The Law's Conflation of the Latinos' Identity: Reconsidering the Exclusionary Rule in Civil Removal Proceedings

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ABSTRACT

In 2014, the Second Circuit held that the exclusionary rule does not apply in civil deportation hearings absent an egregious violation of the Fourth Amendment. An egregious constitutional violation is one in which an individual is subjected to a seizure for no reason at all, or one in which a seizure is based on race, or some other grossly improper consideration. In Maldonado v. Holder*, the Petitioners were seized based solely on their Latino appearance and their eagerness to seek work as day laborers. Despite the presence of an egregious constitutional violation, the Second Circuit declined to extend the protections of the Fourth Amendment to the Petitioners, choosing instead to uphold discriminatory police action, motivated by grossly improper considerations. Concluding that factors such as ethnicity, national origin, and occupational status do not qualify as raced-based or some other grossly improper consideration necessary to trigger the exclusionary rule in civil immigration removal proceedings, the court denied the Petitioners the fundamental human right to due process and a fair trial.*

I. INTRODUCTION

On August 14, 2014, the United States Court of Appeals for the Second Circuit held in *Maldonado v. Holder* that the exclusionary rule does not apply in a deportation proceeding absent an egregious constitutional viola-

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tion.[1] The Petitioners in *Maldonado* had unsuccessfully argued that they were subjected to egregious Fourth Amendment violations as a result of discriminatory police action and thus were constitutionally entitled to either "suppression of evidence, or at least a suppression hearing."[2] The court ruled that the Petitioners had failed to demonstrate any egregious Fourth Amendment violations, and denied their motion for relief.[3]

Thirty years earlier in the landmark case of *I.N.S. v. Lopez-Mendoza*, the United States Supreme Court held that "an admission of unlawful presence in this country made subsequent to an allegedly unlawful arrest" is not subject to the protections of the exclusionary rule in civil deportation hearings.[4] The Court, however, declined to extend this rule to "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."[5] In so doing, the Supreme Court expressly left open the possibility that if an egregious constitutional violation were to occur, or some other transgression offending notions of fundamental fairness, the exclusionary rule might still apply in the context of civil removal hearings.[6]

The Second Circuit has since closed the explicit equitable gap left open by the *Lopez-Mendoza* Court.[7] Pursuant to Second Circuit law, exclusion of evidence is appropriate only if the record establishes: (1) a fundamentally unfair, egregious violation, or (2) if the "violation-regardless of its egregiousness or unfairness-undermine[s] the reliability of the evidence in dispute."[8] Thus,

> [I]f an individual is subjected to a seizure for *no* reason at all, that by itself may constitute an egregious violation, but *only* if the seizure is sufficiently severe. Second, even where the seizure is not especially severe, it may nevertheless qualify as an egregious violation if the stop was based on race (*or some other grossly improper consideration*).[9]

1. *See* Maldonado v. Holder, 763 F.3d 155, 158 (2d Cir. 2014); *see also* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) ("[T]he costs and benefits comes out against applying the exclusionary rule in civil deportation hearings held by the INS.").

2. *Maldonado*, 763 F.3d at 158.

3. *See id.* at 164.

4. *Lopez-Mendoza*, 468 U.S. at 1034.

5. *Id.* at 1050–51.

6. *See id.*

7. *See generally* Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006) (creating a two-part test for determining when evidence must be excluded under *Lopez-Mendoza*).

8. *Id.*

9. *Id.* (emphasis added).

Developed in *Almeida-Amaral v. Gonzales*, this seemingly comprehensive analytical framework under which to define and identify egregious abuse, is not without limitations.[10] "The court . . . had no occasion to explore (1) how severe an abuse must be to be egregious; (2) what it means for a stop to be 'based on race'; and (3) what 'other' considerations are 'grossly improper.'"[11]

The seizure in *Maldonado v. Holder* qualified as an egregious violation both because it was sufficiently severe in itself, and because it was based on other, grossly improper considerations: ethnicity and national origin. The *Maldonado* Court misapplied the egregious abuse standard and unjustifiably denied the Petitioners their right to suppress self-incriminating evidence, or alternatively, their right to a suppression hearing. Part II of this Comment outlines the development of the case law on the prohibition against egregious abuse, and discusses the burden a defendant must meet in order to prevail on an egregious abuse claim. Part III examines the opinions in *Maldonado*, and articulates why the violations qualify as egregious. Finally, Part IV concludes that where an unlawful seizure fails to satisfy the egregious violation standard, constitutional demands and public policy favor application of the exclusionary rule in the context of civil removal proceedings.

II. THE PROHIBITION AGAINST EGREGIOUS ABUSE

A. *I.N.S. v. Lopez-Mendoza*

1. An Imperfect Balancing Exercise

At issue in *Lopez-Mendoza* was whether an "admission of unlawful presence in this country made subsequent to an allegedly unlawful arrest must be excluded as evidence in a civil deportation hearing."[12] A bare majority of the Supreme Court held that the exclusionary rule does not apply in civil deportation hearings.[13] The Court relied on *United States v. Janis*, which established the proper framework for determining in what types of proceedings the exclusionary rule applies.[14] Engaging in an admittedly "imprecise" balancing exercise, the Court weighed the perceived social benefits of applying the exclusionary rule—excluding the unlawfully

10. *See* Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006); Maldonado v. Holder, 763 F.3d 155, 159 (2d Cir. 2014).

11. *Id.*

12. I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1034 (1984).

13. *Id.* at 1050.

14. *Id.* at 1041. *See generally* United States v. Janis, 428 U.S. 433 (1976) (balancing the remedial objectives of applying the exclusionary rule against the likely substantial costs).

seized evidence—against the likely costs.[15] Relying on the probable benefits, the Court noted that "the 'prime purpose' of the exclusionary rule, if not the sole one, 'is to deter future unlawful police conduct.'"[16] As for the costs, the Court observed that loss of probative evidence and secondary costs resulting from "less accurate or more cumbersome adjudication" would likely result from excluding unlawfully seized evidence.[17]

Though the Court recognized that the deterrent value of the exclusionary rule, particularly as applied to civil deportation proceedings, is "difficult to assess,"[18] it nonetheless cited four reasons as to why the likely social costs outweighed any potential deterrent effect.[19] First, deportation is still possible even when evidence derived directly from the arrest is suppressed.[20] Second, because very few arrestees challenge the lawfulness of their arrest at formal deportation hearings, it is unlikely that the arresting officer will have any incentive to conform his or her conduct should the exclusionary rule apply.[21] Third, and most significant, the legacy Immigration and Naturalization Service (INS)[22] had already implemented its own "comprehensive scheme" for "deterring Fourth Amendment violations by its officers."[23] These regulations were aimed at restricting unlawful stops, arrest,

15. *Lopez-Mendoza*, 468 U.S. at 1041.

16. *Id.* (quoting *Janis*, 428 U.S. at 446); *see also Janis*, 428 U.S. at 449–53 (observing that empirical studies as to whether the exclusionary has any deterrent effect are flawed); Jonathan L. Hafetz, Note, *The Rule of Egregiousness:* INS v. Lopez-Mendoza *Reconsidered*, 19 WHITTIER L. REV. 843, 852 (1998) ("[T]he application of the exclusionary rule in a civil proceeding should be determined by weighing the deterrent value against the social costs.").

17. *Lopez-Mendoza*, 468 U.S. at 1041.

18. *See supra* text accompanying note 16.

19. *See generally Lopez-Mendoza*, 468 U.S. at 1042–45 (analyzing four factors that "significantly reduce the likely deterrent value of the exclusionary rule in a civil deportation proceeding").

20. *See id.* at 1043–44 (quoting Sandoval, 17 I. & N. Dec. 70 (B.I.A. 1979), at 79) (noting that in a deportation hearing, the "sole matters necessary for the Government to establish are the respondent's identity and alienage"—matters not themselves suppressible).

21. *See id.* at 1044 (observing that out of 500 reported arrests, over 97.5% of arrestees voluntarily agree to deportation without a formal hearing, and only a "dozen or so in all, per officer, per year," actually challenge their arrests).

22. *See generally* Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (abolishing the INS on March 1, 2003, with the establishment of the Department of Homeland Security (DHS)). The Act transferred the regulatory immigration enforcement functions from the legacy INS to three components within DHS; the newly created Immigration and Customs Enforcement (ICE) is responsible for enforcing immigration laws. *Id.*; *Our History*, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://www.uscis.gov/about-us/our-history (last updated May 25, 2011); *What We Do*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/overview (last visited Mar. 25, 2016).

23. *Lopez-Mendoza*, 468 U.S. at 1044.

and interrogation practices, required that "no one be detained without reasonable suspicion of illegal alienage, and that no one be arrested unless there [be] an admission of illegal alienage or other strong evidence thereof."[24] Finally, the availability of alternative remedies for institutional practices by the legacy INS that are said to violate the Fourth Amendment undermine the deterrent value of the exclusionary rule.[25]

The *Lopez-Mendoza* Court then turned to the "unusual and significant" social costs associated with application of the exclusionary rule to civil deportation hearings.[26] First, the application of the rule in the context of deportation proceedings "would require the courts to close their eyes to ongoing violations of the law."[27] Second, the federal government deliberately operates a simple and streamlined deportation hearing system to permit for the resolution of a large number of immigration actions in which neither the hearing officer nor participating attorneys are likely to be well-versed in Fourth Amendment law.[28] Lastly, application of the exclusionary rule could result in the suppression of lawfully obtained evidence.[29] Weighing both the likely social benefits and costs, the *Lopez-Mendoza* Court held "against applying the exclusionary rule in civil deportation hearings."[30]

2. *Lopez-Mendoza* Limited

The *Lopez-Mendoza* holding was limited by a plurality of the Justices.[31]

24. *See id.* at 1044–45 (citing Department of Justice policy excluding evidence seized through intentionally unlawful conduct).

25. *Id.* at 1045 ("Deterrence must be measured at the margins.").

26. *See generally id.* at 1046–50 (explaining the substantive and procedural costs associated with applying the exclusionary rule to civil deportation hearings).

27. *Id.* at 1046–47 ("[T]he objective of deterring Fourth Amendment violations should not require such a result. The constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime. When the crime in question involves unlawful presence in this country, the criminal may go free, but he should not go free within our borders.").

28. *Id.* at 1048–49 ("At present an officer simply completes a 'Record of Deportable Alien' that is introduced to prove the [legacy] INS's case at the deportation hearing; the officer rarely must attend the hearing. Fourth Amendment suppression hearings would undoubtedly require considerably more, and the likely burden on the administration of the immigration laws would be correspondingly severe.").

29. *Id.* at 1049.

30. *Id.* at 1050 (recognizing that since the legacy INS had already taken measures to prevent Fourth Amendment violations, any additional deterrent value of the exclusionary rule in the context of civil deportation hearings would be small, while the costs high); *see also* Sandoval, 17 I. & N. Dec. 70, 75–83 (B.I.A. 1979) (holding that the exclusionary rule does not apply to civil deportation hearings).

31. *See* Gonzalez-Rivera v. I.N.S., 22 F.3d 1441, 1448, 1448 n.2 (9th Cir. 1994) (explaining that "[t]he majority opinion in *Lopez-Mendoza*, written by Justice O'Connor, was

Notably, the Court maintained that its balancing analysis "did not govern '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."[32] The ruling in *Lopez-Mendoza* is therefore applicable only where "credible evidence [is] gathered in connection with peaceful arrests by INS officers."[33] Thus, *Lopez-Mendoza* holds that credible evidence derived from peaceful arrests by immigration officers do not need to be suppressed at civil deportation hearings; however, arrests implicating egregious constitutional violations or allegations of fundamental unfairness are plainly outside the scope of the decision.[34] Moreover, the Court unambiguously remarked that *Lopez-Mendoza* would be subject to change should there develop widespread Fourth Amendment violations by immigration officials.[35]

B. The Exclusionary Rule

The Fourth Amendment to the United States Constitution protects the people "against unreasonable searches and seizures."[36] The exclusionary rule, a judicially created remedy, is "the primary way by which courts give

joined by four other Justices," while "the part of the opinion where the 'egregiousness' caveat appears was joined by only three other Justices). However, "the four dissenters, who contended that the exclusionary rule applies in the civil and the criminal contexts alike, would have approved any limitation on the majority's decision." *Id.* at 1448 n.2; *see also Lopez-Mendoza*, 468 U.S. at 1050–61 (holding that the exclusionary does not apply to civil removal proceedings but that the Court's "conclusion[] concerning the exclusionary rule's value might change . . . "); Irene Scharf, *The Exclusionary Rule in Immigration Proceedings: Where It Was, Where It Is, Where It May Be Going*, 12 SAN DIEGO INT'L L.J. 53, 60 (2010) (noting that the *Lopez-Mendoza* Court left "open the possibility for suppression of evidence in certain immigration cases").

32. Maldonado v. Holder, 763 F.3d 155, 169 (2d Cir. 2014) (Lynch, J., dissenting); *see Lopez-Mendoza*, 468 U.S. at 1050–51; *see also* Almeida-Amaral v. Gonzales, 461 F.3d 231, 234 (2d Cir. 2006) ("*Lopez-Mendoza* authorizes exclusion for violations that are egregious *either* because the violation 'transgress[es] notions of fundamental fairness,' *or* because the violation 'undermine[s] the probative value of the evidence obtained.'"); Toro, 17 I. & N. Dec. 340, 343 (B.I.A. 1980) ("To be admissible in deportation proceedings, evidence must be probative and its use *fundamentally fair* so as to not deprive respondents of due process of law as mandated by the [F]ifth [A]mendment.") (emphasis added). *See generally* Trias-Hernandez v. I.N.S., 528 F.2d 366, 369 (9th Cir. 1975) (analyzing the Form 1-213 for fundamental fairness and probativeness).

33. *Lopez-Mendoza*, 468 U.S. at 1051.

34. *See id.*; *Gonzalez-Rivera*, 22 F.3d at 1448 ("The *Lopez-Mendoza* Court . . . limited its holding to situations that do not involve 'egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.'").

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

36. U.S. CONST. amend. IV.

effect to the Fourth Amendment."[37] The rule is designed to safeguard a party's Fourth Amendment rights through its deterrent effect, rather than by establishing or preserving a "personal constitutional right of the party aggrieved."[38]

Hence, the courts traditionally reserve application of the exclusionary rule "to those areas where its remedial objectives are thought most efficaciously served."[39] Instead of applying the exclusionary rule automatically whenever a Fourth Amendment violation has occurred, the Court performs a balancing test to determine whether the rule's "remedial objectives" will be served by its application.[40] These balancing tests, created first in *United States v. Calandra*, and then followed by *United States v. Janis*, "opened the door to case-by-case evaluations of whether the exclusionary rule should apply in the face of a given Fourth Amendment violation."[41]

C. Burden-Shifting Framework

The Board of Immigration Appeals (BIA) adopted a burden-shifting framework "[i]n order to accommodate the competing interests of the government in streamlined removal proceedings, while simultaneously guarding individuals against egregious Fourth Amendment violations."[42] In the context of a removal proceeding, a petitioner attempting to suppress evidence due to a Fourth Amendment violation initially has the burden to establish a prima facie case; the burden then shifts to the government which must justify the manner in which that evidence was obtained.[43] The petitioner must offer an "affidavit that *could* support a basis for excluding the

37. 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, 484 (2013); *see* United States v. Janis, 428 U.S. 433, 446 (1976) (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

38. *Janis*, 428 U.S. at 446 (quoting *Calandra*, 414 U.S. at 348); *see also* Rossi, *supra* note 37, at 485–86 (noting that as a result of *Calandra*, courts are "free to weigh the costs and benefits of applying the [exclusionary] rule in . . . non-criminal case[s], instead of applying it automatically whenever a Fourth Amendment violation occur[s]"); Judy C. Wong, *Egregious Fourth Amendment Violations and the Use of the Exclusionary Rule in Deportation Hearings: The Need for Substantive Equal Protection Rights for Undocumented Immigrants*, 28 COLUM. HUM. RTS. L. REV. 431, 447 (1997) (explaining that the exclusionary rule is not a "constitutionally required protection against Fourth Amendment violations" but rather a "procedural remedy" subject to a cost-benefit analysis).

39. *Calandra*, 414 U.S. at 348.

40. Rossi, *supra* note 37, at 485–86.

41. *Id.* at 486.

42. Maldonado v. Holder, 763 F.3d 155, 169 (2d Cir. 2014) (Lynch, J., dissenting).

43. *See id.* at 170 (quoting Cotzojay v. Holder, 725 F.3d 172, 178 (2d Cir. 2013)).

evidence in question," which "must then be supported by testimony."[44] If the petitioner successfully establishes a prima facie case, the burden then shifts to the government to show why the evidence should be admitted.[45] In order to suppress evidence of a Fourth Amendment violation, the petitioner must also make a prima facie showing that an egregious abuse occurred.[46] The egregiousness inquiry is intended to be both broad and flexible, warranting a case-by-case approach.[47]

III. *MALDONADO V. HOLDER*

A. Majority Opinion

"On September 19, 2006, Petitioners were among [others] gathered in [a local park in] Danbury, Connecticut, [ ] seek[ing] work as day laborers."[48] The Danbury Police Department (DPD), together with U.S. Immigrations and Customs Enforcement (ICE), were carrying out a joint sting operation in the area.[49] The Petitioners entered an unmarked vehicle driven by an undercover DPD officer and were taken to a nearby parking lot, where they were arrested.[50] During processing, the Petitioners made self-incriminating statements regarding their immigration status, statements which they later sought to suppress pursuant to the Fourth Amendment.[51] These statements were memorialized on Form I-213s (Records of Deportable/Inadmissible Alien).[52] The Petitioners were subsequently served with Notices to Appear, which alleged that they were citizens of Ecuador who had entered the United States illegally.[53]

The Immigration Judge (IJ) denied the "Petitioners' motions to hold

44. *Id.* (quoting *Cotzojay*, 725 F.3d at 178) (emphasis added).

45. *Id.* (citing *Cotzojay*, 725 F.3d at 178).

46. *Id.* (citing *Cotzojay*, 725 F.3d at 179).

47. *Cotzojay*, 725 F.3d at 182–83.

48. *Maldonado*, 763 F.3d at 158.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*; *see supra* text accompanying note 28. *See generally* Bauge v. I.N.S., 7 F.3d 1540, 1543 (10th Cir. 1993) ("A Form I–213 is an official record routinely prepared by an INS agent as a summary of information obtained at the time of the initial processing of an individual suspected of being an alien unlawfully present in the United States."); Terry Coonan, *Tolerating No Margin for Error: The Admissibility of Statements by Alien Minors in Deportation Proceedings*, 29 TEX. TECH L. REV. 75, 83 (1998) ("[A]bsent a showing that a Form I-213 contains either incorrect information or information obtained by coercion, it is normally regarded as 'inherently trustworthy and admissible as evidence to prove alienage and deportability.'" (quoting In re Garcia, No. A70-006-067, slip op. at 4, 5 (B.I.A. Aug. 17, 1993))).

53. *Maldonado*, 763 F.3d at 158.

suppression hearings, suppress evidence, and terminate removal proceedings."[54] The BIA likewise dismissed the Petitioners' appeal.[55] Upon judicial review of the BIA decision, the Second Circuit held that the Petitioners' affidavits could not support a finding of egregious violations of the Fourth Amendment, and affirmed the decision of the BIA.[56] The Petitioners had relied on a pair of Ninth Circuit decisions to argue that consideration of their status as day-laborers qualified as grossly improper, amounting to an egregious violation.[57] The court concluded that the Petitioners' affidavits did not "suggest[] that they were gathered by the authorities, let alone that they were selected by the authorities on the basis of race." Rather, the court found that the Petitioners' had "*self-selected* on the basis of their willingness to seek and accept day labor."[58]

The Petitioners next unsuccessfully argued that the *Cotzojay* burden-shifting framework adopted and employed by the BIA deprived them of due process because much of the information they would be required to attest to in their affidavits could not possibly be within their personal knowledge; rather, a hearing was required to "explore the circumstances of the arrest and the motivations and attitudes of the officers who arrested them."[59] Relying upon the social costs analysis utilized by *Lopez-Mendoza* Court, the Second Circuit summarily rejected this argument.[60] "[D]eportation hearings, which depend on simplicity and efficiency, would become immensely complicated if testimony had to be heard on the de-

54. *Id.*

55. *Id.*

56. *Id.* at 160.

57. *See* Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 940 (9th Cir. 2011) (holding that the solicitation of work is constitutionally-protected speech in an action brought by a pair of day-laborer organizations); United States v. Manzo-Jurado, 457 F.3d 928, 932 (9th Cir. 2006) (holding that the appearance of a Hispanic work crew is insufficient to support reasonable suspicion of illegal presence); *cf. Maldonado*, 763 F.3d at 161 n.3 ("[T]hese cases say nothing about whether occupation may be considered in an immigration enforcement operation, or whether an officer may take into account that work as a day laborer is likely correlated with undocumented status, or whether such a consideration is 'grossly improper' and an 'egregious violation' of constitutional rights requiring suppression in a civil deportation proceeding.") (citation omitted).

58. *Maldonado*, 763 F.3d at 161 (emphasis added).

59. *Id.*

60. *Id.* at 161–62. *See generally* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1048 (1984) (explaining that removal proceedings are purposefully streamlined to be simple and thus "[t]he prospect of even occasional invocation of the exclusionary rule might significantly change and complicate the character of these proceedings"). *But see* Hafetz, *supra* note 16, at 853–54 (critiquing the *Lopez-Mendoza* Court's analysis of the social costs associated with application of the exclusionary rule).

tailed circumstances of each arrest."[61]

The Petitioners also argued they were specifically targeted by the DPD and ICE on the basis of national origin.[62] Evidence tended to show that the city's better-assimilated Brazilian immigrant population, who congregated as day laborers in a nearby park, were not targeted.[63] The majority interpreted this as tending to refute, rather than support, any race-based animus.[64] According to the court, this "argument conflate[d] 'race' (the only 'grossly improper consideration' posited in *Almeida–Amaral*) with 'ethnicity' and 'national origin.'"[65] Though the "[s]eizure of persons based on nationality, race, or ethnicity (or handicap or sexual orientation, for that matter) can no doubt rise to an egregious constitutional violation . . . it is absurd to foreclose altogether the consideration of nationality in immigration enforcement."[66]

B. Dissent

The dissent found the majority's application of the *Cotzojay* burden-shifting framework to be fundamentally flawed.[67]

> [T]he proper application of the burden-shifting framework . . . ensures that in cases where all of the facts that would prove egregiousness are not within the personal knowledge of the petitioner, the petitioner will have an adequate opportunity to secure such evidence. Thus, while establishing a prima facie case for suppression requires an offer of proof containing information personally corroborated by petitioner, that requirement "cannot extend to information the petitioner does not have."[68]

61. Rajah v. Mukasey, 544 F.3d 427, 447 (2d Cir. 2008); *see Maldonado*, 763 F.3d at 162. *See generally Lopez-Mendoza*, 468 U.S. at 1048–50 (examining the effects that application of the exclusionary rule would have on immigration proceedings and practices); Hafetz, *supra* note 16, at 853–55 (arguing that the *Lopez-Mendoza* Court's reliance on administrative convenience disregards the particularized suspicion required under the Fourth Amendment and "begs the question of whether race" is the overriding factor on which immigration officials rely).

62. *Maldonado*, 763 F.3d at 162.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 167.

67. *Id.* at 170 (Lynch, J., dissenting); *see* Cotzojay v. Holder, 725 F.3d 172, 178 (2d Cir. 2013) ("[T]he requisite 'personal knowledge' refers to information possessed by the respondent who was subject to the alleged constitutional violation; it cannot extend to information the respondent does not have.").

68. *Maldonado*, 763 F.3d at 170 (Lynch, J., dissenting) (quoting *Cotzojay*, 725 F.3d at 178).

Examples of factors tending to establish the need for an evidentiary hearing to determine the presence of a Fourth Amendment violation include whether the violation was intentional; "whether the seizure was gross or unreasonable and without plausible legal ground; . . . and whether the seizure or arrest was based on race *or* ethnicity."[69] However, evidence concerning the intentionality of a violation, an officer's motivation, and the motivating factors for governmental action could not possibly be within a petitioner's knowledge at the prima facie stage.[70] "The affidavits submitted by the [P]etitioners . . . taken as true, strongly suggest that their arrests were without plausible legal grounds and may well have been based on their ethnicity, national origin, and status as day laborers."[71]

The dissent proceeded to elaborate upon the first prong of the egregious abuse test: whether the Petitioners' arrests were conducted with any plausible legal grounds at all.[72] The stated purpose of the law enforcement action at issue in *Maldonado* was traffic safety, namely to prevent day laborers from running into traffic to solicit work, a purpose the majority refers to as a "partial motive at best."[73] Remarkably, nothing in the record suggested that the undercover or arresting officers knew anything about the Petitioners' immigration status other than the fact that they were seeking work as day laborers and appeared Hispanic.[74] Because "it is not a crime for a removable alien to remain present in the United States," the dissent concluded that law enforcement officials lacked any apparent basis to arrest the Petitioners.[75] Not a single traffic ordinance or criminal law was identified as the basis for Petitioners' arrests.[76] Therefore, "prior to their arrest and interrogation, the arresting officers did not have any reasonable basis to suspect that [P]etitioners had violated any state, federal, or local law, the bare minimum required for a lawful seizure."[77] Lacking plausible legal ground for the seizures, the stop must fail the first prong of the egregious abuse test.[78] It follows that at minimum, the Petitioners should have been afford-

69. *Id.* at 170–71 (quoting *Cotzojay*, 725 F.3d at 182) (noting that this list is non-exhaustive).

70. *Id.* at 171.

71. *Id.*

72. *Id.*; *see* Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006).

73. *Maldonado*, 763 F.3d at 165.

74. *Id.* at 172 (Lynch, J., dissenting).

75. *Id.* (quoting Arizona v. United States, 132 S. Ct. 2492, 2505 (2012)); *see* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

76. *Maldonado*, 763 F.3d at 172 (Lynch, J., dissenting).

77. *Id.* (citing Terry v. Ohio, 392 U.S. 1, 27 (1968)).

78. *Id.* at 172; Cotzojay v. Holder, 725 F.3d 172, 182 (2d Cir. 2013); *see* Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006).

ed a suppression hearing.[79]

Lastly, the dissent addressed the issue of whether the law enforcement action in question was motivated by some other "grossly improper consideration," such as ethnicity or nationality.[80] The joint sting operation was the result "of a multi-year effort to combat what some Danbury officials and residents viewed as a growing influx of undocumented immigrants."[81] In 2004, the Mayor of Danbury had written to United States Customs and Immigration Services to ask that enforcement resources be focused on Danbury because the city "had attract[ed] a large number of undocumented immigrants."[82] In 2005, the Mayor again "reached out to Connecticut's then-Governor requesting an agreement under 8 U.S.C. § 1357(g), which would have allowed state or local police officers to enforce federal immigration law under the supervision of ICE officials."[83] The Mayor's efforts were futile.[84]

In apparent response to the Mayor's rebuffed efforts, the DPD amped up theirs, "targeting housing code violations" and events popular among the city's Hispanic immigrant population.[85] Yet, increased enforcement efforts were not targeted towards the city's better-assimilated immigrant population, which were also known to gather as day laborers at a nearby local park.[86] Despite this, on the morning of September 19, 2006, a Danbury police officer dressed as a contractor and drove to the park in an unmarked car where the Ecuadorian Petitioners were known to peacefully assemble to seek work as day laborers, in hopes that he would be approached by the men soliciting work.[87] The immigrants would then enter the car, under the

79. *See Maldonado*, 763 F.3d at 172 (Lynch, J., dissenting).

80. *See id*. at 171.

81. *Id*. at 168; *see supra* text accompanying note 49.

82. *Maldonado*, 763 F.3d at 168 (Lynch, J., dissenting).

83. *Id*. at 168. *See generally* 8 U.S.C.A. § 1357(g) (West 2014) (effective Aug. 12, 2006) (permitting the United States Attorney General to enter into an agreement with a state, or any political subdivision thereof, so that state officers and employees may perform immigration functions).

84. *Maldonado*, 763 F.3d at 168 (Lynch, J., dissenting).

85. *Id*.

86. *Id*. at 168–69. *See generally* René Galindo & Jami Vigil, *Language Restrictionism Revisited: The Case Against Colorado's 2000 Anti-Bilingual Education Initiative*, 7 HARV. LATINO L. REV. 27, 32 (2004) ("A perceived failure to assimilate, such as continuing to speak a non-English language, is considered evidence of disloyalty and un-Americanness."); Enid Trucios-Gaynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of the American National Identity*, 76 OR. L. REV. 369, 381 (1997) ("Assimilation theory is premised on the notion of a literal bonding of the races, and 'Anglo conformity,' requiring the negation of one's culture as a prerequisite to full participation in our society.").

87. *Maldonado*, 763 F.3d at 169 (Lynch, J., dissenting).

mistaken belief that they would be taken to work, but instead were driven to an abandoned parking lot where they were confronted by additional police and ICE agents.[88] The DPD repeated the hoax twice more; a total of eleven men were arrested in this manner.[89]

The majority reasoned that because Petitioners voluntarily entered the vehicle, they had in effect "self-selected" themselves for arrest, as distinguished from bystanders and casual park visitors.[90] But, according to the dissent, "[t]o hold that law enforcement officials can target a specific area on the basis of improper considerations such as ethnicity and national origin, and then suggest that particular individuals selected themselves for arrest by engaging in lawful conduct is to condone ethnic harassment."[91] Moreover, the dissent argued that the majority impermissibly correlated undocumented status with day laborers and ethnicity:[92]

> [P]etitioners "selected" themselves from others gathered in the park only by volunteering to accept an implicit offer of employment. They neither volunteered themselves for arrest nor engaged in any illegal activity. . . . The panel offers no empirical support for its assertion that *anyone* who offers to engage in casual or "off-the-books" work is likely to be an undocumented immigrant. . . . [A] mere statistical correlation between entirely unsuspicious, lawful behavior and some form of illegal activity does not give rise to individualized reasonable suspicion or probable cause. The solicitation of work is in itself constitutionally-protected speech.[93]

Thus, the dissent rejected the majority's self-selection theory because it was inherently over-broad when considered separately from the ethnic, day laborer context.[94]

The dissent also rejected the contention that the only improper consideration in an egregious violation claim can be race-based animus.[95] The majority's failed attempt to distinguish between race, ethnicity, and national origin, the dissent concluded, appears to sanction immigration enforcement campaigns based on "generalized notions of physical appearance and cul-

88. *Id.*

89. *Id.*

90. *Id.* at 161 (majority opinion).

91. *Id.* at 172 (Lynch, J., dissenting).

92. *Id.*

93. *Id.* at 172–73 (emphasis added). *See generally* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) (holding that the solicitation of work is constitutionally-protected speech).

94. *See Maldonado*, 763 F.3d at 173 (Lynch, J., dissenting).

95. *Id.*; *see supra* text accompanying note 65.

tural stereotypes."[96] The targeting of day laborers, whether ethnically-based or due to national origin, is grossly improper, fundamentally unfair, and gives rise to an egregious constitutional violation.[97] When immigration enforcement ceases to hinge on individualized suspicion, targeted raids excepted, but rather rests on grossly improper generalizations relating to ethnicity and national origin, the United States "teeters on the verge of 'the ugly abyss of racism.'"[98]

Lastly, again relying on *Lopez-Mendoza*, the majority held that ICE must be able to rely on national origin in order to conduct raids and mass arrests, such as in "sweatshops, forced brothels, and other settings in which illegal aliens are exploited and threatened—and much worse."[99] Because the circumstances surrounding ICE arrests are often chaotic, arresting agents are usually only able to testify to the fact that they followed agency rules.[100] If immigration officials were made to recall details of specific arrests, the result would be to preclude them from conducting mass arrests altogether, "even when [immigration officials are] confronted . . . with mass numbers of ascertainably illegal aliens, and even when the arrest can be and [is] conducted in full compliance with all Fourth Amendment requirements."[101]

According to the Court, the individualized suspicion required by the Fourth Amendment would render mass arrests impossible or ineffective.[102] This logic is flawed for two reasons.[103] First, the *Lopez-Mendoza* Court assumed "that the exclusionary rule would preclude mass arrests by suppressing lawfully obtained evidence."[104] Second, the Court created a "legal fiction" in which immigration officials "can dispense with the requirement of particularized suspicion" while maintaining that such "searches are 'conducted in full compliance with all Fourth Amendment requirements.'"[105]

96. *Maldonado*, 763 F.3d at 173 (Lynch, J., dissenting) ("[T]he majority appears to suggest that . . . seizures would be entirely permissible if they were based on factors such as apparent ethnicity or national origin, combined with the general experience of local police officers.").

97. *See id.*

98. *Id.* at 174 (quoting Korematsu v. United States, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting)).

99. *Id.* at 162 (majority opinion). *See generally* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1049–50 (1984) (explaining that one impermissible social cost as a result of the application of the exclusionary rule in civil removal hearings is the preclusion of immigration officers from performing mass arrests).

100. *Lopez-Mendoza*, 468 U.S. at 1049.

101. *Id.* at 1049–50.

102. Hafetz, *supra* note 16, at 855.

103. *See id.* at 854.

104. *Id.* at 854.

105. *Id.* at 855 (quoting *Lopez-Mendoza*, 468 U.S. at 1050).

IV. THE CONFLATION OF RACE, ETHNICITY AND NATIONAL ORIGIN

A. The Bad Faith Standard

In *Gonzalez-Rivera v. I.N.S.*, the Ninth Circuit reversed the BIA and reinstated the IJ's, holding that a bad faith and egregious Fourth Amendment violation had occurred, and hence, the exclusionary rule should operate to suppress the Form I-213.[106] Gonzalez (the petitioner) was traveling by car with his father, northbound on Interstate Highway 805, past San Diego, California, when they were stopped by Border Patrol.[107] The petitioner was unable to produce immigration documents when stopped.[108] At trial, Border Patrol Officer Salvador Wilson testified that Highway 805 is a "major corridor for alien smuggling" and that "almost everyone who travels on [it] is of Hispanic descent."[109] Despite there being "nothing wrong or suspicious about the car itself or the manner in which Gonzalez's father was driving," the officer proffered five, seemingly independent factors to justify the stop.[110] Of those five factors, the first and only one at issue in *Gonzalez-Rivera* was that the men appeared Hispanic.[111]

Officer Wilson could not recall how the petitioner was dressed, changed his description of the petitioner's behavior, and contradicted his testimony.[112] The IJ held that the evidence showed the stop was based solely on Hispanic appearance, was an egregious Fourth Amendment violation, and granted the petitioner's motion to suppress the I-213.[113] On appeal, the BIA reversed, noting that the petitioner had failed to come forward with a prima facie case because the his motion to suppress failed to include either "a statement or testimony on his own behalf."[114]

The Ninth Circuit conducted a two-pronged analysis: (1) whether the officers' conduct was unreasonable under the Fourth Amendment, and (2) whether the conduct was egregious.[115] The *Gonzalez* Court concluded that the petitioner was stopped because of his ethnicity – based solely on his Hispanic appearance – and that since the officers lacked reasonable suspi-

106. Gonzalez-Rivera v. I.N.S., 22 F.3d 1441, 1443 (9th Cir. 1994).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 1443–44.

113. *Id.* at 1444.

114. *Id.*

115. *See generally id.* at 1445–52 (holding that the officers' conduct violated the Fourth Amendment and was an egregious constitutional violation).

cion to make the stop, it constituted a Fourth Amendment violation.[116]

To determine whether an egregious Fourth Amendment violation has occurred, the Ninth Circuit employs a "bad faith" standard.[117] Under the bad faith standard, evidence obtained by deliberate Fourth Amendment violations, "or by conduct a *reasonable officer should have known* is in violation of the Constitution," is an egregious constitutional violation.[118] In *Gonzalez-Rivera*, the Ninth Circuit applied this bad faith standard to a stop based solely on race.[119] The court relied on *United States v. Brignoni-Ponce*[120] to hold that a stop based solely on Hispanic appearance is unconstitutional.[121] The court reasoned that racial oppression is a serious threat to the concept of fundamental fairness, and that reliance upon "one's ancestry as probative of possible criminal conduct" is considered "shorthand for likely illegal conduct to be 'repugnant under any circumstances.'"[122] The Ninth Circuit also relied on the *Lopez-Mendoza* Court's balancing analysis, which placed significant emphasis on the fact that the legacy INS had its own comprehensive scheme for deterring Fourth Amendment violations.[123] Thus, the court concluded that the officers who stopped the petitioner did not act on a "good faith belief that their conduct was constitutionally permissible."[124] The court reasoned that because immigration officers receive

116. *Id.* at 1147–49.

117. *See generally id.* at 1449 (explaining that the BIA has adopted "a reasonableness standard to determine whether an officer has engaged in a bad faith constitutional violation"); Adamson v. C.I.R., 745 F.2d 541, 545 (9th Cir. 1984) ("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.").

118. *Gonzalez-Rivera*, 22 F.3d at 1449 (citing *Adamson*, 745 F.2d at 545).

119. *Id.*

120. *See id.* at 1445, 1447–51. *See generally* United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975) (holding that Hispanic appearance alone is insufficient to justify a stop); Nicacio v. I.N.S., 797 F.2d 700, 703 (9th Cir. 1985) ("*Brignoni-Ponce* and its progeny make clear that Hispanic-looking appearance and presence in an area where illegal aliens frequently travel are not enough to justify a stop. . . . More is required.").

121. *Gonzalez-Rivera*, 22 F.3d at 1450–51.

122. *See id.* at 1449, n.7 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 572 n.1 (1976) (Brennan, J., dissenting)). *See generally* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (citation omitted) (relying on Supreme Court precedents and contemporary history to proclaim that "discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society"); Plessy v. Ferguson, 163 U.S. 537, 559 (1896) ("[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind. . . .").

123. *Gonzalez-Rivera*, 22 F.3d at 1450; *see* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1044–45 (1984); *supra* text accompanying notes 23–24.

124. *Gonzalez-Rivera*, 22 F.3d at 1450–51.

extensive training in Fourth Amendment law, any subsequent violation thereof must be deliberate and cannot be in good faith.[125]

The Ninth Circuit "interpreted the 'egregiousness' caveat in *Lopez-Mendoza*" to permit the application of the exclusionary rule where there is an egregious Fourth Amendment violation.[126] By excluding egregious constitutional violations from its holding, the *Lopez-Mendoza* Court implicitly recognized that a core function of the exclusionary rule is to safeguard judicial integrity, even if this would require its application in the civil context.[127] Judicial integrity cannot be impaired by allowing the introduction of evidence obtained in deliberate violation of the Fourth Amendment—that would also "require the courts to close their eyes to ongoing violations of the law."[128] The courts cannot sanction deliberate violations of basic constitutional rights and maintain integrity for the law; to permit the admission of evidence obtained during the course of a racially motivated stop would require judicial participation in discrimination.[129]

B. Rejecting the Black/White Binary

Though both the Second and Ninth Circuit's interpretation of egregious conduct are not altogether different, the Ninth Circuit has adopted a more expansive definition of the term itself.[130] The *Gonzalez* Court shunned the stringent and rarely satisfied standard of egregious (adopted by the Second Circuit) while upholding traditional Fourth Amendment seizure requirements, and rejected the binary black and white definition of race.[131] Paradoxically, the Second Circuit conceded that the "[s]eizure of persons based on nationality, race, or ethnicity" undoubtedly rise to the level of egregious so as to permit the application of the exclusionary rule.[132] Yet, the Second Circuit proved unwilling to expand its definition of race in *Maldonado* and

125. *Id.* at 1450.

126. *Id.* at 1448 (citing Adamson v. C.I.R., 745 F.2d 541, 545–46 (9th Cir. 1984)).

127. *See id.* (citing *Adamson*, 745 F.2d at 545–46).

128. *Id.* (citing *Adamson*, 745 F.2d at 545–46); *see Lopez-Mendoza*, 468 U.S. at 1046 (observing that one unique but significant social cost of applying the exclusionary rule in removal proceedings would require the Court to close its eyes to ongoing violations of the law); *supra* text accompanying note 27.

129. *See Gonzalez-Rivera*, 22 F.3d at 1448–49.

130. *Compare Gonzalez-Rivera*, 22 F.3d at 1149 (holding that *all* bad faith constitutional deprivations of an individual's rights are egregious, but that egregious violations are not limited to only those that are committed in bad faith), *with* Maldonado v. Holder, 763 F.3d 155, 159, 165 (2d Cir. 2014) (defining "egregious" as "a shock to the conscience," something that is by "nature extreme, rare, and obvious," and noting that the egregious standard is stringent and rarely satisfied).

131. *Gonzalez-Rivera*, 22 F.3d at 1449–50, 1445–48.

132. *Maldonado*, 763 F.3d at 167.

refused to condone the thought that the targeting of persons based on ethnicity or nationality constitutes an egregious constitutional violation.[133]

In so doing, the Second Circuit adopted a narrow and restrictive definition of race.[134] The court denied the petitions for review because "Hispanic" did not neatly classify within the black and white binary paradigm in which traditional American rules and thoughts on race continue to persist.[135] The term "race" has two meanings: the "biological race" is the fixed and concrete definition that utilizes a genetic and physical basis for categorizing people into different races based on their possession of certain physical traits.[136] The ideological construct theory posits that race is an evolving social construct, characterized by human interaction, manipulation, and political struggle.[137] Latinos generally do not fit within the binary black/white paradigm of race that defines the biological theory.[138]

In many ways, the law has formally confused the terms nationality and race in respect to the Latino.[139] If race is to "be viewed as a social construction," the continuous conflation of the Latino's ethnicity and race demonstrates that "race exists as powerful social phenomena."[140] For the

133. *See id.*

134. *See generally* Skoler, Abbott & Presser, *It's Not All Black and White Anymore*, 17 NO. 4 MASS. EMP. L. LETTER 4 (July 2006) ("Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace based on race, color, national origin, religion, and sex. . . . The new EEOC guidance expands the definition of race. Rather than relying on traditional racial concepts, such as African American and white, the guidance is much more inclusive. It expands the definition to include ancestry, physical characteristics, race-linked illness, cultural characteristics (such as grooming practices or manner of speech), perception of an individual's race, association with someone of a particular race, race plus another characteristic, and reverse race discrimination.").

135. *See generally* Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as' Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69, 72, 153–54 (1998) (arguing that as the "black/white paradigm" is continuously applied to Latinos, "the dominance/subordination process nurtures the conflation in an effort to dominate and oppress").

136. *Id.* at 105 n.143.

137. *Id.* at 106–07.

138. *Id.* at 140.

139. *See generally id.* at 90–150 (describing the various ways in which the conflation of race and nationality has been institutionalized, for example, through the United States Census, legal decisions, and Title VII of the Civil Rights Act of 1964); Lisette E. Simon, *Hispanics: Not a Cognizable Ethnic Group*, 63 U. CIN. L. REV. 497, 509–22 (1994) (observing the difficulties inherent in defining the term, "Hispanic").

140. Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 19, 27 (1994); *see* Sandrino-Glasser, *supra* note 135, at 107 (defining "racial formation" as "the process by which social, economic, and political forces determine the content and importance of racial categories, and by which they are in turn shaped by racial meanings") (quoting MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE

social construct theorist, the Latino race has been "formulated" through its institutionalized amalgamation.[141] Unfortunately, the law does not comprehend the intersection between ethnicity and race, instead legal discourse continues to adhere to the biological theory.[142] The law's current paradigms for analyzing problems involving race and ethnicity are inadequate.[143] For example, the conflation of race and ethnicity is illustrated in *Hernandez v. New York*, in which the plurality opinion uses the terms interchangeably.[144]

When analyzing whether an egregious Fourth Amendment violation occurred, if "the seizure is not especially severe," the Second Circuit holds "it may nevertheless qualify as an egregious violation if the stop was based on race (or some other grossly improper consideration)."[145] Compared to the Ninth Circuit's bad faith standard, the Second Circuit's grossly improper consideration caveat may appear to be more flexible at first glance.[146] However, *Maldonado* reveals the Second Circuit's binary definition of race and its refusal to include nationality and ethnicity under the grossly improper considerations category of egregious constitutional offenses.[147]

Classifications based on ethnicity, national origin, and race are all suspect classifications under the Equal Protection Clause.[148] The Second Circuit erroneously refused to grant the Petitioners' Fourth Amendment claim,

1980s, at 61 (Henry Louis Gates, Jr. ed., 1986)).

141. *See* Sandrino-Glasser, *supra* note 135, at 103, 107 (arguing that the label, "Hispanic," institutionalized by the United States Bureau of Census in the 1980s and 1990s, "fully formalize[d] the conflation of the Latinos' race and nationality").

142. *See id.* at 131; *see also* Haney Lopez, *supra* note 141, at 15–16 (explaining that though the biological race theory failed as early as 1871, "few in this society seem prepared to fully relinquish their subscription to notions of biological race").

143. *See* Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 594 (1995); Sandrino-Glasser, *supra* note 135, at 131.

144. *See* Hernandez v. New York, 500 U.S. 352, 352–72 (1991); Sandrino-Glasser, *supra* note 135, at 137–38 ("Justice Kennedy writes that the Court must determine whether the prosecutor offered a 'race-neutral' reason for excluding the two Latino jurors. Since the Court is considering potential discrimination based on bilingualism, an ethnic rather than a racial characteristic, it should be determining whether the prosecutor was 'ethnicity-neutral,' not 'race-neutral.'").

145. Maldonado v. Holder, 763 F.3d 155, 159 (2d Cir. 2014) (quoting Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006)).

146. *Compare id.* (holding that a seizure may be classified as an egregious violation, even when the seizure is not especially severe, if the stop was based on a grossly improper consideration), *with* Gonzalez-Rivera v. I.N.S., 22 F.3d 1441, 1449 (9th Cir. 1994) (concluding that all bad faith constitutional violations are egregious).

147. *See Maldonado*, 763 F.3d at 167.

148. Perea, *supra* note 143, at 574.

and did not afford sufficient weight to the impropriety of considering ethnicity and national origin.[149] "It has become a constitutional truism that the Constitution protects individuals against discrimination because of their national origin."[150]

The Second Circuit was likewise wrong not to consider whether nationality or ethnicity could be found to be an egregious constitutional violation in light of the Supreme Court's decision in *Brignoni-Ponce*.[151] The stop in *Maldonado* was not legitimately based on any other consideration except that the Petitioners were Ecuadorian day laborers.[152] "The solicitation of work is in itself constitutionally-protected speech."[153] The targeting of Ecuadorians or Hispanics based on ethnicity or nationality at the very least qualifies as a grossly improper, egregious Fourth Amendment violation.[154]

V. CONCLUSION

The Second Circuit incorrectly held in *Maldonado* that no egregious Fourth Amendment violation had occurred and that the Petitioners were not entitled to an evidentiary hearing.[155] The Petitioners alleged that they were targeted based solely on their Hispanic appearance and eagerness to obtain work as day laborers.[156] In support of their claim, the Petitioners offered evidence that the City of Danbury had for years participated in a harassment campaign that singled out the local Hispanic immigrant population, as opposed to other, better assimilated immigrants.[157] This evidence should have been sufficient for the majority to find that an egregious Fourth

149. *See Maldonado*, 763 F.3d at 159; *Almeida-Amaral*, 461 F.3d at 235.

150. Perea, *supra* note 143, at 572 ("Most of the discrimination . . . currently label[ed] 'national origin' discrimination is actually discrimination because of ethnic characteristics.").

151. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975).

152. *See Maldonado*, 763 F.3d at 172 (Lynch, J., dissenting). *See generally Brignoni-Ponce*, 422 U.S. at 884–87 (holding that a vehicle stop based solely on "Hispanic" appearance violates the Fourth Amendment); United States v. Manzo-Juardo, 457 F.3d 928, 937–38 (9th Cir. 2006) (concluding that appearance as a Hispanic work crew is insufficient to support reasonable suspicion necessary for an investigative stop); Nicacio v. I.N.S., 797 F.2d 700, 702–03 (9th Cir. 1985) (ruling that immigration officials may only stop a vehicle when they have reasonable suspicion and articulable facts that the vehicle contains an illegal immigrant).

153. *Maldonado*, 763 F.3d at 173 (Lynch, J., dissenting).

154. *See id*. at 159 (majority opinion); *Almeida-Amaral*, 461 F.3d at 235.

155. *See Maldonado*, 763 F.3d at 162; *Danbury Laborers Fight Unjust Arrests*, N.Y. TIMES (Nov. 10, 2014), http://www nytimes.com/2014/11/11/opinion/danbury-laborers-fight-unjust-arrests.html?_r=0.

156. *See Maldonado*, 763 F.3d at 174 (Lynch, J., dissenting).

157. *Id*. at 172.

Amendment violation had occurred.[158] However, seeing as though the majority deemed this evidence insufficient to conclude that an egregious violation occurred, the *Cotzojay* burden-shifting framework should have at minimum afforded the Petitioners an evidentiary hearing.[159]

The United States Supreme Court considers race to be a "principal[ly] protected characteristic under the Constitution."[160] Nonetheless, the Court has promoted a binary and underinclusive discourse about race in which the conversation is centered solely around the black/white paradigm.[161] Latinos continue to be "(mis)perceived" and "relegated an inferior minority status" through this binary paradigm of race.[162] As contemporary jurisprudence continues to conflate "nationality" and "race," the Latino population is left with limited legal redress; a cycle that is violative of the anti-discrimination principles upon which the American legal system is founded.[163]

Where an individual's constitutional rights to be free from racially-charged discrimination are violated and subsequently judicially enforced, the American immigration and legal system serve not as defenders of justice for all, but for the privileged few.[164] In *Maldonado*, there is no choice but to conclude that the seizure was expressly motivated by grossly improper motivations.[165] The Petitioners were lured into a work van by false pretenses, with the hopes of attaining gainful employment for the day.[166] The Second Circuit's decision to deny the Petitioners' motion to suppress the Form I-213 was fundamentally unfair.[167]

158. *See generally Almeida-Amaral*, 461 F.3d at 235 (holding that a stop based on grossly improper considerations constitutes an egregious constitutional violation).

159. *Maldonado*, 763 F.3d at 170 (Lynch, J., dissenting) (quoting Cotzojay v. Holder, 725 F.3d 172, 178 (2d Cir. 2013)).

160. Perea, *supra* note 143, at 573.

161. *Id.*

162. Sandrino-Glasser, *supra* note 135, at 150.

163. *Id.*

164. *See id.*

165. Maldonado v. Holder, 763 F.3d 155, 168 (2d Cir. 2014) (Lynch, J., dissenting).

166. *See id.* at 169.

167. *See id.* at 160 (majority opinion).