UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE No. 12-14048-D

ANDRES JIMENEZ-DOMINGO,

Petitioner,

v.

ERIC HOLDER, U.S. ATTORNEY GENERAL

Respondent.

PETITION FOR REVIEW OF A FINAL ORDER OF
OF THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR PETITIONER

REBECCA SHARPLESS
Immigration Clinic
University of Miami School of Law
1311 Miller Drive, Suite E-273
Coral Gables, Florida 33146
(305) 284-3576, direct
(305) 284-6092, clinic
rsharpless@law.miami.edu

Attorney for Petitioner

CERTIFICATE OF INTERESTED PERSONS AND COPRORATE DISCLOSURE STATEMENT

I hereby certify that the following persons may have an interest in the outcome of this case pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rules 26-1 and 28-1 of the United States Court of Appeals for the Eleventh Circuit:

1. Escalera, Hector, Customs and Border Patrol Agent
2. Gitto, Thomas, Palm Beach Gardens Police Officer
3. Holder, Eric, U.S. Attorney General, Respondent
4. Jimenez-Domingo, Andres, Petitioner
5. Mateo, Rene D., Immigration Judge
6. Oglesby, Thomas, Student, University of Miami School of Law Immigration Clinic
7. Parrish, Steven R., Immigration and Customs Enforcement Officer of the Chief Counsel
8. Pauley, Roger, Board Member, Board of Immigration Appeals
9. Quevado, Ben, Student, University of Miami School of Law Immigration Clinic
10. Sharpless, Rebecca, Attorney for Petitioner, University of Miami School of Law Immigration Clinic

11. Shaw, Ian, Student, University of Miami School of Law Immigration Clinic

12. Winston, Colette, Attorney for Respondent, Office of Immigration Litigation, U.S. Department of Justice

13. Yibirin, Daniel, Student, University of Miami School of Law Immigration Clinic

/s Rebecca Sharpless
REBECCA SHARPLESS

Attorney for Petitioner

STATEMENT REGARDING ORAL ARGUMENT

Petitioner requests oral argument in this Petition for Review of a final order of the Board of Immigration Appeals. This case involves important questions relating to the exclusionary rule of the Fourth Amendment as it applies in the context of immigration proceedings. Oral argument is necessary in this case because it will assist the Court in analyzing and deciding this case.

TABLE OF CONTENTS

Table of Authorities

Federal Cases

Board of Immigration Appeals Decisions

Statutes

Regulations

Miscellaneous

STATEMENT OF JURISDICTION

The Court has jurisdiction to review final orders of removal under 8 U.S.C. § 1252(a)(1). The Board of Immigration Appeals ("BIA") had jurisdiction to hear this case pursuant to 8 C.F.R. § 1003.1(b)(3) as an appeal from the decision of an Immigration Judge ("IJ") in a removal proceeding conducted in Miami, Florida. This petition for review was filed within 30 days of the BIA's final decision in the federal circuit in which the IJ completed the proceedings, in accordance with 8 U.S.C. § 1252(b)(1)-(2). Petitioner Andres Jimenez-Domingo has exhausted all available administrative remedies, as required by 8 U.S.C. § 1252(d)(1).

STATEMENT OF THE ISSUES

1. Did the IJ and BIA err as a matter of law by 1) denying Mr. Jimenez-Domingo's motion to suppress and exclude evidence without holding an evidentiary hearing, and 2) ruling that a local police officer did not violate the Fourth Amendment when he detained Mr. Jimenez-Domingo, a vehicle passenger, for a lengthy period of time after a traffic stop solely to enforce federal civil immigration law?
2. *SEC. v. Chenery Corp.*, 318 U.S. 80, 88 (1943), restricts the Court's review to the actual basis of the agency's decision. If, however, the Court reaches issues not addressed by the IJ or BIA, this case raises the following additional Fourth Amendment issues:

a. Does the exclusionary rule apply to the Fourth Amendment violation in Mr. Domingo-Jimenez's case?

b. Does *Lopez-Mendoza,* 468 U.S. 1032 (1984), require a showing of egregious or widespread Fourth Amendment violations before the exclusionary rule applies?

3. Did the IJ and BIA err as a matter of law by failing to hold an evidentiary hearing and ruling that there was no prima facie Fifth Amendment violation when border patrol officers interrogated Mr. Jimenez-Domingo to obtain evidence regarding his alienage after denying his repeated requests to speak with his attorney and creating an atmosphere in which he believed deportation was inevitable?

4. Did the IJ and BIA err as a matter of law by not holding an evidentiary hearing and denying Mr. Jimenez-Domingo's motion to terminate removal proceedings even though border patrol officers violated statutes and regulations intended by Congress to protect the interests of noncitizens?

STATEMENT OF THE CASE

I. Nature Of The Case

This case is a petition for review from a final order of the BIA upholding the decision of the IJ denying Petitioner Jimenez-Domingo's Motion to Suppress Evidence and separately filed Motion to Terminate Proceedings without holding a hearing on the merits of either motion.

II. Course of Proceedings and Dispositions Below

Agents of Customs and Border Protection ("CBP") commenced removal proceedings against Mr. Jimenez-Domingo by a Notice to Appear on April 24, 2009. (R. 593). The Notice to Appear alleges that Mr. Jimenez-Domingo was "present in the United States" without having "been admitted or paroled." (R. 593). At a master calendar hearing in Miami, U.S. Immigration and Customs Enforcement ("ICE") sought to meet its burden of establishing the alienage of Mr. Jimenez-Domingo by introducing into evidence an I-213 Record of Deportable Alien. (R. 139). The I-213, which was completed by a CBP agent, lists Guatemala as Mr. Jimenez-Domingo's place of birth. (R. 139). ICE offered no additional evidence of Mr. Jimenez-Domingo's alienage.

Mr. Jimenez-Domingo objected to the I-213 form being entered into evidence on the grounds that it was illegally obtained. (R. 433). He advised the IJ of his intention to file a motion to suppress and a motion to terminate the removal

proceedings. On February 16, 2010, he filed both motions. The motions requested that the IJ hold an evidentiary hearing. (R. 466).

Without holding an evidentiary hearing, the IJ denied both motions in a written decision. (R. 402). At a master calendar hearing on October 28, 2010, the IJ found that ICE had met its burden of establishing alienage based on the I-213 and ordered Mr. Jimenez-Domingo removed. (R. 73). The BIA summarily affirmed the IJ's ruling on July 13, 2012. (R. 3). This petition for review followed.

III. Statement Of Facts

The following facts come from the documents submitted by Mr. Jimenez-Domingo in support of his Motion to Suppress and Motion to Terminate. Because the IJ did not hold an evidentiary hearing, the IJ expressly "derived" his "factual account" from Mr. Jimenez-Domingo's submissions. (R. 391). There is one discrepancy between the IJ's factual account and the record, which is indicated in a footnote.

A. The Roadside Seizure of Mr. Jimenez-Domingo

On the morning of April 24, 2009, Andres Jimenez-Domingo was riding in a vehicle on his way to work along with two other passengers and the driver, Carlos Alonso. (R. 182, ¶ 2). Everyone in the vehicle was brown-skinned and of Hispanic appearance. (R. 177, ¶ 2). At 7:43 a.m., Officer Thomas Gitto of the

Palm Beach Gardens Police Department ("PBG Police") stopped the vehicle for making an improper right turn at a red light onto Northlake Boulevard in the small municipality of Palm Beach Gardens, Florida. (*Id.*; R. 191).

Mr. Alonso provided Gitto with his driver's license and vehicle registration. Because Mr. Alonso appears Hispanic and has a Hispanic surname, Gitto questioned Mr. Alonso about his immigration status. (R. 182, ¶ 3). Mr. Alonso, who was born in New York to a Puerto Rican mother and a Cuban father, told Gitto that he was a United States citizen. (R. 182, ¶¶ 1,3). Gitto, refusing to believe that Mr. Alonso was a United States citizen, interrogated him about the birth country of his parents. (R. 177, ¶ 7; 182, ¶ 3). Gitto then ordered everyone out of the vehicle, which was stopped at a busy intersection with multiple lanes of traffic. (R. 177, ¶ 5; 182 ¶¶ 3-4).

Neither Gitto nor any other Palm Beach Gardens police officer is authorized to enforce civil federal immigration laws. (R. 223). Nonetheless, Gitto proceeded to turn the simple traffic stop into an immigration enforcement action. Gitto made Mr. Jimenez-Domingo, Mr. Alonso, and the other passengers stand on the center median on Northlake Boulevard and demanded that they show him proof of immigration status. (R. 177, ¶ 6; 182, ¶ 4). Mr. Jimenez-Domingo did not respond

to the request for proof of immigration status.[1] (R. 177; ¶ 7). Gitto ordered everyone back into Mr. Alonso's vehicle and told Mr. Alonso to move to a parking lot on the other side of the street. (R. 177, ¶ 7). Once there, Gitto again ordered everyone out of the vehicle. He had the driver and all passengers remain standing outside the vehicle in the hot sun for the duration of the enforcement action. (*Id.*). Gitto then went into his patrol car. (R. 178, ¶ 7). Two other patrol cars arrived at the scene, adding to the show of force. (R. 178; ¶¶ 7-8).

While Gitto was in his patrol car, he contacted PBG dispatch, which patched him through to CBP at 8:01 a.m. (R. 187-89; 191). The transcript of the call says that the PBG police dispatcher told CBP that Gitto was with "three subjects they're saying are illegals." (R. 187, ¶¶ 4, 11). When Gitto spoke with CBP, he said that he was "with three illegals." (R. 188, ¶ 31). Gitto also indicated that he could not understand the vehicle's passengers because they "don't speak much in the way of English." (R. 189). Nothing in the call transcript mentions Mr. Jimenez-Domingo by name or indicates that Gitto spoke directly to him.

The CBP agent repeatedly asked both the PBG police dispatcher and Gitto if anyone from the vehicle was going to be arrested for a crime. (R. 188). A PBG officer stated, "No they are not going to be arrested." (R. 188, ¶¶ 20, 23, 32). No

[1] The IJ incorrectly characterized the record as showing that Mr. Jimenez-Domingo admitted he was unlawfully present to Officer Gitto. (R. 397). There is no evidence in the record that Mr. Jimenez-Domingo had made such an admission.

criminal arrest was made and Gitto issued the driver a citation for failure to obey a traffic control device. (R. 191). Despite having no suspicion of any crime being committed and having no authority to enforce civil immigration law, Gitto continued to detain Mr. Jimenez-Domingo, Mr. Alonso, and the other passengers. (R. 191-92). This incident was not the first time that Gitto had detained suspected noncitizens by the side of the road while waiting for CBP. (R. 189) ("I mean they came out last time to help . . .").

During the time in the parking lot, no one explained to Mr. Jimenez-Domingo what was going on or why he was being detained standing in the hot sun. (R. 178, ¶ 9). CBP made no guarantee that any of its officers would actually arrive on scene. The CBP dispatcher stated, "It's not that they're not going to come, it's just that, you know, with their manpower issues at this moment . . . ." (R. 189). Gitto nonetheless continued to detain Mr. Jimenez-Domingo and the other men until CBP agents finally arrived at the scene at 9:12 a.m. (R. 191). In total, Gitto held Mr. Jimenez-Domingo, the driver, and the other passengers for 89 minutes after the initial traffic stop at 7:43 a.m. (*Id*.). Even after CBP arrived, Mr. Alonso, the driver, was not immediately released. He was held and questioned for *over three (3) hours* before the agents finally believed that he was a United States citizen and let him go. (R. 182, ¶ 7).

B. CBP Custody

The CBP agents arrested Mr. Jimenez-Domingo without a warrant. They put him in a van and took him to an office in Riviera Beach, where they placed him in a holding cell. (R. 178, ¶ 10). The agents did not inform him of any rights. (*Id.*). CBP agents took all of Mr. Jimenez-Domingo's belongings, including his cellular phone and cash. (*Id.*). Eventually, they took Mr. Jimenez-Domingo out of the holding cell and took photographs of him and his fingerprints. (R. 178, ¶ 11). Mr. Jimenez-Domingo twice told the agent that he had a lawyer and would like to speak with her, but the agent said that he did not believe that Mr. Jimenez-Domingo had a lawyer "because lawyers are too expensive." (*Id*.) After questioning, CBP agents asked Mr. Jimenez-Domingo if he had any tattoos or body marks and measured his height and weight and put him back in the holding cell. (R. 178, ¶¶ 12-13).

About an hour later, another CBP agent spoke to Mr. Jimenez-Domingo. (R. 178, ¶13). The agent asked him, "Are you going to sign for deportation?" (R. 178). The agent then told him to give up his right to a hearing and take voluntary departure. (R. 179). At no point during this exchange did the agent inform Mr. Jimenez-Domingo that he was entitled to an attorney at no expense to the government or provide him with a list of free attorneys. CBP continued to deny

him access to his lawyer. The agents informed Mr. Jimenez-Domingo that they were taking him to Krome Detention Center. (R. 179, ¶ 14).

Mr. Jimenez-Domingo arrived at Krome that evening, where immigration authorities again took all of his possessions, performed a medical examination, and took his fingerprints. (R. 179, ¶ 15). The officers at Krome made Mr. Jimenez-Domingo sign paperwork that was in English, which he did not understand or have time to read. Eight days later, while handcuffed and shackled with chains around his feet and waist, Mr. Jimenez-Domingo was transferred to a detention center in Willacy County, Texas, approximately 1,400 miles from his place of residence in Jupiter, Florida. (R. 170-180). There he was subject to similar processing as at Krome. (R. 179, ¶ 18; R. 179, line 5).

After about one month of being detained in Texas, Mr. Jimenez-Domingo was finally released on $7,000 bond posted by members of his community. (R. 440; R. 180, ¶19). Mr. Jimenez-Domingo took a bus back to Florida from Texas. (R. 180, ¶ 20).

C. Motions to Suppress and Terminate

At Mr. Jimenez-Domingo's immigration court hearing, Immigration and Customs Enforcement ("ICE") offered an I-213 Record of Deportable Alien as its sole evidence for the allegation that Mr. Jimenez-Domingo was born outside the United States. (R. 139). Mr. Jimenez-Domingo objected to the entry of the I-213

form into evidence and filed a Motion to Suppress. (R. 430). In the motion, Mr. Jimenez-Domingo argued that his seizure was a Fourth Amendment violation requiring exclusion of the I-213 from evidence as fruit of an illegal seizure and that CBP officers violated the Fifth Amendment by repeatedly denying his requests to speak to his attorney and making him feel like his deportation was inevitable, thereby coercing him into giving a statement admitting alienage. (*Id.*). Mr. Jimenez-Domingo also filed a Motion to Terminate Proceedings in which he argued that CBP officers violated statutes and regulations designed to benefit noncitizens. (R. 155).

D. The IJ's Decision

Without holding an evidentiary hearing, the IJ denied Mr. Jimenez-Domingo's two motions in a written decision. (R. 389). The IJ assumed that the exclusionary rule applied in Mr. Jimenez-Domingo's removal proceeding and denied the Motion to Suppress on the ground that Gitto did not violate the Fourth Amendment. (R. 394-98). The IJ held that there was "no Fourth Amendment violation in Officer Gitto's decision to detain Respondent for approximately one hour while he awaited the arrival of CBP officers." (R. 397). Gitto had held Mr. Jimenez-Domingo by the side of the road for 89 minutes. (R. 191-92). The IJ cited to *United States v. Salinas-Calderon*, 728 F.2d 1298 (10th Cir. 1984), to suggest that it was permissible for Gitto to detain Mr. Jimenez-Domingo if he had

a "reasonable basis" to believe that he was in the country illegally, even though that decision involved the enforcement of *criminal* laws regarding trafficking of noncitizens illegally in the United States. (R. 397). The IJ ignored Mr. Jimenez-Domingo's uncontroverted declaration stating that he did not discuss his immigration status with Gitto. (R. 177, ¶ 7; 391) (stating that "respondent had admitted he was not lawfully in the United States and this admission provided a reasonable basis for Officer Gitto to conclude respondent was present in violation of federal immigration law"). The IJ also found that because "Gitto did not *arrest* Respondent, but simply *detained* him" outside of a formal agreement with ICE, there was no violation of federal immigration laws. (R. 401) (emphasis added).

Regarding Mr. Jimenez-Domingo's Fifth Amendment claim in the Motion to Suppress, the IJ found that Mr. Jimenez-Domingo's admission of alienage to CBP was not the result of coercion or duress. (R. 399-400) ("the facts as presented by Respondent do not suggest his admissions were made as a result of coercion or duress"). The IJ denied the Motion to Terminate because he found that "there was no violation of any regulation or statute in the arrest and interrogation" of Mr. Jimenez-Domingo. (R. 402). He reasoned that nothing prevents cooperation between federal immigration officers and local police and that it was lawful for CBP to rely on information from Gitto in order to detain Mr. Jimenez-Domingo. (R. 400-02).

E. The BIA Decision

The BIA summarily affirmed the IJ's decision "for the reasons stated therein." (R. 3).

F. The 287(g) Program and Immigration Enforcement

When and how state and local law enforcement agencies enforce federal immigration law is governed by a comprehensive program authorized by Section 287(g) of the Immigration and Nationality Act. *See* 8 U.S.C. 1357(g). PBG police are not authorized under this program to enforce immigration law. (R. 223). The U.S. Attorney General may enter into a written agreement with a state or political subdivision of a state to allow "an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States," to carry out such functions. 8 U.S.C. § 1357(g)(1). A written agreement required by the statute takes the form of a Memorandum of Agreement ("MOA") between immigration authorities and the state or local agency.[2] The written agreement must specify that deputized officers have knowledge of and adhere to federal law and contain a certification that such local

[2] For an example of an MOA, *see* R. 199-220 (current MOA between federal immigration authorities and the Florida Department of Law Enforcement).

officers have undergone the required training regarding enforcement of immigration laws. *Id.*

Officer Gitto's 89-minute detention of Mr. Jimenez-Domingo by the side of the road was but one instance of a pattern of enforcement activity carried out by federal, state, and local officers against people suspected of lacking lawful immigration status. In the small municipality of Palm Beach Gardens alone, there had been at least 21 instances in which police officers had illegally sought to enforce immigration law. (R. 538-582). Gitto himself admitted to previously detaining suspected noncitizens while waiting for CBP to arrive. (R. 189). According to a recent national survey, 21% of large city police and 27% of county sheriff's offices routinely attempt to check the immigration status of people stopped from traffic violations. *See* Monica Varsanyi et. al., *Immigration Federalism: Which Policy Prevails?*, Migration Policy Institute (Oct. 2012) *available at* http*://www.migrationinformation.org/Feature/display.cfm?ID=909*. A 2010 report by the Department of Homeland Security Inspector General reported numerous civil rights violations even among local police who have been deputized under 8 U.S.C. § 1357(g) to assist in civil immigration enforcement. (R. 300-301). A report to the House Appropriations Committee brought attention to unconstitutional racially based enforcement of racially neutral policies. *See* Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in*

the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza, 2008 Wis. L. Rev. 1109, 1128 (2010). Organizations including the United Nations and the United Food and Commercial Workers International Union criticized ICE for its violations of constitutional rights. *Id*. at 1128-29. Allegations of constitutional violations in immigration enforcement even led to a congressional hearing on the matter. *Id*. Allegations of constitutional violations have been seen in jurisdictions all over the country, including 22 different states and 28 separate municipalities. *Id.* at 1129-33.

IV. Standard of Review

When the BIA summarily adopts the IJ's decision without opinion, the Court reviews the decision of the IJ. *See Silva v. U.S. Atty. Gen.*, 448 F.3d 1229, 1236 (11th Cir. 2006). This case only involves the review of legal determinations, which the Court reviews *de novo*. *Id.*

SUMMARY OF THE ARGUMENT

Contrary to the IJ and BIA's decision, the 89-minute roadside detention of Mr. Jimenez-Domingo was an unlawful seizure under the Fourth Amendment because Mr. Jimenez-Domingo was not free to go, the seizure was unnecessarily long for a traffic stop, and PBG Police had no authority to enforce federal immigration law. The IJ erred as a matter of law in not granting an evidentiary hearing on the Motion to Suppress because Mr. Jimenez-Domingo had presented a

prima facie case of a Fourth Amendment violation that required exclusion of illegally obtained evidence. The Court should remand Mr. Jimenez-Domingo's case for an evidentiary hearing because the IJ erred in finding that there was no Fourth Amendment violation.

Under *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943), the Court is limited to reviewing only the actual basis of the IJ's decision. Accordingly, the case must be remanded for further proceedings. If the Court nonetheless considers alternate grounds for the IJ's decision, the Court should hold that the Fourth Amendment's exclusionary rule applies in cases like Mr. Jimenez-Domingo's to deter police officers like Officer Gitto from unlawfully detaining people with foreign-born appearances. The balancing test in *Lopez-Mendoza*, 468 U.S. 1032 (1984), as applied to Mr. Jimenez-Domingo's case, compels the conclusion that the exclusionary rule is necessary to deter police officers like Gitto from unlawfully detaining people to enforce civil immigration law. *Lopez-Mendoza* was limited to Fourth Amendment violations committed by *federal* immigration officers and did not address the exclusionary rule to deter *local police* from violating the Fourth Amendment in the context of enforcing federal immigration law.

Even if the exclusionary rule does not apply to all Fourth Amendment violations committed by police, the rule applies to violations that are either egregious or widespread. Mr. Jimenez-Domingo has made a prima facie showing

that his detention was an egregious violation because it was ethnicity-based, intentional, and lengthy and because CBP officers acted in bad faith when they knowingly colluded with Officer Gitto's unlawful action. The unlawful detention of Mr. Jimenez-Domingo was also part of a widespread pattern of abuse in immigration enforcement at both local and national levels.

The IJ also erred as a matter of law in concluding that CBP had not violated Mr. Jimenez-Domingo's Fifth Amendment rights by denying his affirmative requests to speak with his attorney and creating the "sense that deportation was inevitable." (R. 399). The IJ concluded CBP's denial of Mr. Jimenez-Domingo's requests did not amount to coercion or duress, stating that "the facts as presented by Respondent do not suggest his admissions were made as a result of coercion or duress." (*Id.*). The IJ's incorrectly denied Mr. Jimenez-Domingo an evidentiary hearing because *Matter of Garcia*, 17 I&N Dec. 319 (BIA 1980), dictates that he had made a prima facie case that his admission of alienage was involuntary.

The IJ further erred as a matter of law in denying Mr. Jimenez-Domingo's Motion to Terminate the removal proceedings. CBP's collusion with PBG police in seizing Mr. Jimenez-Domingo violated immigration statutes and regulations intended to benefit noncitizens. 8 U.S.C. § 1357(g) requires formal written agreements between the federal government and state and local law enforcement in order for the latter to have authorization to enforce civil immigration laws. CBP

disregarded regulations recognizing that people have a right to counsel when detained or examined by immigration authorities. The IJ should have terminated the removal proceedings against Mr. Jimenez-Domingo because CBP violated these governing statutory and regulatory provisions.

ARGUMENT

I. CONTRARY TO THE IJ'S DECISION, OFFICER GITTO'S LENGTHY ROADSIDE DETENTION OF MR. JIMENEZ-DOMINGO VIOLATED THE FOURTH AMENDMENT.

The IJ denied Mr. Jimenez-Domingo's Motion to Suppress without holding an evidentiary hearing because he believed that Officer Gitto had not violated the Fourth Amendment. The IJ held that Gitto's detention of Mr. Jimenez-Domingo for "approximately one hour while he awaited the arrival of CBP officers" did not violate the Fourth Amendment. (R. 397). He reasoned that Gitto had authority to detain Mr. Jimenez-Domingo for this length of time because Gitto had a "reasonable basis" to suspect that Mr. Jimenez-Domingo was in the United States unlawfully. (R. 394-98). The IJ was incorrect. Gitto's detention of Mr. Jimenez-Domingo was a seizure that lasted well beyond the traffic stop and Gitto lacked the authority to enforce civil immigration law. Because the IJ's decision was in error, the Court must remand this case.

A. MR. JIMENEZ-DOMINGO WAS "SEIZED" UNDER THE FOURTH AMENDMENT.

Gitto's roadside detention of Mr. Jimenez-Domingo after a traffic stop constituted a seizure under the Fourth Amendment. A seizure has occurred if "a person has been seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would not have believed that he was free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). A vehicle's passenger is seized under the Fourth Amendment during a traffic stop. *See Arizona v. Johnson*, 555 U.S. 323, 333 (2009) ("[A] traffic stop of a car communicates to a reasonable passenger that he or she is not free to terminate the encounter with the police and move about at will."). Because Mr. Jimenez-Domingo could not have reasonably believed that he was free to leave, his roadside detention was a seizure under the Fourth Amendment.

B. THE SEIZURE VIOLATED THE FOURTH AMENDMENT BECAUSE IT WAS UNECESSARILY LONG IN THE CONTEXT OF A SIMPLE TRAFFIC STOP.

The IJ erred in finding that Gitto's seizure of Mr. Jimenez-Domingo was lawful even though it lasted for "about an hour" and was for the purpose of "await[ing] the arrival of CBP officers." (R. 397). Gitto's lengthy seizure of Mr. Jimenez-Domingo became unlawful once he prolonged the seizure beyond the time needed to issue the ticket for the traffic violation in order for CBP to arrive. (*Id.*). A seizure that is initially lawful can become unreasonable if it becomes

unreasonably and unnecessarily long. *See Illinois v. Caballes*, 543 U.S. 405, 407 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."); *see also United States v. Purcell*, 236 F.3d 1274, 1272 (11th Cir. 2001) ("the *duration* of the traffic stop must be limited to the time necessary to effectuate the purpose of the stop") (citing *United States v. Pruitt*, 174 F.3d 1215, 1219 (11th Cir. 1999))). The seizure of a vehicle's passengers is a lawful stop only if inquiries into matters unrelated to the traffic stop "do not measurably extend the duration of the stop." *Arizona v. Johnson*, 555 U.S. at 333. *See also United States v. Place*, 462 U.S. 696, 710 (1983) (noting that the Supreme Court has *never* found a 90 minute seizure to be reasonable without "probable cause"); *United States v.* Cantu, 227 F. App'x. 783, 784 (11th Cir. 2007) (27 minute encounter during traffic stop and ensuing investigation was not unreasonable); *United States v. $175,722.77*, 307 F. App'x. 257, 259 (11th Cir. 2007) (concluding that 7 minutes was reasonable amount of time to effectuate a traffic stop and that a dog sniff did not unreasonably delay stop because it occurred simultaneously to license check); *United States v. Wilbur*, 458 F. App'x. 829, 830 (11th Cir. 2012) (a 10 to 15 minute delay while waiting for drug sniffing dog was reasonable while officer was conducting background check and writing citation); *United States v. Boyce*, 351 F.3d 1102, 1107 (11th Cir. 2000) (ruling that officer

should have let driver go "unless he had a reasonable and articulable suspicion of some other criminal wrong doing").

Gitto's stop and seizure of the vehicle and its occupants was justified solely for the purpose of issuing a citation for improperly running a red light. Absent any basis for believing that a *crime* was "afoot," there was no lawful reason for Gitto to detain Mr. Jimenez-Domingo for as long as he did. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). Gitto had no objective or articulable reason to believe that any crimes were being committed. Being present unlawfully in the United States is not a crime. *See Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012). The occupants of the vehicle were compliant and cooperative with all of Gitto's instructions and commands. Gitto repeatedly communicated to the CBP dispatch that he was not arresting any of the occupants, demonstrating that he did not suspect any criminal activity. (R. 188, ¶¶ 20, 23, 32). Gitto should have issued the citation and released Mr. Jimenez-Domingo once the traffic investigation was complete.

C. THE PROLONGED SEIZURE WAS UNLAWFUL BECAUSE GITTO HAD NO AUTHORITY TO ENFORCE CIVIL IMMIGRATION LAW, AND HE DETAINED MR. JIMENEZ-DOMINGO SOLELY FOR THIS PURPOSE.

Contrary to the IJ's decision, Officer Gitto had no authority to prolong the traffic-related detention of Mr. Jimenez-Domingo in order to "await[] the arrival of

CBP officers." (R. 397).[3] Even if Gitto had "a reasonable basis" for suspecting that Mr. Jimenez-Domingo was "present in violation of federal immigration law," he lacked authority to detain Mr. Jimenez-Domingo. (*Id.*).[4] As explained above, local police departments must have a Memorandum of Agreement with federal authorities under 8 U.S.C. § 1357(g) to be deputized to enforce immigration law. PBG police has no such agreement. Although the Supreme Court has stated that there is no constitutional problem with local police consulting with federal immigration officers to communicate whether an individual is lawfully in the United States, the Court has found that detaining or prolonging a detention to enforce immigration law is unlawful. *See Arizona v. United States*, 132 S.Ct. 2492, 2509 (2012) ("Detaining individuals solely to verify their immigration status would raise constitutional concerns . . . And it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision."). In analyzing Arizona's state law relating to immigration enforcement, the Supreme Court examined a hypothetical scenario analogous to Mr. Jimenez-Domingo's. *Id.* at

[3] The IJ also relied upon a distinction between a roadside "detention" and an "arrest". (R. 398). This distinction, however, is irrelevant because even an investigatory detention must be supported by reasonable suspicion of a crime being " afoot." *Terry v. Ohio*, 392 U.S. at 30.

[4] As explained in Part II.F, Officer Gitto had no "reasonable basis" for such a suspicion.

2509. If a local police officer were to stop an individual without identification for a state offense, such as jaywalking, "unless the person continues to be suspected of some crime for which he may be detained by state officers, it would not be reasonable to prolong the stop for the immigration inquiry." *Id.* Interpreting the Supreme Court's *Arizona* decision, the Ninth Circuit Court of Appeals ruled that reasonable suspicion of unlawful presence in the United States does not justify detention by local law enforcement. *See Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) ("While the seizures of the named plaintiffs based on traffic violations may have been supported by reasonable suspicion, any extension of their detention must be supported by additional suspicion of criminality. Unlawful presence is not criminal.").

Gitto extended the detention of Mr. Jimenez-Domingo only because he believed that Mr. Jimenez-Domingo was unlawfully present in the United States. He did so without the federal direction and supervision that is required under 8 U.S.C. 1357(g). Even if Gitto had reasonable suspicion to believe that Mr. Jimenez-Domingo was unlawfully present in the United States, which he did not, the prolonged detention would have still been unjustified. *See Melendres v. Arpaio*, 695 F.3d at 1000-01. Both federal statutes and the Constitution forbade Gitto from detaining Mr. Jimenez-Domingo for 89 minutes for sole purpose of conducting an immigration investigation. While it may have been permissible to

communicate this belief of alleged alienage to federal immigration officials, Gitto had no right to continue to detain Mr. Jimenez-Domingo for that purpose.

II. THE FOURTH AMENDMENT EXCLUSIONARY RULE APPLIES TO MR. JIMENEZ-DOMINGO'S CASE AND REQUIRES THAT THE I-213 RECORD OF DEPORTABLE ALIEN BE EXCLUDED FROM EVIDENCE.

A. THE *CHENERY* DOCTRINE REQUIRES THAT THE COURT REVIEW THE IJ DECISION ON ITS ORIGINAL BASIS.

The IJ assumed that the exclusionary rule applied to Mr. Jimenez-Domingo's case and he denied the Motion to Suppress on the ground that he believed there had been no Fourth Amendment violation. If the Court finds that the IJ erred in finding no Fourth Amendment violation, it must remand this case to the BIA on the basis of that determination. In *SEC v. Chenery Corp.*, the U.S. Supreme Court ruled that federal appellate courts cannot issue rulings based on improperly rendered agency judgments when it is only an administrative agency that is permitted to make them. 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *see also SEC. v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (reaffirming the *Chenery* rule); *Fla. Dept. of Labor and Emp't. v. U.S. Dept. of Labor*, 893 F.2d 1319, 1321 (11th Cir. 1990) ("If the agency has misapplied the law, its order cannot stand—even if the reviewing court believes that the agency either would reinstate its order under a different theory or would

reach the same decision under the proper rule of law. Instead, the case must be remanded to the agency to make a new determination."). If this Court finds that the IJ incorrectly interpreted the law by not finding a Fourth Amendment violation, this case must be remanded.

B. THE EXCLUSIONARY RULE MUST APPLY TO DETER POLICE OFFICERS LIKE GITTO FROM VIOLATING THE FOURTH AMENDMENT IN IMMIGRATION CASES.

The exclusionary rule applies to Mr. Jimenez-Domingo's case. The exclusionary rule is necessary because it is the only way to deter constitutional violations by police officers like Gitto. The exclusionary rule exists in criminal proceedings to deter unlawful searches and seizures by law enforcement officers in the performance of their duties. *See Mapp v. Ohio*, 367 U.S. 643, 656 (1961) ("[T]he purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—to remove the incentive to disregard it.'"). Without the exclusionary rule, people would have the right against unreasonable searches and seizures, but no way to utilize its "privilege and enjoyment." *Id.*; *see also Davis v. United States*, 131 S.Ct. 2419, 2423 (2011) ("this Court created the exclusionary rule, a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation"); *Herring v. United States*, 555 U.S. 135, 141 (2009) ("we

have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future.").

In applying the exclusionary rule, "the benefits of deterrence must outweigh the costs." *Herring*, 555 U.S. at 141. In cases such as Mr. Jimenez-Domingo's, the benefits outweigh the costs. It may be true that applying the exclusionary rule in immigration proceedings would result in the dismissal of cases against some noncitizens alleged to be in the United States unlawfully. However, it would also prevent officers like Gitto from systematically committing Fourth Amendment violations against any people that he suspects are in the United States unlawfully, including U.S. citizens such as the driver in this case, Mr. Alonso. Such unchecked stops and seizures can lead to widespread racial profiling, which the justice system has long viewed as repugnant and inexcusable. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J. concurring) ("'[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society'"). The benefits of deterrence to ensure that the commands of the Constitution are respected by law enforcement outweigh the possible costs of applying the exclusionary rule to immigration proceedings.

In 1984, the U.S. Supreme Court declined to apply the exclusionary rule to civil immigration proceedings in cases in which *federal* immigration authorities had committed Fourth Amendment violations. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984). In *Lopez-Mendoza*, two noncitizens separately challenged their respective deportation orders on the grounds that their arrests were unlawful. *Id.* at 1034. In both cases the IJs determined that the legality of their arrests was not relevant to deportation proceedings and the BIA agreed. *Id.* at 1035-36, 1037-38. On review, the Ninth Circuit Court of Appeals reversed the findings of the IJs and BIA, determining that the violation of Fourth Amendment rights was relevant and that the exclusionary barred illegally obtained evidence from deportation proceedings. *Id.* at 1036, 1038. The INS appealed those rulings to the U.S. Supreme Court in order to determine whether the exclusionary rule applied in civil immigration proceedings to evidence gained subsequent to an unlawful arrest. *Id.* at 1034. Because *Lopez-Mendoza* involved *federal* rather than *local* officers, however, its holding does not control Mr. Jimenez-Domingo's case. Moreover, the logic of *Lopez-Mendoza* requires that the exclusionary rule apply to his case.

Lopez-Mendoza requires that a court engage in a multi-factor analysis to determine whether the deterrent effect of excluding evidence would outweigh the societal costs. The factors examined by the Court were that 1) immigration

proceedings are "purely civil" in nature; 2) immigration authorities could easily meet their burden of proof in immigration court and very few noncitizens in immigration proceedings actually challenged their deportation, 3) internal administrative deterrence mechanisms existed; and 4) alternative civil remedies for noncitizens subjected to unlawful Fourth Amendment violations were available. *Id.* at 1038-45. The Court found that there were "unusual and significant" "societal costs" to applying the exclusionary rule in immigration proceedings and that the rule would impose an undue administrative burden. *Id*. at 1046. These factors, as applied to Mr. Jimenez-Domingo's case, tip the scale in favor of exclusion because the deterrent effect is much greater in cases involving local police officers and many of the other facts relied upon by the Court to find that exclusion was not warranted in 1984 no longer hold true.

Deportation is no longer "a purely civil action." Immigration has become quasi-criminal in nature. As recognized by the U.S. Supreme Court, immigration and criminal proceedings have become inextricably intertwined. *See Padilla v. Kentucky*, 130 S.Ct. 1473, 1481 (2010) ("Although removal proceedings are civil in nature, . . . deportation is nevertheless intimately related to the criminal process."). Due to the severity and seriousness of deportation, the Sixth Amendment requires criminal defense attorneys to advise their clients on the possible deportation consequences of accepting a plea deal. *Id.* at 1486.

The measures currently used by immigration officials to enforce civil immigration laws are also much more similar to criminal enforcement. Immigration agents conduct aggressive raids against people for both civil and criminal violations. *See* Jennifer M. Chacon, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 Duke L.J. 1563, 1576 (2010). Noncitizens challenging their deportation are often housed under harsh conditions similar to those of people facing criminal proceedings, and in many cases are housed in the same facilities as criminal offenders. *Id.* at 1577-59. This pattern of enforcement is much more analogous to the enforcement of criminal, rather than civil, laws. Additionally, as explained in Part II.C, many state and local law police agencies now actively enforce civil immigration laws as one of their primary activities.

None of the Court's other factors, which related to diminished deterrent effect, apply in Mr. Jimenez-Domingo's case. The Court had found that immigration officers can find independent evidence or rely upon the immigration judge's ability to make an inference from a person's silence. *Lopez-Mendoza,* 468 U.S. at 1043. In 1991, however, the BIA ruled that federal immigration authorities cannot meet their initial burden of proving alienage by asking the judge to make an adverse inference from a person's silence. *Matter of Guevara*, 20 I&N Dec. 238, 242 (BIA 1991). The government must come forward with some evidence of

alienage. In the great majority of cases, this evidence comes from a single source, the I-213 Record of Deportable Alien.

The Court in *Lopez-Mendoza* relied on a finding that most people accused of an immigration violation did not request a formal hearing and "very few challeng[ed] the circumstances of their arrest." *Id.* at 1044. Because the effect of an occasional challenge was trivial to an individual immigration officer's record, the Court found that his or her behavior was unlikely to be influenced by the exclusionary rule. *Id.* It is no longer true that only a few noncitizens challenge their deportations based on illegally obtained evidence. Between 1952 and 1989, fewer than fifty motions to suppress evidence or terminate proceedings had ever been filed in immigration court. *See* Stella Burch Elias, "*Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 Wis. L. Rev. 1109, 1126-27 (2010). Between 2006 and 2009 in New York and New Jersey alone, there was a nine-fold increase in suppression motions filed and a five-fold increase in the number of suppression motions granted. *See* Cardozo Immigration Justice Clinic, *Constitution on ICE* 13-14 (2009), *available at* www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-Raid-Report%20Updated.pdf.

The third, and most "significant," factor relied upon by the Court was its finding that federal immigration authorities had developed internal administrative safeguards designed to deter constitutional violations. *Lopez-Mendoza,* 468 U.S. at 1044-45. This factor is absent in Mr. Jimenez-Domingo's case because Officer Gitto was a city police officer who was not subject to any federal administrative supervision.[5] He acted entirely outside the scope of his authority when he unlawfully seized Mr. Jimenez-Domingo. Gitto was not subject to a 287(g) MOA and was not working under any federal authority. As such, he never received any applicable training regarding Fourth Amendment law and immigration enforcement and was not subject to federal immigration regulations designed to prevent constitutional violations. The *only* deterrent to police officers seeking to unlawfully enforce immigration is the knowledge that the evidence they obtain will be excluded from the immigration proceeding. As explained in Part II-C below, there is no parallel criminal proceeding from which evidence can be excluded that would motivate local officers to not violate Fourth Amendment rights in immigration enforcement. Moreover, to the extent that there are any internal administrative procedures, they have failed to safeguard the constitutional rights of

[5] The Court listed deterrence mechanisms that the Court found were employed by the federal authorities to deter constitutional violations by their officers that have no application to state and local officers such as Gitto. *Id.* at 1044-45.

people suspected of being unlawfully present, subjecting both noncitizens and U.S. citizens alike to widespread unlawful searches and seizures. *See* Part II-H.

Finally, in *Lopez-Mendoza*, the Court relied upon the stated availability of alternative civil remedies, such as declaratory relief, to prevent future unlawful official conduct by federal actors. *Id.* at 1045. The fragmented enforcement of immigration law by a variety of different state and local law enforcement agencies, however, does not provide for an easily identifiable "central" authority against which to file civil suits. *Id*.

The Court's characterization of the "societal costs" of the exclusionary rule as "both unusual and significant" in the immigration context applies with significantly less force today. *Id.* at 1046. The Court based this assessment on the characterization of unlawful presence as an ongoing "crime." *See id.* at 1047 ("When the *crime* in question involves unlawful presence in this country, the criminal may go free, but he should not go free within our borders.") (emphasis added). This rationale cannot stand now that the Court has made clear that mere undocumented presence does not constitute a crime. *See Arizona v. United States*, 132 S. Ct. at 2505 ("As a general rule, it is not a crime for a removable alien to remain present in the United States."). Additionally, recent Department of Homeland Security ("DHS") guidelines have urged immigration officials to exercise prosecutorial discretion when dealing with unlawfully present individuals

who do not represent an enforcement priority. *See* Memorandum from John Morton, ICE Director (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf. DHS has provided an extensive, but non-exhaustive, list of factors for immigration officials to consider in exercising their prosecutorial discretion, including the length of time spent in the United States, the lack of a criminal history, and significant ties to the community among many other factors. *Id.* at 4.

The second societal cost of concern to the Court was the administrative burden that the exclusionary rule would place on federal officials enforcing immigration laws. *See Lopez-Mendoza*, 468 U.S. at 1048-49. The Court noted that a single agent "may arrest many illegal aliens every day" and that federal agents "cannot be expected to compile elaborate, contemporaneous, written reports detailing the circumstances of every arrest." *Id.* at 1049. While federal officers exclusively engaged in immigration enforcement might be inconvenienced, local police officers acting outside of the parameters of 8 U.S.C. § 1357(g) will not be because their unlawful immigration enforcement activities fall outside their official duties and they typically keep no, or no detailed, reports of their illegal actions.

C. *ELKINS* AND *JANIS* REQUIRE THE EXCLUSIONARY RULE IN THIS CASE.

Elkins v. United States and *United States v. Janis* mandate the exclusion of the evidence in this case. 364 U.S. 206 (1960); 428 U.S. 433 (1976). Both cases

stand for the proposition that evidence must be excluded from federal proceedings if exclusion would deter future unlawful conduct committed by state or local officers. Before the exclusionary rule applied to states, the Supreme Court in *Elkins* prohibited the use of illegally obtained state evidence in federal criminal proceedings. *Elkins*, 364 U.S. at 224. The Court based its decision on the ground that application of the rule would prevent "inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation." *Id.* at 222. In *Janis*, the Supreme Court applied the same reasoning to hold that the exclusionary rule does not apply to federal tax proceedings because there was no substantial deterrence benefit and societal costs were not justified. 428 U.S. at 448, 454, 459-60.

Janis was a tax case in which local police arrested the respondent and seized property that was eventually turned over to Internal Revenue Service officers for civil tax proceedings. *Id.* at 436-37. The local criminal charges were dismissed because the seizure of the respondent's property constituted a Fourth Amendment violation. *Id.* at 437-38. The Supreme Court ruled that the evidence could be used in civil federal tax proceedings. *Id.* at 459. The Court noted that the primary purpose of the exclusionary rule is to deter unlawful police conduct. *Id.* at 446. The Court then reasoned that deterrence was not necessary in the tax proceedings because 1) local law enforcement was already "punished" by being disallowed

from using evidence in state criminal proceedings; and 2) the evidence was also excluded from federal criminal trial so that the entire criminal prosecution was frustrated. *Id.* at 448.

In civil cases such as *Janis*, the exclusionary rule is not needed because the rule already deters state and local police in the parallel state and federal criminal proceedings. State law enforcement officers are thus "punished" because their conduct cannot contribute to a successful criminal prosecution. In immigration cases, however, there is no parallel deterrent for police misconduct because the only potential proceedings stemming from the unlawfully obtained evidence are federal immigration proceedings. While state and local police officers are unlikely to be concerned with the outcome of potential federal civil tax proceedings, which fall "outside" their "zone of primary interest", officers like Gitto who seek to enforce immigration law are motivated solely by the prospect of seeing people deported. *Id.* at 454-56.

States and localities are increasingly taking it upon themselves to enforce immigration law, making such enforcement part of state law enforcement officers' "zone of primary interest". *See* Ariz. Rev. Stat. Ann. § 11-1051(B); Ala. Code § 31-13-12; Ga. Code Ann. § 17-5-100(b). Nationwide, twelve percent of police chiefs "reported that their local governments expect their department to take a proactive role in deterring unauthorized immigration in all of the department's

activities."[6] Additionally, a recent survey of police chiefs around the country found that 21% of large city police departments and 27% of county sheriff's offices check the immigration status of people stopped for traffic violations.[7] The suppression of evidence in this case is thus necessary to deter unlawful conduct on the part of local police officers attempting to enforce federal immigration law.

Regarding the societal cost of excluding evidence from a tax proceeding, the deterrent benefits of applying the rule are not warranted because civil tax penalties are not especially severe. In contrast, deportation is a particularly severe punishment that is the "equivalent of banishment or exile." *Padilla*, 130 S.Ct. at 1486 (citing *Delgadillo v. Carmichael*, 332 U.S. 388, 390-91 (1947)). Moreover, prior to deportation, many people in immigration proceedings are deprived of their liberty in jails and jail-like detention facilities. Jennifer M. Chacon, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 Duke L.J. 1563, 1578 (2010). Because the possible consequences of immigration proceedings are so severe, the benefits of deterrence

---

[6] Paul G. Lewis, et al., *Why Do (Some) City Police Departments Enforce Federal Immigration Law? Political, Demographic, and Organizational Influences on Local Choices*, J. of Public Admin. Research & Theory, Oct. 4, 2012, at 11-12.

[7] *See* Monica Varsanyi et. al., *Immigration Federalism: Which Policy Prevails?*, Migration Policy Institute (Oct. 2012) *available at* http*://www.migrationinformation.org/Feature/display.cfm?ID=909*.

outweigh the societal costs of exclusion in immigration cases such as Mr. Jimenez-Domingo's.

D. UNLIKE *JANIS*, THIS CASE INVOLVES THE BAD FAITH ACTIONS OF LAW ENFORCEMENT OFFICERS, INCLUDING CBP.

CBP's active collusion with PBG Police to unlawfully detain Mr. Jimenez-Domingo constituted a bad faith Fourth Amendment violation to which the exclusionary rule must apply. In *Janis*, the respondent had already been arrested and the evidence seized for the violation of local gambling law. The local police had simply contacted federal tax officials in good faith to inform them that the evidence may be useful for civil tax proceedings. *Janis,* 428 U.S. at 435-436. The federal tax official played a passive role in the arrest of respondent and the seizure of his property. In Mr. Jimenez-Domingo's case, however, federal immigration officials actively participated in the unlawful detention. Mr. Jimenez-Domingo had not violated any local laws and Gitto was not arresting him. If CBP had not indicated that they would go to the scene to detain Mr. Jimenez-Domingo, Gitto would not have continued to prolong the detention because there was no reasonable suspicion that Mr. Jimenez-Domingo was violating any criminal law. The active collusion and participation by CBP in Mr. Jimenez-Domingo's unlawful detention was a direct, bad faith Fourth Amendment violation that makes suppression necessary in this case.

E. UNDER *LOPEZ-MENDOZA*, SUPPRESSION IS WARRANTED IN CASES OF EGREGIOUS OR WIDESPREAD VIOLATIONS.

It is well-established that suppression is warranted in cases involving egregious or widespread Fourth Amendment violations. The Court should remand Mr. Jimenez-Domingo's case for an evidentiary hearing because he had established a prima facie case of an egregious and widespread Fourth Amendment violation under the U.S. Supreme Court's test in *Lopez-Mendoza*, as articulated by the U.S. Courts of Appeals for the Second, Third, and Ninth Circuits.

Although *Lopez-Mendoza* held that the exclusionary rule did not apply to two civil deportation proceedings in 1984, the Court left open the possibility that the exclusionary rule could apply "if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread" or in cases of "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *Lopez-Mendoza*, 468 U.S. at 1050. *Lopez-Mendoza* was a plurality opinion, but "eight Justices agreed that the exclusionary rule should apply in deportation/removal proceedings involving egregious or widespread Fourth Amendment violations." *Oliva-Ramos v. U.S. Att'y Gen.*, 694 F.3d 259, 271 (3d Cir. 2012). The opinion "can only be read as affirming that the remedy of suppression justifies the social cost." *Id.* at 272.

At least three U.S. Courts of Appeals have used the rule in *Lopez-Mendoza* to develop tests that apply the exclusionary rule to egregious or widespread violations of the Fourth Amendment in the context of civil immigration proceedings. *See Almeida-Amaral v. Gonzales*, 461 F.3d 231, 234 (2d Cir. 2006); *Oliva-Ramos v. US Atty Gen.*, 694 F.3d 259, 278 (3d Cir. 2012); *Gonzalez-Rivera v. I.N.S.*, 22 F.3d 1441, 1446-47 (9th Cir. 1994). In an unpublished opinion, this Court indicated that the exclusionary rule would apply in the case of an egregious constitutional violation. *See Ghysels-Reals v. U.S. Att'y Gen.*, 418 F. App'x 894, 895-896 (11th Cir. 2011). No U.S. Court of Appeals has ruled to the contrary. Several courts have found that the Supreme Court left open the applicability of the exclusionary rule in cases of egregious constitutional violations. *See Puc-Ruiz v. Holder*, 629 F.3d 771, 778 (8th Cir. 2010); *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 22 (1st Cir. 2004); *Miguel v. INS*, 359 F.3d 408, 411 (6th Cir. 2004); *Gutierrez-Berdin v. Holder*, 618 F.3d 647, 652-53 (7th Cir. 2010); *Luevano v. Holder*, 660 F.3d 1207, 1212 (10th Cir. 2011). Unpublished BIA decisions have recognized the exclusionary rule in cases of egregious violations. *See, e.g., In Re: Christian Rodriguez*, 2011 WL 3443876 (BIA July 13, 2011).

In its 1994 decision *Gonzalez-Rivera v. I.N.S.*, the Ninth Circuit concluded that a stop based on Hispanic appearance constitutes an egregious violation of the

Fourth Amendment that triggers the exclusionary rule. 22 F.3d 1441, 1450, 1452 (9th Cir. 1994). The Court found that because the officers "decided to stop Gonzalez because of his Hispanic appearance alone, the stop was not based on reasonable suspicion and thus constituted a Fourth Amendment violation." *Id.* at 1448. The use of Gonzalez's race in stopping him made the government's action "analogous to a facial racial classification." *Id.* at 1450. Furthermore, the conduct of the immigration official was determined to be a bad faith, and thus egregious, constitutional violation because it constituted conduct that "*a reasonable officer should have known* is in violation of the Constitution." *Id.* at 1449. In the context of racial profiling, "a fundamentally unfair Fourth Amendment violation is considered egregious regardless of the probative value of the evidence obtained." *Id.* at 1450. The Court concluded that the racially motivated conduct of the immigration officers "constituted a bad faith, egregious constitutional violation that warrants the application of the exclusionary rule." *Id.* at 1452.

In 2006, the U.S. Court of Appeals for the Second Circuit articulated a test to determine the applicability of the exclusionary rule in immigration proceedings. In *Almeida-Amaral v. Gonzalez*, 461 F.3d 231 (2nd Cir. 2006), the court agreed with the Ninth Circuit to find that *Lopez-Mendoza* does not require "evidence of fundamental unfairness *and* diminished probative value . . . to justify exclusion." *Id.* at 234. Proof of either is enough to warrant exclusion. *Id. at 235.* Regarding

whether a Fourth Amendment violation was egregious, and thus fundamentally unfair, the court held: "[I]f 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)." *Id.*

This year, the Third Circuit joined the Second and Ninth Circuits and ruled that the exclusionary rule applies to egregious violations of the Fourth Amendment. *See Oliva-Ramos v. U.S. Attorney Gen*., 694 F.3d 259, 278 (3d Cir. 2012). The Court adopted its own two-part test, largely in accordance with the Second Circuit:

> We therefore conclude that evidence will be the result of an egregious violation within the meaning of *Lopez–Mendoza,* if the record evidence established either (a) that a constitutional violation that was fundamentally unfair had occurred, or (b) that the violation—regardless of its unfairness—undermined the reliability of the evidence in dispute.

Id. In adopting this test, the Third Circuit expressly agreed with the Second Circuit "that the probative value of the evidence cannot be part of the calculus." *See id.* at 277-78. The Court listed factors that the BIA should consider in determining whether Fourth Amendment violations are egregious: whether there was an "intentional" Fourth Amendment violation; whether the seizure was gross and unreasonable in addition to having no plausible legal ground (for example, when

the "initial illegal stop is particularly lengthy, there is an unnecessary and menacing show or use of force"); and "whether any seizures or arrests were based on race or perceived ethnicity." *Id.* at 289. Additionally, the Court determined "that most constitutional violations that are part of a pattern of widespread violations of the Fourth Amendment would also satisfy the test for an egregious violation." *Id.* at 280.

F. GITTO'S UNLAWFUL SEIZURE WAS EGREGIOUS BECAUSE IT WAS BASED SOLELY ON THE ETHNICITY OF JIMENEZ-DOMINGO AND IT WAS INTENTIONAL AND UNNECESSARILY LONG.

Mr. Jimenez-Domingo established that his unlawful seizure constituted a prima facie egregious Fourth Amendment violation because the seizure was based on his ethnicity. The Second Circuit views race-based stops as fundamentally unfair and egregious, regardless of their severity or the probative value of the evidence obtained from the stop. *See Almeida-Amaral v. Gonzalez,* 461 F.3d at 234-35. Similarly, the Third Circuit considers seizures based on ethnicity and factors such as the prolonged duration of seizures as critical to determining whether a Fourth Amendment violation is egregious. *See Oliva-Ramos v. INS,* 694 F.3d at 279. Under the Ninth Circuit's standard, race-based stops are *per se* egregious and require suppression of any evidence obtained. *See Gonzalez-Rivera v. INS* 22 F.3d at 1452.

Mr. Jimenez-Domingo has established a prima facie case that he was seized based on his ethnicity. Gitto had no articulable reason to believe that Mr. Jimenez-Domingo was in the country illegally other than his Hispanic appearance and the fact that some passengers were not fluent in English. *See Hernandez v. New York*, 500 U.S. 352, 354 (1991) (plurality opinion) ("It may be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis."). Gitto's racial motivations for the seizure are evident from the fact that he extended the roadside detention of the driver, Mr. Alonso, even though Mr. Alonso told him that he was a U.S. citizen. (R. 182, ¶¶ 1,3).

The IJ misstated the record in his decision when he indicated that Mr. Jimenez-Domingo had admitted to Gitto that he was unlawfully present. (R. 397). While the transcript of PBG police's conversation with CBP suggests that someone in the group may have spoken with Gitto, there was no evidence that Mr. Jimenez-Domingo had made any statement to Gitto. (R. 189). The record is clear that Mr. Jimenez-Domingo "did not respond to the police officer's request for proof of citizenship." (R. 177). In ruling on whether Mr. Jimenez-Domingo had made a prima facie case, the IJ expressly intended to "derive[]" his "factual account" from the documents submitted by Mr. Jimenez-Domingo. (R. 391). The IJ was aware that he was obligated to take the facts as stated by Mr. Jimenez-Domingo because

any disputed material fact would have required an evidentiary hearing. *See Salgado-Diaz v. Gonzales*, 395 F.3d 1158 (9th Cir. 2005) (failure to hold evidentiary hearing was a due process violation). *See also* 8 U.S.C. § 1229a(b)(4)(B) (granting people in removal proceedings the "reasonable opportunity . . . to present evidence").

The unlawful seizure of Mr. Jimenez-Domingo was egregious for the additional reason that it was unnecessarily long and Gitto acted intentionally. *See Oliva-Ramos v. INS*, 694 F.3d at 279 (whether a violation was "intentional" or a seizure lasted unnecessarily long as factors to consider in egregiousness analysis). Gitto intentionally violated Mr. Jimenez-Domingo's constitutional rights by extending the roadside detention without reasonable suspicion that a crime was being committed. Absent reasonable suspicion of a crime being committed, Gitto knew, or should have reasonably known, that his conduct was clearly unlawful. Gitto did not delay the traffic stop by a short amount of time, but by 89 minutes. The long duration of the seizure and the fact that it was intentional make it egregious, regardless of whether Gitto was motivated by racial profiling.

G. CBP'S ACTIVE PARTICIPATION IN MR. JIMENEZ-DOMINGO'S PATENTLY UNLAWFUL DETENTION MADE THE CONSTITUTIONAL VIOLATION EGREGIOUS.

In addition, the seizure was egregious because CBP agents colluded with PBG police even though reasonable officers should have known that the detention was unlawful. *See Gonzalez-Rivera v. I.N.S.*, 22 F.3d 1441, 1449 (9th Cir. 1994). CBP should have recognized that Gitto's detention of Mr. Jimenez-Domingo was clearly unlawful because Gitto had no authority to enforce immigration law, he had no reasonable suspicion that a crime was being committed, and he had no reason to hold Mr. Jimenez-Domingo for so long on account of a traffic violation committed by Mr. Alonso. The CBP dispatcher knew there was an issue when she repeatedly asked if Gitto was arresting anyone. (R. 188, ¶¶ 20, 32). This unlawful and active collusion by CBP was an intentional violation of Mr. Jimenez-Domingo's constitutional rights. *See Oliva-Ramos v. U.S. Attorney Gen.*, 694 F.3d at 279 (determining whether Fourth Amendment violation was "intentional" as important factor in egregiousness analysis). Any reasonable officer should have known that encouraging the continued detention of Mr. Jimenez-Domingo without any suspicion of a crime being committed was a constitutional violation. This encouragement of a clear and ongoing constitutional violation was in bad faith and egregious.

Because Mr. Jimenez-Domingo had made a prima facie case of an egregious violation of the Fourth Amendment, the IJ should have held an evidentiary hearing on the suppression motion.

H. THE UNLAWFUL SEIZURE WAS PART OF A WIDESPREAD PATTERN OF CONSTITUTIONAL VIOLATIONS IN IMMIGRATION ENFORCEMENT.

The detention of Mr. Jimenez-Domingo was prima facie egregious because it was part of a widespread pattern of Fourth Amendment violations against noncitizens. *See Olivia-Ramos v. U.S. Att'y Gen.* 694 F.3d at 280 ("[W]e think that most constitutional violations that are part of a pattern of widespread violations of the Fourth Amendment would also satisfy the test for an egregious violation, as discussed above."). The constitutional violations alluded to by the Supreme Court in *Lopez-Mendoza* are now widespread both nationally and in Palm Beach Gardens specifically. *See INS v. Lopez-Mendoza,* 468 U.S. at 1050.

In Palm Beach Gardens alone, there have been at least 21 instances in which local police have unlawfully prolonged the detention of alleged noncitizens for the purpose of verifying their immigration status. (R. 538-82). Gitto himself had unlawfully detained people in the past. (R. 189). In the 1980s, immigration authorities were "unable to demonstrate that their internal regulation scheme ha[d] ever been successfully implemented." Mitchell Barnes Davis et. al., *The Exclusionary Rule in INS Deportation Hearings: A New Look at the Lopez-*

Mendoza Cost-Benefit Analysis After the 1986 Immigration Reform and Control Act, 23 Land and Water Review 537, 556-57 (1988). There is now extensive documentation of Fourth Amendment violations committed by immigration authorities and local police. A 2010 report by the DHS Inspector General pointed out civil rights violations even by local law enforcement organizations participating in 287(g) MOAs, demonstrating that internal safeguards to protect civil rights are not working even when local officers are deputized to enforce immigration law. (R. 300-301). A report to the House Appropriations Committee brought attention to unconstitutional racially based enforcement of racially neutral policies. *See* Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 Wis. L. Rev. 1109, 1128-29 (2010). Organizations including the United Nations and the United Food and Commercial Workers International Union criticized ICE for its violations of constitutional rights. *Id*. Allegations of constitutional violations in immigration enforcement even led to a congressional hearing on the matter. *Id*. Allegations of constitutional violations have been seen in jurisdictions all over the country, including 22 different states and 28 separate municipalities. *Id.* at 1129-33. The plethora of governmental and non-governmental documentation of constitutional violations in immigration enforcement demonstrates the widespread nature of the problem.

The Court should remand Mr. Jimenez-Domingo's case for an evidentiary hearing because he had made a prima facie case that his unlawful detention was part of a widespread pattern of constitutional violations in immigration enforcement.

III. CBP OFFICERS VIOLATED THE FIFTH AMENDMENT WHEN THEY COERCED MR. JIMENEZ-DOMINGO INTO CONFESSING ALIENAGE BY DENYING HIS REQUESTS TO SPEAK WITH HIS ATTORNEY.

The IJ erroneously found that Mr. Jimenez-Domingo had failed to make a prima facie case for a Fifth Amendment violation. The CBP officers repeatedly denied Mr. Jimenez-Domingo's affirmative requests to speak with his attorney, in violation of the Fifth Amendment. (R. 178, ¶ 11). CBP made deportation seem inevitable by telling Mr. Jimenez-Domingo that he would lose if he tried to fight his case and that his only viable option was to agree to voluntary departure. (R. 178, ¶¶ 11-13). CBP officers did not inform Mr. Jimenez-Domingo of his right to an attorney at no cost to government, as required by federal regulation. (R. 178, ¶ 10). The examining officer also told Mr. Jimenez-Domingo that an attorney would not be able to help him and that he did not believe that he had an attorney because attorneys are very expensive. (R. 177-78, ¶¶ 10-14).

CBP's denial of counsel created a coercive environment where Mr. Jimenez-Domingo made statements he would not otherwise have made if given to the opportunity to consult with counsel. Coerced confessions are fundamentally unfair

and must be excluded from evidence. *See Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980) (holding that admission of alienage by a noncitizen only after being led to believe by Service officers that 1) his deportation was inevitable, 2) that he had no rights whatsoever, 3) that he could not communicate with his counsel, 4) and that he could be detained without explanation of why he was in custody presented a *prima facie* showing that his admissions were involuntarily given). *See also Lopez-Gabriel v. Holder*, 653 F.3d 683, 687 (8th Cir. 2011) (stating "interference with [the] right to counsel" is an "indicia of coercion" that may suggest statements were made involuntarily); *Navia-Duran v. INS*, 568 F. 2d 803, 810 (1st Cir. 1977) (lack of information about rights was relevant to finding that noncitizen was coerced); *Matter of Sandoval*, 17 I&N Dec. 70, 83 n.23 (BIA 1979) (recognizing inadmissibility of involuntary or coerced statements in immigration proceedings).

Mr. Jimenez-Domingo had a right to counsel during his examination by CBP officers regarding his alienage. Immigration regulations state that during an immigration examination "the person involved shall have the right to be represented by an attorney or representative." 8 C.F.R. § 292.5(b). Mr. Jimenez-Domingo unequivocally invoked this right when he twice requested to speak with his attorney, a request that CBP officers denied. This interference with Mr. Jimenez-Domingo's exercise of his right to counsel during a custodial examination prompted him to make involuntary admissions regarding alienage. The IJ

incorrectly cited *Samayoa-Martinez v. Holder*, 558 F.3d 897 (9th Cir. 2009), when ruling there was no Fifth Amendment violation. *Samayoa-Martinez*, however, addressed the failure to provide an *advisal* of the right to counsel under 8 C.F.R. § 287.3(c). Here, Petitioner affirmatively and repeatedly invoked his right to counsel.

Based on CBP's misconduct during Mr. Jimenez-Domingo's custodial examination, the statements given by Mr. Jimenez Domingo should be suppressed under the factors laid out in *Matter of Garcia*. The CBP officers created a coercive atmosphere by interfering with Mr. Jimenez-Domingo's affirmative requests for counsel. The denial of his right to speak with his attorney left him powerless to assess his various options and gave him the sense that deportation was inevitable. The IJ and BIA erred in not granting Mr. Jimenez-Domingo an evidentiary hearing on his motion to suppress based on this prima facie showing of a Fifth Amendment violation.

IV. CBP VIOLATED STATUTORY AND REGULATORY PROVISIONS THAT IMPLICATE MR. JIMENEZ DOMINGO'S CONSTITUTIONAL RIGHTS, REQUIRING TERMINATION OF PROCEEDINGS.

A. CBP'S COLLUSION WITH LOCAL POLICE VIOLATED THE LEGAL FRAMEWORK ESTABLISHED BY CONGRESS IN 8 U.S.C. § 1357(g).

The IJ denied Mr. Jimenez-Domingo's motion to terminate because he found that CBP and PBG police did not violate any statute or regulation when they

detained Mr. Jimenez-Domingo. (R. 401). The IJ ruled that nothing prohibits cooperation between the two law enforcement agencies under 8 U.S.C. § 1357(g).[8] *Id*. The IJ was incorrect. As explained above, 8 U.S.C. § 1357(g) expressly requires that state and local law enforcement officers sign a Memorandum of Agreement ("MOA") with the Attorney General and undergo required training and certification in order to assist in federal immigration enforcement. Because PBG Police were not deputized under 8 U.S.C. § 1357(g), CBP's collusion with Officer Gitto to detain Mr. Jimenez-Domingo was outside the legal and procedural framework created by Congress.

The IJ specifically relied on language from 8 U.S.C. § 1357(g)(10)(B), which states that no MOA is required to "otherwise cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the U.S." The U.S. Supreme Court, however, has held that "no coherent understanding of the term cooperation under 8 U.S.C. § 1357(g)(10)(B) would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government." *Arizona v. United States*, 132 S.Ct. at 2507. The Court listed circumstances that would be considered legitimate cooperation under federal law,

[8] He also drew a distinction between a roadside "detention" and an "arrest." (R. 401). As noted above, this distinction has no bearing because even an investigatory detention must be supported by reasonable suspicion of a crime being "afoot." *Terry v. Ohio*, 392 U.S. at 30.

including "situations where States participate in a joint task force with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities." *Id.* None of these situations apply to Mr. Jimenez-Domingo's case.

The IJ should have terminated the proceedings against Mr. Jimenez-Domingo because CBP and the PBG police violated the statutory and regulatory framework governing when, and how, local police can enforce immigration law. The BIA has established a two-part test to determine whether deportation proceedings should be terminated when immigration officials violate their agency's regulations: 1) the regulation "must serve a 'purpose of benefit to the alien'" and 2) "if the violation prejudiced interests of the alien which were protected by the regulation." *Matter of Garcia-Flores*, 17 I&N Dec. 325, 328 (BIA 1980). Prejudice can be demonstrated "where an entire procedural framework, designed to insure the fair processing of an action affecting an individual is created but then not followed by an agency." *Id.* at 329.

8 U.S.C. § 1357(g), as implemented by MOAs, meets the first requirement of *Matter of Garcia-Flores* because it "serves a purpose of benefit to" noncitizens by limiting nonfederal enforcement of immigration to officers who are deputized by a MOA between the U.S. Attorney General and the state or local agency. The MOA further benefits noncitizens because it contains a detailed complaint

procedure when there are allegations against deputized local officers. (R. 211-216). It binds all deputized personnel to follow applicable federal civil rights laws, including Title IV of the Civil Rights Act of 1964, "which prohibits discrimination based upon race, color, or national origin (including limited English proficiency) in any program or activity receiving Federal financial assistance." (R. 206). The MOA contains Standard Operating Procedures which govern when a deputized officer is authorized to detain an individual solely based on immigration violation. (R. 218). The provisions in 8 U.S.C. § 1357(g) and the MOA are designed to prevent abuses against noncitizens by state and local officers who are not properly trained and authorized to enforce federal immigration laws.

Mr. Jimenez-Domingo has made a prima facie showing of prejudice. The improper collusion between CBP and PBG Police outside the "entire procedural framework" of 8 U.S.C. § 1357(g) resulted in Mr. Jimenez-Domingo being unlawfully detained, coerced into making involuntary statements about his alienage, placed into removal proceedings, and detained in facilities in Florida and as far away as Texas. If Mr. Jimenez-Domingo had been permitted access to his counsel, he would not have admitted his alienage has alleged by the I-213. CBP's violations of the statutes that regulate its behavior and enforcement procedures resulted in the prejudice to Mr. Jimenez-Domingo that would not have otherwise occurred.

B. CBP VIOLATED THE REGULATIONS BY INTERFERING WITH HIS RIGHT TO AN ATTORNEY AND THESE REGULATIONS IMPLICATE HIS FIFTH AMENDMENT RIGHT TO COUNSEL.

In addition, the IJ should have terminated the proceedings against Mr. Jimenez-Domingo because CBP violated regulations meant to benefit him that implicated his Fifth Amendment right to counsel. When immigration officials violate a regulation designed to benefit the noncitizen and the noncitizen is prejudiced, proceedings must be terminated. *Garcia-Flores*, 17 I&N at 328-29. Prejudice is presumed when the regulation implicates a constitutional right, like the Fifth Amendment right to counsel. *Id.* at 329.

Federal immigration regulations recognize the right to counsel of people arrested without a warrant and provide for certain warnings and advice to be given to a noncitizen regarding this right:

> [A]n alien arrested without warrant and placed in formal proceedings under section 238 or 240 of the Act will be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government. The examining officer will provide the alien with a list of the available free legal services provided by organizations and attorneys qualified under 8 CFR part 1003 and organizations . . . that are located in the district where the hearing will be held.

8 C.F.R. § 287.3(c). *See also* 8 C.F.R. § 292.5(b) (granting people the right to counsel during immigration examinations). The Administrative Procedure Act also grants the right to counsel during agency appearances, which includes post-arrest examinations by immigration officials. 5 U.S.C. § 555(b) ("A person

compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.").

CBP agents violated these provisions by repeatedly refusing Mr. Jimenez-Domingo access to his attorney after he twice requested to speak with her. (R. 178, ¶ 11). CBP's violation was prejudicial because it implicated Mr. Jimenez-Domingo's constitutional right to counsel under the Fifth Amendment. Accordingly, the IJ should have terminated the proceedings against him.

CONCLUSION

For the foregoing reasons, Mr. Jimenez-Domingo respectfully requests that this Court find that the IJ and BIA erred in denying Mr. Jimenez-Domingo's Motion to Suppress and Motion to Terminate without holding an evidentiary hearing and remand this case to the BIA for further proceedings.

Respectfully submitted,*

/s Rebecca Sharpless

REBECCA SHARPLESS
FL Bar No. 0131024
University of Miami School of Law
Immigration Clinic, E-273
1311 Miller Drive
Coral Gables, FL 33146
(305) 284-3576, direct
(305) 284-6092, clinic
(305) 284-6093, facsimile
rsharpless@law.miami.edu

* Ian Shaw, a law student at the University of Miami School of Law, assisted in the preparation of this brief.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 12,374 words.

/s Rebecca Sharpless
REBECCA SHARPLESS

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Petitioner's Brief in *Jimenez-Domingo v. Holder*, Case No. 12-14048-D, with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on November 20, 2012.

/s Rebecca Sharpless
REBECCA SHARPLESS

Attorney for Petitioner