE UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**BOARD OF IMMIGRATION APPEALS**

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| **In the matter of**<br><br>[redacted]<br><br>**in Removal Proceedings.** | **File No.** [redacted] |

# RESPONDENT-APPELLANT'S BRIEF ON APPEAL

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| In the Matter of | ] | |
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| [redacted] | ] | File [redacted] |
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| Respondent. | ] | |

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**RESPONDENT-APPELLANT'S BRIEF ON APPEAL**

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COMES NOW Respondent [redacted] ("Respondent" or "Appellant"), through undersigned counsel, and pursuant to 8 C.F.R. § 1003.3(c)(1), submits the following for his brief on appeal:

## I. STATEMENT OF RELEVANT FACTS

### A. Appellant's Mechanical Trouble

Appellant [redacted] was driving on Interstate 40 on July 23, 2011, when he encountered mechanical problems with his car. (Exhibit A – Decl. of [redacted] at ¶ 2; Exhibit B – IJ Decision, at 3). Mr. [redacted] was standing by his car, which was positioned on the edge of the interstate, when he saw a state trooper from the Tennessee Highway Patrol pull in front of his vehicle. (Exhibit A at ¶ 2). The trooper did not activate his emergency lights or sirens and remained in his vehicle for 5-6 minutes. (*Id.*).

The trooper exited his vehicle and asked Appellant what had happened. (*Id.*). Mr. [redacted] has only a sixth-grade education and speaks Spanish, so his response in broken English was based on his limited understanding of English. (*Id.* at ¶ 1). Mr. [redacted] responded that his car shut down while he was driving and was trying to determine the source of the problem. (*Id.* at ¶ 2). After 2-3 attempts at starting the car himself, the trooper asked Appellant if he had any jumper cables. (*Id.*).

[redacted]

With the trooper's help, Mr. [redacted] was able to jump-start his automobile, allowing him to drive to the next exit to address the problem in a safer environment. (*Id.*).

The trooper did not ask for Mr. [redacted] name, driver's license, or proof of insurance during this encounter. (*Id.*). Instead, the trooper limited his inquiries to the status of Appellant's automobile. (*Id.*) ("He only asked me about my vehicle."). The trooper escorted Appellant to the next exit on the interstate—the exit for the rural town of [redacted] Tenn.—with his emergency lights activated. (*Id.*).

Appellant took the next interstate exit ramp for [redacted] and arrived at a stop sign at the end of the ramp. (*Id.*). Appellant turned right (toward a gas station), and the trooper turned his lights off and turned left. (*Id.*).

**B. Appellant's Suspicionless Detention and Arrest**

Mr. [redacted] pulled into a parking space at the gas station, ensured his windows were rolled up and the doors locked, and put his keys in his pocket. (*Id.* at ¶ 3). He started walking toward the gas station to make a phone call, and 2-3 minutes later, he noticed the patrolman who assisted him earlier pulling into the gas station's parking lot. (*Id.*). Mr. [redacted] was about 20 steps from the gas station entrance when the trooper pulled his car in front of his path and ordered Mr. [redacted] to his patrol car's driver-side window. (*Id.*). Appellant did not feel free to leave. (*Id.*).

Mr. [redacted] obeyed the patrolman's order and approached the driver-side window of the officer's car. (*Id.* at ¶ 4). The trooper then asked for Mr. [redacted] driver's license, insurance, and registration. (*Id.*). The trooper "did not say anything about why I was being stopped in the parking lot, or why he was asking me questions." (*Id.*).

Mr. [redacted] presented the trooper his expired Tennessee driver's license. (*Id.* at ¶ 5). The trooper said Mr. [redacted] was under arrest, handcuffed him, and put him in his patrol car. (*Id.*).

### C. Appellant's Detention at ICE's Request Without Lawful Authority

The trooper transported Appellant to the [redacted] County Jail in [redacted] City, Tenn., where Appellant was booked and fingerprinted. (*Id.* at ¶¶ 5-6). The person who took Mr. [redacted] fingerprints told him the officers were not ever going to release him. (*Id.* at ¶ 6). The booking officer said Appellant would be taken to ICE and "deported," that Mr. [redacted] did not have a bond or the right to an attorney. (*Id.*).

A friend posted Appellant's bond, but he was not released. (*Id.* at 8). He was held another day pursuant to an ICE "detainer," Form I-247. (*See* Exhibit D – ICE Detainer). The detainer form, sent to the [redacted] County Sheriff's Office, (*id.* at 1-2), did not state that ICE had concluded that Appellant was removable, only that an "[i]nvestigation has been initiated to determine whether this person is subject to removal from the United States," (*id.* at 2). On the facsimile cover sheet, the sender noted, "ICE DETAINER LODGED PER REQUEST AND AUTHORITY OF D.O. JARED BRASEL ICE/ERO/NSV." (*Id.* at 1).

However, at the time, [redacted] County did not participate in ICE's Secure Communities or 287(g) programs. (*See* Exhibit F – ICE Fact Sheet, "Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act," captured Aug. 18, 2011, *available at:* <https://web.archive.org/web/20110818151202/http://www.ice.gov/news/library/factsheets/287g.htm> (last accessed Feb. 26, 2015) (not showing [redacted] County as a 287(g)-participating jurisdiction); Exhibit G – American Civil Liberties Foundation of Tennessee, *Consequences & Costs: Lessons Learned from Davidson County, Tennessee's Jail Model 287(g) Program*, (Dec. 2012) (not showing [redacted] County as 287(g)-participating jurisdiction); Exhibit E – ICE Secure Communities "Activated Jurisdictions" fact sheet, *available at:* <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf> (last accessed Feb. 26,

2015), at 20 (showing Secure Communities program activated in [redacted] County on January 10, 2012, months *after* Appellant was subjected to ICE detainer).

On July 26, 2011, while Mr. [redacted] remained imprisoned at the [redacted] County Jail after the Highway Patrol trooper arrested him for driving while the privilege to drive was suspended,[1] ICE agent Kevin Hall completed a Form I-213 allegedly for Mr. [redacted] (Exhibit C). Agent Hall's I-213 wrote in the form's "Case Initiation" section, in part, "[Mr. [redacted] posted bond and was turned over to an ICE/ERO detainer." (*Id.* at 2). Then, in the "Arrest Data" section, Agent Hall wrote, "Subject was turned over to an ICE/DRO detainer and was transported to the Nashville ERO for Processing."

ICE arrested Mr. [redacted] and transported him to Nashville. (Exhibit B at 1). After Mr. [redacted] posted his immigration bond and venue was changed to the Memphis Immigration Court, Appellant filed a motion to suppress the Form I-213 that ICE produced in this case. (*Id.* at 1-2). Respondent submitted a declaration detailing the circumstances of his arrest in support of his motion. (Exhibit B at 3; *see also* Exhibit A). The immigration judge denied Mr. [redacted] motion, (Exhibit B), and this timely appeal followed.

## II. STATEMENT OF THE ISSUES

1. Did the immigration judge misapply Respondent's burden to demonstrate a *prima facie* egregious Fourth Amendment violation, so as to warrant an evidentiary hearing on his suppression motion?

2. Did the immigration judge err as a matter of law in denying Respondent's motion to suppress on the basis of an egregious Fourth Amendment violation, even though the arresting officer seized Respondent without *any* lawful basis and then arrested him in violation of state law (when he should have received only a citation), and ICE officials lodged a detainer against Respondent even though the jurisdiction where he was arrested did not participate in Secure Communities and misinformed Respondent that he had no right to bond, an attorney, or to challenge his removal proceedings?

[1] Tenn. Code Ann. § 55-50-504.

[redacted]

## III. STANDARD OF REVIEW

The Board reviews "questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*." *Matter of A-S-B-*, 24 I & N Dec. 493, 496 (BIA 2008); 8 C.F.R. § 1003.1(d)(3). Issues as to whether a party has met his or her burden of proof are similarly reviewed *de novo*. *Matter of Roberto Mendoza Cuello*, No. A021 334 966, 2011 WL 899606 (BIA Feb. 28, 2011).

## IV. LEGAL FRAMEWORK

### A. ICE 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-Castrejon*, 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 impetus 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).

[redacted]

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).

### B. Suppression of Illegally Obtained Evidence is a Recognized, Proper 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 C[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).

### 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). *See Pretzantzin v. Holder*, 736 F.3d 641, 647, 649-50 (2d Cir. 2013) (analyzing Supreme Court's discussion of "identity" evidence through lens of *Maryland v. King*, — U.S. —, 133 S. Ct. 1958 (2013), and holding,

"*Lopez-Mendoza* reaffirmed a long-standing rule of personal jurisdiction; it did not create an evidentiary rule insulating specific pieces of identity-related evidence from suppression.").

## V. ARGUMENT

The IJ erred by admitting into evidence the Form I-213 ICE submitted, (Exhibit C) over Respondent's motion. Because Respondent's sworn declaration described an egregious Fourth Amendment violation resulting in his detention, an ICE detainer, and institution of removal proceedings against him, Respondent stated a *prima facie* case "questioning the legality of the evidence." *Matter of Barcenas*, 19 I & N Dec. 609, 611 (BIA 1988) (quoting *Matter of Burgos*, 15 I & N Dec. 278, 279 (BIA 1975)) (internal quotation marks omitted). The immigration judge should have accepted Respondent's declaration as true, *id.*, and held that a declaration describing a police officer stopping a person without *any* legal basis depicts at least a *prima facie* case of an egregious violation of the Fourth Amendment. Moreover, the Highway Patrol officer custodially arrested Appellant, while he should have been given a misdemeanor citation, and Appellant's jailers conspired with ICE to subject Mr. [redacted] to warrantless detention on ICE's behalf even in the absence of a 287(g) or Secure Communities program at the jail. Mr. [redacted] illegal seizure was an egregious seizure. Therefore, the IJ should have ordered a hearing where "the Service will be called on to assume the burden of justifying the manner in which it obtained the evidence." *Barcenas*, 19 I & N Dec. at 611. The Board should remand to the immigration judge with instructions to hold a hearing pursuant to *Matter of Barcenas*.

### A. Appellant's Declaration States a *Prima Facie* Fourth Amendment Violation, as the State Trooper Had No Legal Basis for Seizing Mr. [redacted] in the Parking Lot, Warranting a *Barcenas* Hearing.

Because Appellant's declaration describes a seizure devoid of *any* constitutional justification, an arrest when Appellant should have received only a citation, and warrantless

immigration detention by local law enforcement without authority to do so pursuant to 287(g) or Secure Communities (and therefore in violation of *Arizona v. United States*, — U.S. —, 132 S. Ct. 2492, 2509 (2012)), Mr. [redacted] satisfied his *prima facie* burden, and the immigration judge should have ordered an evidentiary hearing pursuant to *Barcenas*.

*1. The Immigration Judge Misapplied Appellant's Prima Facie Burden*

A respondent 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 (BIA 1973). "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 (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, 432-33 (6th Cir. 2004) (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)).

At the *prima facie* stage of proceedings, the Respondent's burden is not a heavy one. *See, e.g., Young v. United Parcel Serv., Inc.*, 992 F. Supp. 2d 817, 829 (M.D. Tenn. 2014) ("A plaintiff's burden in establishing a *prima facie* case is not intended to be an onerous one."); *Gordon v. Mukasey*, No. 06-3799, 2008 WL 2001732 at *3 (6th Cir. May 8, 2008) (slip op.) (conflating the *prima facie* pleading stage with the decision on the merits and granting petition for review, "[t]he Board thus imposed an unduly onerous burden upon Gordon and failed to accord his evidentiary exhibits the weight they deserved at a preliminary stage of the decision-making process."); *Martin v. Toledo Cardiology Consultants, Inc.*, 548 F.3d 405, 412 (6th Cir. 2008) (in employment discrimination case where *McDonnell Douglas* burden-shifting—similar to the *Barcenas* burden-shifting framework—occurs after establishment of *prima facie* case, "The prima facie showing is

[redacted]

not intended to be onerous."); *Landon v. Northwest Airlines, Inc.*, 72 F.3d 620, 624 (8th Cir. 1995) ("The prima facie burden is not so onerous as, nor should it be conflated with, the ultimate issue"); BLACK'S LAW DICTIONARY (9th ed. 2009) ("At first sight; on first appearance but subject to further evidence or information."); *Barella v. Village of Freeport*, 16 F. Supp. 3d 144, 158 (E.D.N.Y. 2014); *Wolf v. Antonio Sofo & Son Importing Co.*, 919 F. Supp. 2d 916, 922 (N.D. Ohio 2012) ("the *prima facie* requirement 'poses a burden easily met'") (quoting *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir. 1987)).

According to the Board of Immigration Appeals, a:

> "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." … 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 [].

*Matter of Velarde-Pacheco*, 23 I. & N. Dec. 253, 262 (BIA 2002) (Rosenberg, J., concurring), *overruled on other grounds*, *Matter of Bavakan Avetisyan*, 25 I & N Dec. 688 (BIA 2012). *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 118 (8th ed. 2004)).[2]

[2] Once the respondent makes out a *prima facie* case for potentially suppressible evidence through his sworn statement—taken as true—and supports his statement through live testimony, the burden shifts to ICE to justify "the manner in which it obtained the evidence." *Barcenas*, 19 I & N Dec. at 611-12; *Matter of Ramirez*, 17 I & N Dec. 173, 175 (BIA 1980).

[redacted]

*See also* BLACK'S LAW DICTIONARY (10th ed. 2014) ("Sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it make later be proved to be untrue").

*2. The State Trooper Violated Appellant's Right to Be Free from Unreasonable Seizures.*

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 state trooper's conduct violated the Constitution in several ways: First, the trooper's seizure of Mr. [redacted] occurred absent even reasonable suspicion—much less probable cause—of any illegal activity. There existed no particularized, articulable facts linking Mr. [redacted] to any wrongdoing. When the trooper pulled his car into the convenience store parking lot—blocking Mr. [redacted] path—he Second, Tennessee has no such so-called "stop-and-identify" statute that would have allowed the trooper to block Mr. [redacted] path (thus effecting a "seizure" under the Fourth Amendment), (*see* Exhibit A at ¶ 3), solely to determine Mr. [redacted] identity. Lastly, 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. Because the stop of Mr. [redacted] occurred totally outside the bounds of the Fourth

[redacted]

Amendment—unsupported by any suspicion—the Court should suppress the evidence against him.

Not all contact between police and the public involves the seizure of a person under the Fourth Amendment. Courts have recognized three distinct types of interactions: (1) a full-scale arrest which must be supported by probable cause, *see United States v. Watson*, 423 U.S. 4111, 424 (1976); (2) a *brief* investigatory detention which must be supported by reasonable suspicion of criminal activity, *see Terry v. Ohio*, 392 U.S. 1, 27 (1968); and 93) a *brief* "consensual" encounter which requires no objective justification, *see Florida v. Bostick*, 501 U.S. 429, 434 (1991). Even a consensual encounter becomes a seizure, thus triggering the full Fourth Amendment protections, "when an officer, by means of physical force or show of authority, has in some way restrained the liberty" of a person. *Terry*, 392 U.S. at 19 n. 16.

The first issue in analyzing a suppression motion under the Fourth Amendment is whether a seizure occurred.[3] *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).

Appellant stated in his sworn declaration that in addition to the trooper blocking his path with his squad car, (Exhibit A at ¶ 3), the trooper "ordered" Mr. [redacted] to the trooper's driver-side window, (*id.*). The trooper's tone of voice caused Mr. [redacted] to believe he was not "free to leave or [to] disobey his orders." (*Id.*). *See Mendenhall*, 446 U.S. at 554 (listing factors, including

[3] The immigration judge agreed that Appellant was seized when he was stopped by the trooper. (Exhibit B at 5).

[redacted]

"the use of language or tone of voice indicating that compliance with the officer's request might be compelled" in determining whether a seizure occurred); *United States v. Jones*, 562 F.3d 768, 774 (6th Cir. 2009) (collecting cases, submission to official show of authority as seizure); *United States v. Buchanon*, 72 F.3d 1217, 1224 (6th Cir. 1995) ("swiftness" and "manner" of officer's arrival relevant factor for determining whether seizure occurred).

Since the trooper seized Appellant, the Fourth Amendment compels that the officer have reasonable suspicion that criminal activity may be afoot in order to justify the investigative seizure. *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968); *United States v. Bradshaw*, 102 F.3d 204, 210 (6th Cir. 1996), *cert. denied*, 520 U.S. 1178 (1997). *See Florida v. Royer*, 460 U.S. 491, 498 (1983) ("[A person] may not be detained even momentarily without reasonable, objective grounds for doing so") (citing *Mendenhall*, 446 U.S. at 556). In making reasonable-suspicion determinations, reviewing courts must look to the totality of the circumstances to determine whether the detaining officer has a "particularized and objective basis" for suspecting the person of criminal activity. *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (officer must have "particularized and objective basis"); *United States v. Cortez*, 449 U.S. 411, 417 (1981) ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity."). The officer's reliance on his "hunch" is "insufficient to justify a stop[.]" *Arvizu*, 534 U.S. at 274 (citing *Terry*, 392 U.S. at 27). Similarly, an "inchoate and unparticularized suspicion" is not enough. *United States v. Sokolow*, 440 U.S. 1, 7 (1989) (quoting *Terry*, 392 U.S. at 27); *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.'"").

Here, Appellant's declaration demonstrates the total absence of *any* objective facts that could have supported his warrantless detention. The trooper first encountered Appellant on the

shoulder of the interstate, where he rendered motorist assistance. (Exhibit A at ¶ 2). During the encounter on the side of the highway, the trooper never asked for Appellant's "name, license, or proof of insurance. He only asked [Appellant] about [his] vehicle." (*Id.*). The trooper obtained no information that could have given him reason to believe Appellant had committed any crime. Then, the officer escorted Appellant to the highway exit ramp. (*Id.*). At the stop sign at the intersection of the exit ramp and a surface street, Appellant turned in one direction—toward a gas station—and the trooper turned the opposite direction, with his emergency lights off. (*Id.*).

Therefore, the trooper's seizure in the gas station parking lot—minutes later—required that he have articulable, objective facts particularized to Appellant that criminal activity was afoot. *See Illinois v. Wardlow*, 528 U.S. 119, 128 (2000); *United States v. Berry*, 25 F. Supp. 3d 931, 944 (N.D. Tex. 2014); *Terry*, 392 U.S. at 27. The Fourth Amendment requires at least "some minimal level of objective justification" for making a stop, which was woefully lacking here. *Delgado*, 466 U.S. at 217. The trooper did not even possess an inchoate suspicion or "hunch" that Mr. [redacted] had committed any crime, which is far less than the Constitution's requirement of particularized and specific suspicion based on facts. *United States v. Keith*, 559 F.3d 499, 507 (6th Cir. 2009); *United States v. Urrieta*, 520 F.3d 569, 578 (6th Cir. 2008) ("The Fourth Amendment simply does not allow a detention based on an officer's 'gut feeling' that a suspect is up to no good.").

Moreover, Tennessee does not have a so-called "stop-and-identify" statute. Even if the trooper had some "hunch" that Mr. [redacted] was somehow involved in criminal activity such as driving on an expired license—the only particularized and objective "fact" he had was that Mr. [redacted] was of Latino appearance (based on his earlier encounter with him trying to repair his car), which is certainly an impermissible factor and not probative of criminal activity—absent

[redacted]

reasonable suspicion of criminal activity, he could not seize Appellant and demand his identification.

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.[4] *See also Almeida-Amaral*, 461 F.3d at 235 n. 2 (discussing *Hiibel*'s identification requiremetns in the immigration suppression context). Some states, but not Tennessee, 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. § 171.123; N.H. Rev. Stat. Ann. § 594:2; N.M. Stat. Ann. § 30-22-3; N.Y.

[4] 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.

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 detention of Respondent was unconstitutional under *Terry*. Second, Tennessee 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."); *see also United States v. Henderson*, 463 F.3d 27, 45 (1st Cir. 2006) (suppressing evidence and vacating conviction, stating 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.'") (quoting *Brown v. Texas*, 443 U.S. 47, 52 (1979)); *accord United States v. Dapolito*, No. 2:12-cr-45, 2012 WL 3612602 (D. Me. Aug. 21, 2012) (suppressing evidence). The trooper had no legal justification for seizing Mr. [redacted]

Since the trooper did not learn that Appellant's driver's license had expired until *after* he seized Appellant without justification, his arrest of Appellant violated the Fourth Amendment. *See Ornelas v. United States*, 517 U.S. 690, 696 (1996) ("The principle components of a determination of reasonable suspicion … will be the events which occurred *leading up to the stop or search*, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion….") (emphasis added).

When the trooper demanded identification from Mr. [redacted] in the convenience store parking lot, the trooper had no reasonable suspicion that he was committing any crime. *See Farm Labor Org. Cmte. v. Ohio State Hwy. Patrol*, 308 F.3d 523, 543-44 (6th Cir. 2002). As Mr. [redacted] declaration—taken as true, *Barcenas*, 19 I & N Dec. at 611-12—demonstrates that the

[redacted]

trooper's conduct was entirely outside the bounds of the Fourth Amendment and therefore egregious, he is entitled to an evidentiary hearing. His declaration describing his arrest is "[s]ufficient to establish" that an egregious Fourth Amendment violation occurred, "even though it make later be proved to be untrue." "Prima facie," BLACK'S LAW DICTIONARY (10th ed. 2014).

Respondent was seized in violation of our Constitution. The Highway Patrol trooper had no reasonable suspicion for launching an investigative detention of Mr. [redacted] ICE placed Mr. Nieto into removal proceedings as a direct result of the trooper's unconstitutional actions, (*see* Exhibit C at 2; Exhibit D), 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). The immigration court should have ordered an evidentiary hearing pursuant to *Barcenas*.

**B. Appellant's Seizure Was an Egregious Violation of the Fourth Amendment under the Totality of the Circumstances, and the Immigration Judge Should Have Granted an Evidentiary Hearing.**

The trooper's seizure of Appellant without ***any*** facts indicative of criminal conduct, his subsequent unlawful arrest of Appellant (when he should have only received a citation), and the collaboration between ICE and Appellant's local jailers to hold him absent any legal authority evince an egregious Fourth Amendment violation that could have resulted in suppression. At a minimum, the immigration court should have ordered an evidentiary hearing pursuant to *Barcenas*, since Appellant's declaration states a *prima facie* violation.

While the Courts of Appeal have grappled with the precise contours of what constitutes an "egregious" Fourth Amendment in the suppression context, Respondent's declaration states an egregious Fourth Amendment violation under nearly every formulation. Therefore, the Board

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should remand with instructions to hold an evidentiary hearing on Mr. [redacted] motion to suppress.

1. *In the Absence of* Any *Legitimate Explanation for the Trooper's Conduct, the Immigration Court Could Have Reasonably Inferred that His Seizure of Mr.* [redacted] *was Based on Race or Some Other Improper Basis.*

The immigration judge misapplied the *prima facie* pleading stage of the two-step *Barcenas* formulation, holding, "Without any evidence, the Court cannot conclude that the Respondent's arrest was based solely on race, and therefore cannot find that Respondent has met his burden of demonstrating a *prima facie* case that his arrest violated the Fourth Amendment." (Exhibit B at 6). At the *prima facie* pleading stage, Mr. [redacted] burden was not to produce evidence beyond his declaration. *Barcenas,* 19 I & N Dec. at 611 ("If the affidavit is such that the facts alleged, if true, *could* support a basis for excluding the evidence in question, then the claims must also be supported by testimony.") (emphasis added). The immigration judge should have accepted Mr. [redacted] statement as true, and the "evidence" the immigration judge sought that could support suppression is more appropriate for a *Barcenas* hearing.

Without the benefit of assessing the credibility of witnesses and permitting cross-examination—as would have occurred in a hearing had the immigration judge correctly found that Mr. [redacted] declaration states a case that "could support a basis for excluding the evidence"—it would have been impossible for Mr. [redacted] to state the arresting trooper's state of mind as to whether his arrest was based "solely on race," (Exhibit B at 6), or any other impermissible factor that could support suppression of the Form I-213.

As the immigration court *never* heard testimony from the trooper or any other person responsible for the Fourth Amendment violation, the court should have limited its analysis to whether Respondent's declaration *based on his own personal knowledge* stated a case that "could

support a basis" for suppression. *See Matter of Jorge Martinez-Hernandez*, No. A200 127 216, 2010 WL 5173944, at *1 (BIA Dec. 2, 2010) ("The motion to suppress, however, must be supported by specific and detailed statements *based on personal knowledge* which explain the alleged illegality of the evidence.") (emphasis added). Because the immigration judge impermissibly placed the burden of stating the arresting trooper's subjective state of mind (outside of his personal knowledge) on Respondent at the *prima facie* stage, remand is appropriate on this basis alone. Moreover, the immigration judge was incorrect as a matter of law in holding that Mr. [redacted] arrest did not violate the Fourth Amendment, for the reasons described above.

The immigration judge criticized Appellant for failing to include a "statement or any indication that his interaction with this trooper was based on [his] race or ethnicity." (Exhibit B at 6). However, since at the *prima facie* step of the *Barcenas* framework Appellant only needed to describe the events based on his personal knowledge that set forth a minimal, *prima facie* case for suppression. *Matter of Wong*, 13 I & N Dec. at 822 (ICE not called upon to justify the manner in which it obtained evidence until respondent provides statements "based on personal knowledge" in motion to suppress that establish *prima facie* case). Obviously, statements as to whether the trooper's conduct was based on his subjective racial animus cannot be based on *Respondent's* personal knowledge. Therefore, since Respondent's declaration, taken as true, describes a *prima facie* case for suppression, the immigration court should have ordered a hearing where the trooper's state of mind could be discerned through testimony and cross-examination.

Furthermore, the immigration judge could have reasonably inferred that the complete absence of *any* lawful, Fourth Amendment justification for the trooper's seizure of Mr. [redacted] was based on race or some other grossly improper basis. *Almeida-Amaral*, 461 F.3d at 235 ("Second, even where the seizure is not especially severe, it may nevertheless qualify as an

[redacted]

egregious violation if the stop was based on race (or some other grossly improper consideration)."). *See also, e.g., Matter of Waggeh Ousman*, No. A088 737 674, 2010 WL 2846373 at *3 ("Immigration Judge may make reasonable inferences from the record and is not required to interpret the evidence the applicant seeks."); *United States v. Tinoco-Medina*, 6 OCAHO 890, 1996 WL 670175 at *12 (1996); *Matter of Alessandra de Paula*, No. A96 414 623, 2007 WL 2074418 at *1 n. 1 (BIA June 18, 2007).

According to Appellant's declaration, the trooper had no knowledge of specific, articulable, particularized facts ("together with rational inferences from those facts"), *United States v. Brignoni-Ponce*, 422 U.S. 873, 884-85 (1975), implicating Appellant in any criminal wrongdoing. (*See* Exhibit A). The only objective fact the trooper had was Mr. [redacted] Latino or Hispanic appearance. Minutes after escorting Mr. [redacted] to the interstate exit ramp and turning in the opposite direction, the trooper, who did not know Mr. [redacted] name or any other identifying information, seized Mr. [redacted] in the complete absence of specific facts tying him to any criminality. (*Id.* at ¶¶ 2-4). Therefore, the immigration court could have reasonably inferred that the trooper's arrest of Mr. [redacted] (devoid of any legal justification, much less reasonable suspicion)—in addition to the other indicia of egregiousness, such as his custodial arrest when a citation was required and law enforcement's efforts to persuade ICE to lodge a detainer absent a 287(g) or Secure Communities agreement—certainly warranted a *Barcenas* hearing. Appellant's declaration on personal knowledge taken as true "could support a basis for excluding the evidence in question[.]" *Barcenas*, 19 I & N Dec. at 611.

Furthermore, the immigration judge erred by implying that *only* a stop "based solely on race" could constitute an egregious Fourth Amendment violation. (Exhibit B at 6). While the court could have reasonably inferred at the *prima facie* stage that the stop *was* based solely on race, *see*

[redacted]

*supra*, the courts have held that no one factor transforms a "merely" illegal seizure into an egregious one. *See Almeida-Amaral*, 461 F.3d at 235 n. 1; *Oliva-Ramos*, 694 F.3d at 279. While a race-based seizure is certainly powerful evidence of an egregious Fourth Amendment violation, *see Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994); *Almeida-Amaral*, 461 F.3d at 237; *Puc-Ruiz v. Holder*, 629 F.3d 771, 779 (8th Cir. 2010) (agreeing with Second Circuit that race-based seizure may be egregious), the courts have not so limited the egregiousness inquiry, and the courts have repeatedly required each case of egregiousness to rest on its own facts. *Oliva-Ramos*, 694 F.3d at 278-79 ("First, and most importantly, courts and agencies must adopt a flexible case-by-case approach for evaluating egregiousness"); *Cotzojay*, 725 F.3d 172, 182 (2d Cir. 2013) ("This [egregiousness] inquiry is intended to be broad.").

*2. Any Reasonable Officer Should Have Known that Seizing a Person Absent Any Particularized Facts Supporting the Seizure Violates Well-Established Fourth Amendment Law.*

The Ninth Circuit has adopted a "bad faith" standard for determining when a Fourth Amendment violation becomes "egregious." *See Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 (9th Cir. 1994) (a Fourth Amendment violation is "egregious" if "evidence is obtained by deliberate violations of the fourth amendment, or by conduct a *reasonable officer should [have known]* is in violation of the Constitution.") (quoting *Adamson v. CIR*, 745 F.2d 541, 545 (9th Cir. 1984)) (emphasis and final alteration original). The court has held that reasonable officers, for example, should have known that they were violating the Fourth Amendment when entering a home without a warrant, consent, or exigency. *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1018 (9th Cir. 2008). There is "nothing ambiguous or arcane," *id.* at 1019, about the well-established requirement that a law enforcement officer have a reason for stopping a person, *see supra*. The requirement that specific, articulable facts undergird a detention—no matter how brief—has been black-letter law

in this country since 1968. *See Terry*, 392 U.S. at 20-22. As was the case in *Lopez-Rodriguez*, any reasonable officer should have known that completely suspicionless seizures violate the Constitution. Therefore, the trooper's seizure of Appellant was egregious.

Similarly, under the Third Circuit's egregiousness formulation, a seizure of a person without *any* legal justification is "fundamentally unfair" and is offensive to even the most nascent idealizations of justice. *See Oliva-Ramos*, 694 F.3d at 278.

Respondent's declaration also fits neatly within the Second Circuit's formulation of egregiousness. *See Almeida-Amaral*, 461 F.3d at 235 ("Thus, if an individual is subjected to a seizure for *no* reason at all, that by itself may constitute an egregious violation, but only if the seizure is sufficiently severe. Second, even where the seizure is not especially severe, it may nevertheless qualify as an egregious violation if the stop was based on race (or some other grossly improper consideration).") (emphasis in original).

In this case, both factors are present: First, as described *supra*, the trooper seized Respondent "for *no* reason at all." Additionally, there was more to the unlawful seizure than a total lack of reasonable suspicion, *see infra*. The trooper also custodially arrested Respondent when he should have given him a citation, and Respondent's ICE detainer was invalid. Both of these additional facts render the seizure "sufficiently severe." Second, the trooper's complete lack of any facts supporting the detention supported the inference that the stop "was based on race (or some other grossly improper consideration)." The immigration judge should have ordered a hearing.

The Sixth Circuit has suggested at least 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." *Navarro-Diaz*, 420 F.3d at 587. Appellant's declaration supports

the inference that the trooper did stop him in a random attempt to determine whether he was an undocumented immigrant, as it was known to Tennessee officers that persons in the country without documentation cannot receive a driver's license. *See* Tenn. Code Ann. § 55-50-321(c)(1)(B)-(C). At the time the trooper seized Appellant, the trooper had no objective information giving rise to an inference that Mr. [redacted] was involved in criminal activity—except his Hispanic appearance and possibility of being an "illegal alien." (Exhibit A).

The courts "have long regarded racial oppression as one of the most serious threats to our notion of fundamental fairness and consider reliance on the use of race or ethnicity as a shorthand for likely illegal conduct to be 'repugnant under any circumstances.'" *Gonzalez-Rivera*, 22 F.3d at 1449. The facts of this case strongly support the inference that the trooper's stop was based on race, and Appellant should have been permitted to develop his argument through live testimony and cross-examination of the arresting officer. The robust possibility of race-based policing in this case offends fundamental notions of fairness; as the Supreme Court has emphasized, "discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive to democratic society." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring). At the very least, the trooper acted in "bad faith," meaning the seizure was "egregious." *See Gonzalez-Rivera*, 22 F.3d at 1451. Therefore, Appellant has established facts that "*could* support a basis for excluding the evidence in question," *Barcenas*, 19 I & N Dec. at 611 (emphasis added).

*3. The Trooper Violated State Law by Custodially Arresting Mr. [redacted] When He Should Have Only Issued a Misdemeanor Citation.*

Some jurisdictions' formulations of egregiousness require a greater showing, however. But even in those jurisdictions, the facts in Appellant's case evince a *prima facie* egregious Fourth

[redacted]

Amendment violation necessitating a *Barcenas* hearing. For example, the Second Circuit has held that when a seizure lacks *any* lawful justification, the suspected noncitizen must show something more. *See Almeida-Amaral*, 461 F.3d at 236 ("we believe that while the lack of any valid basis whatsoever for a seizure sets the stage for egregiousness, more is needed.").[5] Aside from this case involving the likely use of race as a proxy for whether Appellant was an "illegal alien" who could not legally have a driver's license, described *supra*, there is "more" to his seizure. First, the trooper custodially arrested Mr. [redacted] when he should have issued a state citation instead.

In Tennessee, where Respondent was arrested, (Exhibits A-D), driving without a license is a misdemeanor. Tenn. Code Ann. § 55-50-504(a)(1). Consequently, Respondent's arrest was governed by Tennessee's "cite-and-release" statute, which provides in pertinent part:

> A peace officer who has arrested a person for the commission of a misdemeanor committed in the peace officer's presence, or who has taken custody of a person arrested by a private person for the commission of a misdemeanor, *shall issue a citation to the arrested person to appear in court in lieu of the continued custody* and the taking of the arrested person before a magistrate. If the peace officer is serving an arrest warrant or capias issued by a magistrate for the commission of a misdemeanor, it is in the discretion of the issuing magistrate whether the person is to be arrested and taken into custody or arrested and issued a citation in accordance with this section in lieu of continued custody. The warrant or capias shall specify the action to be taken by the serving peace officer who shall act accordingly.

Tenn. Code Ann. § 40-7-118(b)(1) (emphasis added). None of the exceptions applicable to the "cite-and-release" statute existed in Appellant's case.[6] Furthermore, state law specifically includes

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[5] The Second Circuit considers stops based on race separately from those devoid of any legal basis. *Id.* at 237.

[6] *See, e.g.*, Tenn. Code Ann. § 40-7-118(b)(2)(A) (excepting DUI offenses), § 40-7-118(c)(1) (arrestee unable to care for own safety), § 40-7-118(c)(2) (continued offense or danger to property or persons), § 40-7-118(c)(3) (failure to provide minimally adequate identification or fingerprint), § 40-7-118(c)(4) (jeopardization of prosecution), § 40-7-118(c)(5) (reasonable likelihood of failing to appear in court); § 40-7-118(c)(6) (arrestee demands to be taken before a

driving without a license (or on an expired license) as a misdemeanor for which a citation is appropriate, Tenn. Code Ann. § 40-7-118(b)(3)(C).

Tennesseans such as Mr. [redacted] enjoy "a presumptive right" to be cited and released—and not custodially arrested—for commission of most misdemeanors. *State v. Walker*, 12 S.W.3d 460, 464 (Tenn. 2000). Adopting Ohio's rationale that the state's "cite-and-release" scheme "create[s] a substantive right of freedom from arrest for one accused of the commission of a minor misdemeanor," Tennessee's Supreme Court determined that the statute limits an arresting officer's discretion. *Id.* at 464-66 (quoting *State v. Slatter*, 423 N.E.2d 100, 104 (Ohio 1981)).[7] Indeed, the Supreme Court's exhortation is mandatory; an officer arresting a person for a citation-qualifying misdemeanor "is to issue a citation in lieu of custodial arrest" unless an exception is present. *Walker*, 12 S.W.3d at 467-68 (and holding that suppression is the proper remedy for evidence obtained in violation of the "cite-and-release" statute).

The trooper's second unlawful decision that should lead to suppression—his determination to custodially arrest Mr. [redacted] instead of a citation in contradiction of well-established Tennessee law—resulted in Appellant arriving in jail, where an ICE detainer was lodged against him. (*See* Exhibit A at ¶¶ 5-6; Exhibit D). Accordingly, the trooper's second unlawful action provided something "more" to the initial unlawful seizure. While the Highway Patrol officer's unlawful seizure in the gas station parking lot "set[] the stage for egregiousness," *Almeida-Amaral*,

magistrate), § 40-7-118(c)(7) (intoxicated), § 40-7-118(c)(8) (outstanding arrest warrants), § 40-7-118(c)(9) (serious bodily injury and no proof of financial responsibility).

[7] The suspected offender's inability to produce "approved 'government papers'" is insufficient. *Walker*, 12 S.W.3d at 466. To that end, the state's "cite-and-release" statute "works on an 'honor system,' operating under the assumption that the misdemeanant will act in good faith by furnishing accurate identification so that an officer can be assured that the misdemeanant is the person he or she claims to be." *Id.*

[redacted]

461 F.3d at 236, the trooper heightened the egregiousness of the seizure by custodially arresting Mr. [redacted] instead of issuing a citation. The record must be remanded for a hearing.

*4. Appellant's Jailers Collaborated with ICE to Prolong His Detention with No Authority.*

Then, after arriving at the [redacted] City Jail, Mr. [redacted] found himself subjected to an ICE detainer. (*See* Exhibit D). His jailers told Mr. [redacted] that he would never be released and that he did not have a right to a bond or an attorney. (Exhibit A at ¶ 6). An ICE agent told Mr. [redacted] that he did not have any rights to an attorney. (*Id.* at ¶ 9). While these misrepresentations are concerning—further elevating the already unlawful seizure beyond the egregiousness threshold—Mr. [redacted] was subjected to an ICE detainer without any lawful authority.

At the time of Respondent's arrest, ICE employed two similar programs intended to identify and apprehend suspected noncitizens: "287(g)" and "Secure Communities:"

> In addition, OSLC administers the 287(g) Program, through which ICE enters into agreements with state, local, and tribal law enforcement agencies for those agencies to perform certain federal immigration enforcement functions under the supervision of federal officials. Each agreement is formalized through a Memorandum of Agreement (MOA) and authorized pursuant to Section 287(g) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1357(g).
>
> 7. Consistent with its policy of focusing enforcement efforts on criminal aliens, ICE created the Secure Communities program to improve, modernize, and prioritize ICE's efforts to identify and remove criminal aliens from the United States. Through the program, ICE has leveraged biometric information-sharing to ensure accurate and timely identification of criminal aliens in law enforcement custody. The program office arranges for willing jurisdictions to access the biometric technology so they can simultaneously check a person's criminal and immigration history when the person is booked on criminal charges. When an individual in custody is identified as being an alien, ICE must then determine how to proceed with respect to that alien, including whether to lodge a detainer or otherwise pursue the alien's detention and removal from the United States upon the alien's release from criminal custody. ICE does not lodge detainers or otherwise pursue removal for every alien in custody, and has the discretion to decide whether lodging a detainer and/or pursuing removal reflects ICE's policy priorities.

[redacted]

*Georgia Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317, 1344-45 (N.D. Ga. 2011) *aff'd in part, rev'd in part and remanded sub nom. Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250 (11th Cir. 2012).

However, in Respondent's case, the [redacted] County Sheriff's Office (which operates the [redacted] County Jail in [redacted] City, Tenn.), <http://www.[redacted]net/jail.htm> (last accessed March 3, 2015), did not have a memorandum of agreement with the federal government authorizing either a 287(g) or Secure Communities program at the time of Respondent's arrest and detention. (*See* Exhibit E at 20 (listing [redacted] County as participating in Secure Communities beginning January 10, 2012); Exhibits F-G (not showing [redacted] County as participating in 287(g)). Therefore, Mr. [redacted] was subjected to a *third* warrantless,[8]

[8] Several federal courts have seriously questioned the legality of ICE detainers without evidence of probable cause. In Respondent's case, the detainer itself indicated only that an investigation had been "*initiated*." (Exhibit D at 2) (emphasis added). *See Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-cv-2317, 2014 WL 1414305, at *11 (D. Ore. Apr. 11 , 2014) (holding that county violated the Fourth Amendment by relying on an ICE detainer that did not provide probable cause regarding removability); *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 29 (D.R.l. 2014) (concluding that detention pursuant to an immigration detainer "for purposes of mere investigation is not permitted"). *See also Moreno v. Napolitano*, Case No. 11 C 5452, 2014 WL 4814776 (N.D. Ill. Sept. 29, 2014) (denying judgment on the pleadings to the government on plaintiffs' claim that ICE's detainer procedures violate probable cause requirements); *Gonzalez v. ICE*, No. 2:13-cv-0441-BRO-FFM, at 12- 13 (C.D. Cal. July 28, 2014) (granting the government's motion to dismiss, but allowing plaintiffs to file an amended complaint and noting that plaintiffs "have sufficiently pleaded that Defendants exceeded their authorized power" by issuing "immigration detainers without probable cause resulting in unlawful detention"); *Villars v. Kubiatoski*, — F. Supp. 2d —, 2014 WL 1795631, at* 10 (N.D. Ill. May 5, 201 4) (rejecting dismissal of Fourth Amendment claims concerning an ICE detainer issued "without probable cause that Villars committed a violation of immigration laws"); *Galarza v. Szalczyk*, No. 10-cv-068 15, 2012 WL 1080020, at * 14 (E.D. Penn. March 30, 2012) (denying qualified immunity to immigration officials for unlawful detention on an immigration detainer issued without probable cause), *rev' d and remanded on other grounds*, 745 F.3d 634 (reversing district court's finding of no municipal liability); *Uroza v. Salt Lake City*, No. 2: 11 CV 713DAK, 2013 WL 653968, at *6-7 (D. Utah Feb. 21, 2013) (denying dismissal on qualified immunity grounds where plaintiff claimed to have been held on an immigration detainer issued without probable cause). *Cf.*

unlawful detention by his [redacted] County jailers with ICE's permission, (*see* Exhibit D), without lawful authority and in violation of *Arizona v. United States*, — U.S. —, 132 S. Ct. 2492, 2509 ("Detaining individuals solely to verify their immigration status would raise constitutional concerns."). *See also Melendres v. Arpaio*, 989 F. Supp. 2d 822, 894-95 (concluding that sheriff's efforts to find suspected undocumented immigrants after 287(g) agreement was revoked violated *Arizona* and the Fourth Amendment).

As the court in *Melendres* explained:

> To the extent the [Maricopa County Sheriff's Office] actually follows the written requirements of the LEAR policy, it requires the MCSO deputy to summon an MCSO supervisor to the scene and requires the supervisor to obtain certain information, contact ICE, pass along the information to ICE, await an ICE response, and/or deliver the arrestees to ICE. This inevitably takes time in which the subject is not free to leave regardless of whether the detention is officially termed an arrest. If the cooperation clause in 8 U.S.C. § 1357(g)(10) were to be read broadly enough to countenance such arrests as cooperation, there would be no need for the 287(g) authorization and training which the same statute authorizes. *Cf. Christensen v. C.I.R.*, 523 F.3d 957, 961 (9th Cir. 2008) (stating that courts should avoid interpretations "that would render ... subsections redundant").

*Id.* at 894.

Therefore, with ICE's cooperation, Mr. [redacted] jailers violated his Fourth Amendment rights a third time by subjecting him to an ICE detainer—which permitted ICE to arrest him, (*see* Exhibit C)—without any lawful authority to do so. Even if Respondent's arrest was not based on race (it was), Mr. [redacted] met the more restrictive *Almeida-Amaral* requirements for showing egregiousness: a detention absent any lawful basis plus something "more." 461 F.3d at 236. The record must be remanded for a hearing.

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*Makowski v. United States*, — F. Supp. 2d —, 2014 WL 1089119, at *10 (N.D. Ill. 2014) (concluding that plaintiff stated a plausible false imprisonment claim against the United States where he was held on a detainer without probable cause).

## VI. CONCLUSION

For the foregoing reasons, Respondent has met his burden in demonstrating a *prima facie* case of an egregious Fourth Amendment violation. His declaration, taken as true, describes a detention devoid of any Constitutional justification. The absence of any justification for the state trooper's actions logically supports the reasonable inference that Appellant's seizure was based on race or some other grossly improper basis. Furthermore, Appellant has demonstrated that he was subjected to custodial arrest (and incarceration) when he should have received only a citation, and he was jailed pursuant to an ICE detainer absent the existence of a 287(g) or Secure Communities agreement between the federal and local governments, which could have authorized his detention. Respondent's arrest and these removal proceedings "transgress[ed] notions of fundamental fairness." *Lopez-Mendoza*, 468 U.S. at 1050. Therefore, the Board should SUSTAIN this appeal and REMAND with instructions to hold an evidentiary hearing in compliance with *Barcenas*.

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Respectfully submitted,

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