Note

Suppressing Evidence in Immigration Proceedings: The Need for a Lenient Egregiousness Standard and Rebellious Lawyering

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Werquely Jeanini Almeida-Amaral was walking with a couple of friends into a gas station parking lot in Texas when a border patrol agent stopped him for no reason.[1] The agent used Almeida-Amaral's Brazilian passport as the basis for filing a Record of Deportable/Inadmissible Alien form with an immigration court.[2] Consequently, the Immigration Judge (IJ) ordered Almeida-Amaral deported.[3] On appeal, Almeida-Amaral disputed the IJ's denial of his motion to suppress the evidence obtained during the stop.[4] The Court of Appeals for the Second Circuit determined that, although the stop was a violation of Almeida-Amaral's Fourth Amendment rights,[5] the Fourth Amendment violation was not severe and egregious enough under the prevailing *Lopez-Mendoza* standard,[6] and the denial of Almeida-Amaral's motion to suppress evidence was proper.[7]

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1. Almeida-Amaral v. Gonzales, 461 F.3d 231, 236 (2d Cir. 2006) ("[T]he arresting agent in our case . . . had no valid reason or suspicion to justify his stop.").

2. *Id.* at 232–33.

3. *Id.* at 233.

4. *Id.*

5. The Fourth Amendment prohibits unreasonable searches and seizures. U.S CONST. amend. IV.

6. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); *see infra* Part I.A (explaining the *Lopez-Mendoza* standard).

7. *Almeida-Amaral*, 461 F.3d at 236–37.

Because the Supreme Court has determined that immigration proceedings are "purely civil,"[8] motions to suppress evidence are generally not appropriate.[9] The Supreme Court has identified three possible exceptions to this rule: (1) if Fourth Amendment violations are widespread, (2) if the violations are egregious and go beyond fundamental fairness, or (3) if the violations are egregious and undermine the validity of the evidence obtained.[10] However, some circuits' interpretations of these exceptions still result in constitutional violations that are not remedied.[11]

The Supreme Court itself recognized that it is important "to protect the Fourth Amendment rights of all persons,"[12] including undocumented immigrants. Nevertheless, the Court held that the main goal of the exclusionary rule[13] was to deter misconduct by immigration officials, not to protect immigrants' rights.[14] The Court determined that since immigration proceedings are civil, and there are already other measures in place to deter misconduct,[15] the exclusionary rule would be pointless in immigration proceedings.[16] However, immigration law increasingly resembles criminal law, both in investigations and in court proceedings.[17] Moreover, non-immigration officials, such as state and local law enforcement, now conduct immigration

8. *Lopez-Mendoza*, 468 U.S. at 1038.

9. *See id.* at 1050–51 ("We hold that evidence derived from [peaceful arrests by INS officers] need not be suppressed in an INS civil deportation hearing.").

10. *Id.*

11. *See, e.g.*, Puc-Ruiz v. Holder, 629 F.3d 771 (8th Cir. 2010); Melnitsenko v. Mukasey, 517 F.3d 42 (2d Cir. 2008); Westover v. Reno, 202 F.3d 475 (1st Cir. 2000).

12. *Lopez-Mendoza*, 468 U.S. at 1046.

13. The "exclusionary rule" refers to the protections of the Fourth Amendment, under which it is appropriate to suppress or exclude evidence that was obtained illegally, such as through a warrantless arrest. *Id.* at 1040–41.

14. *Id.* at 1041 (citing United States v. Janis, 428 U.S. 433, 446 (1976)).

15. Alternate measures to deter misconduct include deportation based upon other evidence not uncovered during the unlawful arrest and the INS's disciplinary scheme for agents that violate constitutional rights. *Id.* at 1043–45.

16. *Id.* at 1046 (citing *Janis*, 428 U.S. at 458).

17. *See generally* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010); Stephen Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012).

stops.[18] Without proper remedies like suppression of evidence, local, state, and federal law enforcement officers stretch their authority too far,[19] and immigrants pay the price for it—usually deportation.[20] The solutions that others have offered to solve this problem, like overturning *INS v. Lopez-Mendoza*,[21] using the "widespread violation" exception,[22] and implementing systemic changes[23] are not practicable.

This Note proposes a two-part solution to the growing issue of constitutional violations going unremedied in immigration proceedings. Part I of this Note introduces the development of the *Lopez-Mendoza* standard and how it limits the consequences officers face if they violate the Fourth Amendment. Part II discusses why immigrants need more protection in immigration proceedings and explains the limitations of proposed solutions. Part III argues that the practicable solution consists of two components—one at the attorney and client level, and the other at the judicial level. Specifically, this Note proposes that these constitutional violations can be solved if all federal circuits adopt the Ninth Circuit's interpretation of "egregious" propounded in *Lopez-Rodriguez v. Mukasey*,[24] while urging immigration attorneys to be "rebellious lawyers."[25]

I. *LOPEZ-MENDOZA* AND THE CRIMINALIZATION OF IMMIGRATION PROCEEDINGS

This Part describes the development and current state of immigration proceedings. Section A examines *Lopez-Mendoza* and the standard it developed to determine whether or not a motion to suppress evidence should be granted. Section B discusses the pervasiveness of Fourth Amendment violations in

18. *See* Chacón, *supra* note 17, at 1579–81.

19. *See id.* at 1606–11 (describing four ways in which law enforcement officials interpret their authority more broadly than the Immigration and Nationality Act actually provides).

20. *See generally* cases cited *supra* note 11.

21. *See generally* Elizabeth A. Rossi, *Revisiting* INS v. Lopez-Mendoza*: Why the Fourth Amendment Exclusionary Rule Should Apply in Deportation Proceedings*, 44 COLUM. HUM. RTS. L. REV. 477 (2013).

22. *See* Stella Burch Elias, *"Good Reason To Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109 (2008).

23. *See* Chacón, *supra* note 17.

24. Lopez-Rodriguez v. Mukasey, 536 F.3d 1012 (9th Cir. 2008).

25. *See* GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 38 (1992). *See infra* Part III for a more in-depth discussion of the concept of "rebellious lawyering."

the immigration context and how the circuits interpret the *Lopez-Mendoza* standard. Section C explains how immigration proceedings have become increasingly criminalized over time.

A. *LOPEZ-MENDOZA*: THE SEMINAL CASE REGARDING MOTIONS TO SUPPRESS IN IMMIGRATION PROCEEDINGS[26]

Immigration and Nationalization Service (INS) agents arrested Adan Lopez-Mendoza while he was at work at a transmission repair shop in California.[27] Although his boss told the INS agents that they could not question his employees during work hours, the agents entered the workplace anyway and spoke to Lopez-Mendoza.[28] He gave his name and admitted that he was from Mexico; the INS agents placed him under arrest due to those admissions.[29]

At Lopez-Mendoza's individual hearing in front of an IJ, his counsel argued that Lopez-Mendoza was arrested illegally and therefore the proceedings should be terminated.[30] Both the IJ and the Board of Immigration Appeals (BIA) held that the "legality of the arrest was not relevant to the deportation proceeding" and thus found Lopez-Mendoza deportable.[31] On appeal, the Court of Appeals for the Ninth Circuit remanded Lopez-Mendoza's case, holding that the exclusionary rule applied in immigration proceedings.[32]

The Supreme Court reversed the Ninth Circuit's holding.[33] The Court justified its holding in two ways: by finding that immigration proceedings are "purely civil" and therefore a form of relief for criminal proceedings is inappropriate, and by applying a balancing test as formulated in *United States v. Janis*.[34] For the first justification, the Court stated that immigration proceedings are "purely civil" since they only "determine eligibility to remain in this country," and that deportation is not a

26. *Lopez-Mendoza* is the first Supreme Court case responding to the use of the exclusionary rule in immigration proceedings and is still the seminal case as the Court has not yet revisited the issue. 468 U.S. 1032, 1041 (1984). It was controversial even in 1984, resulting in a 5–4 vote. *See id.* at 1033.

27. *Id.* at 1035.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 1035–36.

32. *Id.* at 1034.

33. *Id.* at 1051.

34. *Id.* at 1038, 1041; United States v. Janis, 428 U.S. 433, 446 (1976).

punishment.[35] In addition, IJs cannot adjudicate guilt, hearings can proceed in the absence of the respondent, and the INS usually only has to prove identity and alienage[36] before the burden shifts to the respondent to show that he or she is not deportable.[37] The Court found that these factors distinguished immigration proceedings from criminal proceedings.[38]

For the second justification, the Court explained that the purpose of suppressing evidence is "to deter future unlawful police conduct."[39] *Janis* established that the Court should weigh the benefit of deterring unlawful police conduct through suppression of unlawfully obtained evidence with the cost of not being able to use that evidence in court.[40] The Court determined that there were very few benefits because: (1) evidence of identity and alienage, the only matters the INS needs to prove, can usually be obtained through means independent of the unlawful arrest; (2) respondents hardly ever contest the lawfulness of their arrest; (3) the INS has its own deterrence scheme, including initial training on constitutional behavior, excluding unlawfully obtained evidence on its own, and punishing officers who violate the Fourth Amendment; and (4) there are alternative remedies like declaratory relief against the INS.[41]

As for costs, the Court identified many.[42] Allowing suppression of evidence would require IJs to "close their eyes to ongoing violations of the law," meaning they would have to release immigrants—criminals under our immigration laws—even when IJs know for a fact that the immigrants are violating the law.[43] Furthermore, applying the exclusionary rule to immigration proceedings would complicate the immigration system.[44] It would require IJs, immigration attorneys, and INS agents to understand the intricacies of the Fourth Amendment; it would delay immigration proceedings longer than necessary; and it would put a heavy burden on INS agents to write more detailed

35. *Lopez-Mendoza*, 468 U.S. at 1038.

36. The burden to prove this is not "beyond a reasonable doubt" as in criminal proceedings; the burden is only "clear, unequivocal and convincing." *Id.* at 1039 (citing 8 C.F.R. § 242.14(a) (1984)).

37. *Id.* at 1038–39.

38. *Id.* at 1039.

39. *Id.* at 1041 (quoting *Janis*, 428 U.S. at 446).

40. *Id.*

41. *Id.* at 1043–45.

42. *See id.* at 1046–49.

43. *Id.* at 1046–47.

44. *Id.* at 1048.

written reports for every one of the numerous arrests they make.[45] Therefore, since few benefits and many costs would be gained from allowing suppression of evidence, the Court declined to apply the exclusionary rule to immigration proceedings.[46]

However, in the final paragraph of its decision, the Supreme Court gave three possible exceptions to its holding.[47] It stated that the exclusionary rule could apply if: (1) "Fourth Amendment violations by INS officers were widespread;" (2) the violations were egregious and thus "transgress[ed] notions of fundamental fairness;" or[48] (3) the violations were egregious and thus "undermine[d] the probative value of the evidence obtained."[49] Case law and legal scholarship regarding the exclusionary rule after *Lopez-Mendoza* tend to focus on these three exceptions, with an emphasis on the interpretation of "egregious."[50]

45. *Id.* at 1048–49.

46. *Id.* at 1050. The dissenting opinions by Justices Brennan, White, Marshall, and Stevens all argued that the exclusionary rule is not based on costs and benefits, nor does it serve the purpose of being a deterrent; instead, it arises from the Fourth Amendment itself. *Id.* at 1051–61. Nonetheless, the Supreme Court continues to use the *Janis* balancing test in a variety of cases regarding the Fourth Amendment and the exclusionary rule. An example is *Davis v. United States*. 131 S. Ct. 2419 (2011). In that case, the respondent was searched during a routine traffic stop. *Id.* at 2425. The officer found the respondent's revolver during the stop, and the respondent filed a motion to suppress the revolver. *Id.* at 2425–26. Although *Davis* was a criminal case, the Supreme Court cited to *Lopez-Mendoza* and applied the balancing test from *Janis*. *Id.* at 2427.

47. *Id.* at 1050.

48. Although the language in the decision uses the conjunctive "and," and not the disjunctive "or," to link the three exceptions, *see id.*, circuit courts and legal scholars have concluded that the Supreme Court's reliance on *Rochin v. California*, 342 U.S. 165 (1952), makes no sense if the conjunctive "and" is used. *See, e.g.*, Almeida-Amaral v. Gonzalez, 461 F.3d 231, 234 (2d Cir. 2006) (finding that the use of "and" by the Supreme Court in *Lopez-Mendoza* was a mistake); Rossi, *supra* note 21, at 496–97.

49. *Lopez-Mendoza*, 468 U.S. at 1050.

50. *See, e.g.*, Carcamo v. Holder, 713 F.3d 916 (8th Cir. 2013); Oliva-Ramos v. Att'y Gen. of U.S., 694 F.3d 259 (3d Cir. 2012); Eric W. Clarke, Lopez-Rodriguez v. Mukasey*: The Ninth Circuit's Expansion of the Exclusionary Rule in Immigration Hearings Contradicts the Supreme Court's* Lopez-Mendoza *Decision*, 2010 B.Y.U. L. REV. 51 (2010); Jonathan L. Hafetz, Note, *The Rule of Egregiousness:* INS v. Lopez-Mendoza *Reconsidered*, 19 WHITTIER L. REV. 843 (1998).

B. FOURTH AMENDMENT VIOLATIONS AND HOW COURTS INTERPRET THE *LOPEZ-MENDOZA* RULE

Fourth Amendment violations are commonplace in the immigration context.[51] The Cardozo Immigration Justice Clinic conducted a study between the years of 2006 and 2008, estimating that between fourteen and twenty-four percent of raids that occurred in New York and New Jersey were conducted without consent or warrants.[52] Immigration home raids and work raids have consistently been covered on the news.[53] Although not every raid results in a Fourth Amendment violation,[54] data suggests that attorneys are filing an increasing number of motions to suppress, especially in home raid cases, which correlates with the significant percentage of immigration raids that occur without a warrant or consent.[55] The *Lopez-*

51. *See generally* BESS CHIU ET AL., CARDOZO IMMIGRATION JUSTICE CLINIC, CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS (2009), *available at* http://cw.routledge.com/textbooks/9780415996945/human-rights/cardozo.pdf; *Motions To Suppress in Removal Proceedings*, LEGAL ACTION CTR., http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/enforcement-motions-suppress (last visited Sept. 14, 2014).

52. CHIU ET AL., *supra* note 51, at 10.

53. *See generally 40 Arrested in Immigration Raid*, NBC CONN., Mar. 1, 2012, http://www.nbcconnecticut.com/news/local/40-Arrested-in-Immigration-Raid-141026783.html; Greg Botelho, *ICE Agents Raid Arizona Car Wash Chain*, CNN, Aug. 18, 2013, http://www.cnn.com/2013/08/17/justice/arizona-criminal-immigration-raid; Kacy Capobres, *Immigration Agents Arrest More Than 3,100 in Largest Operation Ever*, FOX NEWS LATINO, Apr. 2, 2012, http://latino.foxnews.com/latino/politics/2012/04/02/us-immigration-customs-enforcement-arrest-more-than-3100-in-nationwide; Spencer S. Hsu, *Immigration Raid Jars a Small Town*, WASH. POST, May 18, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/05/17/AR2008051702474.html; *Hundreds Arrested in Immigration Raids*, CBS NEWS, Apr. 17, 2008, http://www.cbsnews.com/news/hundreds-arrested-in-immigration-raids.

54. *See* CHIU ET AL., *supra* note 51, at 10.

55. *See id.* at 13–14 (noting that between 2006 and 2009, there was a "nine-fold increase in the filing of suppression motions" and a "twenty-two-fold increase in suppression motions related to home raids"). The data was obtained by looking at BIA decisions on Westlaw. *Id.* at 13 n.45. Because the Executive Office for Immigration Review (EOIR) does not keep track of filed motions to suppress, this is the only available way to obtain data. *Id.* at 13. The Cardozo report does acknowledge that this data "significantly underrepresents the prevalence of suppression motions" because it does not include motions filed at the Immigration Court level. *Id.* Currently on Westlaw, there are eighty-four BIA decisions containing the term "motion to suppress" from 2006 to the present. *Board of Immigration Appeals Decisions*, WestlawNext Database, https://1.next.westlaw.com (follow the "Administrative Decisions & Guidance" hyperlink; then follow the "Immigration" hyperlink; then follow the "Board of Immigration Appeals Decisions" hyperlink; then search "motion to

Mendoza standard is applied in these types of cases to attempt to remedy the illegal conduct through suppression of the evidence obtained, but the circuits' interpretations of the exceptions, specifically the "egregiousness" exception, vary widely.[56]

The Ninth Circuit first explained the "egregiousness" standard in *Adamson v. Commissioner* in 1984, a few months after the Supreme Court decided *Lopez-Mendoza*.[57] In explaining *Lopez-Mendoza* and the "egregiousness" exception, the Court of Appeals for the Ninth Circuit stated: "When evidence is obtained by deliberate violations of the [F]ourth [A]mendment, or by conduct a reasonable officer should know is in violation of the Constitution, the probative value of that evidence cannot outweigh the need for a judicial sanction."[58] Thus, the Ninth Circuit has consistently held that an egregious violation has occurred when the officer either intentionally violates the Fourth Amendment, or if a reasonable officer should have known that his conduct violated the Fourth Amendment.[59]

This standard was further elaborated on in *Lopez-Rodriguez v. Mukasey* in 2008.[60] In *Lopez-Rodriguez*, INS agents questioned the respondents, an aunt and her niece, in their home in California.[61] According to the niece's testimony, she partially opened her door when she saw that the INS agents were standing outside, but did not fully open the door or verbally indicate that they could enter.[62] The INS agents then pushed the door open and entered her home, where they elicit-

suppress" between Jan. 1, 2006 and present) (last visited Jan. 21, 2014). This is an increase from the Cardozo report's forty-eight motions filed from 2006 to 2009. CHIU ET AL., *supra* note 51, at 13. However, considering that there are over 10,000 BIA decisions on Westlaw from 2006 to present, this is still not a significant number. *Board of Immigration Appeals Decisions*, *supra* (without searching "motion to suppress").

56. *See, e.g.*, Cotzojay v. Holder, 725 F.3d 172 (2d Cir. 2013) (fairly lenient egregiousness standard); Carcamo v. Holder, 713 F.3d 916 (8th Cir. 2013) (strict egregiousness standard); Adamson v. Comm'r, 745 F.2d 541 (9th Cir. 1984) (lenient egregiousness standard).

57. *Adamson*, 745 F.2d 541. Although this was a tax case, the Ninth Circuit has consistently applied the egregiousness standard to its immigration jurisprudence. *See, e.g.*, Martinez-Medina v. Holder, 673 F.3d 1029 (9th Cir. 2011); Lopez-Rodriguez v. Mukasey, 536 F.3d 1012 (9th Cir. 2008); Gonzalez-Rivera v. INS, 22 F.3d 1441 (9th Cir. 1994).

58. *Adamson*, 745 F.2d at 545.

59. *Id. See also Martinez-Medina*, 673 F.3d 1029; *Lopez-Rodriguez*, 536 F.3d 1012; *Gonzalez-Rivera*, 22 F.3d 1441.

60. *Lopez-Rodriguez*, 536 F.3d 1012.

61. *Id.* at 1014–15.

62. *Id.*

ed a sworn statement indicating that the niece was not legally present in the United States.[63] Although the IJ found that there may have been a Fourth Amendment violation, it ordered Lopez-Rodriguez deported.[64] The Court of Appeals for the Ninth Circuit reversed the BIA's and the IJ's decisions, and granted the motion to suppress the evidence obtained during that questioning because it found the Fourth Amendment violation to be egregious.[65] In its explanation of the holding, the Ninth Circuit found it significant that the "unequivocal doctrinal backdrop" of Fourth Amendment jurisprudence in the Ninth Circuit showed that entrance into a home without a warrant or consent, even if the individual fails to object to such entry, is a violation of the Fourth Amendment.[66] Because of this, the Court held that "reasonable officers would not have thought it lawful to push open the door to petitioners' home simply because [the niece] did not 'tell them to leave or [that] she did not want to talk to them.'"[67]

The Second Circuit has a similar standard. In *Cotzojay v. Holder*, another forced entry situation occurred.[68] The respondent, Sicajau, awoke to officers pounding on the windows and doors of his apartment building.[69] Although another resident of the complex let the officers into the building, Sicajou left his door closed and locked.[70] When the officers began pounding at his bedroom door, he opened it because he was afraid they would knock the door down.[71] Sicajau gave no indication of permission to enter, but the officers entered the bedroom anyway.[72] They handcuffed him, questioned him, and searched his bedroom without a warrant or permission, uncovering evidence of his Guatemalan citizenship.[73] The IJ held that although the officers' conduct was "not courteous . . . and was disrespectful," it did not amount to an egregious violation of Fourth Amend-

63. *Id.* at 1015.
64. *Id.*
65. *Id.*
66. *Id.* at 1018. *See* Payton v. New York, 445 U.S. 573 (1980); United States v. Matlock, 415 U.S. 164 (1974); Jones v. United States, 357 U.S. 493 (1958); United States v. Shaibu, 920 F.2d 1423 (9th Cir. 1990).
67. *Lopez-Rodriguez*, 536 F.3d at 1018.
68. Cotzojay v. Holder, 725 F.3d 172 (2d Cir. 2013).
69. *Id.* at 174.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*

ment rights.[74] The IJ explained that since Sicajau was not harmed or threatened with harm, there could be no egregious violation.[75] The BIA affirmed the IJ's order of deportation.[76] The Court of Appeals for the Second Circuit vacated this holding and remanded for further proceedings to determine whether there was in fact voluntary consent for officers to enter the home.[77] In its analysis, the court reiterated its egregiousness standard: "[I]f record evidence establishe[s] either (a) that an egregious violation that was fundamentally unfair had occurred, or (b) that the violation—regardless of its egregiousness or unfairness—undermined the reliability of the evidence in dispute," then a motion to suppress evidence should be granted.[78] When proceeding with this analysis, a court should consider the "characteristics and severity" of the officer's conduct and whether the conduct was based on a "grossly improper consideration," like race.[79] While the Second Circuit, up to this point in time, had never found a violation to be "fundamentally unfair,"[80] the Court of Appeals declined to require a showing of physical harm or threat of physical harm to reach the level of fundamental unfairness.[81] This declaration allowed the Court to find an egregious violation in Sicajau's case.[82] The ruling expanded the Second Circuit's standard. It still does not rise to the leniency of the Ninth Circuit standard, but it comes close.

In contrast, the Eighth Circuit has a stricter standard of egregiousness.[83] In *Carcamo v. Holder*, essentially the same illegal entrance occurred as in the Ninth Circuit *Lopez-Rodriguez* case.[84] One of the respondents, Roberto Garcia Nuñez, opened the door to his trailer home slightly when he heard knocking on it.[85] The Immigration and Customs Enforcement (ICE) officers pushed into the home without consent

74. *Id.* at 176.
75. *Id.* at 177.
76. *Id.*
77. *Id.* at 184.
78. *Id.* at 180 (quoting Almeida-Amaral v. Gonzalez, 461 F.3d 231 (2d. Cir. 2006)).
79. *Id.*
80. *Id.*
81. *Id.* at 182.
82. *Id.* at 183.
83. *See* Carcamo v. Holder, 713 F.3d 916 (8th Cir. 2013).
84. *Id.*
85. *Id.* at 918–19.

or a warrant and uncovered evidence of illegal presence.[86] The IJ ordered Nuñez deported, and the BIA affirmed.[87] The Eighth Circuit also affirmed, using a "totality of the circumstances" test for egregiousness.[88] This test is a discretionary, case-by-case analysis that does not reference a specific list of conduct that is considered egregious.[89] It stated that this Circuit has never held "that an unreasonable search becomes an egregious search merely because it invades the privacy of the home."[90] The Eighth Circuit deliberately rejected the Ninth Circuit's standard, which it labeled as a "bad faith" standard.[91]

C. HOW IMMIGRATION PROCEEDINGS HAVE BECOME CRIMINALIZED SINCE *LOPEZ-MENDOZA*

The Supreme Court in *Lopez-Mendoza* held that deportation proceedings are "purely civil."[92] However, past and current developments demonstrate that immigration proceedings may instead resemble criminal proceedings.[93] Without the label of "criminal," however, those caught up in the immigration system are not given the types of safeguards normally found in criminal proceedings even though the consequences of immigration violations can be more devastating than criminal sentences.[94]

Fairly recently, immigration has turned into a "zero-tolerance policy."[95] Some of the biggest changes occurred in the 1980s.[96] Stephen Legomsky gives a helpful list of ways in which

86. *Id.* at 919.
87. *Id.* at 920.
88. *Id.* at 923.
89. *Id.* at 922–23.
90. *Id.* at 923.
91. *Id.*
92. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).
93. *See generally* Legomsky, *supra* note 17 (arguing that immigration law has adopted harsh enforcement aspects of criminal law without adopting criminal procedural protections).
94. For example, deportation and a permanent bar to reentry into the United States can be much more devastating than a one-month prison sentence.
95. Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 642 (2004).
96. *See, e.g.*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of 8 U.S.C., 15–16 U.S.C., 18 U.S.C., 21–23 U.S.C., 26–29 U.S.C., 31 U.S.C., 39 U.S.C., 42 U.S.C., and 48 U.S.C.) (increasing fines and sentence lengths for existing immigration-related offenses); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603,

immigration proceedings have become part of this "zero-tolerance policy."[97] First, immigration violations can now also be criminal offenses—there are certain crimes that are both violations of immigration law *and* criminal offenses, resulting in both immigration and criminal consequences.[98] Examples include the crime of marrying solely to evade immigration laws under 8 U.S.C. § 1325(c) and the crime of making false statements in order to obtain a passport under 18 U.S.C. § 1542.[99]

Second, criminal convictions are increasingly dangerous for immigrants, as many have serious immigration consequences.[100] For example, an undocumented person who has spent more than 180 days in a penal institution is barred from being considered a person of "good moral character," a finding of which is required in order to apply for certain types of relief from removal.[101] In addition, those with an "aggravated felony" are deportable.[102] The definition of "aggravated felony" has expanded dramatically.[103] It went from only including "murder, weapons trafficking, and drug trafficking" to also including fraud, physical force, bribery, gambling, and obstruction of justice, among others.[104] The Antiterrorism and Effective Death Penalty Act of 1996 also reduced the sentencing requirements for an "aggravated felony" determination.[105]

Third, the same actors now enforce both immigration laws and criminal laws—state and local police enforce immigration laws, as well as immigration officials.[106] Between 1978 and

100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.) (criminalizing immigration-related offenses). Daniel Kanstroom argues that many of these past examples of criminalization of immigration law have increased substantially since the September 11 attacks. *See generally* Kanstroom, *supra* note 95.

97. Kanstroom, *supra* note 95; Legomsky, *supra* note 17, at 475–501.

98. Legomsky, *supra* note 17, at 476.

99. *Id.* at 477; *see* 8 U.S.C. § 1325(c) (2012); 18 U.S.C. § 1542 (2006); *see also* McLeod, *supra* note 17, at 118.

100. Legomsky, *supra* note 17, at 482.

101. 8 U.S.C § 1101(f)(7) (2012).

102. *Id.* § 1227(a)(2)(A)(iii).

103. Legomsky, *supra* note 17, at 484.

104. *Id.* at 484–85; *see also* 8 U.S.C. § 1101(a)(43)(A).

105. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., 28 U.S.C., 22 U.S.C., and 42 U.S.C.); *see also* Legomsky, *supra* note 17, at 484–85.

106. Legomsky, *supra* note 17, at 496; *see also* McLeod, *supra* note 17, at 113 ("Immigration enforcement is regularly delegated to local and state criminal officers.").

2002, the Department of Justice (DOJ) advised local police to "refrain from detaining any person not suspected of a crime, solely on the ground that they may be deportable aliens."[107] In 2002, however, the Attorney General explicitly renounced this policy and "concluded that state and local criminal enforcement officials have the inherent authority to arrest those individuals whom they believe to be deportable."[108]

These trends conflict with the Supreme Court's categorization of deportation proceedings as civil.[109] Furthermore, they contradict Fourth Amendment jurisprudence.[110] Because of this, legal scholars have explored various solutions to the issue of immigrants' Fourth Amendment right to be free from unreasonable searches and seizures.[111] These solutions, however, are inadequate.

II. PROFFERED SOLUTIONS ARE NEITHER PRACTICABLE NOR EFFECTIVE

Overruling *Lopez-Mendoza*, securing procedural safeguards, and immigration reform are all lofty goals. Nevertheless, in terms of Fourth Amendment violations, they are neither practicable nor effective. This Part discusses legal scholars' proposed solutions to the issue of Fourth Amendment violations in immigration proceedings as they relate to the availability of motions to suppress evidence. Section A explains why overruling *Lopez-Mendoza* is not necessary to remedy Fourth Amendment violations, and even if attempted, it would be difficult to accomplish. Section B describes how additional protections, like guaranteed counsel, training of officers, class actions, and declaratory and injunctive relief, are inadequate to remedy Fourth Amendment violations. Finally, Section C argues that administrative reform would be just as difficult as—or even more difficult than—overturning *Lopez-Mendoza*, and therefore is not practicable.

107. Kanstroom, *supra* note 95, at 664 (quoting Press Release, Att'y Gen. Griffin Bell, U.S. Dep't of Justice (June 23, 1978)).

108. Legomsky, *supra* note 17, at 497; *see also* Kanstroom, *supra* note 95, at 664–65.

109. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

110. *See* Rossi, *supra* note 21, at 482–83 (arguing that non-citizens are not given the same Fourth Amendment rights held by U.S. citizens).

111. *See, e.g.*, Chacón, *supra* note 17; Elias, *supra* note 22; Hafetz, *supra* note 50; Rossi, *supra* note 21.

A. OVERRULING *LOPEZ-MENDOZA* IS NOT A PRACTICABLE SOLUTION

Overruling *Lopez-Mendoza* seems like a simple solution that would result in a Supreme Court decision that eradicates the circuit split and makes the exclusionary rule determination much clearer. Nevertheless, the Supreme Court would need to overcome substantial hurdles to overrule *Lopez-Mendoza*, and this measure is unnecessary given the exceptions outlined in *Lopez-Mendoza*.

1. Overruling Supreme Court Precedent Is Not Likely to Occur

The Supreme Court overrules its precedents in very limited circumstances. It has held that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."[112] The Court delineated four factors to consider in determining whether to overrule one of its precedents: (1) whether the decision is no longer practical; (2) whether there is substantial reliance on the decision; (3) whether new law has essentially eliminated the need for the decision; and (4) whether the facts have changed so much as to render the decision unjustified.[113] The last consideration is the most relevant in the immigration context. Elizabeth Rossi, for example, argued that the facts surrounding motions to suppress, such as the increase in Fourth Amendment violations, render the Supreme Court's decision in *Lopez-Mendoza* unjustified.[114] Nevertheless, Courts heavily rely on *Lopez-Mendoza* to justify decisions to grant or deny motions to suppress.[115] New law has not eliminated the need for *Lopez-Mendoza*, and courts' frequent usage of the decision indicates that its use is still

112. Planned Parenthood v. Casey, 505 U.S. 833, 864 (1992).

113. *Id.* at 854–55; *see also* Kenji Yoshino, *Can the Supreme Court Change Its Mind?*, N.Y. TIMES, Dec. 5, 2002, http://www.nytimes.com/2002/12/05/opinion/can-the-supreme-court-change-its-mind.html.

114. Rossi, *supra* note 21, at 535 ("The Supreme Court based its holding in *INS v. Lopez-Mendoza* on two assumptions that can no longer justify it. The first assumption was that deportation proceedings are purely civil in nature. . . . The second assumption the Court made was that its holding would preserve the streamlined deportation process.").

115. A Shepard's report of *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), indicates that every circuit except the D.C. Circuit and the Federal Circuit has cited to *Lopez-Mendoza* in at least twenty-six cases, and that *Lopez-Mendoza* has been used in an increasing number of cases from 1984 until 2014.

practical.[116] Even if the Supreme Court looked past these three factors and only focused on the change in facts, the timeline for review could stretch into years.[117] If we sit and wait for years, hoping that the Supreme Court will hear a motion to suppress case, Fourth Amendment violations will continue to occur without remedy. This is unacceptable.

In addition, the Supreme Court recently had the opportunity to reconsider *Lopez-Mendoza*, but chose instead to follow its precedent.[118] In *Davis v. United States*, decided in 2011, the Supreme Court used *Lopez-Mendoza* to justify not applying the exclusionary rule, and held that "when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply."[119] Furthermore, if properly interpreted, *Lopez-Mendoza* does not need to be overturned at all, now or in the future.

2. The Three Exceptions in *Lopez-Mendoza* Are Broad Enough To Allow Relief

The Supreme Court in *Lopez-Mendoza* delineates three exceptions to its general rule: widespread violations, egregious violations that are fundamentally unfair, and egregious violations that undermine the value of the evidence.[120] A broad interpretation of the "egregious" exceptions in *Lopez-Mendoza* can provide just as much relief as overturning the case. Even Rossi, writing in early 2013, argued that the Supreme Court should overturn *Lopez-Mendoza*, admitting that "incorporating [the exclusionary rule] into deportation proceedings would essentially mean bringing all of the federal courts in line with the Ninth Circuit's definition of the egregious violations standard."[121] The Ninth Circuit's interpretation is the broadest among the circuits.[122] In *Lopez-Rodriguez v. Mukasey*,[123] the Ninth Circuit explained that "egregious" violations are those where "evidence is obtained by deliberate violations of the

116. *Id.*

117. *See Supreme Court Procedure*, SCOTUSblog, http://www.scotusblog.com/reference/educational-resources/supreme-court-procedure (last visited Sept. 14, 2014) (discussing the numerous steps necessary before a case is heard by the Supreme Court).

118. Davis v. United States, 131 S. Ct. 2419 (2011).

119. *Id.* at 2434.

120. *Lopez-Mendoza*, 468 U.S. at 1050–51.

121. Rossi, *supra* note 21, at 533.

122. *Id.* at 517.

123. 536 F.3d 1012 (9th Cir. 2008).

[F]ourth [A]mendment, or by conduct a *reasonable officer should* [*have known*] is in violation of the Constitution."[124]

Furthermore, there is evidence that the first exception, widespread violations, may now be a valid way to bypass *Lopez-Mendoza*'s general rule.[125] Although respondents typically rely on the "egregious" exception when arguing for a motion to suppress,[126] Fourth Amendment violations have also become geographically and institutionally widespread.[127] This indicates that the first exception could also be used to obtain an order to suppress.

The combination of the Supreme Court's hesitancy to overrule precedent with the availability of the *Lopez-Mendoza* exceptions demonstrates that overruling *Lopez-Mendoza* is not a practicable or necessary remedy. Other solutions have been proposed, but they too are not adequate or essential.

B. OTHER PROTECTIONS STILL DO NOT ADDRESS THE SPECIFIC ISSUE OF A REMEDY FOR FOURTH AMENDMENT VIOLATIONS

Scholars have suggested various additional protections that undocumented individuals should be given in order to protect against Fourth Amendment violations; some also highlight the protections that undocumented individuals already have.[128] However, none of these "protections" actually addresses the specific issue of remedying Fourth Amendment violations in immigration proceedings.

1. Guaranteed Counsel

Some legal scholars suggest that undocumented individuals should be guaranteed counsel in deportation proceedings.[129] Guaranteed counsel could increase the number of motions to

124. *Id.* at 1018 (alteration in original) (quoting Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449 (9th Cir. 1994)). For a discussion regarding the validity of *Lopez-Rodriguez*, see *infra* Part III.B.

125. *See generally* Elias, *supra* note 22 (arguing that constitutional violations by immigration officers have become widespread since *Lopez-Mendoza*).

126. *Id.* at 1125.

127. *Id.* at 1126–40 (explaining that violations occur across the United States and are occurring more frequently now that law enforcement officers have gotten involved with detaining undocumented individuals).

128. *See, e.g.*, Chacón, *supra* note 17 (discussing the gap in constitutional protections between criminal and civil proceedings and suggesting immigration court reforms that could better protect undocumented individuals).

129. *See, e.g.*, *id.* at 1629; Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113 (2008).

suppress that are filed, since a large percentage of individuals in immigration proceedings are unrepresented.[130] Pro se respondents are not likely to understand when a motion to suppress should be made.[131] Even if counsel *was* guaranteed, however, it would do no good in most circuits since it would not necessarily correlate with more motions to suppress being granted. Guaranteed counsel would need to be accompanied by an alteration to the exclusionary rule standard itself, either through the overruling of *Lopez-Mendoza* or the adoption of a more lenient standard.

Moreover, guaranteed counsel would have substantial detrimental effects on the immigration system due to its high cost.[132] The system is slow and over-burdened even without guaranteed counsel—adding an expense of $53 to $111 million for government-provided counsel for all indigent noncitizens in removal proceedings[133] will only slow it down further.

2. Enforcement Officer Training

In *Lopez-Mendoza*, the Supreme Court held that suppression of evidence in immigration proceedings was unnecessary because of the internal INS protections already in place, such as the extensive training that enforcement officers receive when beginning their job.[134] Contrary to the Supreme Court's assumption in *Lopez-Mendoza*, evidence indicates that authorized officials may not actually receive effective training, especially when it comes to Fourth Amendment violations.[135]

130. According to the Executive Office for Immigration Review's Statistical Year Book, in 2012 only fifty-six percent of respondents in completed immigration proceedings were represented. EOIR, U.S. DEP'T OF JUSTICE, FY 2012 STATISTICAL YEAR BOOK G1 Fig. 9 (2013), *available at* http://www.justice.gov/eoir/statspub/fy12syb.pdf. However, this number has been increasing over the past few years. *Id.*

131. Chacón, *supra* note 17, at 1629–30 ("[U]nrepresented immigrants are unlikely to be able to adequately address the complex legal issues that a suppression motion requires.").

132. *See* Kevin R. Johnson, *An Immigration* Gideon *for Lawful Permanent Residents*, 122 Yale L.J. 2394, 2413 (2013) (noting the substantial costs of providing representation for immigration proceedings).

133. *Id.* (citing ABA, ENSURING FAIRNESS AND DUE PROCESS IN IMMIGRATION PROCEEDINGS 5–16 (2008)).

134. INS v. Lopez-Mendoza, 468 U.S. 1032, 1044–45 (1984).

135. *See* Chacón, *supra* note 17 (discussing state and local police involvement in immigration enforcement and increasing allegations of constitutional violations in immigration enforcement efforts); Elias, *supra* note 22, at 1148–50 (pointing to the failure of ICE officers to follow INS guidelines and ICE's resultant assertion that it is no longer required to adhere to INS guidelines).

One explanation for this lack of training is the indistinct line between immigration officials and state and local law enforcement.[136] Congress first expanded immigration authority to state and local law enforcement in 1996, but it continues to grow.[137] Some immigration law enforcement programs did require training in order for state and local law enforcement officials to participate in immigration enforcement.[138] However, there is evidence indicating that efforts to regulate and train state and local officials—and even immigration officials—are not functioning correctly, resulting in more constitutional violations.[139] For some programs, like the Fugitive Operations Teams that target fugitive and criminal aliens, no training whatsoever is required.[140] We cannot rely on the minimal or nonexistent training that officials receive. While some training is present, it is not enough to protect against Fourth Amendment violations.

3. Civil Suits Including Class Actions

Another alternative to suppression of evidence suggested by the Supreme Court in *Lopez-Mendoza* is declaratory relief.[141] The Court pointed to *INS v. Delgado* as an example.[142] In that case, four employees of a factory filed suit in district court seek-

136. Chacón, *supra* note 17, at 1579–82.

137. *Id.* at 1580–81.

138. For example, 287(g) agreements under the Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2006), allowed certain state and local law enforcement officers to enforce federal immigration law provided that they undergo training. Chacón, *supra* note 17, at 1582–83.

139. After the September 11 attacks in 2001, data regarding undocumented immigrants were added to criminal justice databases used by state and local law enforcement officials. HANNAH GLADSTEIN ET AL., BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NATIONAL CRIME INFORMATION CENTER DATABASE 2002–2004, at 5–7 (2005), *available at* http://www.migrationpolicy.org/pubs/MPI_report_Blurring_the_Lines_120805.pdf. State and local law enforcement officials were given the authority to run people through the database and notify DHS if an immigration violation was noted in the database. *Id.* at 12. Approximately forty-two percent of those notifications came up false, where the individual was not an immigration violator. *Id.* at 3. The authors attribute this high percentage to the limited amount of training the officials received, and they expressed concern that the limited training is resulting in wrongful detentions. *Id.* at 29; *see also* Elias, *supra* note 22, at 1148–50 (describing that the training of ICE and INS officials is also limited and is causing regulatory violations in addition to constitutional violations).

140. *See* Chacón, *supra* note 17, at 1588–90.

141. INS v. Lopez-Mendoza, 468 U.S. 1032, 1045 (1984).

142. *Id.*

ing declaratory and injunctive relief based on their challenge to the legality of the interrogation tactics INS officials used in a workplace raid.[143]

Standing and jurisdiction were held to be proper, indicating that similar suits are possible for undocumented individuals. However, the Supreme Court ultimately reversed the judgment and denied relief because it found that the respondents had not been "seized" for purposes of their Fourth Amendment claim.[144]

Since *Delgado* in 1984, changes have been made to limit noncitizens' rights to file civil lawsuits.[145] For example, "the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 enacted limitations to judicial review, and the REAL ID Act of 2005 requires administrative exhaustion and limits judicial review for certain matters arising out of immigration proceedings."[146] In addition, during the Bush administration, it was argued that Immigration and Nationality Act (INA) § 242 "prevents immigration respondents from bringing *Bivens*[147] claims for damages, and the Second Circuit found that it does not have jurisdiction to hear claims under the Torture Victim Protection Act by nonresident aliens who were mistreated by U.S. officials and removed to nations where they were subjected to torture."[148] Changes like these have limited the availability of class action filings.[149] Thus, although it is theoretically possible for noncitizens to file civil suits either individually or as members of a class, it has become more difficult. Because of the tightening restrictions on the ability to sue, this alternative

143. INS v. Delgado, 466 U.S. 210, 212–13 (1984).

144. *Id.* at 212, 220–21.

145. Chacón, *supra* note 17, at 1630. *See generally* Jill E. Family, *Threats to the Future of the Immigration Class Action*, 27 WASH. U. J.L. & POL'Y 71 (2008) (explaining current trends limiting the future use of immigration class actions).

146. Chacón, *supra* note 17, at 1630–31 (citing 8 U.S.C. § 1252 (2006)).

147. A *Bivens* action is one in which a victim of a Fourth Amendment violation sues the violator for that alleged constitutional deprivation. This type of action was established in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

148. Elias, *supra* note 22, at 1154.

149. Family identified three threats to immigrant class actions: "(1) a general congressional unwillingness to restrict immigration judicial review; (2) the application of waivers of judicial review to immigration law; and (3) legislative jurisdiction-stripping attacks more specific to the immigration class action." Family, *supra* note 145, at 74.

cannot be considered an adequate remedy for Fourth Amendment violations.

C. ADMINISTRATIVE OVERHAUL STILL DOES NOT ADDRESS FOURTH AMENDMENT VIOLATIONS, AS EVIDENCED BY THE CURRENT CONGRESSIONAL DEBATE ON IMMIGRATION

Comprehensive immigration reform is certainly desirable.[150] A House bill regarding reform to immigration law, H.R. 15, is based on the Senate's similar bill and addresses some procedural and administrative problems with the immigration system.[151] H.R. 15 guarantees appointed counsel in immigration proceedings for unaccompanied children, incompetent individuals,[152] and those who are particularly vulnerable.[153] It also provides for additional immigration judges to lessen their individual workloads,[154] and requires an improvement to training that immigration judges receive.[155] H.R. 15 mandates extensive training for immigration officials, including training about the constitutional rights of individuals.[156] Furthermore, it gives federal courts jurisdiction over claims of constitutional violations outside of removal proceedings.[157] Of course, these protections would be beneficial to the system as a whole, and should eliminate some constitutional, procedural, and administrative issues.[158] However, nowhere in the bill are Fourth Amendment violations specifically addressed; there is no provision regarding the suppression of illegally obtained evidence.[159] In addition, the training of state and local law enforcement officials is not

150. *See, e.g.*, Soraya Fata et al., *Custody of Children in Mixed-Status Families: Preventing the Misunderstanding and Misuse of Immigration Status in State-Court Custody Proceedings*, 47 FAM. L.Q. 191, 191 (2013) ("Since 2005, there has been a growing consensus about the need for comprehensive immigration reform.").

151. *See* Border Security, Economic Opportunity, and Immigration Modernization Act, H.R. 15, 113th Cong. (1st Sess. 2013).

152. Incompetent individuals are defined as those having a "serious mental disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(1). *Id.* at 698.

153. *Id.*

154. *Id.* at 694.

155. *Id.* at 704.

156. *Id.* at 106.

157. *Id.* at 45.

158. *See, e.g.*, Chacón, *supra* note 17, at 1629; Family, *supra* note 145, at 74; Kaufman, *supra* note 129, at 114.

159. *See* Border Security, Economic Opportunity, and Immigration Modernization Act, H.R. 15, 113th Cong. (1st Sess. 2013).

mentioned, and neither are internal protections within the INS with regards to constitutional violations by officials.[160] The problems of Fourth Amendment violations are neither prevented by H.R. 15, nor are they remedied by any provision. Thus, even if H.R. 15 eventually becomes law, it will do nothing to remedy Fourth Amendment violations.

Throughout Part II, this Note argues that proposed solutions are not sufficient to alleviate the harm of Fourth Amendment violations. To be clear, this Note is *not* arguing that any one of these solutions should be ignored. To the contrary, adoption of any of the above solutions would benefit immigration law. Rather, this Note argues that, alone and in the aggregate, none of these solutions are sufficient, as they do not directly and quickly address Fourth Amendment violations. More action is necessary. This Note proposes that the optimal solution is the national adoption of the Ninth Circuit's interpretation of the *Lopez-Mendoza* "egregiousness" exception, and while that change is pending, lawyers should act "rebelliously."[161]

III. SOLUTION: ADOPT THE NINTH CIRCUIT'S INTERPRETATION OF "EGREGIOUSNESS" AND BE REBELLIOUS LAWYERS

This Note suggests a two-part solution to the issue of Fourth Amendment violations in immigration proceedings. The primary solution is adoption of the Ninth Circuit's "egregiousness" standard in every federal circuit, which is addressed in Section A. Section B addresses concerns about the Ninth Circuit's standard, and Section C explains how and when the standard could potentially be adopted. Section C also recognizes that adoption of the standard may be challenging due to the slow pace of case law and the reluctance of courts to change precedent. To respond to this challenge, Section D describes rebellious lawyering, a concurrent method to remedy Fourth Amendment violations that should be implemented at least until the Ninth Circuit's standard is adopted.

A. THE NINTH CIRCUIT'S INTERPRETATION OF "EGREGIOUS"

The Ninth Circuit has continued to adhere to the interpretation of "egregious" it made in 1984, in the case of *Adamson v. Commissioner*: "When evidence is obtained by deliberate viola-

160. *See id.*

161. LÓPEZ, *supra* note 25, at 38.

tions of the [F]ourth [A]mendment, or by conduct a reasonable officer should know is in violation of the Constitution, the probative value of that evidence cannot outweigh the need for a judicial sanction."[162] In other words, the Ninth Circuit finds that an egregious violation has occurred when the officer either intentionally violates the Fourth Amendment, or if a reasonable officer should have known that his conduct violated the Fourth Amendment.[163]

The Ninth Circuit's interpretation provides for effective relief for Fourth Amendment violations without overruling *Lopez-Mendoza*, which has proven to be a hefty task.[164] The relief is sufficiently broad to cover most Fourth Amendment violations, but is limited to when the officer deliberately acted or should have known that his or her conduct was unconstitutional.[165] Even without comprehensive immigration reform or additional protections like guaranteed counsel and civil remedies, the adoption of this standard can alleviate the harms of Fourth Amendment violations. It manages to find a middle ground between fully applying the exclusionary rule to immigration proceedings (overruling *Lopez-Mendoza*) and only applying the rule in the most extreme cases (the approach of other circuits, such as the Eighth Circuit's totality of the circumstances test), which should ease the minds of many skeptics.

B. CONCERNS ABOUT THE NINTH CIRCUIT'S STANDARD

One concern that legal scholars have about the Ninth Circuit's standard is that it is an "excessively broad interpretation" of *Lopez-Mendoza*.[166] Even Judge Bybee in his concurring opinion to *Lopez-Rodriguez*[167] voiced concern about this issue. Judge Bybee posited that the Ninth Circuit's standard "might even

162. Adamson v. Comm'r, 745 F.2d 541, 545 (9th Cir. 1984).

163. *See* Lopez-Rodriguez v. Mukasey, 536 F.3d 1012, 1016 (9th Cir. 2008). For a more detailed description of the Ninth Circuit's interpretation, see *supra* Part I.B.

164. *See supra* Part II.A.

165. *See, e.g.*, Martinez-Medina v. Holder, 673 F.3d 1029, 1035 (9th Cir. 2011) (holding that suppression of evidence was inappropriate because there was no unequivocal doctrinal backdrop; it was unclear that "an alien's admission to being illegally present in the United States created probable cause to seize the alien for violating federal immigration law").

166. *See* Clarke, *supra* note 50, at 51–52.

167. *See Lopez-Rodriguez*, 536 F.3d at 1019–20 ("Our case law appears destined to import the exclusionary rule, with all of its attendant costs, back into immigration proceedings, after the Court has taken it out. At some point, we may wish to revisit our position.").

include the unseemly conduct of the INS agents in *Lopez-Mendoza*, which the Court held did *not* warrant applying the exclusionary rule . . . ."[168] However, this is not necessarily true. The Ninth Circuit's standard is dependent upon whether the history of the Fourth Amendment jurisprudence is clear enough to indicate that a reasonable officer should have known the conduct was unconstitutional.[169] In *Lopez-Mendoza*, one of the two respondents was denied relief for a reason unrelated to the Supreme Court's ruling on motions to suppress.[170] The other respondent, Sandoval-Sanchez, objected to the evidence obtained in a workplace raid, which is directly related to the Supreme Court's ruling.[171] If Sandoval-Sanchez's case came before the Ninth Circuit today, it is unlikely that the outcome—denial of suppression—would have changed, because it is not clear that the officials in that case knew or should have known they were violating the Constitution.[172] The Supreme Court indicated that at the time *Lopez-Mendoza* was decided, the INS's scheme for deterring Fourth Amendment violations consisted of regulations, which "require that no one be detained without reasonable suspicion of illegal alienage, and that no one be arrested unless there is an admission of illegal alienage or other strong evidence thereof."[173] The regulations as stated by the Supreme Court in *Lopez-Mendoza* say nothing about getting a warrant or consent before entering a workplace or a home.[174] Therefore, the Ninth Circuit would likely hold that the immigration jurisprudence in effect at the time of *Lopez-Mendoza* (as evidenced by the INS regulations) was too ambiguous, and thus would hold that suppression of evidence was not warranted.

Additionally, the Supreme Court itself used the same *Lopez-Rodriguez* "doctrinal backdrop"[175] reasoning in *Davis v. United States*.[176] In *Davis*, an officer searched the respondent during a routine traffic stop, during which the officer found the

168. *Id.* at 1020.

169. *Id.* at 1018–19.

170. INS v. Lopez-Mendoza, 468 U.S. 1032, 1040 (1984) ("Lopez-Mendoza objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest; he entered no objection to the evidence offered against him.").

171. *Id.* at 1036–37.

172. *See id.* at 1044–45.

173. *Id.* at 1045.

174. *Id.*

175. Lopez-Rodriguez v. Mukasey, 536 F.3d 1012, 1018 (9th Cir. 2008).

176. Davis v. United States, 131 S. Ct. 2419 (2011).

respondent's revolver.[177] The respondent filed a motion to suppress the evidence of the revolver.[178] Although this is a criminal case, the Supreme Court cites to *Lopez-Mendoza* and applies the same balancing test from *Janis* that it did in *Lopez-Mendoza*.[179] In using the balancing test—weighing costs of the exclusionary rule against the benefits of officer deterrence—the Supreme Court found it significant that the officers did not violate the Fourth Amendment "deliberately, recklessly, or with gross negligence" and that their actions were in "strict compliance with binding precedent."[180] This indicates that the "doctrinal backdrop"[181] of the officers' actions was clear in that their actions did *not* violate the Constitution. This same reasoning was applied in the Ninth Circuit in *Lopez-Rodriguez v. Mukasey*.[182] Because both courts used the same reasoning, and would have come to the same conclusion, it is clear that the Ninth Circuit's standard is, in fact, consistent with *Lopez-Mendoza* and the Supreme Court's interpretation of the exclusionary rule as it applies to motions to suppress in immigration proceedings.[183]

The Ninth Circuit's interpretation of the "egregiousness" standard is the ideal interpretation. Nevertheless, the problem of implementing the adoption of the Ninth Circuit's standard needs to be addressed.

C. IMPLEMENTATION OF THE NINTH CIRCUIT'S STANDARD

The Ninth Circuit's standard could be adopted in two ways: through the Supreme Court or through each federal appeals court individually. At the Supreme Court level, the Ninth Circuit's interpretation would not require overruling *Lopez-Mendoza*, as was established in Section B of this Note. However, it would require substantial effort by the Supreme Court to adopt a new interpretation of its own rule, and it would also require that the Supreme Court hear another motion to suppress case in the context of immigration proceedings. Although possible, it is not likely to be a quick and easy solution.

177. *Id.* at 2425.
178. *Id.* at 2426.
179. *Id.* at 2427; United States v. Janis, 428 U.S. 433, 446 (1976).
180. *Davis*, 131 S. Ct. at 2428–29.
181. Lopez-Rodriguez v. Mukasey, 536 F.3d 1012, 1018 (9th Cir. 2008).
182. *Id.*
183. *See supra* notes 166–182 and accompanying text.

Adopting the standard through each federal appeals court would also be an unwieldy solution.[184] It is clear that a uniform adoption of the Ninth Circuit's standard would be incredibly difficult to achieve. For example, some circuits, like the Eighth Circuit,[185] will find it challenging to adopt the Ninth Circuit's standard without overruling their own precedent. Other circuits, such as the Second Circuit,[186] may find it easier because they do not have well-defined standards or the Ninth Circuit's standard is consistent with their own.

Although difficult, adoption of the Ninth Circuit's interpretation is still the ideal solution and should be pursued through rigorous appeals of motion-to-suppress denials in all circuits. However, because the adoption process may be lengthy, this Note proposes a concurrent solution to implement while the adoption of the standard is being sought. Rebellious lawyering[187] may not force the immediate adoption of the Ninth Circuit's standard, but it encourages action at the attorney and client level, and can initiate change regarding motions to suppress in immigration proceedings.

D. CONCURRENT SOLUTION: REBELLIOUS LAWYERING

This Note proposes that rebellious lawyering, a concept coined by Gerald López,[188] is the concurrent solution to initiate the nationwide adoption of the Ninth Circuit's standard. Rebellious lawyering differs from traditional and formal advocacy in that it intimately involves clients in every step of the representation, and encourages them to problem solve through self-help measures and community organizing.[189] A review of López's book explained rebellious lawyering as follows:

> López's rebellious lawyers . . . are deeply rooted in the communities in which they live and work. They collaborate with other service agencies and with the clients themselves; they try to educate members of the community about their rights; they explore the possibilities of change and continually reexamine their own work in order to help their clients best. Rebellious lawyering thus redefines the lawyer-client relationship as a cooperative partnership in which

184. This Note will not attempt to analyze the likelihood of each circuit adopting the Ninth Circuit's standard.

185. *See* Martinez Carcamo v. Holder, 713 F.3d 916, 923 (8th Cir. 2013) (deliberately rejecting the Ninth Circuit's standard).

186. *See* Cotzojay v. Holder, 725 F.3d 172, 176 (2d Cir. 2013).

187. LÓPEZ, *supra* note 25.

188. *Id.*

189. *See* Angelo N. Ancheta, *Community Lawyering*, 81 CALIF. L. REV. 1363, 1368–69 (1993) (reviewing LÓPEZ, *supra* note 25).

> knowledge and power are shared, rejecting a relationship limited to an active professional working on behalf of the passive, relatively powerless layperson.[190]

Significantly, rebellious lawyers "focus on individual client representation" and not on institutional reform and impact work; its goal is to empower clients and others in similar situations, and to allow them to control the situation.[191]

While López crafted this ideal of rebellious lawyering over twenty years ago, scholars continue to utilize the concept to support arguments for community and collaborative lawyering.[192] In the phrase "rebellious lawyering," López managed to artfully combine client-centered representation[193] and community lawyering, two nontraditional lawyering tactics. These two tactics—as embodied in the phrase "rebellious lawyering"—can be put to great use in the immigration context. Rebellious lawyering provides a concrete method to begin to change motions to suppress in immigration proceedings, and to adopt the Ninth Circuit's standard. It supports the argument that lawyers should not focus solely on systemic reform, like adopting the Ninth Circuit's standard, because it does not focus on individual clients or community-based change. Of course, the court system *does* have to be involved, but it is not the only method by which to initiate change.[194] Instead, lawyers can implement change at the client level in two main ways: community education and client-driven representation and education.

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190. *Id.* at 1370.

191. *Id.* at 1371.

192. *See, e.g.*, Robin S. Golden, *Collaborative as Client: Lawyering for Effective Change*, 56 N.Y.L. SCH. L. REV. 393, 406 (2011–2012) (using López's descriptions of rebellious lawyering to advocate for thinking about the collaborative—the community—as one's client); Kelly McAnnany & Aditi Kothekar Shah, *With Their Own Hands: A Community Lawyering Approach To Improving Law Enforcement Practices in the Deaf Community*, 45 VAL. U. L. REV. 875, 896 (2011) (calling López "a renowned pioneer of the community lawyering model" and discussing the use of a community lawyering model to remedy problems arising from deaf persons' interactions with law enforcement officials).

193. *See, e.g.*, Robin Steinberg, *Heeding* Gideon*'s Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 962 (2013) (defining the concept of client-centered representation as attorneys striving to "put clients' lives, not just their cases, first").

194. Ancheta, *supra* note 189, at 1368 ("Certainly, much work arises out of necessity: lawyers cannot escape the government's monopoly over fields such as . . . immigration law . . . . The trap of regnant lawyering is failing to understand that nontraditional alternatives such as self-help and community organizing do exist and that the customary roles of attorney and client are not etched into stone.").

1. Community Education

Lawyers should spend time creating ways in which they can inform communities where undocumented immigration is prevalent about their Fourth Amendment rights. This is an important step in enacting change in Fourth Amendment jurisprudence. Noncitizens should be aware of their Fourth Amendment rights and their ability to file motions to suppress if those rights are violated. Then, even if they are part of the approximately 44% of unrepresented immigrants in removal proceedings,[195] they will have the opportunity to file motions to suppress. The more motions that are filed in immigration court, the more chances the appeals courts will have to reconsider their own standards.

An example of community education is "Know Your Rights" programs.[196] These types of programs can include information regarding eligibility for immigration benefits, procedures for acquiring immigration benefits, services available to immigrants, and constitutional rights such as the right to not be unreasonably searched.[197] The programs at the Immigrant Legal Resource Center in California even include the distribution of "Red Cards."[198] On one side, the Red Cards give instructions in Spanish about how to exercise one's constitutional rights.[199] On the other side is a statement of an immigrant's rights in English, intended to be given to an immigration enforcement officer if the officer attempts to speak with or enter the home of an immigrant without the appropriate warrant or consent.[200]

Community education does not have to be difficult or complicated. One group of people can implement community education through a full-time commitment,[201] or many groups can implement this solution to spread out the commitment and

195. *See* EOIR, U.S. DEP'T OF JUSTICE, *supra* note 130 (indicating that 56% of immigrants in removal proceedings in 2012 were represented in those proceedings).

196. *See, e.g.*, Bill Ong Hing, *Legal Services Support Centers and Rebellious Advocacy: A Case Study of the Immigrant Legal Resource Center*, 28 WASH. U. J.L. & POL'Y 265, 282–85 (2008) (examining the "Know Your Rights" programs at the Immigrant Legal Resource Center as a form of community education).

197. *Id.* at 282–83.

198. *Know Your Rights*, IMMIGRANT LEGAL RESOURCE CENTER, http://www.ilrc.org/for-immigrants-para-inmigrantes/know-your-rights (last visited Sept. 14, 2014).

199. *Id.*

200. *Id.*

201. Hing, *supra* note 196, at 282 (mentioning that attorneys at the Immigrant Legal Resource Center do the presentations themselves).

workload, like the New York City Know Your Rights Program.[202] This program functions with the help of "the City Bar Justice Center, the Legal Aid Society, the New York Chapter of the American Immigration Lawyers Association, private law firms, and several law school clinics."[203] The latter option fits more cleanly into rebellious lawyering, since it promotes involvement with a community education program, yet still allows for a concurrent position as a legal representative for immigrant clients. This is where attorneys can utilize client-driven representation—in addition to community education—to inform clients on a one-to-one basis of their Fourth Amendment rights, and to diligently file motions to suppress evidence.

2. Client-Driven Representation and Education

Client-driven representation and education are also necessary in rebellious lawyering. Lawyers should inform their potential clients of all possible avenues of redress, including self-help. Even if a noncitizen cannot afford legal representation, they deserve to understand their rights, and attorneys can help with this by teaching potential clients about the Fourth Amendment.[204]

If an individual enters into a representation agreement with the lawyer, the lawyer should fully engage the client in deciding whether or not to file a motion to suppress. Motions to suppress should be suggested often, if relevant to the client's case, even in jurisdictions with strict "egregiousness" standards. When filing motions to suppress, lawyers should push the court to recognize the Ninth Circuit's lenient standard.

Rebellious lawyering empowers clients more than traditional lawyering, giving them control of their situation, education to better make decisions, and hope for alternative solutions. They are better able to see change as it applies to their case. It may not fix the immigration system, but, at the very least, it is kick-starting the change necessary in Fourth Amendment jurisprudence, while attorneys diligently file motions to suppress, appeal the denials, and push for the adoption of the Ninth Circuit's "egregiousness" standard.

202. Denny Chin, *Representation of the Immigrant Poor: Upstate New York*, 33 CARDOZO L. REV. 351, 355 n.28 (2011).

203. *Id.*

204. Rebellious lawyering encourages "teaching" over "talking about" the law. *See* Ancheta, *supra* note 189, at 1369.

CONCLUSION

Imagine sitting in your living room and hearing a knock on the door. Before getting up to answer it, ICE agents are inside your home, demanding to see your identification without showing you a warrant or telling you who they are.[205] Then imagine not being able to seek redress for this obvious Fourth Amendment violation. Is this constitutional?

It is clear that Fourth Amendment violations are still prevalent and require a remedy, especially in immigration proceedings. Motions to suppress evidence can be an effective and sufficient method to remedy constitutional wrongs, yet they are not regularly used in immigration proceedings. Solutions proposed by other scholars, such as guaranteed counsel, overruling *Lopez-Mendoza*, and broad immigration reform are neither practicable nor necessary. In order to reduce Fourth Amendment violations and provide redress, this Note proposes a two-part solution: nationwide adoption of the Ninth Circuit's standard for the *Lopez-Mendoza* "egregiousness" exception, while concurrently being rebellious lawyers to initiate change at the client and attorney level. Not only will this solution lead to an eventual binding interpretation to provide an effective remedy to Fourth Amendment violations, but it will also empower clients with the education and control needed to alter their circumstances while adoption of the Ninth Circuit's standard is pending.

205. CHIU ET AL., *supra* note 51, at 17 (describing how this happened in Texas in 2008 to a sixty-eight-year-old woman who had been a citizen for forty years).