IN THE

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.

On Petition for Review of a Final Order
from the Board of Immigration Appeals

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

I, Paul M. Smith, attorney for Amicus Curiae, certify that the American Immigration Council is a non-profit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

November 27, 2012 /s/ Paul M. Smith

CERTIFICATE OF INTERESTED PARTIES

I, Paul M. Smith, attorney for Amicus Curiae, certify that, in addition to those parties who have already been disclosed, the following parties have an interest in the outcome of the appeal:

- Paul Smith, attorney for amicus curiae American Immigration Council
- Matthew Price, attorney for amicus curiae American Immigration Council
- Elizabeth Bullock, attorney for amicus curiae American Immigration Council
- Melissa Crow, attorney for amicus curiae American Immigration Council

November 27, 2012 /s/ Paul M. Smith

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STATEMENT OF INTEREST

The American Immigration Council ("AIC") is a non-profit organization that promotes the just and fair administration of our immigration laws and protects the rights of noncitizens. AIC engages in impact litigation, appears as *amicus curiae* before administrative tribunals and federal courts, and provides technical assistance to attorneys representing noncitizens in removal proceedings. AIC has a substantial interest in the issues presented in this case, which implicate the scope of local law enforcement officers' authority to enforce federal immigration law, noncitizens' right to counsel during immigration examinations, and the use of motions to suppress in removal proceedings.[1] Below, *Amicus* focuses only on selected issues that justify vacatur and remand, although the remaining issues raised in Petitioner's brief also warrant that relief.

STATEMENT OF THE ISSUES

1. Did the Board of Immigration Appeals ("BIA") err as a matter of law by concluding that local police could lawfully detain Petitioner solely on the basis of his suspected immigration status?

[1] Pursuant to Fed. R. App. P. 29(c)(5), *Amicus* AIC states that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *Amicus Curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

2. Does the exclusionary rule apply in immigration proceedings where evidence was obtained by state or local officers in violation of the Fourth Amendment?

3. Did the BIA err in refusing to suppress Petitioner's statements concerning alienage when those statements were made after Customs and Border Protection ("CBP") officers repeatedly refused Petitioner's request to speak with his attorney?

SUMMARY OF ARGUMENT

Under well-established Fourth Amendment law, police may not prolong a lawful traffic stop beyond the time necessary to effectuate the stop, unless there is some other suspected criminal activity that justifies a longer detention. Here, the decision on review found no Fourth Amendment violation when, following a routine traffic stop, a local police officer prolonged Petitioner's detention for approximately one hour based solely on the suspicion that Petitioner was unlawfully present in the United States. Yet the Supreme Court has made clear that unlawful presence is not a crime, and that a local police officer may not prolong a detention based upon reasonable suspicion of a civil immigration violation or to investigate an individual's immigration status. *See Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012).

Therefore, the Immigration Judge ("IJ") erred in denying Petitioner's motion to suppress on the ground that no Fourth Amendment violation had been committed.[2] Because the government may defend an agency's decision only on the grounds invoked by the agency itself, *see SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943), the case must be remanded to the agency for further proceedings.

This Court should provide the agency guidance concerning the legal principles to be applied on remand. Specifically, this Court should make clear that the exclusionary rule applies with full force to evidence obtained through a constitutional violation committed by local law enforcement officers. To be sure, the Supreme Court held in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), that the exclusionary rule generally does not apply in civil removal proceedings where *federal* immigration officers violated the Fourth Amendment. That case, however, is not controlling where state or local officers committed the constitutional violation, and the rationale of the Supreme Court's decision strongly supports applying the exclusionary rule in such circumstances. Increasingly, state and local law enforcement officers seek to assist federal officers in the enforcement of civil immigration law, and experience has shown that the deterrent effect of the exclusionary rule is needed to ensure respect for constitutional rights.

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[2] The BIA expressly adopted and affirmed the IJ's decision "for the reasons stated therein." R.3. This court should therefore "review the IJ's analysis as if it were the Board's." *Najjar v. Ashcroft*, 257 F.3d 1262, 1284 (11th Cir. 2001).

Finally, the IJ also erred in holding that Petitioner had failed to present a prima facie case in support of his motion to suppress his statements to CBP officers as involuntary in violation of the Due Process Clause. Petitioner had a right to be represented by counsel, and he requested the opportunity to speak with his lawyer. The CBP officers refused that request and told him that it was pointless for him to fight deportation because he would lose his case. Because immigration officers' interference with the right to counsel may cause statements made in custodial interrogations to be involuntary and inadmissible in removal proceedings, the IJ erred by refusing to grant Petitioner an evidentiary hearing on this issue.

ARGUMENT

I. The Agency Erred as a Matter of Law by Concluding that Petitioner Could Be Detained Solely to Verify his Immigration Status.

A. The Agency Denied Petitioner's Motion to Suppress on the Ground that Local Police Were Permitted to Detain Petitioner Solely for the Purpose of Enforcing Civil Immigration Law.

Well-established Fourth Amendment law holds that, even when police have a legitimate basis for initiating the seizure of a person, they may not prolong that seizure beyond the time necessary to effectuate its purpose. *See, e.g., United States v. Purcell*, 236 F.3d 1274, 1277 (11th Cir. 2001). Thus, for example, during an otherwise lawful traffic stop, police may ask questions unrelated to the purpose of the stop, including questions regarding an individual's immigration status. *See*

Arizona v. Johnson, 555 U.S. 323, 333 (2009); *Muehler v. Mena*, 544 U.S. 93, 101 (2005). But the duration of the stop "must be limited to the time necessary to effectuate the purpose of the stop." *Purcell*, 236 F.3d at 1277. "The traffic stop may not last 'any longer than necessary to process the traffic violation' unless there is articulable suspicion of other illegal activity" beyond the traffic offense. *Id.* (citation omitted); *see also 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.").

Here, the IJ recognized these basic Fourth Amendment principles. The IJ acknowledged that "the proper manner by which to assess whether [Petitioner's] Fourth Amendment rights were violated is by examining whether Officer Gitto's questioning unreasonably prolonged an otherwise lawful traffic stop." R.396 (citing *United States v. Hernandez*, 418 F.3d 1206, 1209 n.3 (11th Cir. 2005) ("[I]t is unreasonable extension of the *duration* – not the scope of conversation – that could render an otherwise justified detention unreasonable for Fourth Amendment purposes.")). The IJ determined that Gitto's questions to the vehicle's passengers concerning their immigration status did not themselves violate the Fourth Amendment because they did not prolong the traffic stop. R.396-97.

Yet the IJ also found that Gitto – a local police officer – was then permitted to *continue* to detain Petitioner for over an hour *after* the questioning and the traffic stop were complete while he waited for CBP to arrive, based solely on his suspicion that Petitioner had committed a civil immigration violation. R.397. This extension in the duration of Petitioner's detention beyond the time needed for the traffic stop requires Fourth Amendment justification. The record makes clear that Petitioner was not under arrest for any suspected criminal activity, *see* R.480 (Gitto tells dispatch that Petitioner is "not being arrested"), and that the only reason for his detention was Gitto's suspicion that Petitioner and his companions were "illegals." *Id.* However, according to the IJ, Gitto was permitted to detain Petitioner on that basis. The IJ reasoned that there was "no Fourth Amendment violation in Officer Gitto's decision to detain [Petitioner] for approximately one hour while he awaited the arrival of CBP officers. At this stage, [Petitioner] 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."[3] R.397.

[3] Petitioner denies that he made such an admission, but the IJ denied an evidentiary hearing on the ground that Petitioner had not made out a prima facie case for suppression. *See Matter of Wong*, 13 I. & N. Dec. 820, 822 (BIA 1971) (holding that a noncitizen must present a prima facie case for suppression in his or her motion). In assessing whether Petitioner had made such a showing, the IJ erred in resolving contested factual matters against Petitioner without a hearing. *See* 8 C.F.R. § 1240.10(d) (The IJ "shall receive evidence as to any unresolved issues").

B. Under *United States v. Arizona*, State and Local Police May Not Detain an Individual to Verify His Immigration Status.

The IJ erred in finding no violation of the Fourth Amendment when Gitto prolonged Petitioner's detention based solely on the suspicion that Petitioner was not lawfully in the United States.[4] An investigative detention is permitted under the Fourth Amendment when there is reasonable suspicion that "criminal activity may be afoot." *Terry v. Ohio*, 392 U.S. 1, 30 (1968). However, in *Arizona*, the Supreme Court reaffirmed that "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States." *Arizona*, 132 S. Ct. at 2505. Because unauthorized presence in the United States is not a crime, even if police have probable cause to believe that an individual is unlawfully present, the police may not arrest an individual on that basis. *See id.* ("If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent."). Nor may the police prolong an investigative detention solely on the basis that an individual is suspected to be present in violation of immigration law. *See id.* at 2509.

[4] There can be no dispute that Petitioner was seized when Gitto stopped the vehicle in which he was traveling as a passenger, *Brendlin v. California*, 551 U.S. 249, 255 (2007), and that the seizure continued for over an hour, as Gitto detained Petitioner at the scene until CBP officers arrived. The only question is whether the continued detention of Petitioner had a lawful basis. For the reasons given above, it did not.

Indeed, the *Arizona* Court was particularly concerned about the potential for unlawful detentions in precisely the circumstances present here. At issue in *Arizona* was a state law that required law enforcement officers to make a "'reasonable attempt … to determine the immigration status' of any person they stop, detain, or arrest on some other legitimate basis if 'reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.'" *Id.* at 2507 (quoting Ariz. Rev. Stat. Ann. § 11-1051(B) (2012)) (alteration in original). The Court emphasized that, read literally, the statute posed constitutional difficulties, as "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns." *Id.* at 2509. The Court suggested such constitutional concerns could be "avoid[ed]," however, if the Arizona courts were to read the statute narrowly, so as *not* to authorize officers "to prolong [a] stop for [an] immigration inquiry" – unless, of course, the person stopped "continues to be suspected of some crime for which he may be detained by state officers." *Id.*

Thus, *Arizona* makes clear that the Fourth Amendment does not allow state and local police to detain a person, or prolong a detention, based only on reasonable suspicion that the person is unlawfully present in the United States – which is a civil immigration violation, not a criminal offense. *See also Muehler*, 544 U.S. at 102 (holding that the Fourth Amendment permits an officer to ask questions about a person's immigration status during the course of a lawful stop,

but emphasizing that "the Court of Appeals did not find that the questioning extended the time Mena was detained. Thus no additional Fourth Amendment justification for inquiring about Mena's immigration status was required."); *United States v. Griffin*, 696 F.3d 1354, 1361 (11th Cir. 2012) (applying *Muehler* for the proposition that police may question persons concerning their immigration status "as long as the queries [do] not prolong the detention").

The Ninth Circuit has applied *Arizona* to prohibit local officers from detaining an individual based solely on a reasonable suspicion that he or she is unlawfully present in the United States. In *Melendres v. Arpaio*, the court held that "because mere unauthorized presence is not a criminal matter, suspicion of unauthorized presence alone does not give rise to an inference that criminal activity is 'afoot.'" 695 F.3d 990, 1001 (9th Cir. 2012) (citing *Terry*, 392 U.S. at 30). Therefore, the court held, suspicion of unlawful presence alone is an insufficient basis for a local police officer to prolong a stop. *Id.* Any extension of Petitioner's detention beyond the original purpose of the traffic stop was required to be supported by additional suspicion of criminal activity. *See id.* at 1000-01; *Arizona*, 132 S. Ct. at 2509.

Here, suspicion of criminal activity was totally lacking. Gitto indicated to CBP that he was not arresting Petitioner. R.480-81. Nor is there any indication in the record that Petitioner could have been reasonably suspected of engaging in any

criminal activity. Even if Petitioner had admitted that he did not have a green card and was not otherwise lawfully in the country, which Petitioner disputes, *see supra* n.3, such an admission indicates only a civil immigration law violation – not criminal conduct. *See Arizona*, 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."); *Melendres*, 695 F.3d at 1001 ("Although we have recognized that illegal presence may be some indication of illegal entry, unlawful presence need not result from illegal entry." (citation omitted)). Because Gitto lacked reasonable suspicion that Petitioner had engaged in any criminal activity, it was unlawful to prolong Petitioner's detention on this basis.

The IJ suggests that Gitto may nonetheless have possessed authority to prolong Petitioner's detention under 8 U.S.C. § 1357(g)(10)(B), which permits state and local officers to "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10)(B); *see* R.398 (citing § 1357(g)(10)(B)). That provision, however, does not permit state and local officers to detain individuals for suspected immigration violations. Rather, as the Supreme Court has explained, Section 1357(g)(10) was intended to encompass "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 …. State officials can also assist the Federal Government by responding to requests for information about when an alien will be released from their custody." *Arizona*, 132 S. Ct. at 2507 (citation omitted). However, "unilateral state action to detain" falls outside the scope of cooperation authorized by Section 1357(g)(10)(B). *Id.*; *Melendres*, 657 F.3d at 1001 (suspected unlawful presence is not sufficient "to justify a stop by [local police] officers who are not empowered to enforce civil immigration violations" pursuant to a written agreement under Section 1357(g)(1)).[5]

Accordingly, once the purpose of the traffic stop was complete, Petitioner should have been free to go. *See, e.g.*, *United States v. Pruitt*, 174 F.3d 1215, 1221 (11th Cir. 1999) (holding that after a traffic citation had been processed the defendants "should have been free to go, as [the officer] was provided at that time

[5] The authority under Section 1357(g)(10)(B) contrasts with the authority that state and local officers can possess to perform the functions of immigration officers under written agreements between their state or political subdivision and the federal government. *See* 8 U.S.C. § 1357(g)(1). These Agreements (often called 287(g) agreements) require state or local officers to receive adequate training to carry out the duties of an immigration officer. *Id.* § 1357(g)(2). They also require state or local officers to "be subject to the direction and supervision of the Attorney General" when performing an immigration-related function. *Id.* § 1357(g)(3). Palm Beach Gardens Police Department does not have such an agreement with the federal government. R.515-17.

with no reasonable suspicion of their criminal activity"). In concluding otherwise, the IJ erred as a matter of law.[6]

II. The Exclusionary Rule Should Apply with Full Force in Immigration Proceedings Where State or Local Law Enforcement Officers Violated the Fourth Amendment.

The IJ erred as a matter of law in concluding that there was "no Fourth Amendment violation" in prolonging Petitioner's detention because Gitto had a "reasonable basis … to conclude [Petitioner] was present in violation of federal immigration law." R.397. Therefore the case must be remanded to the agency. As the Supreme Court has held:

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

During the remand, however, the BIA would benefit from this Court's guidance as to the proper application of the exclusionary rule. Accordingly, this

[6] The IJ also appeared to believe that the fact that Gitto had merely detained Petitioner, but had not arrested him, was a distinction of constitutional significance. *See* R.398. That was also error. An investigative detention (or *Terry* stop) is also a seizure for constitutional purposes, and can be justified only if there is reasonable suspicion of criminal activity. *United States v. Harris*, 526 F.3d 1334, 1337 (11th Cir. 2008).

Court should make clear that the exclusionary rule requires the suppression of the evidence obtained as result of Gitto's unconstitutional detention of Petitioner.

A. The Exclusionary Rule Plays an Essential Role in Preventing Fourth Amendment Violations by Law Enforcement Officers.

The exclusionary rule plays a vital role in protecting the Fourth Amendment rights of persons in the United States. Its purpose is not to "cure the invasion" of rights after a Fourth Amendment violation occurs. *United States v. Leon*, 468 U.S. 897, 906 (1984) (quotation marks omitted). Instead, its "prime purpose is to deter future unlawful police conduct." *United States v. Calandra*, 414 U.S. 338, 347 (1974). To be sure, there are societal costs to suppressing evidence of wrongdoing. *See, e.g.*, *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011) ("It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence."). In recognition of these costs, courts apply a balancing framework to decide the circumstances in which the exclusionary rule should apply. The exclusionary rule applies only where the benefits of deterrence outweigh the costs. *Herring v. United States*, 555 U.S. 135, 141 (2009) (citing *Leon*, 468 U.S. at 910).

In *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Supreme Court addressed whether evidence obtained by *federal* officers as a result of a Fourth Amendment violation should be excluded from civil deportation proceedings. The Court drew a distinction between criminal and civil proceedings. *See id.* at 1042-43. It held that the exclusionary rule did not generally apply in civil

immigration proceedings to evidence obtained through Fourth Amendment violations by federal immigration officers, because the costs of extending the exclusionary rule in such cases outweighed the benefit of any additional deterrence that would result. *Id.* at 1050.

A plurality of the Court went on to state that the exclusionary rule could apply if there were "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."[7] *Id.* at 1050-51 (plurality opinion). The plurality opinion also admitted its conclusion could change "if there developed good reason to believe that the Fourth Amendment violations by INS officers were widespread." *Id.* at 1050.

Lopez-Mendoza, however, does not answer the question before this Court: Whether the exclusionary rule applies in civil immigration proceedings where *state or local officers* violated the Fourth Amendment. *Lopez-Mendoza* considered only the costs and benefits of the exclusionary rule as they applied to federal immigration officers. *See id.* at 1041 (observing that, unlike *United States v. Janis*,

[7] In an unpublished opinion, this Court recognized in *dicta* that an "egregious violation" would warrant suppression. *See Ghysels-Reals v. U.S. Att'y Gen.*, 418 F. App'x 894, 895 (11th Cir. 2011) (per curiam) (unpub.) ("[E]vidence obtained illegally can be used in deportation proceedings, unless the violation was so 'egregious … that [it][ ] transgress[es] notions of fundamental fairness and undermine[s] the probative value of the evidence obtained.'" (alterations in original) (citation omitted)).

428 U.S. 433, 447 (1976), the case at bar concerned federal, not state, officers). As applied to violations by state and local officers, the balance between deterrent benefits and social costs tips decidedly in favor of applying the rule.

B. The Exclusionary Rule Should Apply When State or Local Law Enforcement Officers Violate the Fourth Amendment.

"[T]he deterrence value of the exclusionary rule [is] dependent upon the incentive of the police to violate constitutional rights." *United States v. Farias-Gonzales*, 556 F.3d 1181, 1187 (11th Cir. 2009) (discussing *Hudson v. Michigan*, 547 U.S. 586, 596 (2006)). In the realm of immigration enforcement, police unfortunately have strong incentives to violate constitutional rights. In many States, including Florida, local and state police forces are increasingly engaging in immigration enforcement, whether authorized by a Section 287(g) agreement (as in the case of the Florida Department of Law Enforcement) or not (as here). *See, e.g.*, Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. Pa. J. Const. L. 1084, 1104 (2004). *Lopez-Mendoza* does not itself address the applicability of the exclusionary rule in immigration proceedings to evidence obtained through constitutional violations by state and local officers, and the Supreme Court's rationale in that case illustrates precisely why the exclusionary rule *must* apply in such circumstances.

In balancing the costs and benefits of applying the exclusionary rule, the Court first considered the degree to which exclusion would deter officer

misconduct. It recognized that the deterrent benefit of the exclusionary rule was particularly strong in the field of immigration enforcement because so few arrests of immigrants "are intended or expected to lead to criminal prosecutions." *Lopez-Mendoza*, 468 U.S. at 1042-43. Since "the arresting officer's primary objective, in practice, will be to use evidence in the civil deportation proceeding," not a criminal proceeding, the officer was unlikely to be deterred by the exclusionary rule's applicability in criminal proceedings. *Id.* at 1043. Such reasoning is equally true today: in 2010, there were nearly 517,000 immigration apprehensions, but only 85,000 federal criminal proceedings for immigration misdemeanors and felonies.[8]

Nonetheless, the Court determined that several other factors reduced the deterrent value of applying the exclusionary rule. These factors either no longer hold true, or do not apply to state and local police officers.

First, the Court emphasized the low rate of formal deportation hearings. In 1984 when *Lopez-Mendoza* was decided, over 97.5% of noncitizens charged with violating the civil immigration laws agreed to leave the United States voluntarily without a formal hearing. *Id.* at 1044. The Court also noted that, even where there was a formal hearing, it was rare for noncitizens to challenge the circumstances of

[8] Moreover, these criminal prosecutions largely involved noncitizens arrested on the Southwest border. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Immigration Offenders in the Federal Justice System, 2010*, at 7, 8 (July 2012), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/iofjs10.pdf.

their arrests. *Id.* Relying on these figures, the Court reasoned that "the arresting officer is most unlikely to shape his conduct in anticipation of the exclusion of evidence at a formal deportation hearing." *Id.* Today, however, removal hearings are commonplace. Immigration courts decide more than 220,000 removal proceedings each year,[9] and the percentage of noncitizens choosing voluntary departure has dropped from 97.5% when *Lopez-Mendoza* was decided to 45% in 2011.[10] Thus, an officer is much more likely to be deterred by the prospect of having evidence excluded from a removal proceeding.

Second, the Court cited as "perhaps the most important" factor guiding its decision the existence of the former Immigration and Naturalization Service's ("INS's") "comprehensive scheme" for deterring its officers from committing Fourth Amendment violations, *id.*, including "rules restricting stop, interrogation, and arrest practices." *See id.* at 1044-45; *see also* 8 C.F.R. §§ 287.8(b)-(c) (rules governing stops and arrests by immigration officers). In light of these apparent

[9] U.S. Dep't of Justice, Executive Office for Immigration Review, *FY 2011 Statistical Yearbook*, at D1 (February 2012), *available at* http://www.justice.gov/eoir/statspub/fy11syb.pdf.

[10] *See* Dep't of Homeland Security, *Yearbook of Immigration Statistics: 2011*, Table 39, *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf.

administrative protections, the Court expected that the additional deterrent value of applying the Fourth Amendment exclusionary rule would be minimal.

State and local law enforcement officers who are not operating under a Section 287(g) agreement do not receive federal immigration training, however, thereby increasing the risk that they will commit constitutional violations in conducting immigration-related investigations.[11] Nor are state or local officers subject to federal regulations that limit the stop-and-arrest authority of federal immigration officers. There simply is no reason to believe that state and local officers will be any more scrupulous in observing constitutional constraints in the immigration context than in enforcing criminal law generally. Just as the exclusionary rule is needed in the criminal context to deter violations of the Fourth Amendment by state and local officers, it is needed in the immigration context as well.

Finally, the Court emphasized "the availability of alternative remedies" like declaratory relief "for institutional practices by INS that might violate Fourth Amendment rights." *Lopez-Mendoza*, 468 U.S. at 1045. Such alternative remedies

[11] The record illustrates that Palm Beach Gardens ("PBG") police lack a clear understanding of their authority to detain individuals for suspected immigration violations. *See* R.574 (officer lacks understanding of which agency to contact); R.578 (similar). Immigration and Customs Enforcement ("ICE") has even refused to take custody of individuals detained by PBG police on the basis of suspected immigration violations. *See* R.538 ("ICE DOES NOT WANT TO COME OUT … THEY ONLY WANT FELONS WHO ARE ILLEGAL").

further reduced the deterrent value of the exclusionary rule. Where state and local officers detain or arrest an individual for suspected immigration violations, however, there is no "agency under central federal control," *id.*, that can be held accountable. Without a single target for declaratory relief, few tools are available to deter constitutional violations other than the exclusionary rule.

Thus, the *Lopez-Mendoza* Court's rationale for discounting the deterrent value of the exclusionary rule plainly does not apply to violations by *state and local* officers.

The Court next considered the societal costs that would result from applying the exclusionary rule in removal proceedings to evidence obtained by federal officers in violation of the Constitution. The Court was primarily concerned that applying the exclusionary rule would require the courts to close their eyes to ongoing criminal offenses. *See id.* at 1047 ("The constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime. 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.").

As noted above, however, the Supreme Court has recently clarified that unlawful presence alone is not a continuing criminal act, and allowing the continued presence of removable noncitizens is not necessarily inconsistent with

federal immigration policy. *See Arizona*, 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."); *id.* at 2499 ("Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime…. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission."). Thus, *Lopez-Mendoza*'s analogy to a continuing criminal offense is simply inapt, in light of the Supreme Court's more recent holding. Moreover, suppression in the immigration context carries lower social costs than in the criminal context, because there is no double jeopardy bar to reinitiating proceedings. If the government does choose to prioritize the removal of a particular immigrant, it is free to reinitiate proceedings, supported by evidence that is lawfully obtained. *Matter of Perez-Lopez*, 14 I. & N. Dec. 79, 80 (BIA 1972).

The Court in *Lopez-Mendoza* was also concerned that the exclusionary rule would create documentary and administrative burdens for immigration officers. *See Lopez-Mendoza*, 468 U.S. at 1049. For example, because immigration officers frequently conduct mass arrests, the Court feared that it would be burdensome to expect them to document the circumstances of each individual arrest. *Id.* at 1049-

50. Such concerns are absent where state or local officers are involved, however, because they lack authority to engage in such large-scale immigration raids except through formal cooperation with the federal government. *See Arizona*, 132 S. Ct. at 2506-07.

In sum, *Lopez-Mendoza*'s holding is limited to immigration proceedings in which federal immigration officers violated the Fourth Amendment. The Court's rationale for declining to apply the exclusionary rule in *Lopez-Mendoza* simply does not apply to situations in which the evidence is obtained through a constitutional violation by state or local officers. To the contrary, in light of the significant differences between the training and administrative regulations governing federal immigration officers on one hand, and state or local police officers on the other, the benefits of deterrence decidedly outweigh the social costs of applying the rule. Accordingly, the exclusionary rule should apply in immigration removal proceedings to evidence obtained through Fourth Amendment violations by state or local police officers.

C. The Supreme Court's Decision in *United States v. Janis* Does Not Preclude Applying the Exclusionary Rule in Civil Immigration Proceedings Where State or Local Law Enforcement Officers Engaged in Unconstitutional Conduct.

In *Janis*, the Supreme Court refused to apply the exclusionary rule in a federal civil tax proceeding where the evidence in question had been unlawfully obtained by state law enforcement officers. 428 U.S. at 459-60. That decision,

however, does not undermine the argument for applying the exclusionary rule in the very different context of immigration removal proceedings.

In *Janis*, local police executed a search warrant to find evidence of illegal bookmaking. After the search, police arrested two individuals, who were charged with violating local gambling laws. *Id.* at 436-37. Police also provided the evidence to the Internal Revenue Service. *Id.* at 436. The evidence found during the search was suppressed in state criminal proceedings because the affidavit in support of the warrant was inadequate. *Id.* at 437-38. Civil litigation regarding the tax liabilities resulting from the illegal gambling operation also followed. *Id.* at 438.

As in *Lopez-Mendoza*, the *Janis* Court engaged in a balancing test to determine whether the exclusionary rule should apply. *See Lopez-Mendoza,* 468 U.S. at 1041 ("[T]he Court recognized in *Janis* that there is no choice but to weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs."). The Court held that although the evidence was acquired through an unconstitutional search, the evidence should not be suppressed in civil tax proceedings. *Janis*, 428 U.S. at 454.

Janis identified three reasons for reaching that conclusion. As with *Lopez-Mendoza*, the Court's rationale not only is inapplicable to immigration removal proceedings, but in fact demonstrates why the exclusionary rule *should* apply in

such proceedings to evidence obtained through a state or local officer's constitutional violation.

First, *Janis* stated that the exclusionary rule had limited deterrent value because a state court had already suppressed the evidence in question in a state criminal proceeding. Therefore, the local officers had already been "punished" by the suppression of the evidence. *Id.* at 448. The possibility of such "punishment" through state criminal proceedings is absent in the immigration context, however. As the Court held in *Arizona*, states may not impose parallel criminal sanctions corresponding to federal immigration crimes. *Arizona*, 132 S. Ct. at 2502 ("Permitting the State to impose its own penalties for the federal [immigration] offenses here would conflict with the careful framework Congress adopted."). Thus, the *only* proceeding in which immigration-related evidence will be used is a federal proceeding.

Second, *Janis* noted that because the disputed evidence would also be excluded in federal criminal proceedings, "the entire criminal enforcement process, which is the concern and duty of these officers, is frustrated." *Janis*, 428 U.S. at 448. In the Court's view, this minimized the potential deterrent effect of extending the exclusionary rule to civil tax proceedings. But in the immigration context, criminal prosecutions are relatively rare. As noted above, only a small fraction of immigration arrests result in federal criminal prosecutions. *See supra* n.8 and

accompanying text. Thus, civil removal proceedings – not criminal prosecutions – are the principal concern of officers conducting immigration-related arrests or investigations.

Third, the Court assumed that local officers would have little interest in the outcome of federal proceedings – civil or criminal – and therefore suppression in the federal civil proceeding would be unlikely to deter any unconstitutional conduct by local officers. *Janis*, 428 U.S. at 458 ("[T]he imposition of the exclusionary rule sought in this case is unlikely to provide significant, much less substantial, additional deterrence. It falls outside the offending officer's zone of primary interest."); *id.* at 454-56.

Although it is easy to understand why a police officer would have little concern for an individual's federal tax liability, the same cannot be said for an individual's immigration status. Unlike in the realm of taxation, states have shown an acute interest in enforcing federal immigration law and are forcing local law enforcement officers to make immigration a priority. Arizona and Alabama now have laws requiring police to investigate the immigration status of certain persons. *See* Ariz. Rev. Stat. Ann. § 11-1051(B); Ala. Code § 31-13-12. Florida's governor has advocated passing a similar law in his state.[12] Georgia law authorizes police to

[12] Laura Wides-Munoz, *Governor Rick Scott to Push for Florida Immigration Law in 2012*, WPTV.com, Aug. 18, 2011, http://www.wptv.com/dpp/news/state/governor-rick-scott-to-push-for-florida-

investigate a person's immigration status if probable cause exists that the individual has committed a crime. *See* 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."[13]

The federal government also encourages state and local cooperation in immigration enforcement. States and local law enforcement agencies have become highly involved in the mechanics of federal immigration enforcement through Section 287(g) agreements, the Secure Communities program,[14] and the Criminal Alien Program.[15] Additionally, "Congress has obligated ICE to respond to any

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immigration-law-in-2012 ("'If somebody is in our country illegally, and they're violating our laws, we ought to be able to ask them if they're legal or not. That's what I'd like to have happen,' Scott told The Associated Press.").

[13] 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, *available at* http://jpart.oxfordjournals.org/content/early/2012/10/02/jopart.mus045.full.pdf.

[14] Through the Secure Communities Program, federal immigration officials receive the fingerprints of individuals arrested and booked by state and local law enforcement agencies and check those fingerprints against federal immigration databases. *See* ICE, *Secure Communities*, *available at* http://www.ice.gov/secure_communities/.

[15] The mission of the Criminal Alien Program is to provide "ICE-wide direction and support in the identification and arrest of those aliens who are incarcerated within federal, state and local prisons and jails, as well as at-large criminal aliens."

request made by state officials for verification of a person's citizenship or immigration status." *Arizona*, 132 S. Ct. at 2508 (citing 8 U.S.C. § 1373(c)). As a result, immigration enforcement has increasingly fallen within the "zone of primary interest," *Janis*, 428 U.S. at 458, of state and local policing.

The Palm Beach Gardens Police Department is a case in point. Palm Beach County has participated in the Secure Communities program since 2010.[16] The administrative record also shows Palm Beach Gardens police regularly contact ICE and CBP in an effort to enforce immigration laws against individuals suspected of being unlawfully present. *See* R.538-82. Indeed, Gitto's primary concern in detaining Petitioner was not the enforcement of any state or municipal law. There is no evidence Petitioner committed, or could be reasonably suspected of having committed, any crime. Rather, the officer's sole interest was Petitioner's suspected immigration status. *See* R.480-81 (Gitto told dispatch he was not going to arrest Petitioner); R.480 (telling CBP that he had detained "illegals").

Because federal immigration enforcement is a primary concern of local police, there would be a substantial deterrent effect from applying the exclusionary

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ICE, *Criminal Alien Program, available at* http://www.ice.gov/criminal-alien-program/.

[16] News Release, ICE, Palm Beach County Sheriff's Office Joins ICE Secure Communities Initiative To Enhance Identification and Removal of Criminal Aliens (April 26, 2010), *available at* http://www.ice.gov/news/releases/1004/100426palmbeach.htm.

rule in removal proceedings to evidence obtained through illegal conduct by such officers. And, as discussed above, those benefits strongly outweigh any social costs resulting from exclusion. *See supra*, Part II.B. Accordingly, under the framework articulated in *Janis*, the exclusionary rule should apply in cases like this one.

III. Because Petitioner's Requests for Counsel Were Refused, the Fifth Amendment and Agency Regulations Require Suppression.

The IJ also erred by finding that Petitioner had not made out a prima facie case for suppression of his statements to CBP on Fifth Amendment grounds. The BIA and federal courts have recognized that the requirements of due process warrant excluding a noncitizen's admissions from removal proceedings where those admissions were involuntarily made. *See Matter of Garcia*, 17 I. & N. Dec. 319, 321 (BIA 1980); *Navia-Duran v. INS*, 568 F.2d 803, 810-11 (1st Cir. 1977); *Kandamar v. Gonzales*, 464 F.3d 65, 71 (1st Cir. 2006); *Bustos-Torres v. INS*, 898 F.2d 1053, 1057 (5th Cir. 1990); *Choy v. Barber*, 279 F.2d 642, 646-47 (9th Cir. 1960).

In assessing voluntariness, courts examine whether statements were obtained through coercion, duress, or improper actions by an immigration officer. *See, e.g.*, *Bustos-Torres*, 898 F.2d at 1057. In *Garcia*, for example, immigration officers "repeatedly rebuffed" a noncitizen's requests to speak with his attorney and led him to believe that his removal "was inevitable." *Matter of Garcia*, 17 I. & N.

Dec. at 321. The BIA concluded that, as a result, his admission of alienage was involuntary and should be suppressed. *Id.* Significantly, the plurality in *Lopez-Mendoza* cited favorably to *Matter of Garcia* as an example of a Fifth Amendment violation that might warrant suppression, characterizing the case as one where the "admission of alienage [was] obtained after [the noncitizen's] request for counsel had been repeatedly refused." 468 U.S. at 1051 n.5.

Under *Garcia*, due process requires the suppression of Petitioner's statements, including his admission of alienage, because the circumstances of Petitioner's custodial interrogation were inherently coercive. As in *Garcia*, Petitioner repeatedly asked for access to his attorney, but these requests were repeatedly rebuffed. R.178 ¶11. This improper action rendered him particularly vulnerable to the misinformation conveyed by CBP – namely, that it would be pointless to contest his removability and that he could accept voluntary departure but change his mind later. R.178-79 ¶¶10, 13-14. Such conditions, which made Petitioner's removal seem inevitable and created an atmosphere of coercion that rendered his statements involuntary, require suppression. *See Matter of Garcia*, 17 I. & N. Dec. at 321. Had the CBP officer heeded Petitioner's requests to speak to his attorney, the atmosphere of coercion during his examinations would have been minimized.

Additionally, CBP's conduct violated Petitioner's regulatory right to counsel in immigration examinations. *See* 8 C.F.R. § 292.5(b); *Kandamar*, 464 F.3d at 71 ("By regulation, [noncitizens] have a right to be represented by counsel at examinations by immigration officers.").[17] That regulatory violation underscores the due process violation. *Cf. de Rodriguez-Echevarria v. Mukasey*, 534 F.3d 1047, 1051 (9th Cir. 2008) ("Any failure to comply with the regulations [requiring notice of right to counsel] may also bear on the question of whether [a noncitizen's] statements were voluntary under the Fifth Amendment….").[18] The regulatory violation also is an independent ground for suppression – regardless of whether there was a violation of due process – because the violation prejudiced interests that the regulation was intended to protect. *See*, *e.g.*, *Matter of Garcia-Flores*, 17 I. & N. Dec. 325, 328-29 (BIA 1980); *Ward v. Holder*, 632 F.3d 395, 397-99 (7th Cir. 2011); *Chuyon Yon Hong v. Mukasey*, 518 F.3d 1030, 1035 (9th Cir. 2008).

[17] Under the statute and its regulations, such "examinations" include interrogations following a warrantless arrest by immigration officers, such as CBP's questioning of Petitioner. *See* 8 U.S.C. § 1357(a)(2); 8 C.F.R. §§ 287.3(a)-(c). Guidance from the former INS to field officers confirms that a noncitizen has a regulatory right to counsel and that if a noncitizen placed under arrest requests counsel, "interrogation must be suspended until such desires [to consult with counsel] have been satisfied." INS Examinations Handbook (1988) at I-76.

[18] While *de Rodriguez-Echevarria* dealt with a different regulation governing the timing of rights advisals, the CBP officers' failure in this case to comply with 8 C.F.R. § 292.5(b) has similar Fifth Amendment ramifications.

In reaching the opposite conclusion, the IJ relied on *Samayoa-Martinez v. Holder*, 558 F.3d 897 (9th Cir. 2009). R.400. That case, however, is inapposite. It concerns a failure to *advise* a noncitizen of the right to counsel under 8 C.F.R. § 287.3(c); the case is not relevant to Petitioner's attempts to invoke his right to counsel affirmatively under 8 C.F.R. § 292.5(b). *See Samayoa-Martinez*, 558 F.3d at 902. Thus, the BIA erred in denying Petitioner an evidentiary hearing concerning his motion to suppress his statements to CBP.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for review and remand for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation because this brief contains 6,976 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman size 14.

/s/Paul M. Smith

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November 2012, a true and correct copy of the foregoing Brief of the American Immigration Council as *Amicus Curiae* In Support of Petitioner was served on all counsel of record in this appeal via CM/ECF.

/s/ Paul M. Smith