No. 12-14048

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANDRES JIMENEZ-DOMINGO, Alien No. 088 900 426, Petitioner,

v.

ERIC H. HOLDER, JR., United States Attorney General, Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

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Andres Jimenez-Domingo v. Eric H. Holder, Jr., U.S. Attorney General

11th Cir. No. 12-14048-D

RESPONDENT'S CERTIFICATE OF INTERESTED PERSONS

I hereby certify that the following persons may have an interest in the outcome of this case:

1. Bernal, David V., Attorney for Respondent, Assistant Director, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington, D.C.;

2. Camilleri, Dana M., Attorney for Respondent, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington, D.C.;

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6. Holder, Jr., Eric H., Respondent, Attorney General of the United States, U.S. Department of Justice, Washington, D.C.;

7. Jimenez-Domingo, Andres, Petitioner, Jupiter, Florida;

8. Mateo, Rene D., Immigration Judge, Miami, Florida;

9. Molina, Jr., Ernesto H., Attorney for Respondent, Assistant Director, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington, D.C.;

10. Neal, David, Acting Chairman, Board of Immigration Appeals, Falls Church, Virginia;

11. Pauley, Roger, Board Member, Board of Immigration Appeals, Falls Church, Virginia;

12. Sharpless, Rebecca, Attorney for Petitioner, Coral Gables, Florida.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The respondent submits that the parties' briefs adequately address the issues in this case and that oral argument is therefore unnecessary. However, should the Court schedule oral argument, respondent will attend.

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No. 12-14048

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STATEMENT OF JURISDICTION

This is an immigration case in which the petitioner, Andres Jimenez-Domingo ("Jimenez-Domingo"), a male native and citizen of Guatemala, seeks review of a July 13, 2012 decision of the Board of Immigration Appeals ("Board") dismissing his appeal from an immigration judge's denial of his motions to terminate removal proceedings and suppress evidence probative of his identity and alienage. Certified Administrative Record ("A.R.") 3, 389-402. The Board's jurisdiction arose under 8 C.F.R. § 1003.1(b)(3) (2012), which grants the Board appellate jurisdiction over decisions of immigration judges in removal cases.

This Court's jurisdiction is governed by Section 242 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252 (2006), which provides for judicial review of final orders of removal. Jimenez-Domingo timely filed his petition for review on August 6, 2012, within thirty days of the Board's July 13, 2012 order. *See* 8 U.S.C. § 1252(b)(1) (2006). Venue is proper because the proceedings before the immigration judge were completed in Miami, Florida. *See* 8 U.S.C. § 1252(b)(2) (2006); A.R. 73.

COUNTER-STATEMENT OF THE ISSUES

1. Whether the agency properly determined that Jimenez-Domingo failed to establish a *prima facie* case of an egregious violation of the Fourth Amendment, which warranted the suppression of the evidence establishing his removability, where he submitted no evidence that the police stopped him based on his race or national origin or otherwise engaged in any egregious conduct.

2. Whether the Board correctly determined that Customs and Border Patrol ("CBP") agents did not violate the Fifth Amendment where Jimenez-Domingo's right to counsel was not invoked by the act of his booking, but rather by the issuance of the NTA, and where Jimenez-Domingo was advised of his rights to counsel and to contest removal when he was formally placed into removal proceedings.

3. Whether the Board correctly determined that Officer Gitto's phone call to CBP, and his cooperation with CBP comported with the statutory and regulatory scheme of INA § 287(g)(10)(B), 8 U.S.C. § 1357(g)(10)(B), which expressly authorizes such cooperation between local law enforcement and federal immigration officials.

STATEMENT OF THE CASE AND THE RELEVANT FACTS

I. BACKGROUND FACTS

Jimenez-Domingo is a male native and citizen of Guatemala who entered the United States on or about March 8, 2003, and was not then properly admitted or paroled. A.R. 593. On April 24, 2009, at 7:43a.m., a vehicle in which Jimenez-Domingo was a passenger was pulled over by West Palm Gardens police officer Thomas Gitto ("Officer Gitto") because the driver ran a red light. A.R. 188-89, 191-92. After Officer Gitto executed the traffic stop, he asked for identification from the driver and passengers of the vehicle. A.R. 191-92. The passengers refused to provide identification aside from one man's Mexico driver's license, but they indicated they were not lawfully present in the United States. *Id.* Officer Gitto then contacted Customs and Border Patrol ("CBP") and was informed that CBP officers would respond. A.R. 188-89. CBP arrived at 8:24 a.m., and placed Jimenez-Domingo into custody. A.R. 191-92, 424.

Jimenez-Domingo was transported to the CBP station in Riviera Beach, Florida, where he was fingerprinted and booked for processing. A.R. 425. During an interview with a CBP agent, Jimenez-Domingo was informed of his rights in an administrative proceeding and his right to consular access. A.R. 141, 425. He was then served with the Notice to Appear ("NTA") (A.R. 593), an I-200 Warrant of Arrest (A.R. 595), Notice of Custody Determination (A.R. 596), and a Notification of Alien Rights along with a list of free legal service providers in the Miami, Florida Area (A.R. 594). *Id.* On May 7, 2009, DHS filed the NTA with the immigration court alleging that Jimenez-Domingo was removable pursuant to INA § 212(a)(6)(A)(i), as an alien present in the United States who has not been properly admitted or paroled. A.R. 593.

Appearing before an immigration judge on December 17, 2009, Jimenez-Domingo denied the allegations contained in the NTA and filed a motion to terminate and a motion to suppress based on his assertion that CBP officers and Officer Gitto's conduct violated his Fourth and Fifth Amendment rights. A.R. 88-89. On August 12, 2012, an immigration judge denied Jimenez-Domingo's motions. A.R. 389-402. On August 26, 2010, Jimenez-Domingo, through counsel, admitted the factual allegations contained in the NTA, denied removability, and requested relief in the form of voluntary departure. A.R. 121-22. Based on the evidence submitted by DHS, the immigration judge sustained the allegations of

removability, finding that there was no evidence refuting the charge of removability. A.R. 123.

II. THE IMMIGRATION JUDGE'S INTERLOCUTORY DECISION DENYING JIMENEZ-DOMINGO'S MOTION TO SUPPRESS AND TERMINATE HIS REMOVAL PROCEEDINGS

On August 12, 2010, an immigration judge denied Jimenez-Domingo's Motion to Suppress and Terminate his removal proceedings. A.R. 389-402. The immigration judge determined that Officer Gitto's traffic stop, and his subsequent request for identification from the passengers of the vehicle, did not constitute a violation of the Fourth Amendment, "egregious or otherwise." A.R. 394. As an initial matter, the immigration judge noted that the exclusionary rule did not apply in civil immigration proceedings, and that evidence may be suppressed in situations where the violations were "egregious." A.R. 393, citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044-51, 104 S.Ct. 3479, 3486-89 (1984); *Matter of Sandoval*, 17 I. & N. Dec. 70, 77-83 (BIA 1979) (same).

The immigration judge observed that the legality of the initial traffic stop had not been challenged by Jimenez-Domingo in this case. A.R. 394. Officer Gitto legally stopped the truck in which Jimenez-Domingo was a passenger following the driver's illegal right turn. *Id.* The immigration judge rejected Jimenez-Domingo's assertion that Officer Gitto exceeded the scope of the lawful traffic stop when he requested that Jimenez-Domingo and the other passengers in

the vehicle provide information as to their identities and immigration status. *Id.* Under *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879 (1968), once an officer has executed a lawful traffic stop, he may take steps to protect his safety regardless of whether he suspects any additional wrongdoing. A.R. 395, citing *Terry*, 309 U.S. at 1278-79; *see also Maryland v. Wilson*, 519 U.S. 408, 413-15, 117 S.Ct. 882, 885-86 (1997) (holding that an officer making a traffic stop may routinely order passengers to exit the vehicle without any individualized suspicion). As such, the immigration judge found that Officer Gitto's request for Jimenez-Domingo's identification was "reasonably related in scope to the lawful traffic stop." A.R. 395, citing *U.S. v. Purcell*, 236 F.3d 1274, 1277 (11th Cir. 2001). As the immigration judge noted, because this Court had already determined in *Purcell* that an officer was permitted to investigate the criminal history of any passengers in a vehicle during a traffic stop without any independent Fourth Amendment justification, it "necessarily follows that he must be able to ask that passenger for identification." *Id.* The immigration judge also noted that the Supreme Court previously found that the identity of a respondent in a civil or criminal proceeding is "never suppressible, even when obtained through unlawful arrest." A.R. 395, citing *Lopez-Mendoza*, 468 U.S. at 1039. Accordingly, the immigration judge found that Officer Gitto's request for Jimenez-Domingo's identification did not constitute a violation of his Fourth Amendments rights. A.R. 395.

Furthermore, the immigration judge determined that Officer Gitto's questions regarding Jimenez-Domingo's immigration status did not violate his Fourth Amendment rights. A.R. 395. The immigration judge noted that, based on Supreme Court and Eleventh Circuit case law, the only relevant question was whether Officer Gitto's questions regarding Jimenez-Domingo's immigration status "unreasonably prolonged an otherwise lawful traffic stop." A.R. 396, citing *Purcell*, 236 F.3d at 1280 ("[O]nly unrelated questions which unreasonably prolong detention are unlawful; 'detention, not questioning, is the evil at which *Terry*'s prohibition is aimed.'"), quoting *Florida v. Bostwick*, 501 U.S. 429, 434, 11 S.Ct. 2382, 2386 (1991). Based on Jimenez-Domingo's own affidavit, Officer Gitto only began questioning him after he had requested the driver's license and the driver had exited the vehicle. A.R. 396, citing A.R. 182. Thus, it appeared likely that the questions were posed to Jimenez-Domingo and the other passengers while Officer Gitto ran a routine check on the driver's license, thereby suggesting that the questions did not cause any delay in the proceedings. A.R. 396-97. Because Officer Gitto had independent reasons for his actions, the immigration judge also rejected Jimenez-Domingo's argument that Officer Gitto only questioned him because of his Hispanic appearance. A.R. 397, citing *Whren v. U.S.*, 517 U.S. 806, 814, 116 S.Ct. 1769, 1174-75 (1996) (rejecting the argument

that "the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved").

Finally, the immigration judge found that there was no Fourth Amendment violation in Officer Gitto's decision to detain Jimenez-Domingo for one hour while he awaited the arrival of CBP officers. A.R. 397. The immigration judge noted that Jimenez-Domingo had conceded that he was unlawfully present in the United States. A.R. 397, citing *U.S. v. Salinas-Calderon*, 728 F.2d 1298 (10th Cir. 1984) (finding that a state trooper had probable cause to detain and later arrest several individuals who admitted to being unlawfully in the United States after contacting immigration officials). Moreover, Officer Gitto's detention of Jimenez-Domingo did not constitute an arrest and, in any event, INA § 287(g)(10)(B) provided that the continued legal authority of local law enforcement to apprehend and detain individuals suspected of being unlawfully in the country irrespective of any INA § 287(g) contract. *Id.*

Turning to the Jimenez-Domingo's Fifth Amendment claims, the immigration judge determined that Jimenez-Domingo's statements in the Form I-213 were not involuntarily made or in violation of due process. A.R. 398-400. The immigration noted that the second CBP officer to speak with Jimenez-Domingo informed him that he had a right to challenge his removal. A.R. 399. Moreover, the immigration judge observed that the CBP officers were not

obligated to inform Jimenez-Domingo of his right to counsel until he was placed in formal removal proceedings. A.R. 400, citing *Samayoa-Martinez v. Holder*, 558 F.3d 897 (9th Cir. 2009), citing 8 C.F.R. § 287.3 and 62 Fed.Reg. 10312, 10390. Accordingly, the immigration judge denied Jimenez-Domingo's motion to suppress his statements to both Officer Gitto and his Form I-213, as his constitutional rights were not violated. A.R. 400.

The immigration judge denied Jimenez-Domingo's motion to terminate, finding that there was no violation of any regulation or statute in his arrest and interrogation. A.R. 400-02. First, the immigration judge rejected Jimenez-Domingo's contention that, because the Palm Beach Gardens Police Department did not have an INA § 287(g) agreement with federal authorities, Officer Gitto's collaboration with CBP officials violated the law. A.R. 400-01. The immigration judge noted that INA § 287(g)(1) explicitly states that nothing in INA § 287(g) should be construed to require an INA § 287(g) agreement in order for local law enforcement and federal immigration authorities to communicate and cooperate in the "identification, apprehension, detention, or removal of aliens not lawfully present in the United States." A.R. 401, citing INA § 287(g)(1)(B).

The immigration judge also rejected Jimenez-Domingo's claim that he was unlawfully detained and interrogated in contravention of 8 C.F.R. § 287.8(b) and (c), which hold that immigration officers need a reasonable suspicion before

detaining a person for questioning, and that an alien may only be arrested if the immigration officer has reason to believe that the alien is unlawfully present in the United States. A.R. 401. Because the immigration judge rejected Jimenez-Domingo's claim that Officer Gitto obtained information regarding Jimenez-Domingo's status unlawfully, the immigration judge found that CBP properly pool information to establish probable cause for detention and arrest. A.R. 402, citing *Salinas-Calderon*, 728 F.2d at 1302; *see also Illinois v. Andreas*, 463 U.S. 765, 771 n.5, 103 S.Ct. 3319, 3324 n.5 (1983) ("where law enforcement authorities are cooperating in an investigation, as here, the knowledge of one is presumed shared by all"). Accordingly, the immigration judge denied Jimenez-Domingo's motion to suppress the form I-213 and denied his motion to terminate. A.R. 402.

III. THE BOARD'S JULY 13, 2012 DECISION

Jimenez-Domingo appealed to the Board, and on July 13, 2012, the Board adopted and affirmed the decision of the immigration judge. A.R. 3, citing 8 C.F.R. § 1003.1(e)(5) (2012).

This petition for review followed thereafter.

SUMMARY OF THE ARGUMENT

The agency properly admitted the Form I-213, which established Jimenez-Domingo's unlawful presence in the United States. During the removal proceedings, Jimenez-Domingo alleged that the Form I-213 should be suppressed because it was obtained pursuant to an egregious violation of the Fourth Amendment. Generally, the Fourth Amendment's exclusionary rule does not apply in civil removal proceedings. However, the exclusionary rule may apply in removal proceedings where the evidence resulted from an egregious violation of the Fourth Amendment. Here, the agency properly determined that Jimenez-Domingo failed to establish a *prima facie* case of an egregious violation. Although Jimenez-Domingo argued that Officer Gitto requested identification from Jimenez-Domingo and inquired about his alienage because he was engaged in racial profiling, the record indicated that Officer Gitto executed a traffic stop based on the fact that the driver of the car ran a red light and Jimenez-Domingo was riding in the flatbed of the pick-up truck in violation of traffic laws. Jimenez-Domingo submitted no evidence to support his allegations, aside from other records of traffic stops made by Officer Gitto that were provided without context or information regarding the population of Palm Beach Gardens and statistical information that would demonstrate Officer Gitto executed traffic stops based solely on Hispanic appearance. Nothing in the record warrants the reversal of the agency's

determination that Jimenez-Domingo failed to establish that the police stopped him based on his Hispanic appearance or engaged in any other egregious conduct. Accordingly, the agency properly admitted the Form I-213 as evidence of Jimenez-Domingo's removability.

CBP officers also did not violate Jimenez-Domingo's Fifth Amendment rights. The record indicated that CBP officers informed Jimenez-Domingo of his right to counsel at the time he was entered into removal proceedings. That Jimenez-Domingo requested an attorney during booking, at a time when his rights had not been invoked, had no bearing on his failure to request an attorney at the time he was interviewed and received the advisals. Jimenez-Domingo does not dispute this fact, and Jimenez-Domingo's argument that CBP was obligated to inform Jimenez-Domingo of that right at the time they took him into custody and before he was formally entered into proceedings is contrary to this Court's case law.

Finally, the agency properly denied Jimenez-Domingo's motion to terminate. The cooperation between Officer Gitto and CBP officers is explicitly authorized by the INA. As such, the Board properly determined that the cooperation was legal, and not in violation of the governing statute. Jimenez-Domingo's contention that the cooperation was unlawful based on an alleged bias by Officer Gitto and West Palm Beach Gardens is meritless. The statute explicitly

encourages that inter-agency cooperation. Accordingly, Jimenez-Domingo has failed to demonstrate that his Fourth and Fifth Amendments rights were violated such that his motion to suppress and terminate proceedings should have been granted. He also failed to demonstrate that the cooperation between CBP officers and Officer Gitto violated any statute or regulation. As such, the petition for review should be denied.

ARGUMENT

I. SCOPE AND STANDARD OF REVIEW

The Court reviews "only the Board's decision, except to the extent that it expressly adopts the [immigration judge's] opinion." *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1284 (11th Cir. 2001). Here, because the Board expressly adopted and affirmed the immigration judge's decision, the Court reviews the immigration judge's decision as if it were that of the Board. *Id.*; *see* A.R. 3 .

Judicial review of removal orders is limited to a review of the administrative record. INA § 242 (b)(4)(A), 8 U.S.C. § 1252(b)(4)(A). To the extent that the decision below rested on an interpretation of law, the Court reviews *de novo* the immigration judge's legal determinations subject to established principles of deference. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782 (1984); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425,

199 S.Ct. 1439, 1445-46 (1999); *see also Ornelas v. U.S.*, 517 U.S. 690, 691, 116 S.Ct. 1657, 1659 (1996) (standard for appellate review of reasonable-suspicion determinations under the Fourth Amendment should be *de novo*). The factual findings underlying the immigration judge's determinations, however, are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." INA § 242(b)(4)(B), 8 U.S.C. §1252(b)(4)(B); *see Ornelas*, 517 U.S. at 699 (reviewing court must give "due weight" to factual inferences drawn by resident judges and local law enforcement officers). This is a codification of the substantial evidence test articulated in *INS v. Elias-Zacarias*, 502 U.S. 478, 483-84, 112 S.Ct. 812, 816-17 (1992). Under this standard, a reviewing court must affirm even if it is possible to draw two inconsistent conclusions from the evidence. *See Consolo v. FMC*, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026-27 (1966) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."); *Pedro-Mateo v. INS*, 224 F.3d 1147, 1150 (9th Cir. 2000) ("Under the substantial evidence standard of review, the court of appeals must affirm when it is possible to draw two inconsistent conclusions from the evidence."), citing *Lambert v. Ackerley*, 180 F.3d 997, 1012 (9th Cir. 1999) (*en banc)*. If a petitioner challenges the immigration judge's decision as not supported by substantial evidence, the Court may not reweigh the evidence; rather, the Court need only

determine whether the challenged decision is supported by "such relevant evidence as might be accepted by a reasonable mind as adequate to support the conclusion reached." *Consolidated Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938).

However, the Court accords *Chevron* deference where an agency interprets its own statute. *Negusie v. Holder*, 555 U.S. 511, 516-18, 129 S. Ct. 1159, 1163-64 (2009) ("'[i]t is well-settled that the principles of 'Chevron deference are applicable to'" the Board's interpretation of the INA), citing *Aguirre-Aguirre*, 526 U.S. at 424 (1999). This is particularly important where the agency is acting to maintain uniformity in the application of Federal law. *Chevron U.S.A.*, 467 U.S. 837

II. DHS'S DOCUMENTARY EVIDENCE WAS PROPERLY ADMITTED AND JIMENEZ-DOMINGO'S CONSTITUTIONAL CHALLENGES TO THE IMMIGRATION JUDGE'S DENIAL OF HIS MOTION TO SUPPRESS PROVIDE NO BASIS FOR RELIEF

A. Generally, The Fourth Amendment's Exclusionary Rule Does Not Extend To Bar Illegally Procured Evidence In A Removal Proceeding

Generally, the Fourth Amendment's exclusionary rule does not extend to bar illegally procured evidence in a removal proceeding. In criminal cases, evidence obtained pursuant to an unlawful search or seizure under the Fourth Amendment cannot constitute proof against the victim of the unlawful action. *See Wong Sun v.*

U. S., 371 U.S. 471, 484, 83 S. Ct. 407 (1963). This "exclusionary rule" extends to both direct and indirect products of such unlawful searches. *Id.*

However, the exclusionary rule under the Fourth Amendment does not apply to bar illegally procured evidence from admission in a civil deportation hearing. *Lopez-Mendoza*, 468 U.S. at 1050. In *Lopez-Mendoza*, 468 U.S. at 1036-37, uniformed immigration agents positioned themselves at the exits of a factory and "looked for passing employees who averted their heads, avoided eye contact, or tried to hide." An agent arrested an alien who he described as "very evasive." *Id.* at 1037. The alien later admitted that he unlawfully entered the country. *Id.* The Supreme Court upheld the agency's decision denying the alien's motion to suppress evidence of his identity and his admission of unlawful presence. *Id.* at 1050. With regard to the alien's identity, the Court ruled that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." *Id.* at 1039. With regard to the evidence of the alien's unlawful presence, the Court held that the exclusionary rule for Fourth Amendment violations did not apply in civil deportation proceedings. *Id.* at 1050.

However, a plurality of the Court opined that the exclusionary rule might apply in a civil deportation case to evidence obtained through "egregious violations of [the] Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *Id.* at 1050-51, *citing Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205 (1952). As the Supreme Court noted, *Lopez-Mendoza* 468 U.S. at 1051 n.5, the Board had historically ruled that evidence obtained illegally could be used in a deportation hearing unless the violation was so egregious that it transgressed the notions of fundamental fairness under the due process clause of the Fifth Amendment. *See, e.g.*, *Matter of Toro*, 17 I. & N. Dec. 340, 343 (BIA 1980) ("cases may arise in which the manner of seizing evidence is so egregious that to rely on it would offend the fifth amendment's due process requirement of fundamental fairness."); *see also Matter of Garcia*, 17 I. & N. Dec. 319, 321 (BIA 1980) (suppression of admission of alienage obtained after request for counsel had been repeatedly refused).

The "egregious" example in *Rochin* identified by the Supreme Court in *Lopez-Mendoza* involved the following facts. "Having 'some information that [the petitioner] was selling narcotics,' three deputy sheriffs of the County of Los Angeles, on the morning of July 1, 1949, made for the two-story dwelling house in which Rochin lived with his mother, common-law wife, brothers and sisters." 342

U.S. at 166. "Finding the outside door open," the officers "entered and then forced open the door to Rochin's room on the second floor." *Id.* The officers found Rochin "sitting partly dressed on the side of the bed, upon which his wife was lying. On a 'night stand' beside the bed the deputies spied two capsules. When asked 'Whose stuff is this?' Rochin seized the capsules and put them in his mouth." *Id.* "A struggle ensued, in the course of which the three officers 'jumped upon him' and attempted to extract the capsules. The force they applied proved unavailing against Rochin's resistance. He was handcuffed and taken to a hospital. At the direction of one of the officers a doctor forced an emetic solution through a tube into Rochin's stomach against his will. This 'stomach pumping' produced vomiting. In the vomited matter were found two capsules which proved to contain morphine." *Id.*

Since issuing *Lopez-Mendoza*, the Supreme Court has continued to reject the use of the exclusionary rule in civil proceedings. *See Penn. Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363-64, 118 S. Ct. 2014 (1998) (refusing to extend the exclusionary rule to parole revocation proceedings and noting that the Court has "repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials," including grand jury proceedings). The issue has not garnered much discussion in this Court. In *Rampasard v. U.S. Atty Gen.*, 147 Fed. Appx. 90, 2005 WL 2045029 at *1 (11th Cir. 2005), this Court upheld the denial of a

motion to suppress based on alleged "egregious" conduct. The petitioner alleged that "he was locked in a room with five government employees and interrogated." *Id.* The petitioner did not claim that "he was physically threatened, interrogated for an unusually long time, or denied any comfort during his interrogation." *Id.* Further, the petitioner "did not even expressly claim that the interrogating officers failed to read him his *Miranda* warnings." *Id.* "[E]ven assuming *arguendo* an 'egregious' violation of the Fifth Amendment would warrant suppression in an immigration case," this Court held that "there was no evidence in the record such a violation occurred."[1] *Id.*

[1] While this Court has not discussed what qualifies as an egregious violation, other courts of appeals have considered the standard for egregiousness. *See, e.g.*, *Martinez-Medina v. Holder*, 673 F.3d 1029, (9th Cir. 2011) ("A constitutional violation is not egregious unless evidence is obtained by deliberate violations of the [F]ourth [A]mendment, or by conduct a reasonable officer should have known is in violation of the Constitution." (additional citations and internal quotations omitted); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006) ("[First,] if an individual is subjected to a seizure for no reason at all, that by itself may constitute an egregious violation, but only if the seizure is sufficiently severe. Second, even where the seizure is not especially severe, it may nevertheless qualify as an egregious violation if the stop was based on race (or some other grossly improper consideration."); *Gutierrez-Berdin v. Holder*, 618 F.3d 653 (7th Cir. 2010) ("handcuffing an alien who resisted arrest is certainly not the 'egregious' behavior contemplated by *Lopez-Mendoza*.").

B. The West Palm Beach Police Officer's Decision to Execute a Vehicle Stop and Question Jimenez-Domingo Regarding His Identity and Alienage Is Permitted under the Fourth Amendment

Even assuming *arguendo* that an egregious violation of the Fourth Amendment would warrant the suppression of evidence in an immigration case, the agency properly determined that Jimenez-Domingo failed to establish a *prima facie* case that such a violation occurred during his traffic stop. "Deportation proceedings are civil in nature and are not bound by the strict rules of evidence. Rather, the tests for the admissibility of documentary evidence in dep[o]rtation proceedings are that evidence must be probative and that its use must be fundamentally fair." *Matter of Barcenas*, 19 I. & N. Dec. 609, 611 (BIA 1988) (additional citations omitted). "One who raises the claim questioning the legality of the evidence must come forward with proof establishing a *prima facie* case before the Service will be called on to assume the burden of justifying the manner in which it obtained the evidence." *Id.* (additional citations and internal quotations omitted). *Prima facie* evidence means "evidence of such nature as is sufficient to establish a fact and which, if unrebutted, remains sufficient for that purpose." *Cumulus Media, Inc. v. Clear Channel Communications, Inc.*, 304 F.3d 1167, 1176 n.13 (11th Cir. 2002) (internal quotation marks omitted).

In this case, the agency properly denied Jimenez-Domingo's motion to suppress the Form I-213. A.R. 389-402. During his removal proceedings, Jimenez-Domingo did not challenge the probity or the accuracy of the information contained within the Form I-213. The agency therefore properly admitted the Form I-213, which established Jimenez-Domingo's removability from the United States. *Matter of Ponce-Hernandez*, 22 I. & N. Dec. 784, 785 (BIA 1999) ("absent any evidence that a Form I-213 contains are that evidence must be probative and that its use must be fundamentally fair." *Matter of Barcenas*, 19 I. & N. Dec. 609, 611 (BIA 1988) (additional citations omitted). "One who raises the claim questioning the legality of the evidence must come forward with proof establishing a *prima facie* case before the Service will be called on to assume the burden of justifying the manner in which it obtained the evidence." *Id.* (additional citations and internal quotations omitted). *Prima facie* evidence means "evidence of such nature as is sufficient to establish a fact and which, if unrebutted, remains sufficient for that purpose." *Cumulus Media, Inc. v. Clear Channel Communications, Inc.*, 304 F.3d 1167, 1176 n.13 (11th Cir. 2002) (internal quotation marks omitted).

The agency correctly determined that Jimenez-Domingo's rights were not violated by the actions of Officer Gitto. Given that Jimenez-Domingo's case involved credible evidence gathered in connection with a lawful traffic stop, the

immigration judge cited the Supreme Court's holding that in such cases an alien's identity is "'never itself suppressible as a fruit of an unlawful arrest . . . .'" A.R. 395, quoting *Lopez-Mendoza*, 468 U.S. at 1039-40. The Supreme Court also held in *Lopez-Mendoza*, that "[t]he body or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest," 468 U.S. at 1039 (internal quotations omitted), and the Ninth Circuit has recognized that "there is no sanction to be applied when an illegal arrest only leads to discovery of the man's identity and that merely leads to the official file or other independent evidence." *U.S. v. Del Toro Gudino* 376 F.3d 997, 1001-02 (9th Cir. 2004). The Supreme Court has also found that where there is a reasonable suspicion to stop an individual, the mere questioning of his immigration status does not, in and of itself, create a separate event requiring probable cause. *Muehler*, 544 U.S. 93, 125 S.Ct. 1465 (2005). This Court interpreted *Muehler* to mean that "it is unreasonable extension of the duration – not the scope of conversation – that could render an otherwise justified detention unreasonable for Fourth Amendment purposes. *U.S. v. Hernandez*, 418 F.3d 1206, 1209 n.3 (11th Cir. 2005). Moreover, this Court noted in *Purcell* that "only unrelated questions which unreasonably prolong the detention are unlawful; 'detention, not questioning, is the evil at which *Terry's* prohibition is aimed.'" 236 F.3d at 1280, citing *Florida*, 501 U.S. at 434.

While Officer Gitto was running the driver's license information, Officer Gitto requested identification from the passengers in the vehicle, including Jimenez-Domingo. A.R. 424, 469, 480-81. Jimenez-Domingo conceded that he refused to provide Officer Gitto with identification. A.R. 469. Therefore, at the time he contacted CBP, Officer Gitto had evidence of possible "derogatory" information related to the driver, and the passengers refused to provide any identification. Thus, as the immigration judge noted, the traffic stop was ongoing at the time Officer Gitto requested evidence of their identities. A.R. 396, citing 469-70. Indeed, as the immigration judge noted, a law enforcement officer may take any steps to protect his or her safety during a traffic stop, including requested the identities of all the passengers and investigating their criminal histories. A.R. 395, citing *Purcell*, 236 F.3d at 1277; *see also Maryland v. Wilson*, 519 U.S. 408, 413-15 (1997) (holding that an officer making a traffic stop may routinely order passengers to exit the vehicle without any individualized suspicion). The only distinction between the instant case and *Purcell* is that Jimenez-Domingo was unlawfully present in the United States, which militates against his case.

Moreover, the inquiry regarding Jimenez-Domingo's identity and immigration status had no bearing on subsequent removal proceedings, which look prospectively to the alien's right to remain in this country in the future. *See Lopez-*

Mendoza, 468 U.S. at 1039-40; *see also Avila-Gallegos v. INS*, 525 F.2d 666, 667 (2d Cir. 1975) ("Assuming, arguendo, that petitioner's arrest was technically defective, it does not follow that the deportation proceedings were thereby rendered null and void"); *see also U.S. v. Farias-Gonzalez*, 556 F.3d 1181 (11th Cir. 2009) (in prosecution of defendant as alien who had illegally reentered the United States following deportation, evidence identifying defendant as alien who had previously been deported did not have to be suppressed, though officers allegedly obtained this evidence as result of illegal search). Indeed, the Supreme Court has recognized that within the context of the United States' immigration system, Jimenez-Domingo "is a person whose unregistered presence in this country, without more, constitutes a crime" and with respect to the issue of suppression of evidence based on police misconduct, while "[t]he constable's blunder may allow the criminal to go free . . . he should not go free within our borders." *Lopez-Mendoza*, 468 U.S. at 1047.

The record fails to reflect that Jimenez-Domingo was subject to any Fourth Amendment violations, let alone "egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *Lopez-Mendoza*, 468 U.S. at 1051. This conclusion is supported by the fact that the circumstances of Jimenez-Domingo's seizure did not render the subsequent detention so

unreasonable as to be considered "egregious." Indeed, CBP indicated that when the driver's name was run through NCIC, the search indicated possible derogatory information. A.R. 425. Officer Gitto contacted CBP and requested that CBP run a further check on the driver's identity. *Id.* This, in itself, was a continuation of the same traffic stop, and the traffic stop was not completed until the driver was cited for the traffic violations and cleared of criminal wrongdoing. The log indicates that the driver was issued a traffic citation at 9:12 a.m. – after CBP arrived on scene and placed Jimenez-Domingo into custody. A.R. 191. Thus, Petitioner's argument that the traffic stop ended before Officer Gitto cleared the driver and cited him for traffic violations is unavailing.

In any event, the record indicated that the entire traffic stop, from the time Officer Gitto first executed the lawful traffic stop, to the time CBP officers arrived and took Jimenez-Domingo into custody, spanned approximately forty-one minutes. A.R.191 (indicating with code "97" that CBP arrived on scene at 8:24:35 a.m.). Respectfully, these facts do not constitute an "egregious" Fourth Amendment violation. The Ninth Circuit recently noted that "[a] constitutional violation is not egregious unless 'evidence is obtained by deliberate violations of the [F]ourth [A]mendment, or by conduct a reasonable officer should have known is in violation of the Constitution.'" *Gonzalez–Rivera v. INS*, 22 F.3d 1441, 1449 (9th Cir. 1994), quoting *Adamson v. C.I.R.*, 745 F.2d 541, 545 (9th Cir.1984)

(internal quotation marks omitted). Whether a reasonable officer should have known his conduct violated the Constitution depends in part on whether the constitutional right was clearly established in the particular context at issue. *See Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1018 (9th Cir.2008) (holding that a reasonable officer should have known his warrantless entry into a home was unconstitutional because it was committed against an "unequivocal doctrinal backdrop" that prohibited such conduct); *Gonzalez-Rivera*, 22 F.3d at 1450 (holding that a reasonable officer should have known a stop based solely on a person's Hispanic appearance was unconstitutional because "the [stop] occurred long after the Supreme Court . . . made clear that the Constitution does not permit such stops").

However, "even where the seizure is not especially severe, it may nonetheless qualify as an egregious violation if the stop was based on race (or some other grossly improper consideration)." *Almeida-Amaral v.Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006). Although Jimenez-Domingo unilaterally claims that Officer Gitto engaged in "profiling" (Pet. Br. at 41-42, 45-46), the record evidence supports the agency's rejection of this allegation. *See Almeida-Amaral*, 461 F.3d at 237 ("Almeida-Amaral offers nothing other than his own intuition to show that race played a part in the arresting agent's decision."). Jimenez-Domingo contends that Officer Gitto was part of a "widespread pattern" of constitutional violations,

and that if this officer was engaged in racial profiling by stopping Hispanics not for the real purpose of traffic violations, but to inquire as to immigration status, then this conduct would have rendered the information obtained by Officer Gitto subject to exclusion. Pet. Br. 45-46. However, the Supreme Court has unanimously rejected the argument that a police officer's subjective motive invalidates objectively justifiable behavior under the Fourteenth Amendment. *See Whren v. United States*, 517 U.S. 806 (1996). To the contrary, "[s]ubjective intentions play *no* role in ordinary, probable cause Fourth Amendment analysis." *Id.* at 813 (emphasis added). As such, the decision of Officer Gitto to inquire as to the identities of the passengers in the vehicle pursuant to a lawful traffic stop did not require separate probable cause irrespective of his subjective motivation. In any event, the record indicates that Officer Gitto initiated the traffic stop because the driver ran a red light. A.R. 191, 469. Petitioner was riding in the flatbed of a pick-up truck, which was also a violation of traffic laws. A.R. 469. Despite Jimenez-Domingo's baseless assertions otherwise, it seems clear that Officer Gitto initiated the traffic stop for no other reason but that Jimenez-Domingo and the driver of the vehicle were violating traffic laws.

Officer Gitto's decision to question Jimenez-Domingo about his immigration status following Jimenez-Domingo's refusal to provide identification (A.R. 469) was also not an egregious violation of Jimenez-Domingo's fundamental

rights. The Second Circuit has held that "[t]he Fourth Amendment does provide protection against random or gratuitous questioning related to an individual's immigration status" in that "government agents may not stop a person for questioning regarding his citizenship status without a reasonable suspicion of alienage." *Rajah v. Mukasey*, 544 F.3d 427, 441 (2d Cir. 2008). However, Officer Gitto's inquiry was not random or gratuitous in that it resulted from a reasonable suspicion regarding Jimenez-Domingo's alienage. The facts state that upon receiving the driver's license, and getting feedback from NCIC which indicated possible terrorism links (and was later confirmed by CBP), Officer Gitto requested identification from the passengers in the vehicle. A.R. 140, 423, 469. While Officer Gitto misinterpreted the information in NCIC, that in no way renders the request for further identification unlawful. It was, therefore, reasonable for Officer Gitto to ask for identification and immigration status from the passengers after they had refused to provide any identification, and the driver's name had turned up possible derogatory information in the NCIC database. Moreover, the record indicates that Officer Gitto confirmed that the passengers were not lawfully present in the United States prior to contacting CBP.[2] A.R. 191, 477.

[2] Petitioner argues that the transcripts from Officer Gitto's conversation with CBP should not be considered, and that the Court is confined to Jimenez-Domingo's affidavit in considering the facts of the case, because the immigration judge did not hold an evidentiary hearing. Pet. Br. 42-43. Setting aside the fact that Petitioner quotes from the transcripts where he believes it benefits him (Pet. Br. 44), the

The record indicates that the traffic stop was initiated at 7:43:08 a.m. A.R. 483. According to the log, officer Gitto spent nine minutes attempting to reach CBP before speaking with them at 8:01:36. *Id.* CBP arrived on scene at 8:24:35 am. *Id.* The driver was not cited for his traffic violation until 9:12 a.m., after CBP confirmed that he did not have links to terrorism. Indeed, because Officer Gitto was waiting on further information on the driver, the driver was not issued the traffic citation until 9:12 a.m., and, therefore, the traffic stop could be considered to have been ongoing. *Id.* Despite Petitioner's assertion that the traffic stop lasted eighty-nine minutes (Pet. Br. 14, Amicus Curae ("Am.Cu.") Br. 6), the arrival of CBP officers, who it is undisputed had the right to place Jimenez-Domingo into custody, ended the alleged seizure by Officer Gitto. Therefore, the amount of time in question, assuming Officer Gitto's phone call to CBP was outside the scope of the traffic stop, was approximately forty minutes. Respondent respectfully asserts that forty minutes does not constitute an egregious Fourth Amendment violation.

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immigration judge specifically noted that Jimenez-Domingo's affidavit was silent as to the series of the events as they unfolded at the traffic stop, and that none of the accounts provided were in conflict. A.R. 396, n.1. Thus, the evidence in the record can be considered in its entirety in determining the sequence of events and timing of the traffic stop. Because there is no conflicting evidence in the record, the immigration judge could consider each piece of evidence it was unnecessary to have an evidentiary hearing. However, should the Court determine that there is conflicting evidence in the record, the record should be remanded to the agency in order for the agency to engage in factfinding in the first instance.

Amicus Curae contend that *Arizona v. U.S*, 569 U.S. –, 132 S.Ct. 2492 (2012), and the Ninth Circuit's preliminary injunction decision in *Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012), require a local law enforcement agent to have reasonable suspicion of criminal activity, apart from the activity that prompted the vehicle stop, in order to extend the length of the detention. Am. Cu. Br. 7-11. Contrary to Amicus Curae's assertion that *Arizona* "makes clear" that an officer requires reasonable suspicion, the Supreme Court declined to reach that issue prior to the Arizona statute's implementation. *Arizona*, 132 S.Ct. at 2507-09 ("There is no need in this case to address whether reasonable suspicion of illegal entry or another immigration crime would be a legitimate basis for prolonging a detention, or whether this too would be preempted by federal law").

Arpaio is similarly unpersuasive, and is not controlling case law, as it is merely a decision for a preliminary injunction, and the Court only considered whether the Plaintiffs had a reasonable likelihood of success on the merits of their claim. 695 F.3d at 1001-03 (assessing the case under the preliminary injunction standard). Moreover, even assuming, *arguendo*, that a forty-minute traffic stop violated the Fourth Amendment, Petitioner had to demonstrate that the violation was egregious. *Ghysels-Reals v. U.S. Att'y Gen.*, 418 F. App'x 894, 2011 WL 1045778 (11th Cir. 2011). He utterly failed to do so. Accordingly, because there

was no egregious Fourth Amendment violation in the instant case, the exclusionary rule does not apply.[3]

C. The CBP Officers Did Not Violate the Due Process Clause Where He Was Informed of His Right to Counsel When He Was Formally Placed into Removal Proceedings Through the Filing of the NTA with the Immigration Court

Jimenez-Domingo argues that the agency erred in determining that DHS did not violate Jimenez-Domingo's Fifth Amendment rights because it did not allow him to contact counsel when he requested it during the fingerprinting and booking process. Pet. Br. 47-49. Specifically, Jimenez-Domingo contends that DHS's conduct amounted to coercion. *Id.* These arguments are meritless.

"To establish a due process violation, the petitioner must show that he was deprived of liberty without due process of law and that the purported errors caused her substantial prejudice." *Lapaix v. U.S. Att'y. Gen*. 605 F.3d 1138, 1143 (11th Cir. 2010); *Matthews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 1890 (1976). Jimenez-Domingo, however, fails to establish that the conduct of CBP officers and the admission of the I-213, the veracity of which is not in question, violated his due

[3] Because Petitioner failed to demonstrate that he suffered an egregious Fourth Amendment violation, the Court need not reach Petitioner and Amicus Curae's arguments regarding the applicability of the Exclusionary Rule. Pet. Br.45-47; Am.Cu. Br. 12-26.

process right to a fundamentally fair proceeding or that he suffered prejudice from its admission in his removal proceedings.

Under the Board's decision in *Matter of Garcia*, 17 I. & N. Dec. 321, an alien can make a prima facie showing that the statements contained in the I-213 "were involuntarily made and that the requirements of due process warrant their exclusion from the record." However, as the immigration judge noted, the facts in this case are dissimilar to those in *Matter of Garcia*. A.R. 399. In *Matter of Garcia*, the alien's I-213 was coerced based on the fact that CBP officers took the alien to his home, made him pack, told him removal was inevitable, rubbed off the number of an attorney that was on the alien's arm, and did not inform him, at any point, of his right to counsel. *Id.* at 320. The alien was also detained for a "significant period of time." *Id.* Though Jimenez-Domingo was initially taken into custody by an English-speaking CBP agent, he was interviewed by a Spanish-speaking CBP agent who informed him he could fight his removal. A.R. 178. Jimenez-Domingo requested counsel while he was being booked and fingerprinted. A.R. 470; *see U.S. v. Olivares-Rangel*, 458 F.3d 1104, 1113 (10th Cir. 2006) (noting that the fingerprinting and booking process are, generally, "routine.") However, Jimenez-Domingo's right to counsel in immigration proceedings did not attach until he was placed into formal removal proceedings. 8 C.F.R. § 287.3.

When he was interviewed by the Spanish-speaking CBP officer, Jimenez-Domingo was informed of his right to fight removal and asked whether he would challenge his removability. A.R. 178-79, 470. Jimenez-Domingo does not claim that he requested an attorney during this interview, or any time thereafter. A.R. 179. Moreover, though Jimenez-Domingo claimed that the first CBP officer told him his case was hopeless and that he could not contact counsel, he conceded that he did not understand everything the CBP officer said in English. A.R. 179.

"A deportation proceeding is invalid where the INS fails to adhere to its own regulation and the 'regulation [was] promulgated to protect a fundamental right derived from the Constitution or a federal statute.' *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir.1993). However, if the regulation does not affect a fundamental right derived from the Constitution, the proceeding will be invalidated only if the petitioner shows prejudice – that the INS's infraction affected either the outcome or the overall fairness of the proceeding." *Montero v. INS*, 124 F.3d 381, 386 (2d Cir. 1997); *see* Lovell v. INS, 52 F.3d 458, 461 (2d Cir.1995).

The regulations require only that an alien who has been placed in formal proceedings be advised of his rights, including his right to counsel. *See Samayoa-Martinez v. Holder*, 558 F.3d 897, 901 (9th Cir. 2009) ("[f]ormal proceedings do not commence until the [DHS] has filed an NTA in immigration court."); *see also* 8 C.F.R. § 1239.1(a). At the time of Jimenez-Domingo's interview with DHS, no

NTA had been issued, so the advisals of 8 C.F.R. § 287.3(c) were not yet required. Jimenez-Domingo argues that, because he requested counsel while he was being fingerprinted, the fact that he received the advisals at the time the NTA was issued is of no moment. Pet. Br. 48-50, Am. Cu. Br. 27-30. However, the salient point is that Jimenez-Domingo was afforded ample opportunity to request counsel when it was his right to do so. He was informed of his right to contact counsel during the interview with the CBP officer, but declined to do so. A.R. 424-25, 470-71. That is all that due process requires.

Furthermore, Petitioner's reliance on *Padilla v. Kentucky*, 559 U.S. –, 130 S.Ct. 1473, 1481 (2010), misses the mark. As an initial matter, the Supreme Court has made clear time and again, most recently in *Arizona v. United States*, that removal proceedings are civil in nature. *See* 132 S.Ct. at 2499 ("Removal is a civil, not criminal, matter"). Furthermore, Petitioner's arguments are based on a fundamental misunderstanding of the difference between criminal aliens like Padilla, and aliens who, like Jimenez-Domingo, are detained solely because they are unlawfully present in the United States. Moreover, *Padilla v. Kentucky* involved an alien who was lawfully present in the United States and was not informed by his attorney of the immigration consequences of his plea deal.[4] 130 S.Ct. at 1475. Under those circumstances, the plea agreement and criminal

[4] Indeed, an alien with a *Padilla* claim must challenge his conviction in criminal, not immigration, proceedings.

proceedings were related to the removal proceedings because the removal proceedings were based on the conviction and, but for the conviction, Padilla could have remained lawfully in the United States. *Id.* Jimenez-Domingo is not a criminal alien. He has provided no evidence that he was ever admitted to the United States or lawfully present in the United States. A.R. 122-23. His removal proceedings are based solely on his unlawful presence in violation of INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i). A.R. 593. Thus, Petitioner's arguments regarding the criminal nature of Jimenez-Domingo's situation and immigration enforcement are not only unavailing, they fly in the face of established Supreme Court precedent.

Furthermore, even if CBP's actions constituted a due process violation, Jimenez-Domingo has not demonstrated that any statements he made while being fingerprinted formed the basis of his removability. *Matter of Garcia*, 17 I. & N. Dec. at 321. Before receiving the advisals and being informed of his right to counsel, Jimenez-Domingo was booked and placed in a room to await a Spanish-speaking CBP officer. A.R. 140-41. Nothing he said prior to the interview with the CBP officer was included in the I-213, and, therefore, had no bearing on his removability. *Id.* His failure to request an attorney after receiving the advisals when he was formally placed into removal proceedings is his own doing, and CBP is not obligated to continually ask whether Jimenez-Domingo would like to contact

an attorney. Moreover, Jimenez-Domingo has not identified any form of relief for which he would have been eligible but for the absence of counsel. Indeed, Jimenez-Domingo did not seek any relief from removal before the immigration judge, aside from the opportunity to suppress evidence of his identity and his unlawful presence in the United States. A.R. 133-36.

III. OFFICER GITTO AND CBP'S COOPERATION DID NOT VIOLATE INA § 287(g)

Jimenez Domingo**'s** contention that the cooperation between Officer Gitto and CBP officers violated INA § 287(g) is without merit. Pet. Br. 49-54. As an initial matter, Jimenez-Domingo's arguments concerning INA § 287(g), 8 U.S.C. § 1357(g), are predicated on Petitioner's assertion that the lawful traffic stop pursuant to *Terry v. Ohio* constituted a unilateral arrest by Officer Gitto. Pet. Br. 49-50, 50 n.8. As discussed *supra*, because the traffic stop was a lawful detention pursuant to the driver running a red light, no additional probable cause regarding Jimenez-Domingo's alienage was necessary. Moreover, the forty-minute traffic stop did not constitute an arrest. Thus, contrary to Petitioner's assertion, there is, in fact, a distinction between an arrest and a detention.

Because of that distinction Petitioner's arguments regarding *Arizona v. United* States, 132 S.Ct. at 2507, are beside the point. Pet. Br. 50. In Arizona, the Supreme Court stated that cooperation between local police organizations and

DHS did not authorize police officers to "unilateral[ly] . . . arrest an alien for being removable *absent any request, approval, or instruction* from [DHS]." This was not the situation in the instant case. Officer Gitto ascertained that Jimenez-Domingo was unlawfully present in the United States. A.R. 185. He immediately contacted CBP, was informed that CBP officers would respond, and was instructed by CBP to detain the illegal aliens. A.R. 188-89. CBP officers responded within twenty minutes of speaking with Officer Gitto, and placed Jimenez-Domingo into custody. A.R. 140. Therefore, Officer Gitto did not act unilaterally, and he simply complied with CBP's instructions.

Petitioner attempts to characterize *Arizona* as stating that cooperation is only permissible where there is a joint task force, where the local law enforcement agency is providing occupational support in executing a warrant, and where federal immigration officials need to access detainees in state facilities. Pet. Br. 51, citing *Arizona*, 132 S.Ct. at 2507. However, though the Supreme Court highlighted those as *examples* of cooperation, it was not intended to be a comprehensive list of activities constituting cooperation, and was merely a sampling of examples from DHS guidance for state and local law enforcement authorities. *Arizona*, 132 S.Ct. at 2507, citing Dep't of Homeland Security, Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters 13–14 (2011), *available at* http://www.dhs.gov/xlibrary/assets/guidance-state-local-

assistance-immigration-enforcement.pdf. In fact, the DHS guidance cited by the Supreme Court explicitly provides for cooperation where a state or local law enforcement agent, pursuant to a lawful stop, learns of possible immigration violations and refers the case to DHS. *See* Dep't of Homeland Security, Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters at 13.

In their briefs to this Court, neither Petitioner nor Amicus Curae point to any legal authority – statutory, regulatory, or otherwise – that states that local law enforcement officials are barred from detaining illegal aliens pursuant to a lawful traffic stop where the alien refuses to produce identification, where the driver's record turns up a red flag, and where the officer has been directed to briefly hold the alien by CBP. As such, his arguments for terminating the removal proceedings fail.[5] Accordingly, the petition for review should be denied.

[5] Because Officer Gitto's actions did not contravene statutory or regulatory authority, it is unnecessary to reach Petitioner's arguments in favor of termination. Pet. Br. 51-54. In any event, even were Officer Gitto's actions not the very essence of cooperation contemplated in INA § 287(g)(10)(B), Jimenez-Domingo cannot establish that he suffered prejudice based on that cooperation. It is uncontested that Jimenez-Domingo was unlawfully present in the United States, and, as noted, he did not seek any form of relief from removal. A.R. 133-36.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2012, I electronically filed this, Respondent's Answering Brief, with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system, including Petitioner's counsel, Rebecca Sharpless.

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