"Widespread" Uncertainty: The Exclusionary Rule in Civil-Removal Proceedings

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INTRODUCTION

As of 2012, an estimated 11.7 million unauthorized immigrants lived in the United States.[1] Many of them will be deported. Under the Obama administration, annual deportations have reached nearly 400,000.[2] A considerable number of these removals take place without court involvement through expedited and voluntary-removal procedures, but immigration courts still play a large role in the enforcement system.[3] Indeed, between 2008 and 2012, immigration judges completed a yearly average of about 284,000 removal proceedings,[4] with more than 75 percent resulting in removal orders.[5]

The immigration-enforcement actions spurring these removals feature illegal searches and seizures with worrying frequency. Perhaps most prominent are arrests made by Immigration and Customs Enforcement (ICE) agents in warrantless

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1 Jeffrey S. Passel, D'Vera Cohn, and Ana Gonzalez-Barrera, *Population Decline of Unauthorized Immigrants Stalls, May Have Reversed: New Estimate: 11.7 Million in 2012* *6 (Pew Research Center Sept 23, 2013), online at http://www.pewhispanic.org/files/2013/09/Unauthorized-Sept-2013-FINAL.pdf (visited Nov 3, 2014).

2 Mark Hugo Lopez, Ana Gonzalez-Barrera, and Seth Motel, *As Deportations Rise to Record Levels, Most Latinos Oppose Obama's Policy: President's Approval Rating Drops, but Obama Has a Big Lead over 2012 GOP Rivals* *11 (Pew Hispanic Center Dec 28, 2011), online at http://www.pewhispanic.org/files/2011/12/Deportations-and-Latinos.pdf (visited Nov 3, 2014) ("This is 30% more than the 300,000 deported annually on average during the second term of the Bush administration. And it is nearly twice as many as the 200,000 deportations that occurred annually on average during Bush's first term."). See also John Simanski and Lesley M. Sapp, *Immigration Enforcement Actions: 2011* *1 (DHS Sept 2012), online at http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf (visited Nov 3, 2014).

3 See Simanski and Sapp, *Immigration Enforcement Actions: 2011* at *2, 4–6 (cited in note 2).

4 Executive Office for Immigration Review, Office of Planning, Analysis, and Technology, *FY 2012 Statistical Year Book* *C4 (DOJ Feb 2013), online at http://www.justice.gov/eoir/statspub/fy12syb.pdf (visited Nov 3, 2014).

5 Id at *D2.

home raids—an increasingly common enforcement tool.[6] During the typical raid, a team of armed ICE agents approaches a private dwelling before dawn with only an administrative warrant[7] for an individual suspected of having committed an immigration violation.[8] The agents then enter the residence without the occupants' consent—either by knocking and pushing their way in once the door is opened, or by simply breaking in.[9] Having gained entry, the team moves from room to room, seizing all occupants, interrogating them, and arresting those who cannot produce proof of citizenship.[10] In such a raid, the ICE agents have violated the Fourth Amendment by entering a private dwelling without a proper warrant or informed consent[11] and by making seizures without reasonable suspicion.[12]

Usually, victims of Fourth Amendment violations can prevent illegally seized evidence from being used against them in court by means of the exclusionary rule, which prohibits the admission of inculpatory evidence collected in violation of the

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6 See Bess Chiu, et al, *Constitution on ICE: A Report on Immigration Home Raid Operations* *3 (Cardozo Immigration Justice Clinic 2009), online at http://cw.routledge.com/textbooks/9780415996945/human-rights/cardozo.pdf (visited Nov 3, 2014).

7 Even ICE concedes in its field-agent training materials that administrative removal warrants do not authorize agents to enter private homes. Federal Law Enforcement Training Center, *ICE Administrative Removal Warrants (MP3)* (Aug 15, 2008), online at https://www.fletc.gov/audio/ice-administrative-removal-warrants-mp3 (visited Nov 3, 2014) (explaining that an "administrative removal warrant authorizes the ICE officer to arrest the subject, but not to enter into an REP area such as his or her home unless consent to enter is given").

8 Chiu, et al, *Constitution on ICE* at *3 (cited in note 6).

9 Id. Searches without a valid warrant are justified if "voluntary" in light of the totality of the circumstances, but only if consent "was [not] coerced by threats or force, or granted only in submission to a claim of lawful authority." *Schneckloth v Bustamonte*, 412 US 218, 227, 233 (1973).

10 Chiu, et al, *Constitution on ICE* at *3, 18, 24 (cited in note 6). In many cases, they do so without even apprehending the individual named in the administrative warrant. See id at *3.

11 See *Illinois v Rodriguez*, 497 US 177, 181, 188–89 (1990) (holding that entry into a home without consent from an individual empowered to give it is a prima facie violation of the Fourth Amendment, but remanding to determine whether the officers reasonably believed that the individual had authority to consent). In some cases in which ICE agents obtain a homeowner's informed consent to enter, they nevertheless violate the Fourth Amendment by searching beyond the scope of consent. See Chiu, et al, *Constitution on ICE* at *6 (cited in note 6).

12 See *Payton v New York*, 445 US 573, 576 (1980) (holding that the Fourth Amendment generally prohibits "a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest," with the standard for a warrant being probable cause).

defendant's constitutional rights.[13] But the victims of the illegal searches and seizures in the raid described above are practically without remedy. In accordance with the Supreme Court's landmark 1984 decision in *Immigration and Naturalization Service v Lopez-Mendoza*,[14] the exclusionary rule generally does not apply in civil-removal hearings.[15] This holding has become increasingly troubling, however, as evidence of serious and frequent Fourth Amendment violations committed by immigration authorities has mounted in recent years.[16]

The *Lopez-Mendoza* Court carved out two exceptions to its broad holding. A plurality of four justices—effectively, but not explicitly, joined by four dissenting justices—stated that the exclusionary rule ought to apply (1) when the predicate violation of the respondent's constitutional rights was "egregious," or (2) when Fourth Amendment violations by immigration officers have become "widespread."[17] While the former exception has been analyzed extensively,[18] it remains unclear what is required to establish that a violation has become widespread. Ascertaining the scope of the widespread-violations exception is important because of the gap left by *Lopez-Mendoza* between constitutional violations in immigration-enforcement actions and the availability of a remedy to those who suffer these violations. This Comment proposes an approach for courts and practitioners to use in determining whether an alleged violation is widespread and assesses that determination's consequences for the application of the exclusionary rule.

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13 See *Mapp v Ohio*, 367 US 643, 656 (1961) (creating a rule for "the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure").

14 468 US 1032 (1984).

15 See id at 1050.

16 See, for example, Nathan Treadwell, *Fugitive Operations and the Fourth Amendment: Representing Immigrants Arrested in Warrantless Home Raids*, 89 NC L Rev 507, 560–61 (2011) (noting the frequency of home-raid violations by ICE officials); Chiu, et al, *Constitution on ICE* at *9–11 (cited in note 6) (evaluating data from Long Island and New Jersey and finding "an unacceptable level of illegal entries by ICE agents during home raid operations"); 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, 1139–40 (presenting evidence that constitutional violations have become both "geographically" and "institutionally" widespread); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U Pa J Const L 1084, 1105–13 (2004) (presenting data on constitutional violations committed by federal law-enforcement officials engaging in immigration enforcement).

17 *Lopez-Mendoza*, 468 US at 1050–51.

18 See, for example, *Kandamar v Gonzales*, 464 F3d 65, 70 (1st Cir 2006); *Almeida-Amaral v Gonzales*, 461 F3d 231, 235–36 (2d Cir 2006); *Gonzales-Rivera v Immigration and Naturalization Service*, 22 F3d 1441, 1448–49 (9th Cir 1994).

This Comment proceeds as follows: Part I presents background on the exclusionary rule, analyzes the Supreme Court's decision in *Lopez-Mendoza*, and surveys the egregiousness and widespread-violations exceptions laid out in that decision. Part II examines examples of widespread-violations exceptions in other Fourth Amendment contexts, discusses the uncertainty over the widespread-violations question, and draws a connection between other widespread-violations exceptions in Fourth Amendment law and 42 USC § 1983's municipal-liability standards, as well as municipal liability's federal civil-suit analogues. Part III rejects the prevailing approach to the widespread-violations exception because it would functionally overturn *Lopez-Mendoza*'s core holding. This Part then proposes an alternative approach for determining whether putative violations are widespread by drawing on the deterrent purposes of the exclusionary rule and § 1983 municipal-liability jurisprudence. This approach suggests that a given Fourth Amendment violation by ICE officials invites suppression because of the *Lopez-Mendoza* widespread-violations exception if the violation suffered by the individual is traceable to a policy or pattern of violations in the local enforcement area.

I. THE EXCLUSIONARY RULE AND *LOPEZ-MENDOZA*

The widespread-violations exception to the general inapplicability of the exclusionary rule in civil-removal proceedings is set against the backdrop of a large body of Fourth Amendment law. This Part discusses the background Fourth Amendment jurisprudence and the *Lopez-Mendoza* decision. Part I.A summarizes the origins, purposes, and effects of the exclusionary rule. Part I.B explains the Court's rationale in *Lopez-Mendoza* for holding that the exclusionary rule does not apply in civil-removal proceedings. Finally, Part I.C describes the Court's exceptions to that holding for egregious and widespread Fourth Amendment violations.

A. The Fourth Amendment and the Exclusionary Rule

The exclusionary rule is a judicially created remedy for Fourth Amendment violations. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue,

> but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[19]

The exclusionary rule bolsters the Fourth Amendment by precluding prosecutors from using inculpatory evidence if it is obtained in violation of constitutional protections.[20] The Supreme Court first recognized and applied the exclusionary rule in 1914 in *Weeks v United States*,[21] which held that evidence seized by federal officials in violation of the Fourth Amendment is inadmissible in federal court.[22] Several decades later, in *Mapp v Ohio*,[23] the Court incorporated the exclusionary rule to apply to unconstitutional actions by state officials.[24] Upon application of the exclusionary rule, statements and other evidence obtained as a result of Fourth Amendment violations are suppressible if the link between the evidence and the unlawful conduct is not too attenuated.[25]

Although early cases suggest that the Court viewed the rule as a "self-executing mandate implicit in the Fourth Amendment itself"—and thus concerned primarily with protecting individual rights and the integrity of the criminal justice system—the Court has clarified in recent years that "the *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement."[26] After all, the exclusionary rule does not appear in the Fourth

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[19] US Const Amend IV. The Supreme Court has not affirmatively held that unauthorized aliens in the United States are protected by the Fourth Amendment. See *United States v Verdugo-Urquidez*, 494 US 259, 272 (1990) ("The question presented for decision in *Lopez-Mendoza* was limited to whether the Fourth Amendment's exclusionary rule should be extended to civil deportation proceedings; it did not encompass whether the protections of the Fourth Amendment extend to illegal aliens in this country."). Notably, however, the Supreme Court has interpreted "the people" to include the "class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." Id at 265. Many lower courts have assumed that Fourth Amendment guarantees extend to unauthorized immigrants, but as *Verdugo-Urquidez*'s "sufficient connection" test has taken hold, some have begun denying immigrants these guarantees. See D. Carolina Núñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S Cal L Rev 85, 90–91 (2011).

[20] See *United States v Leon*, 468 US 897, 906 (1984).

[21] 232 US 383 (1914).

[22] Id at 398.

[23] 367 US 643 (1961).

[24] Id at 657.

[25] See *Wong Sun v United States*, 371 US 471, 487–88 (1963).

[26] *Davis v United States*, 131 S Ct 2419, 2427, 2432 (2011). See also Eugene Milhizer, *The Exclusionary Rule Lottery*, 39 U Toledo L Rev 755, 756–57 (2008).

Amendment's text.[27] Instead, the rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[28] Under modern doctrine, the Court requires that the exclusionary rule satisfy a balancing test originally propounded in *United States v Janis*[29] if it is to apply to illegally seized evidence in a particular proceeding.[30] The *Janis* test weighs the deterrence value of exclusion against its "societal costs."[31] Suppression of unconstitutionally obtained evidence must yield "appreciable deterrence" of future law-enforcement misconduct and must account for the "substantial cost" associated with forcing courts to ignore otherwise reliable evidence of criminal guilt and allow likely criminals to walk free.[32] Only if exclusion satisfies the test will this "last resort" be exercised.[33] In short, the fact of a Fourth Amendment violation in a given case will trigger the exclusionary rule only when application would yield marginal deterrence of future Fourth Amendment violations sufficient to justify the rule's attendant social costs.

In line with this balancing test, the Court has arrived at a number of limitations to the exclusionary rule over the years. Some of the most prominent include the impeachment exception, the independent-source exception, the inevitable-discovery exception, the good-faith exception, the harmless error exception, and the rule of attenuation.[34] Finally, and significantly for this Comment, the exclusionary rule generally does not apply in civil cases and proceedings, as the Court has determined that the marginal deterrence added by exclusion in the civil context is usually not substantial enough to outweigh the social costs.[35]

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27 See *Davis*, 131 S Ct at 2423.

28 *United States v Calandra*, 414 US 338, 348 (1974).

29 428 US 433 (1976).

30 *Lopez-Mendoza*, 468 US at 1041.

31 *Janis*, 428 US at 454.

32 Id at 448, 454.

33 *Davis*, 131 S Ct at 2427, quoting *Hudson v Michigan*, 547 US 586, 591 (2006).

34 See Heather A. Jackson, Arizona v. Evans*: Expanding Exclusionary Rule Exceptions and Contracting Fourth Amendment Protection*, 86 J Crim L & Criminol 1201, 1204–09 (1996).

35 See *Janis*, 428 US at 454 (declining to exclude evidence that was unlawfully seized by a state law-enforcement officer in a federal civil proceeding).

B. *Lopez-Mendoza*: The Exclusionary Rule Is Generally Unavailable in Civil-Removal Proceedings

Applying the *Janis* balancing test in *Lopez-Mendoza*, the Supreme Court determined that the exclusionary rule is generally unnecessary in the civil-deportation context in light of the insubstantial deterrence gains and significant social costs of applying the rule.[36] The facts of the case presented classic grounds for applying the exclusionary rule, except that the case arose in the immigration context.

Adan Lopez-Mendoza, a Mexican citizen, was working at a transmission repair shop in San Mateo, California, when, pursuant to a tip, Immigration and Naturalization Service (INS) agents arrived without a search warrant or an arrest warrant.[37] Despite the shop manager's refusal to allow the investigators to question any of his employees during working hours, one agent began questioning Lopez-Mendoza.[38] Responding to the agent, Lopez-Mendoza stated his name and noted that he was originally from Mexico and lacked family ties to the United States.[39] The agent arrested him and, on further questioning, Lopez-Mendoza admitted that he was a Mexican citizen who had entered the United States illegally and executed an affidavit to that effect.[40] The other respondent in *Lopez-Mendoza*, Elias Sandoval-Sanchez, had a similar arrest experience: INS officers checked his place of work for unauthorized immigrants and detained and then arrested him after he behaved evasively when passing by the agents.[41]

In their deportation hearings, the respective Immigration Judges (IJs) denied motions "to terminate proceeding[s] on the ground that Lopez-Mendoza [and Sandoval-Sanchez] had been arrested illegally" and determined that the respondents should be deported.[42] In addition, Sandoval-Sanchez argued for suppressing the evidence of his alienage as the fruit of an unlawful arrest, which the IJ considered and rejected. The Board of Immigration Appeals (BIA) dismissed Lopez-Mendoza's and Sandoval-Sanchez's appeals, but the Ninth Circuit reversed in each case

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36 See *Lopez-Mendoza*, 468 US at 1050.

37 Id at 1035.

38 Id.

39 Id.

40 *Lopez-Mendoza*, 468 US at 1035.

41 Id at 1036–37.

42 Id at 1035–38.

on Fourth Amendment grounds, holding that the exclusionary rule applies in deportation proceedings.[43] The court concluded that Sandoval-Sanchez's admission of his unlawful presence in the United States was the fruit of an unlawful arrest and remanded Lopez-Mendoza's case to determine whether his Fourth Amendment rights were violated in the course of his arrest.[44]

On review, the Supreme Court rested its decision on a straightforward application of the *Janis* balancing test. On the benefits side was deterrence of illegal police conduct—perhaps the only benefit provided by the exclusionary rule.[45] The costs associated with suppression are inherently burdensome. They include the "loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication" that results from suppression.[46]

The Court concluded that any marginal deterrence benefit, added to the INS's existing "comprehensive scheme" of internal regulations deterring unconstitutional officer conduct, did not outweigh the costs of excluding relevant evidence in civil deportation proceedings.[47] While acknowledging that the rule would contribute at least some deterrence in deportation proceedings given the procedural connection between arrest and deportation (the same officials who effect arrests are those who subsequently bring deportation actions), the Court determined that four considerations diminish the rule's deterrent value.[48]

First, the Court stated that the ease with which the government can meet its burden of proof in civil deportation proceedings reduces deterrence. The government's burden in removal hearings is simply to establish by "reasonable, substantial, and probative evidence"—as opposed to proof beyond a reasonable doubt—the respondent's identity and alienage.[49] If satisfied, the burden shifts to the respondent to prove "the time, place, and manner of entry" into the United States.[50] But since a respondent's identity is not suppressible, the government need prove only alienage.[51] The

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43 Id at 1036, 1038.

44 *Lopez-Mendoza*, 468 US at 1036, 1038.

45 See id at 1041.

46 Id.

47 Id at 1044, 1050.

48 See *Lopez-Mendoza*, 468 US at 1042–43.

49 Id at 1039, 1043–44.

50 Id at 1043.

51 See id. But see *United States v Ortiz-Hernandez*, 441 F3d 1061, 1063–65 (9th Cir 2006) (Paez dissenting from denial of rehearing en banc) (arguing that *Lopez-Mendoza* incorrectly expanded a rule barring respondents from challenging their presence at a

Court doubted that the availability of the exclusionary rule would make much difference in that regard because evidence of alienage can often be gathered either "independently of, or sufficiently attenuated from, the original arrest."[52] In other words, the threat of suppression would probably not significantly shape officer behavior because it would often be possible to prove alienage without resorting to evidence obtained directly from an illegal arrest.

Second, at the time of *Lopez-Mendoza*, few aliens arrested for removal even sought formal deportation hearings or suppression of unlawfully obtained evidence; indeed, over 97.5 percent opted to leave the country voluntarily.[53] Voluntary departures do not require formal hearings.[54] As an arresting INS officer would realize the infrequency of suppression challenges, the officer would be "most unlikely to shape his conduct in anticipation of the exclusion of evidence at a formal deportation hearing."[55]

Third, the Supreme Court believed that INS-officer conduct was already constrained by a "comprehensive scheme" of INS regulations establishing rules for when searches and seizures are appropriate.[56] These regulations include internal rules requiring that stops, interrogations, and arrests be made in accordance with the Fourth Amendment, as well as procedures for investigating and punishing agents who commit Fourth Amendment violations.[57] In essence, the Court determined that the professionalization of immigration-enforcement operations rendered judicial oversight superfluous.

Finally, the Court stressed that the availability of alternative remedies for institutional practices that violate Fourth Amendment rights, such as declaratory judgment actions, further undercut the deterrent potential of the exclusionary rule in civil-deportation proceedings.[58] In other words, the possibility of civil suits challenging unconstitutional INS practices would deter unconstitutional behavior in the first place, obviating the

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hearing in order to defeat the court's personal jurisdiction into a novel rule that evidence of the respondent's identity is not suppressible).

52 *Lopez-Mendoza*, 468 US at 1043.

53 Id at 1044.

54 See Simanski and Sapp, *Immigration Enforcement Actions: 2011* at *2 (cited in note 2).

55 *Lopez-Mendoza*, 468 US at 1044.

56 Id at 1044–45.

57 See id.

58 See id at 1045.

need for any additional deterrence.[59] The Court concluded that, taken together, these considerations suggest that the marginal deterrence to be gained from exclusion is quite insubstantial.[60]

On the other side of the balance, the Court determined that the social costs of applying the exclusionary rule in the civil-deportation context would swallow any remaining benefit. These included: (1) the unusual cost created by potential situations in which application of the exclusionary rule would "require the courts to close their eyes to ongoing violations of the law" by unauthorized aliens;[61] (2) the increased administrative costs that would hamper a "deliberately simple" and necessarily "streamlined" system that was already very busy;[62] and (3) the potential suppression of evidence that was lawfully obtained but had been gleaned from large-scale, chaotic raids, the details of which can be difficult to precisely recount for purposes of demonstrating Fourth Amendment compliance.[63] Accordingly, the Court held that the exclusionary rule is inappropriate in the civil-deportation setting.[64]

C. Exceptions to *Lopez-Mendoza*

The *Lopez-Mendoza* rule is complicated by Part V of the opinion, a short paragraph at the end that garnered the support of only four justices.[65] The four-justice plurality suggested two limits to the majority's holding on the inapplicability of the exclusionary rule in civil-deportation proceedings: First, the plurality stated that its "conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were *widespread*."[66] Second, the plurality emphasized that the holding ought not extend to "*egregious* violations of Fourth Amendment or other

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59 See *Lopez-Mendoza*, 468 US at 1045. Of course, the availability of a civil suit for unconstitutional enforcement practices is cold comfort to a deportee unless a judgment against the enforcement agency would allow suppression of illegally obtained evidence and thus save the alien from deportation.

60 See id at 1050.

61 Id at 1046–47 (noting further that "[t]he 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").

62 Id at 1048–49.

63 See *Lopez-Mendoza*, 468 US at 1049–50.

64 Id at 1050.

65 Chief Justice Warren Burger, who was in the majority, declined to join this part of the opinion. Id at 1033.

66 Id at 1050 (O'Connor) (plurality) (emphasis added).

liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."[67]

The plurality's statements complicate *Lopez-Mendoza* because it is unclear exactly how they affect its holding. Although only four justices joined Part V of the opinion, four dissenting justices believed that the exclusionary rule should apply in civil-deportation hearings.[68] Hence, eight justices agreed that the exclusionary rule should apply at least when the predicate Fourth Amendment violations committed by immigration-enforcement officials were egregious or widespread. Technically, however, it is doubtful that the two exceptions constitute part of the *Lopez-Mendoza* holding. This is because the Court held in *Marks v United States*[69] that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who *concurred* in the judgments on the narrowest grounds.'"[70] While some observers have called for the integration of plurality and dissenting opinions into legal holdings,[71] the *Marks* rule clearly precludes this practice.[72]

Notwithstanding *Marks*, circuit courts have prudentially adopted the exceptions as limitations to *Lopez-Mendoza*'s holding. Most have long recognized the egregious-violations exception, and several have acknowledged the widespread-violations exception—though only the Third Circuit has given it more than passing reference.[73] As the Eighth Circuit recently noted in *Puc-Ruiz v*

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67 *Lopez-Mendoza*, 468 US at 1050–51 (O'Connor) (plurality) (emphasis added).

68 Id at 1051–52 (Brennan dissenting); id at 1052–60 (White dissenting); id at 1060–61 (Marshall dissenting); id at 1061 (Stevens dissenting).

69 430 US 188 (1977).

70 Id at 193, quoting *Gregg v Georgia*, 428 US 153, 169 n 15 (1976) (emphasis added).

71 See, for example, James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 Harv L Rev 131, 136–37 (2007), citing Oliver Wendell Holmes Jr, *The Path of the Law*, 10 Harv L Rev 457, 458 (1897) (eschewing the "technical" view—which distinguishes holdings from dicta and therefore excludes dissenters who agree with the plurality's reasoning but not its outcome—in favor of a "law-as-prediction perspective").

72 See *United States v Robison*, 505 F3d 1208, 1221 (11th Cir 2007) ("In our view, *Marks* does *not* direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented. *Marks* talks about those who 'concurred in the judgment[ ],' not those who did not join the judgment.") (citations omitted). See also Jonathan H. Adler, *Once More, with Feeling: Reaffirming the Limits of Clean Water Act Jurisdiction*, in L. Kinvin Wroth, ed, *The Supreme Court and the Clean Water Act: Five Essays* 81, 93–94 (Vermont 2007) (noting that the *Marks* rule excludes consideration of dissents not concurring in any part of the judgment of the Court).

73 See *Oliva-Ramos v Attorney General of the United States*, 694 F3d 259, 279–82 (3d Cir 2012).

Holder,[74] even though only four justices explicitly endorsed the *Lopez-Mendoza* exceptions, the four dissenters "would have approved any limitation on the majority's decision," and as a result, "it is reasonable to read *Lopez-Mendoza* as showing that eight justices would have applied the exclusionary rule in circumstances where evidence was obtained through an 'egregious' Fourth Amendment violation."[75] Indeed, all circuits that have considered the question have agreed with this reasoning, treating Part V of the *Lopez-Mendoza* opinion as good law.[76]

1. The egregiousness exception.

The egregious-violations exception has received the bulk of attention from courts and legal observers.[77] Because the widespread-violations exception is practically significant only insofar as it can capture violations that would not also trigger suppression under the egregiousness exception, determining the scope of the latter is necessary for ascertaining the independent terrain of the former. The First, Second, and Ninth Circuits have developed divergent standards for determining whether a constitutional violation qualifies as egregious, and the remaining circuits have addressed egregiousness claims without articulating a standard.[78]

The First Circuit has adopted the narrowest approach. In *Kandamar v Gonzales*,[79] the court conceived of egregiousness as the use of "threats, coercion or physical abuse" by immigration-enforcement officials.[80] Because the respondent failed to present "specific evidence of any government misconduct by

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74 629 F3d 771 (8th Cir 2010).

75 Id at 778 n 2.

76 See 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, 526–30 (2013) (noting that at least the First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits have adopted the *Lopez-Mendoza* egregiousness exception).

77 For commentary on the egregious-violations exception, see generally Jonathan L. Hafetz, *The Rule of Egregiousness:* INS v. Lopez-Mendoza *Reconsidered*, 19 Whittier L Rev 843, 846 (1998) (concluding that, because all violations of the Fourth Amendment by the INS are "race-based," they all fall under the *Lopez-Mendoza* egregious-violations exception); Rossi, 44 Colum Hum Rts L Rev at 535 (cited in note 76) (arguing that *Lopez-Mendoza* should be overturned). See also Irene Scharf, *The Exclusionary Rule in Immigration Proceedings: Where It Was, Where It Is, Where It May Be Going*, 12 San Diego Intl L J 53, 62–70 (2010).

78 See Treadwell, 89 NC L Rev at 547 & n 286 (cited in note 16).

79 464 F3d 65 (1st Cir 2006).

80 Id at 71.

threats, coercion or physical abuse" with regard to the seizure of his passport at a Department of Homeland Security interview, the court deemed the exclusionary rule inapplicable.[81] This is a narrow conception of the exception, offering little more than a "glimmer of hope of suppression."[82]

At the opposite end of the spectrum is the Ninth Circuit's egregiousness standard. In *Gonzales-Rivera v Immigration & Naturalization Service*,[83] the court held that all "bad faith violations" of Fourth Amendment protections are "sufficiently egregious to require application of the exclusionary sanction" in civil proceedings.[84] "Bad faith" was given a broad definition: a violation is committed in bad faith if the evidence is obtained "by deliberate violations of the [F]ourth [A]mendment, or by conduct a reasonable officer should have known is in violation of the Constitution."[85] This effectively amounts to a recklessness standard for assessing egregiousness.[86]

The Second Circuit's egregiousness standard strikes a balance between the First Circuit and Ninth Circuit approaches. There are, in the Second Circuit's view, two routes to egregiousness. First, in contrast with the Ninth Circuit's standard, the Second Circuit has held that the unreasonableness of a stop is generally insufficient for the egregiousness determination. Rather, as the court explained in *Almeida-Amaral v Gonzales*,[87] the inquiry turns on the "characteristics and severity of the offending conduct."[88] Hence, if an alien is "subjected to a seizure for *no* reason at all," the violation will be deemed egregious only "if the

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81 Id.

82 Id at 70.

83 22 F3d 1441 (9th Cir 1994).

84 Id at 1449 (quotation marks and brackets omitted).

85 Id, quoting *Adamson v Commissioner of Internal Revenue*, 745 F2d 541, 545 (9th Cir 1984) (emphasis omitted). The Ninth Circuit initially limited its application of the standard to its holding that all stops based solely on race rise to the level of egregiousness. See *Gonzales-Rivera*, 22 F3d at 1449. However, the court expanded the list of egregious violations to include stops based purely on an unauthorized immigrant's foreign-sounding name, and the theoretical list meeting the standard is longer still. See *Orhorhaghe v Immigration and Naturalization Service*, 38 F3d 488, 492–93, 497 (9th Cir 1994).

86 See Eric W. Clarke, Note, 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 BYU L Rev 51, 58–59 (observing that the Ninth Circuit effectively asks whether acts by immigration officers were "unreasonable violations of the Fourth Amendment" in determining whether conduct was bad faith and therefore per se egregious).

87 461 F3d 231 (2d Cir 2006).

88 Id at 235.

seizure is sufficiently severe."[89] Second, and compatible with the Ninth Circuit's view, such a showing of severity is *not* required to establish egregiousness "if the stop was based on race (or some other grossly improper consideration)."[90] Because many violations deemed widespread may also be egregious, the differences between these egregiousness standards will prove relevant for determining the exact scope of the widespread-violations exception.

2. The widespread-violations exception.

Unlike the egregiousness exception, *Lopez-Mendoza*'s widespread-violations language has received no in-depth academic treatment. This should not cast doubt on the exception's validity. First, it would be wholly inconsistent for courts to adopt one exception based on the reasoning that eight Supreme Court justices have effectively endorsed it while not adopting another exception that received the same support. Second, several circuits have already acknowledged the widespread-violations exception to *Lopez-Mendoza*'s core holding, including the Second,[91] Third,[92] and Eighth Circuits.[93] The problem, however, is that no court has articulated a standard for assessing widespread violations or determined how the exclusionary rule should operate in the event of a finding of widespread Fourth Amendment violations by immigration-enforcement officials.

II. EXPLORING THE MEANING OF THE WIDESPREAD-VIOLATIONS EXCEPTION

This Comment focuses on the uncertainty over *Lopez-Mendoza*'s widespread-violations exception. This exception has only recently been invoked to suppress evidence in civil-removal cases, when the Third Circuit reversed and remanded a civil-removal case on the grounds of potential widespread violations

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89 Id.

90 Id.

91 See *Melnitsenko v Mukasey*, 517 F3d 42, 47 (2d Cir 2008); *Pinto-Montoya v Mukasey*, 540 F3d 126, 130–31 & n 2 (2d Cir 2008) (noting the Supreme Court's adoption of both the egregiousness and widespread-violations exceptions but offering little discussion of the latter).

92 See *Oliva-Ramos*, 694 F3d at 280 (noting that the egregious-violations exception and the widespread-violations exception are "independent rationale[s] for applying the exclusionary rule").

93 See *Martinez Carcamo v Holder*, 713 F3d 916, 922 (8th Cir 2013) (stating that suppression "should be granted only because of an 'egregious' or 'widespread' Fourth Amendment violation").

by ICE.[94] Indeed, a new practice guide encourages immigration defense attorneys to look for opportunities to raise the widespread-violations exception in suppression motions.[95] The difficulty is that existing case law has not developed a standard for assessing widespread violations.

This Part begins by examining the Third Circuit's application of the widespread-violations exception in *Oliva-Ramos v Attorney General of the United States*[96] as well as the few immigration-court decisions to have addressed the exception. To further explore the meaning of the *Lopez-Mendoza* widespread-violations exception, this Part then examines similar exceptions in other areas of Fourth Amendment law, ultimately drawing a connection between widespread-violations exceptions and § 1983 jurisprudence.

A. The Third Circuit's Decision in *Oliva-Ramos*

Oliva-Ramos came before the Third Circuit on facts similar to the home raid described at the outset of this Comment. At 4:30 on a March morning in 2007, ICE Fugitive Operations Team officers arrived at an Englewood, New Jersey, apartment and began repeatedly ringing an entrance buzzer.[97] Erick Oliva-Ramos, the respondent, shared the apartment with his three sisters (Clara, Maria, and Wendy), his nephew, his brother-in-law, and two visiting friends.[98] Clara, hearing the buzzing but unable to discern that the ICE agents were its source due to a broken intercom, opened the entry door and stepped out of the apartment, fearing an emergency.[99] The ICE officers climbed the stairs to the apartment and flashed a warrant for the arrest of Maria, who was not then present in the apartment.[100] Despite lacking information about the identity and legal status of anyone in the apartment other than Maria, the officers asked Clara for her name and legal status and then followed Clara into the

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94 See *Oliva-Ramos v Attorney General of the United States*, 694 F3d 259, 281–82 (3d Cir 2012).

95 See Abbey Augus and Matt Craig, *Practice Advisory: Understanding* Oliva-Ramos v. Attorney General *and the Applicability of the Exclusionary Rule in Immigration Proceedings* *12–13 (NYU Immigrant Rights Clinic Nov 30, 2012), online at http://www.law.nyu.edu/sites/default/files/ECM_PRO_074309.pdf (visited Nov 3, 2014).

96 694 F3d 259 (3d Cir 2012).

97 Id at 261–62, 269.

98 Id at 262.

99 Id.

100 *Oliva-Ramos*, 694 F3d at 262.

apartment when her son reopened the door for her.[101] Clara had not refused their request for entry, having not understood what was and was not required of her under the circumstances.[102] The ICE agents then, with Clara's assistance, woke up the apartment's occupants and gathered them in the living room.[103] One agent stationed himself by the door to prevent exit.[104]

The ICE agents then inquired about the identities and nationalities of each person in the living room and asked Oliva-Ramos to retrieve his identification from his bedroom.[105] Oliva-Ramos complied out of confusion and fear of arrest, and the documentation that he provided revealed his Guatemalan citizenship.[106] He was unable to present evidence of lawful residence in the United States.[107] All occupants other than Clara, who was able to provide proof of legal residence, were handcuffed and placed in an ICE van, in which they remained while ICE agents conducted several other predawn raids, all following a similar pattern.[108] Shortly thereafter, Oliva-Ramos was charged, detained, and ultimately found removable following a series of hearings before an IJ.[109]

On appeal, the BIA considered a motion by Oliva-Ramos to remand the proceedings back to the IJ to consider new evidence relating to potential widespread violations by ICE officials.[110] The motion featured a September 2006 ICE memorandum obtained by Oliva-Ramos through a Freedom of Information Act[111] (FOIA) request.[112] The memorandum dramatically changed ICE's quota policy on collateral arrests—arrests of persons not originally targeted in enforcement raids and thus about whom the authorities lack any prior particularized suspicion.[113] Whereas ICE had formerly not counted collateral arrests toward each Fugitive Operations Team's annual arrest target, the new policy allowed such arrests to count toward as much as 50 percent of each team's

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101 Id.
102 Id.
103 Id.
104 *Oliva-Ramos*, 694 F3d at 262–63.
105 Id at 263.
106 Id.
107 Id.
108 *Oliva-Ramos*, 694 F3d at 263.
109 Id at 263–66.
110 Id at 269.
111 5 USC § 552.
112 *Oliva-Ramos*, 694 F3d at 269
113 Id at 269–70.

target of one thousand arrests.[114] Noting that collateral arrests accounted for 40 percent of total ICE arrests by Fugitive Operations Teams in the fiscal year of his detention, Oliva-Ramos argued that the quota policy fostered widespread Fourth Amendment violations.[115] Specifically, he argued that the collateral-arrest policy gave ICE agents incentives to engage in suspicionless searches and collateral arrests in home raids as opportunities to fill their quotas, and that he had been detained pursuant to this policy.[116]

Oliva-Ramos alleged the following Fourth Amendment violations: an illegal entry into his home, a stop without prior reasonable suspicion, and an arrest without probable cause or a warrant.[117] To bolster his claim that these violations were in fact widespread, and thus that evidence that the government obtained during the home raid should be suppressed, Oliva-Ramos further argued (and the government admitted) that he was arrested pursuant to ICE's "Operation Return to Sender."[118] This enforcement scheme emphasizes office and home raids, and a detailed study by the Cardozo Immigration Justice Clinic characterizes it as creating "a suspiciously uniform pattern of constitutional violations during ICE home raids."[119] But the BIA rejected Oliva-Ramos's motion, stating that the plurality opinion of *Lopez-Mendoza* was not binding.[120]

The Third Circuit vacated the removal order and remanded the case to the BIA, holding that the IJ and the BIA "should have, but did not, first determine whether agents violated Oliva-Ramos's Fourth Amendment rights and second, whether any such violations implicated the *Lopez-Mendoza* exception for being widespread or egregious."[121] In its decision, the court officially

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[114] Id. For the original ICE memoranda establishing this policy change, see *Previously Secret Memos and Data Show Bush-Era Immigration Raids Were Law Enforcement Failure* *4, 7–9 (Cardozo Immigration Justice Clinic 2009), online at http://www.nationalimmigrationproject.org/legalresources/Immigration%20Enforcement%20and%20Raids/Press%20Release%20-%20Secret%20Memos%20from%20Bush%20Era%20Made%20Public%20-%20%20Cardozo%20Law%20School%20-%202009.pdf (visited Nov 3, 2014).

[115] See *Oliva-Ramos*, 694 F3d at 269–70.

[116] Id.

[117] Id at 274.

[118] Id at 281 & n 27.

[119] *Oliva-Ramos*, 694 F3d at 281 n 27 (brackets omitted). For the full report, see Chiu, et al, *Constitution on ICE* at *9 (cited in note 6).

[120] *Oliva-Ramos*, 694 F3d at 270.

[121] Id at 275.

recognized the widespread-violations exception to *Lopez-Mendoza* and held that the BIA had erred in refusing Oliva-Ramos's motion for consideration of the new evidence relating to ICE's collateral-arrest and quota procedures.[122]

The court engaged briefly with the matter of determining what is required to establish a widespread-violations claim but fell short of elaborating an actual standard. First, the court expressly noted that egregious violations and widespread violations are "independent rationale[s] for applying the exclusionary rule" but said little of how to distinguish between the two.[123] Indeed, the court surmised that "most constitutional violations that are part of a pattern of widespread violations of the Fourth Amendment would also satisfy the test for an egregious violation."[124] Second, the court made the obvious observation that "a single Fourth Amendment violation is not sufficient to extend the exclusionary rule to civil removal proceedings unless it is also egregious."[125] But, the court noted, Oliva-Ramos alleged not only that the violations that he suffered were egregious but also that ICE had engaged in a "*consistent pattern* of conducting these raids during unreasonable hours."[126] Specifically, Oliva-Ramos claimed that ICE had actually conceded that it had "a *policy* of rounding up everyone in a home, without any particularized suspicion, in order to question all of the occupants about their immigration status."[127] The court—apparently accepting that such a demonstration would be enough to meet the widespread-violations exception—held that the BIA had wrongfully denied Oliva-Ramos the opportunity to show that the circumstances of his arrest fit within the "narrow exception" of *Lopez-Mendoza* for widespread Fourth Amendment violations and remanded the case back to the BIA.[128]

This suggests that the Third Circuit deemed it important to connect the particular predicate Fourth Amendment violations suffered to either an existing pattern of similar violations in similar contexts or to an actual ICE policy. The court appeared to believe that the widespread-violations exception is not necessarily a mixing bowl that factors any and all particular forms of

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122 Id at 282.
123 Id at 280.
124 *Oliva-Ramos*, 694 F3d at 280.
125 Id at 281.
126 Id (emphasis added).
127 Id (emphasis added).
128 *Oliva-Ramos*, 694 F3d at 281.

ICE violations into a single "widespread" inquiry.[129] Rather, the court found it significant that Oliva-Ramos had identified a specific type and setting of Fourth Amendment violations—predawn home raids involving stops without prior reasonable suspicion—that he himself had suffered, which were part of an identifiable pattern in New Jersey, and which could also be connected to an ICE policy.[130] Hence, in terms of showing what quantum of violations is substantial enough to be considered "widespread" (and not, in the extreme case, just a "single Fourth Amendment violation"), the court tacitly acknowledged that a demonstration that those violations are part of a "consistent pattern"—or, more formally, a "policy"—is sufficient (though perhaps not necessary).[131]

B. Other Immigration Decisions Implicating Widespread Violations

Several immigration courts have also addressed and applied the widespread-violations exception. Perhaps the only one to actually grant a motion to suppress on those grounds was a recent New York City Immigration Court in a case involving two brothers who were arrested in a warrantless ICE home raid. The IJ found that their case was "part of a widespread practice of warrantless and consentless home raids by ICE agents, resulting in Fourth Amendment violations."[132] The IJ relied on the Cardozo Immigration Justice Clinic's report on the frequency of INS home raids and various news articles further examining the topic, intimating a loose understanding of "widespread" as being satisfied by forms of Fourth Amendment violations that have become "not uncommon."[133]

A number of other immigration-court cases appear to assume that for certain violations to be "widespread," they must have some connection to institutional policy. Notably, these cases emphasize the importance of tying the actual arrest experiences of the respondent to the type of violation alleged to be widespread but otherwise do little in the way of formulating a

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[129] See id at 280–82.

[130] See id at 281.

[131] Id.

[132] Treadwell, 89 NC L Rev at 559 (cited in note 16), quoting *In re R-C- and J-C-*, slip op at 16–17 (NYC Immigr Mar 12, 2010).

[133] Treadwell, 89 NC L Rev at 559 (cited in note 16), quoting *In re R-C- and J-C-*, slip op at 2–3, 11 n 6.

standard for the widespread-violations exception. For example, in a 2009 BIA case in which the respondents appealed the IJ's denial of their motion to suppress on the grounds of widespread traffic stops based on physical appearance, the court emphasized that the IJ did not find "any indication that the respondents were targeted in an ongoing, widespread policy against persons of a certain ethnicity."[134] In another case, while the BIA acknowledged evidence potentially showing an "ongoing and widespread policy of racial profiling in Berkshire County, Massachusetts," crucially, the BIA ultimately concluded that the evidence did not show that the respondent was "personally the target of racial profiling" given evidence that he was simply stopped and arrested for violating state traffic laws.[135] In sum, immigration courts have addressed the widespread-violations exception with reference to institutional policies and patterns but have not fleshed out the required standard.

C. Widespread-Violations Exceptions in Other Areas of Fourth Amendment Law

Lopez-Mendoza is not the only instance in which the Supreme Court has made a widespread-violations exception to a general rule of nonapplicability of the exclusionary rule. In other areas of Fourth Amendment jurisprudence, even when the Supreme Court has held suppression to be generally unavailable, the Court has sometimes gestured at a clawback exception if the constitutional violation suffered is systemic or widespread. These other widespread-violations exceptions can help inform the comparable *Lopez-Mendoza* exception.

First, at a minimum, there is a widespread-violations exception to the good-faith exception to the exclusionary rule. Under the good-faith exception, courts do not suppress evidence produced from an unlawful search if the officers who conducted the search acted with an objective, good-faith belief in the lawfulness of the search.[136] This exception is most apparent in *Herring v United States*,[137] which involved an arrest and subsequent search and seizure based on officers' good-faith reliance on a

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[134] *In re Boris Rene Cruz Guilfredo Estuardo Camey-Munoz Jose Augusto Coronado Aquino*, 2009 WL 3713276, *4 (BIA) (quotation marks omitted).

[135] *In re Thiago Assereui de Oliveira*, 2013 WL 4924951, *5 n 3 (BIA).

[136] See *United States v Leon*, 468 US 897, 924 (1984).

[137] 555 US 135 (2009).

recordkeeping error.[138] Although the arrest turned up evidence of additional crimes, the county's computer database failed to indicate that the outstanding arrest warrant on which the search was based had been recalled.[139] Based on the faulty arrest warrant, the defendant sought to exclude the evidence obtained after the arrest.[140] Applying the exclusionary rule's logic that "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it,"[141] the Court held that the good-faith exception applied due to the isolated, merely negligent nature of the illegal search and seizure.[142] Crucially, however, the Court limited its holding by stating that the good-faith exception would not apply if there was evidence that errors in the warrant recordkeeping system were "routine or widespread."[143]

Herring is but one example. Several earlier cases also refer to an exception to a general rule of nonsuppression in the good-faith-violation context when there are widespread or systemic constitutional violations. Consider, for example, *Illinois v Krull*,[144] which involved a search performed by officers in good-faith reliance on a state statute permitting certain motor vehicle searches. Although the state trial court had deemed the statute unconstitutional,[145] the Court held that the good-faith exception applied and that evidence obtained was therefore admissible.[146] Significantly, however, the Court indicated that if unconstitutional statutes themselves were widespread in Illinois, the exclusionary rule could apply, but it declined to assume that "there exists a significant problem of legislators who perform their legislative duties with indifference to the constitutionality of the statutes they enact."[147] Similarly, in *United States v Leon*,[148] which applied the good-faith exception to an execution of a warrant without probable cause,[149] the Court hinted at a willingness to entertain a widespread-violations exception when it noted the absence of evidence that magistrates or judges were "inclined to

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138 Id at 137–38.
139 Id.
140 Id at 138.
141 *Herring*, 555 US at 144.
142 Id at 145.
143 Id at 146–47.
144 480 US 340 (1987).
145 Id at 342–45.
146 Id at 355–57.
147 Id at 352 n 8.
148 468 US 897 (1984).
149 Id at 903, 924.

ignore or subvert the Fourth Amendment" in deciding warrant applications, or that police engaged in magistrate shopping in obtaining warrants.[150] Hence, at least with respect to the good-faith exception to the exclusionary rule, the Court has recognized that, when constitutional violations are widespread, the deterrent value of suppression can merit an exception to that exception.

The justices have also invoked a widespread-violations exception to a general rule of nonsuppression in at least one case outside of the good-faith-exception context. In *Hudson v Michigan*,[151] Justice Anthony Kennedy wrote separately to qualify the Court's holding that the exclusionary rule does not apply to knock-and-announce violations, which occur when police fail to properly wait after announcing themselves prior to entering a dwelling to execute a search warrant.[152] Kennedy emphasized that "[i]f a *widespread pattern* of violations were shown, and particularly if those violations were committed against persons who lacked the means or voice to mount an effective protest, there would be reason for grave concern."[153] Because four dissenting justices wrote that they would apply the exclusionary rule to all knock-and-announce violations,[154] a majority supported *at least* a widespread-violations exception to the general rule of nonsuppression.

D. Section 1983 Roots and Civil-Suit Analogues to Fourth Amendment Widespread-Violations Exceptions

There is reason to believe that these widespread-violations exceptions to general rules of nonsuppression have not simply emerged from thin air. Rather, widespread-violations exceptions in the exclusionary rule context have much in common with the Court's § 1983 jurisprudence. This statute allows damages suits against state entities, officials, and their supervisors for violations of constitutional rights perpetrated "under color of any statute, ordinance, regulation, custom, or usage."[155] In *Bivens v*

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150 Id at 916.

151 547 US 586 (2006).

152 See id at 599 ("[T]he social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrences against them are substantial."). See also id at 602–04 (Kennedy concurring).

153 Id at 604 (Kennedy concurring) (emphasis added).

154 See id at 604–05 (Breyer dissenting).

155 42 USC § 1983.

Six Unknown Named Agents of Federal Bureau of Narcotics,[156] the Court inferred from the Fourth Amendment an equivalent private right of action for constitutional violations by federal officials.[157]

While a range of constitutional violations may give rise to § 1983 claims, those stemming from policy or custom in the context of municipal liability under the statute are of particular relevance to Fourth Amendment widespread-violations exceptions. In *Monell v Department of Social Services of the City of New York*,[158] the Supreme Court held that state and local government entities qualify as "persons" under § 1983 and thus may be held liable under the statute for constitutional deprivations related to an "official policy"[159] or an informal "custom."[160] "Custom" is defined as a "persistent, *widespread* practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy."[161]

Municipal liability is distinct from respondeat superior liability, which does not exist under § 1983. That is, "a municipality may not be held liable under § 1983 solely because it employs a tortfeasor."[162] Rather, plaintiffs suing municipal entities under § 1983 "must demonstrate a direct causal link between the municipal action and the deprivation of federal rights," which requires the identification of a municipal "policy" or "custom" described above.[163] Specifically, to find municipal liability, the "critical points are (1) identifying the specific 'policy' or 'custom'; (2) fairly attributing the policy and fault for its creation to the municipality; and (3) finding the necessary 'affirmative link' between identified policy or custom and specific violation."[164]

Municipal-liability doctrine tracks remarkably well onto widespread-violations exceptions to the nonapplicability of the

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156 403 US 388 (1971).

157 See id at 390–97.

158 436 US 658 (1978).

159 An "official policy" is a "policy statement, ordinance, regulation or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority." *Sanders-Burns v City of Plano*, 594 F3d 366, 380 (5th Cir 2010).

160 *Monell*, 436 US at 690–91.

161 *Sanders-Burns*, 594 F3d at 380 (emphasis added).

162 *Board of the County Commissioners of Bryan County, Oklahoma v Brown*, 520 US 397, 403 (1997) (noting further that the Court has "consistently refused to hold municipalities liable under a theory of *respondeat superior*").

163 Id at 404.

164 *Spell v McDaniel*, 824 F2d 1380, 1389 (4th Cir 1987).

exclusionary rule. Similar to the Court's exclusionary rule jurisprudence, "§ 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well."[165] The policy-or-custom (that is, widespread-pattern-or-practice) requirement for municipal liability serves deterrence ends because it ensures that the constitutional harms being remedied are actually attributable to the responsible municipal entity, and thus deterrable.[166] The Supreme Court elaborated this deterrence rationale in *Owen v City of Independence, Missouri*:[167]

> The knowledge that a municipality will be liable for all of its injurious conduct . . . should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the *interactive behavior of several government officials*, each of whom may be acting in good faith.[168]

The Court's point about the role that municipal liability serves in preventing "systemic injuries"[169] is especially salient for widespread-violations exceptions in the Fourth Amendment context. Indeed, Professor Jennifer Laurin has made a powerful case that *Herring*'s indication that the exclusionary rule may be applied to remedy constitutional violations "traceable to system-level failure" is imported from, or at least "conceptually resonant with[,] the Court's post-*Monell* approach to entity-based liability under § 1983."[170] After all, § 1983 relief and suppression may be

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165 *Owen v City of Independence, Missouri*, 445 US 622, 651 (1980). See also *Pembaur v City of Cincinnati*, 475 US 469, 495 (1986) (Powell dissenting) ("The primary reason for imposing § 1983 liability on local government units is deterrence.").

166 See *Pembaur*, 475 US at 479–80.

167 445 US 622 (1980).

168 Id at 651–52 (emphasis added).

169 Id at 652 (quotation marks omitted).

170 Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 Colum L Rev 670, 732 (2011).

conceived of as two sides of the same coin: deterrence-enhancing remedies to constitutional torts in cases of systemic underdeterrence. For § 1983, the widespread inquiry is meant to determine whether certain constitutional violations are pervasive enough to make the imposition of liability on the government both fair and deterrence enhancing.[171] For exclusionary rule jurisprudence, the widespread inquiry serves to deter an otherwise suppression-immune sphere from giving rise to systemic failures that undermine the basis for making it an exception in the first place. Indeed, in *Oliva-Ramos* and the immigration-court decisions described above, the courts' emphasis on policies and patterns for purposes of applying the widespread-violations exception highlights the extent to which the exception may be germane to § 1983 analogical analysis.[172] This Comment uses this connection to § 1983 and its comparators to inform an approach for assessing widespread violations in the immigration-enforcement realm.[173]

Section 1983 municipal liability has a close parallel in 42 USC § 14141, which authorizes the DOJ to seek civil injunctive relief against state and local government entities, such as counties and police departments, that are engaged in "pattern[s] or practice[s]" of constitutional violations.[174] Like municipal liability, § 14141 aims at correcting systemic, organizational failures to limit constitutional violations. As one article has explained, § 14141 "[p]attern or practice litigation is designed to effect organizational changes in law-enforcement agencies to enhance police accountability" when internal management policies and other means of deterrence have failed, resulting in patterns or

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171 See *Carey v Piphus*, 435 US 247, 256–57 (1978) (arguing that "Congress intended that awards under § 1983 should deter the deprivation of constitutional rights"). See also *City of Canton, Ohio v Harris*, 489 US 378, 400 (1989) (O'Connor dissenting) ("The grave step of shifting those resources to particular areas where constitutional violations are likely to result through the deterrent power of § 1983 should certainly not be taken on the basis of an isolated incident."). For an extended argument that municipal liability serves important deterrence goals, see Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 BU L Rev 17, 31–32 (2000).

172 See text accompanying notes 124–27.

173 See Part III.B.

174 42 USC § 14141. See also Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 Ala L Rev 351, 370–71 (2011) (calling § 14141 "one of the most promising tools within the federal arsenal to combat police misconduct").

practices of constitutional violations.[175] While § 14141 injunctive suits are relatively rare,[176] the important point is that they serve as a means for the federal government to correct state-, county-, and agency-wide failures to adequately deter constitutional violations—just like municipal liability. Suits brought under § 14141 can thus be useful analogues for the *Lopez-Mendoza* widespread-violations exception, which this Comment argues is meant to step in and provide exclusionary rule deterrence in cases in which existing strictures on the actions of immigration-enforcement officials have so thoroughly failed to adequately deter constitutional violations that policies or patterns of violations have resulted.

Municipal liability also has parallels in the context of civil suits against *federal* officials and agencies. These too can inform the widespread-violations exception. The closest *Bivens* analogue is supervisory liability, which was influenced by municipal-liability rules and requires a very similar showing.[177] Under *Bivens*, a supervisor may be liable for the unconstitutional acts of subordinates if the supervisor:

> (1) directly participated in the constitutional violation; (2) failed to remedy the violation after learning of it through a report or appeal; (3) *created a custom or policy fostering the violation or allowed the custom or policy to continue after learning of it*; (4) was grossly negligent in supervising subordinates who caused the violation; or (5) failed to act on information indicating that unconstitutional acts were occurring.[178]

Here, the third route to supervisory liability is similar to the showing required for municipal liability.[179] The rationale for increased deterrence in cases of systemic failure also applies as supervisory liability is imposed when supervisors have failed to use their institutional authority to prevent constitutional violations. However, the Supreme Court cast doubt on, and possibly

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[175] Samuel Walker and Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 Geo Mason U CR L J 479, 483–84, 487–88 (2009).

[176] See Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 SLU Pub L Rev 33, 48 (2012).

[177] See *Mathews v Crosby*, 480 F3d 1265, 1270 (11th Cir 2007). See also William N. Evans, Comment, *Supervisory Liability after* Iqbal*: Decoupling* Bivens *from Section 1983*, 77 U Chi L Rev 1401, 1412–13 (2010).

[178] *Thomas v Ashcroft*, 470 F3d 491, 497 (2d Cir 2006) (emphasis added).

[179] See Evans, Comment, 77 U Chi L Rev at 1414–15 (cited in note 177) (describing the parallels between § 1983 municipal liability and *Bivens* supervisory liability).

eliminated, *Bivens* supervisory-liability actions in *Ashcroft v Iqbal*[180] by suggesting that a supervisory *purpose* to violate constitutional rights, as opposed to mere constructive knowledge of widespread violations, is necessary to establish such liability.[181] Some circuits have preserved *Bivens* supervisory liability, treating contrary language in *Iqbal* as dicta, but others have abandoned it.[182] But regardless of whether the underlying basis of liability survives, cases addressing *Bivens* supervisory liability are relevant to this Comment in that they flesh out the standard for establishing the existence of widespread constitutional violations.

Given that *Bivens* generally bars suits against federal agencies themselves,[183] the other major federal parallel to municipal liability, which *does* allow actions against agencies, is a suit for injunctive relief against policies or patterns of Fourth Amendment violations committed by federal agencies.[184] Specifically, federal courts "have equitable power to enjoin law enforcement agencies when such agencies have engaged in a persistent pattern of misconduct."[185] The need for injunctive relief in the context of unconstitutional agency patterns or practices is akin to the need for the exclusionary rule in the context of widespread violations. Injunctions are appropriate when the injury is so systemic as to merit not only increased deterrence, but also an outright order forbidding the policy or practice. Similarly, given a pattern or

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180 556 US 662 (2009).

181 Id at 677:

> Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of a clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; *the same holds true for an official charged with violations arising from his or her superintendent responsibilities*.

(emphasis added). See also Evans, Comment, 77 U Chi L Rev at 1415–17 (cited in note 177) (analyzing *Iqbal*'s discussion of *Bivens* supervisory liability).

182 See Evans, Comment, 77 U Chi L Rev at 1417–19 (cited in note 177).

183 See *FDIC v Meyer*, 510 US 471, 485 (1994) (holding that *Bivens* damages actions do not lie against federal agencies); *Correctional Services Corp v Malesko*, 534 US 61, 69 (2001), quoting *Meyer*, 510 US at 484–86 (refusing to "extend *Bivens* to permit suit against a federal agency" because "the purpose of *Bivens* is to deter *the officer*, not the agency") (quotation marks omitted).

184 See *Allee v Medrano*, 416 US 802, 802–03, 815–16 (1974) (holding that an injunction prohibiting police from intimidating union members was a permissible and appropriate exercise of the district court's equitable power when there was a persistent pattern of police misconduct).

185 *Zepeda v United States Immigration and Naturalization Service*, 753 F2d 719, 725 (9th Cir 1983).

practice of widespread Fourth Amendment violations in the immigration-enforcement context suggestive of a systemic failure of deterrence, the exclusionary rule would also work to reduce violations—here, through increased marginal deterrence of immigration-enforcement officials.

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In sum, the Third Circuit and the immigration courts that have addressed *Lopez-Mendoza*'s widespread-violations exception to date have each alluded to institutional policy and custom for purposes of assessing the exception. But they have neglected to articulate and justify a standard elaborating this connection. The preceding Section illustrates that the purposes that municipal liability and its various parallels serve in curing system-level failure strongly resonate with Fourth Amendment widespread-violations exceptions. These exceptions serve to reintroduce the availability of the exclusionary rule—thereby enhancing deterrence—in cases in which the predicate constitutional violations have become widespread. But since these exceptions operate in contexts in which the Court has already deemed the exclusionary rule unnecessary, "widespread" connotes a systemic failure of the alternative means of deterrence that justified nonsuppressibility in the first place. The law already has tools for evaluating this sort of deterrence failure. Thus, this Comment argues that courts and practitioners should turn to the policy-or-pattern elements of municipal liability and its § 14141, *Bivens*, and injunctive-relief parallels in order to inform the *Lopez-Mendoza* widespread-violations exception.

III. A POLICY-OR-PATTERN APPROACH TO WIDESPREAD VIOLATIONS

Courts have not yet established what it means for Fourth Amendment violations to be "widespread" in the civil-removal context, nor have they determined exactly how the exclusionary rule should operate amid widespread violations. This Part argues that courts and practitioners should draw on § 1983 municipal liability and its parallels in § 14141, *Bivens*, and pattern-or-practice injunctive suits to give content to the widespread-violations exception. The roles that these civil-suit mechanisms serve in increasing deterrence when there has been system-level failure to adequately control enforcement agencies' constitutional violations—considered in light of the exclusionary rule's

deterrence-centric rationale—provide support for a policy-or-pattern approach to the *Lopez-Mendoza* widespread-violations exception. Courts and practitioners should appeal to whether Fourth Amendment violations committed by immigration-enforcement officials rise to the level of policy or custom in considering whether they are sufficiently widespread to merit the extraordinary remedy of the exclusionary rule.

This Part begins by describing the only existing attempt by commentators to explain the *Lopez-Mendoza* widespread-violations exception, which this Comment refers to as the "light-switch approach" because it treats the widespread-violations exception as a mechanism that "turns off" the *Lopez-Mendoza* rule entirely following a single-shot determination that Fourth Amendment violations have become widespread. This Comment rejects the light-switch approach because it is so broad that it essentially eviscerates the *Lopez-Mendoza* holding. This Part suggests an alternative approach for implementing the widespread-violations exception—the "policy-or-pattern approach." This approach looks to the deterrence-centric logic of the exclusionary rule, § 1983 municipal liability and its civil-suit parallels, and the underlying need to deter ICE and cooperating local enforcement agencies in cases of system-level Fourth Amendment violations. To illustrate the independent value added by the widespread-violations exception, this Part also examines the distinction between egregious violations and widespread violations. While the question of what exact showing is *necessary* to establish that putative violations are widespread is a blurry, legal-empirical one, a policy-or-pattern approach to the *Lopez-Mendoza* exception points courts in a principled direction and practitioners in a promising one.

A. Rejecting the Light-Switch Approach to the Widespread-Violations Exception

The few commentators who have offered their own assessments of the widespread-violations standard have provided direction that is either implausible, by essentially asking lower courts to overturn *Lopez-Mendoza*, or unhelpful for practitioners, by arguing that ICE violations are now widespread but that practitioners must wait for the Supreme Court to overturn

Lopez-Mendoza.[186] Their collective view may be referred to as the "light-switch approach," because it treats the widespread-violations question as a one-shot, catchall inquiry: if by some appropriate measure it is determined that immigration-enforcement violations have become widespread within an enforcement area or even nationwide, then the *Lopez-Mendoza* holding no longer applies and suppression is accordingly available in all removal proceedings.[187] On this view, the exception is like a light switch: the exclusionary rule was "turned off" at the time of *Lopez-Mendoza* because violations were not widespread, but if circumstances change and violations become nationally widespread, then the rule "flips on" and the exclusionary rule becomes available in *all* removal proceedings.

1. The case in favor of the light-switch approach.

There is some legal support for the blanket rule outlined above. For one thing, the language used by the *Lopez-Mendoza* plurality could be read as framing the widespread-violations exception as an all-or-nothing conditional: "*if* there developed good reason to believe that Fourth Amendment violations by INS officers were widespread," *then* the Court's "conclusions concerning the exclusionary rule's value" would change, and the rule would correspondingly apply in civil-removal proceedings.[188] In other words, the specific type of violations by immigration officials

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[186] See Wishnie, 6 U Pa J Const L at 1114 (cited in note 16) (arguing that constitutional violations committed by immigration-enforcement officials have become widespread and, accordingly, that "the exclusionary rule may now be appropriate in immigration proceedings"); Margaret B. Hobbins, *A Practitioner's Guide to Motions to Suppress Evidence and Terminate Removal Proceedings Due to Constitutional and Regulatory Violations*, 10-10 Immig Briefings 1, 1 (2010) (arguing that "constitutional and regulatory violations are increasingly widespread and that it is time for the law to respond to this reality in order to uphold the right to due process and the integrity of removal proceedings"); Treadwell, 89 NC L Rev at 556–61 (cited in note 16) (arguing that *Lopez-Mendoza* should be revisited in light of ICE's "widespread and unchecked misconduct"); Elias, 2008 Wis L Rev at 1140 (cited in note 16) (stating that "now may be the time for the Supreme Court to revisit its decision in *Lopez-Mendoza*" in light of evidence of widespread Fourth Amendment violations).

[187] See generally Elias, 2008 Wis L Rev 1109 (cited in note 16) (arguing that the exclusionary rule should be introduced in immigration proceedings because of widespread violations of constitutional rights). See also Treadwell, 89 NC L Rev at 1156–57 (cited in note 16) (arguing that nationwide "widespread violations in home raids in particular justify reconsideration of the exclusionary rule in that context"); Wishnie, 6 U Pa J Const L at 1114 (cited in note 16) (observing that the exclusionary rule may be appropriate in immigration proceedings given that "even trained immigration officers routinely resort to impermissible discrimination in immigration enforcement").

[188] *Lopez-Mendoza*, 468 US at 1050–51 (O'Connor) (plurality).

and the context of their policy or enforcement pattern might not matter on a case-by-case basis for purposes of the widespread-violations exception, so long as various and disparate types of violations occurring throughout a geographic area aggregate to some level that may properly be called "widespread." Hence, once violations have become widespread, the exclusionary rule should apply in *all* civil-deportation proceedings within a given enforcement area, or perhaps even nationwide.

Professor Stella Burch Elias is one prominent commentator who appears to have adopted this reading of *Lopez-Mendoza*.[189] Her interpretation is that the sum of constitutional violations by ICE—egregious and otherwise—suggests that constitutional violations have become "so widespread that it may be necessary to revisit the Supreme Court's holding in *Lopez-Mendoza*."[190] Similarly, having considered anecdotal and empirical evidence of ICE and police violations of aliens' Fourth Amendment rights throughout the country, Professor Michael Wishnie believes that the switch has been flipped: "Under the logic of *Lopez-Mendoza* itself, the exclusionary rule may now be appropriate in immigration proceedings."[191]

More broadly, the Court has in other contexts signaled its willingness to change the applicability of the exclusionary rule in light of social developments, adding further support to the blanket rule. In *Leon*, Justice Harry Blackmun, concurring, explained this notion:

> If a single principle may be drawn from this Court's exclusionary rule decisions, from *Weeks* through *Mapp v. Ohio*, to the decisions handed down today, it is that the scope of the exclusionary rule is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom.[192]

Social circumstances certainly have changed. The immigration system today looks much different than it did in 1984. ICE is the country's largest law-enforcement agency, and it works with many thousands of state and local police officials throughout the nation,[193] using enforcement approaches that have increasingly

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189 See Elias, 2008 Wis L Rev at 1119–23 (cited in note 16).

190 Id at 1126.

191 Wishnie, 6 U Pa J Const L at 1114 (cited in note 16).

192 *Leon*, 468 US at 928 (Blackmun concurring) (citations omitted).

193 See Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 Duke L J 1563, 1632 (2010).

blurred the line between criminal law and civil immigration enforcement.[194] Further, reports of constitutional violations by immigration-enforcement officials are certainly more common.[195] The light-switch approach thus maintains that the value of the exclusionary rule in removal proceedings has changed—and that the widespread-violations exception is the vehicle by which the rule should be made generally available.

2. The case against the light-switch approach.

The light-switch approach faces serious difficulties. If adopted by lower courts, its sweeping effects threaten to eviscerate *Lopez-Mendoza*. Indeed, lower courts are unlikely to be convinced that, by grammatically framing the widespread-violations exception as a conditional, the Supreme Court was inviting inferior courts to dissolve *Lopez-Mendoza* upon a generalized assessment of the state of Fourth Amendment violations in the immigration-enforcement context. Yet the light-switch approach would do just that, allowing suppression not only for immigration-enforcement practices rising to the level of policy or custom, but also in removal proceedings involving violations unrelated to problematic policies or patterns.[196] This is far from the "narrow exception" to the *Lopez-Mendoza* holding that the Third Circuit envisioned in *Oliva-Ramos*.[197] It may be that the logic of *Lopez-Mendoza* no longer obtains, but it is doubtful that the widespread-violations exception is the proper tool for entirely reworking its general rule of nonsuppression in removal proceedings.

This discussion reveals a deeper issue with the light-switch approach. It is disconnected from the systemic-failure rationale of existing widespread-violations exceptions to general rules of nonsuppression in other areas of Fourth Amendment law.[198] The light-switch approach goes beyond the scope of the current widespread-violations-exception doctrine by making suppression available in cases of violations unrelated to system-level deterrence

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194 See id at 1573 (arguing that developments in the scope and approach of US immigration enforcement have undermined "distinctions between immigration law and criminal law enforcement").

195 See id at 1624.

196 Problematically, the light-switch approach also leaves courts that have "turned off" the exclusionary rule due to widespread violations with no guidance as to when or whether to reinstate the *Lopez-Mendoza* rule if immigration-enforcement officials improve their behavior and internal controls.

197 *Oliva-Ramos*, 694 F3d at 282.

198 See Parts II.C, II.D.

failures. This would upset the delicate balance between marginal deterrence and social costs that the exclusionary rule aims to strike. To elaborate, the existence of a certain policy or pattern of violations in an enforcement area does not necessarily mean that another violation unrelated to that policy or pattern suffered by an alien in that area should be suppressible on the basis of the widespread-violations exception. While there is special need to use the exclusionary rule to deter violations rising to the level of policy or custom—indications that alternative means of deterrence have failed—the calculus works out differently in cases of disparate, isolated violations, in which ICE is getting it right most of the time. That is why the Court adopted a balancing test in the first place.

After all, due to an explosion of unlawful immigration, courts are likely to conclude that the social costs of the exclusionary rule have grown since *Lopez-Mendoza*.[199] The light-switch approach would, upon a single finding of certain widespread violations in an enforcement area, effectively overturn *Lopez-Mendoza* for that area, possibly upsetting the balance between marginal deterrence and social costs. By contrast, conceiving of widespread violations as features of the policies or customs of individual immigration-enforcement geographies homes in on the areas in which greater deterrence is needed. It does so without reintroducing the social costs of uniform availability of the exclusionary rule or bringing into question the institutional competence of immigration courts to deal with a consequent increase in suppression motions for nonegregious, nonwidespread violations.

Further, the only proponent of the light-switch approach to actually provide principles for the determination of whether Fourth Amendment violations are widespread has been Professor Elias. She has offered a detailed tallying of alleged ICE abuses purportedly showing that constitutional violations have become both "geographically" and "institutionally" widespread.[200]

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[199] According to DHS estimates, the population of unauthorized immigrants residing in the United States more than tripled from 1990 to 2010. Michael Hoefer, Nancy Rytina, and Bryan C. Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011* *1 (DHS Mar 2012), online at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf (visited Nov 3, 2014); Office of Policy and Planning, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000* *4 (INS Jan 2003), online at http://www.dhs.gov/xlibrary/assets/statistics/publications/Ill_Report_1211.pdf (visited Nov 3, 2014).

[200] Elias, 2008 Wis L Rev at 1126–40 (cited in note 16).

But in making this determination, Elias simply adopts the definition of "widespread" provided by the Compact Oxford English Dictionary: "spread among a large number or over a wide area."[201]

There are two central problems with Elias's dictionary definition of "widespread." First, it instantiates a light-switch approach that, as argued above, is divorced from the rich background of Fourth Amendment doctrine against which the widespread-violations exception is set. Second, the definition amounts to a distinction without a difference. Courts and practitioners need legal-empirical tools to help them assess whether certain Fourth Amendment violations have become widespread. A bare recitation of the words "spread among a large number or over a wide area" will be of little use for this purpose.[202] How large a number? How wide an area? More precision is required. The next Section argues that a policy-or-pattern approach to the widespread-violations exception, informed by entity-liability concepts, offers a better path.

B. A Policy-or-Pattern Approach to the Widespread-Violations Exception

A widespread-violations standard should perform two major functions: (1) provide principles for determining whether putative violations are widespread, and (2) answer how the exclusionary rule should be applied upon a finding of widespread violations. This Section proposes an approach—the policy-or-pattern approach—that does both. The policy-or-pattern approach interprets the *Lopez-Mendoza* widespread-violations exception to include policies and patterns of Fourth Amendment violations. It also distinguishes between egregious violations and widespread violations by comparing the implications of various circuits' egregiousness standards to the widespread-violations approach proposed by this Comment. Upon a finding that a certain class of violations is widespread given a certain policy or custom, the policy-or-pattern approach suggests that suppression should be available in all removal proceedings featuring Fourth Amendment violations associated with that policy or pattern. However, consistent with the *Lopez-Mendoza* holding, this approach suggests that suppression should not be allowed in removal proceedings featuring violations unrelated to the problematic policy or custom.

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[201] Id at 1126.

[202] Id.

1. "Widespread" as policy or pattern.

Fourth Amendment widespread-violations exceptions to general rules of nonsuppression are consonant with entity-liability mechanisms that remedy unlawful policies or patterns of constitutional violations. Section 1983 municipal liability and its parallels in § 14141, *Bivens*, and pattern-and-practice injunctive suits serve to correct unconstitutional policies or customs of enforcement entities when existing strictures on enforcement behavior have thoroughly underdeterred constitutional violations.[203] Widespread-violations exceptions have a similar logic and purpose. Making suppression available when Fourth Amendment violations are widespread introduces additional marginal deterrence of enforcement behavior in order to correct systemic failure that undermines the basis for making the exclusionary rule generally unavailable in the first place. Since a number of entity-liability, *Bivens*, and pattern-and-practice–injunctive-relief cases address what quantum of error qualifies as widespread, these analogues can be imported into the exclusionary rule context to inform widespread-violations exceptions to nonsuppression.[204]

To reiterate, a municipality may become liable under § 1983 "by formulating a policy, or engaging in a custom, that leads to the challenged occurrence."[205] Policies are the surest route to liability because they constitute unconstitutional regulations and decisions that have received "formal approval through [a] body's official decisionmaking channels."[206] Customs, by contrast, have been defined by the Supreme Court as "'persistent and widespread practices,' 'permanent and well settled' practices, and 'deeply embedded traditional ways of carrying out policy.'"[207] Widespread practices can serve as the basis for liability "although not authorized by written law or express municipal policy" when they are "so permanent and well settled as to constitute a 'custom

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[203] See Part II.D.

[204] See Laurin, 111 Colum L Rev at 732–33 (cited in note 170) (observing and predicting further convergence between principles and tests resulting in exclusion of evidence).

[205] *Maldonado-Denis v Castillo-Rodriguez*, 23 F3d 576, 582 (1st Cir 1994), citing *Oklahoma City v Tuttle*, 471 US 808, 823–24 (1985).

[206] *Monell*, 436 US at 691.

[207] *Fundiller v City of Cooper City*, 777 F2d 1436, 1442 (11th Cir 1985), quoting *Adickes v S.H. Kress & Co*, 398 US 144, 167–68 (1970).

or usage' with the force of law."[208] As such, the Court has held that an identifiable "pattern of similar violations" meets this "widespread" standard.[209] Thus, incorporating § 1983 standards into the *Lopez-Mendoza* widespread-violations exception calls for suppression when Fourth Amendment violations are either embedded in formal policy or pervasive in informal custom (which, again, can be established by identifying patterns of similar violations in immigration-enforcement actions).[210] As Part II.D explained, considering their similar focus on policies and patterns, § 14141 DOJ investigations and suits, *Bivens* supervisory-liability actions, and pattern-and-practice–injunctive-relief case law are also useful.

a) Policies and patterns. Both logic and the limited existing case law on the widespread-violations exception to *Lopez-Mendoza* support the conclusion that widespread violations should be conceived of in terms of ICE policies or the patterns flowing from them.[211] This way of conceptualizing "widespread" avoids the pitfalls of a dictionary or numerical definition. Under this Comment's approach, policies that facially approve of unconstitutional enforcement actions obviously merit application of the widespread-violations exception; but policies can also be useful for identifying *patterns* of violations. The logic runs as follows: Due to data-collection difficulties and the likelihood that aliens underreport violations, immigration-law practitioners often lack data regarding the number and types of violations committed by ICE throughout the country.[212] A widespread-violations standard should account for that difficulty. Policies have the benefit of being concrete and relatively easy to measure because, even in the absence of strong data on the effects of certain policies, observers can look to the incentives that they create. So, even when a policy itself does not promote unconstitutional practices, its incentive effects can be useful for purposes of identifying *patterns* (though, as discussed below, this requires some evidence of a series of similar unconstitutional actions). Indeed, the respondent relied on similar logic in *Oliva-Ramos* by identifying an ICE change in quota policy, articulating its

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[208] *City of St. Louis v Praprotnik*, 485 US 112, 127 (1988), quoting *Adickes*, 398 US at 167–68 (defining "custom or usage" for establishing § 1983 liability against local governments).

[209] *Connick v Thompson*, 131 S Ct 1350, 1358–60 (2011).

[210] "Policy" and "custom" are used interchangeably in this Comment.

[211] See Parts II.A, II.B.

[212] See Elias, 2008 Wis L Rev at 1127–28 (cited in note 16).

problematic incentives for agents to perform unconstitutional searches and seizures in pursuit of greater numbers of collateral arrests and connecting these to similar home-raid violations in New Jersey.[213]

To elaborate, policies are often formalized into specific regulations and documents, and because they aim to guide enforcement behavior, they are relatively easy to connect to changes in officer conduct and enforcement outcomes. In the immigration-enforcement context, policies can include any formalized enforcement practice or major operation. These policies would trigger the widespread-violations exception if the specific plans themselves, as written, reveal that they are organized in a way that disregards Fourth Amendment rights.[214] But even when they are facially unproblematic, enforcement policies might also serve as foundations for a causal logic linking enforcement goals to officer behavior to *patterns* of Fourth Amendment violations. Because enforcement policies generally affect entire organizations, they by definition have widespread effects. And finally, because policies influence the incentives of those whom they regulate, attaching penalties (such as the exclusionary rule) to violations flowing from putative policies brings about the real possibility of deterrence—the watchword for the exclusionary rule.

Under the policy-or-pattern approach—even when practitioners can point to an enforcement policy that creates bad incentives—suppression motions founded on alleged *patterns* of widespread violations require evidentiary support showing that an alleged violation is not merely isolated but rather is part of a recurring pattern of similar enforcement behavior.[215] Here, the geographic and enforcement-action denominator matters significantly for the "widespread" determination. The proportion of violations to the number of relevant enforcement actions must be such that the enforcement actions feature violations commonly enough that it is suggestive of a serious failure of deterrence. For example, in a § 1983 municipal-liability case involving several police officers who molested women stopped for traffic violations,

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[213] See *Oliva-Ramos*, 694 F3d at 269–70.

[214] Such facially impermissible policies are likely rare, but ICE's collateral-arrest quota policies and Operation Return to Sender might be candidates. See id at 269–70, 280 n 27.

[215] See Laurin, 111 Colum L Rev at 735 (cited in note 170) (noting that the Supreme Court "has repeatedly rejected municipal liability claims premised on 'isolated' practices").

the Second Circuit held that "[a] few violations by a small group" of government officials did not amount to a widespread practice or custom.[216] This makes sense when considered in terms of municipal liability's underlying logic of deterring systemic failure. The large denominator of traffic stops within the enforcement area and the very limited number of officers and incidents involved suggests that there was no systemic failure of deterrence.[217]

By contrast, also in the traffic-stop context, two DOJ § 14141 investigations recently determined that the Maricopa County Sheriff's Office in Arizona and the Alamance County Sheriff's Office in North Carolina engaged in widespread Fourth Amendment violations by "routinely" targeting Latinos for traffic stops and arresting Latinos for minor traffic violations while giving warnings or citations when the same violations are committed by non-Latinos.[218] The crucial distinction is that violations must to some extent pervade the organization and its enforcement actions rather than amount to isolated deviations from common practice. In Maricopa County, for instance, it was decisive for the widespread-violations determination that, over a three-year period, data showed that "roughly one-fifth" of the county's Human Smuggling Unit's traffic incident reports, nearly all of which involved Latino drivers, "contained information indicating that the stops were conducted in violation of the Fourth Amendment's prohibition against unreasonable seizures."[219] This ratio suggests a serious failure of deterrence at the organizational level. Indeed, the federal government later sued Maricopa County and its sheriff's office pursuant to § 14141, alleging "a custom, policy and practice of targeting, searching, arresting

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[216] *Rubio v County of Suffolk*, 328 Fed Appx 36, 38 (2d Cir 2009).

[217] For another illustration that the geographic and enforcement-action denominator against which alleged violations are compared is important for identifying patterns, see *Pineda v City of Houston*, 291 F3d 325, 329–31 (5th Cir 2002) ("Eleven incidents [of alleged Fourth Amendment violations] . . . cannot support a pattern of illegality in one of the Nation's largest cities and police forces. The extrapolation fails . . . because the sample of alleged unconstitutional events is just too small.").

[218] Thomas E. Perez, *United States' Investigation of the Maricopa County Sheriff's Office* *17 (DOJ Dec 15, 2011), online at http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf (visited Nov 3, 2014). See also Press Release, *Justice Department Releases Investigative Findings on the Alamance County, N.C., Sheriff's Office* (DOJ Sept 18, 2012), online at http://www.justice.gov/opa/pr/2012/September/12-crt-1125.html (visited Nov 3, 2014).

[219] Perez, *United States' Investigation of the Maricopa County Sheriff's Office* at *3 (cited in note 218).

and detaining Latinos without probable cause or reasonable suspicion because of their race, color and national origin."[220] The court found this sufficiently plausible to support municipal liability against the county and sheriff's office.[221]

This discussion gives a rough indication of the blurry line between isolated violations and impermissible patterns. Immigration-court motions to suppress relying on alleged patterns of constitutional violations undoubtedly, then, require some type of data on allegations of constitutional violations. Without being able to point to a specific enforcement policy with problematic incentive effects, this task could be difficult. Nevertheless, more extensive use of surveys and FOIA requests could help provide the data necessary to support suppression motions on the basis of patterns of violations.[222] Further, these data might even take the form of newspaper articles reporting allegations of constitutional violations committed by immigration-enforcement officials.[223] Part III.B.1.c of this Comment will discuss some illustrative cases that indicate what evidence is sufficient for this purpose. But, as *Oliva-Ramos* and several of the cases discussed below illustrate, it appears that patterns of violations are often connected to formal ICE policies and special operations, making them helpful reference points in supporting motions to suppress. Respondents can use enforcement policies to connect the dots between what might otherwise appear to be disparate collections of alleged violations by identifying various policies' incentive effects. Indeed, a policy-or-pattern formulation of "widespread" reflects and reinforces the treatments that the few courts to examine the widespread-violations exception have given the exception. In *Oliva-Ramos*, for example, the respondent substantiated his allegations of a "consistent pattern"[224] of ICE home-raid violations in New Jersey by connecting that pattern to an ICE policy—Operation Return to Sender—and the incentive

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220 *United States v Maricopa County, Arizona*, 915 F Supp 2d 1073, 1084 (D Ariz 2012).

221 Id.

222 Courts have shown a willingness to force ICE's hand when it responds inadequately to FOIA requests. See, for example, *Perez-Rodriguez v United States Department of Justice*, 888 F Supp 2d 175, 184 (DDC 2012) ("ICE has not demonstrated that its searches for responsive records were reasonable under the circumstances.").

223 See *Diaz-Bernal v Myers*, 758 F Supp 2d 106, 132 (D Conn 2010) (considering as relevant, in a *Bivens* supervisory-liability claim against ICE officials, a newspaper article that "mention[ed] allegations of unconstitutional behavior on the part of raid officers, including Fourth Amendment violations").

224 *Oliva-Ramos*, 694 F3d at 281.

effects of that policy.[225] This was enough to convince the Third Circuit that Oliva-Ramos should be able to move for suppression based on evidence of widespread violations.[226]

b) The geographic scope of "widespread." A policy-or-pattern approach to the *Lopez-Mendoza* widespread-violations exception does not require nationwide data. Conceiving of widespread violations in terms of ICE policy and custom recognizes the operational independence of the twenty-four ICE Enforcement and Removal Operations field offices across the United States and their respective enforcement territories.[227] As each field office has independent enforcement jurisdiction over its respective region and can differ in its enforcement approaches,[228] the policy-or-pattern approach—rather than requiring the pooling of disparate violations across distinct enforcement areas to reach a widespread-violations determination—looks for policies and patterns of violations attributable to the ICE field office within each enforcement area.

In addition, considering high levels of local police involvement in immigration enforcement in recent years, a policy-or-pattern approach would deem policies or patterns of Fourth Amendment violations at the local level sufficient to merit application of the widespread-violations exception. An array of federal and state laws authorize[229] and often mandate local authorities to help enforce federal immigration law.[230] Most notably, since 2008, the joint FBI-DHS program Secure Communities[231] has provided ICE with fingerprint and arrest data from local

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225 Id at 262, 281–82 & n 27.

226 See id at 282.

227 See Immigration and Customs Enforcement, *Enforcement and Removal Operations* (DHS 2014), online at http://www.ice.gov/contact/ero (visited Nov 3, 2014).

228 See Chiu, et al, *Constitution on ICE* at *9–10 (cited in note 6) (noting that New York ICE field offices failed to obtain requisite consent in their enforcement raids at a much higher rate than New Jersey field offices over a two-and-a-half-year period).

229 See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub L No 104-208, 110 Stat 3009-546, 3009-563 to -564, amending the Immigration and Nationality Act § 287(g), codified as amended at 8 USC § 1357(g). Section 287(g) permits the attorney general to enter into agreements with state and local governments to assist in the enforcement of immigration law. See Adam B. Cox and Thomas J. Miles, *Policing Immigration*, 80 U Chi L Rev 87, 93 (2013) ("Under this statutory provision . . . the attorney general has authorized local police in nearly seventy-five jurisdictions around the country to screen prisoners for immigration violations and, in some cases, to assist in street-level immigration enforcement.").

230 See Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 Colum L Rev Sidebar 180, 182–83 (2013).

231 See Immigration and Customs Enforcement, *Secure Communities* (DHS 2014), online at http://www.ice.gov/secure_communities (visited Nov 3, 2014).

authorities participating in the FBI's data-sharing program.[232] Upon discovering a match, ICE often issues a detainer for the alien.[233] Such joint immigration-enforcement arrangements may also be susceptible to serious failures of deterrence. Specifically, because local authorities "know they have . . . a direct line to federal immigration enforcers," they may feel free to engage in unconstitutional stops of individuals that they suspect of being in the country unlawfully, arrest them on minor charges, and then leave it to ICE to remove them in proceedings in which suppression is not available.[234] In fact, state and local officials now arrest four times as many immigrants referred to removal hearings as federal officials.[235] Accordingly, the policy-or-pattern approach suggests that policies or patterns of Fourth Amendment violations in immigration enforcement at the *local* level should trigger the *Lopez-Mendoza* widespread-violations exception.

In sum, the policy-or-pattern approach requires that widespread-violations motions to suppress identify the type and setting of the Fourth Amendment violations alleged to be widespread in the relevant enforcement area by tying them to a policy or pattern. By shifting the geographic scope of the widespread-violations inquiry to ICE enforcement areas and—in cases of local police involvement—localities, the policy-or-pattern approach recognizes the possibility of systemic deterrence failures at multiple enforcement levels and provides an attainable route for practitioners to demonstrate the presence of widespread violations.[236]

c) Illustrative cases. A number of *Bivens* and policy-and-practice–injunctive-relief cases dealing specifically with Fourth Amendment violations in the immigration-enforcement context further demonstrate the usefulness and appropriateness of the policy-or-pattern approach for purposes of identifying widespread

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[232] See Developments in the Law, *Immigrant Rights & Immigration Enforcement*, 126 Harv L Rev 1565, 1647–48 (2013).

[233] See id at 1648.

[234] Id.

[235] Cade, 113 Colum L Rev Sidebar at 183 (cited in note 230).

[236] For an illustration of how data and geographic specificity are useful for identifying patterns, see *Pineda*, 291 F3d at 329–31. By contrast, for an illustration of data sufficient to show a pattern of constitutional violations associated with a system-level failure to deter, see *Floyd v City of New York*, 813 F Supp 2d 417, 447 (SDNY 2011) ("[T]he fact that the legal sufficiency of 31 percent of all stops [pursuant to New York City's 'stop and frisk' policy] cannot be shown suggests that the current regime for regulating the constitutional sufficiency of the huge volume of stops is ineffective and insensitive to the actual conduct of stops.").

Fourth Amendment violations. These cases also provide useful examples of how statistical evidence might be employed to support suppression motions based on patterns of violations, as well as how the incentive effects of enforcement policies may be invoked to bolster widespread-violations claims.

One recent *Bivens* case that demonstrates the appropriateness of importing municipal and supervisory liability into the widespread-violations exception to *Lopez-Mendoza* is *Argueta v United States Immigration and Customs Enforcement*.[237] This case involved a class of immigrants who suffered violations to their Fourth Amendment rights virtually identical to those of Oliva-Ramos in a raid associated with the same ICE operation.[238] The court allowed the suit to go forward against the most immediate ICE supervisors involved in the raids (as opposed to ICE and government officials far removed from the specific operations)[239] because of the plausibility of the plaintiffs' claims that "the 'practice' of unlawful and abusive raids [had] flourished as a predictable consequence of the 'arbitrary' and 'exponentially-increased' quotas" of Operation Return to Sender.[240] The inferred incentive effects of ICE policy helped connect the dots: "Under pressure from these quotas immigration agents have regularly disregarded the obligation to secure a judicial warrant or probable cause in carrying out unlawful entries and dragnet searches of homes in which the agents only loosely suspect immigrant families may reside."[241]

Another *Bivens* supervisory-liability case, *Diaz-Bernal v Myers*,[242] suggests that evidence of *allegations* of constitutional violations is relevant to the policy-or-pattern determination.[243] The plaintiffs in that case sought to impose *Bivens* supervisory liability for an alleged pattern of constitutional violations in Fugitive Operations Team home raids in the Fair Haven neighborhood of New Haven, Connecticut.[244] Like Oliva-Ramos, the plaintiffs identified ICE's collateral-arrest quota policy as the root of this alleged pattern.[245] In support of their claim that the policy fostered

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237 643 F3d 60 (3d Cir 2011).
238 See id at 62–65.
239 Id at 77.
240 Id at 64, 69.
241 *Argueta*, 643 F3d at 64.
242 758 F Supp 2d 106 (D Conn 2010).
243 Id at 130
244 Id at 113.
245 Id at 114.

widespread violations in New Haven, plaintiffs cited "a number of lawsuits brought after the change in [the Fugitive Operation Team's] policy, but before the Fair Haven raid, in which ICE officers were accused of Fourth Amendment violations."[246] The court noted that two high-level ICE officials responsible for creating and implementing the quota policy—ICE's director and assistant secretary—were named as defendants in at least one of these suits, and it concluded that this "should certainly have put them on notice that unconstitutional practices were allegedly occurring as a result of their policies."[247] Accordingly, the court reasoned that the plaintiffs had pleaded a plausible supervisory-liability claim "because [the high-level ICE officials'] actions imposing intense pressure to make arrests, allowing bystander arrests, and providing inadequate training created a policy under which constitutional violations occurred."[248]

Notably, the District Court for the Southern District of New York recently came to a similar conclusion on nearly identical home-raid facts in *Aguilar v Immigration and Customs Enforcement Division of the United States Department of Homeland Security*.[249] In that case, the plaintiffs argued that ICE's collateral-arrest quota policy fostered widespread violations in home raids and cited ICE operational plans showing that ICE agents "were instructed on using ruses to gain entry into a home, without being contemporaneously advised that the use of such ruses might undermine a claim of valid consent."[250] This evidence was crucial in convincing the court that the plaintiffs had stated a supervisory-liability claim against the former ICE Office of Detention and Removal Operations director and the former ICE Office of Investigations director because the plaintiffs had plausibly alleged that the "defendants personally created a policy pursuant to which unconstitutional practices occurred."[251] These decisions accord with the underlying logic of municipal and supervisory liability for widespread violations—and, this Comment argues, that of the *Lopez-Mendoza* widespread-violations exception: introducing increased deterrence to correct systemic failures and prevent constitutional violations.

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246 *Diaz-Bernal*, 758 F Supp 2d at 130.

247 Id.

248 Id at 131.

249 811 F Supp 2d 803, 819 (SDNY 2011).

250 Id at 818–19.

251 Id at 819.

The *Diaz-Bernal* decision also lends support to the discussion in Part III.B.1.b of the policy-or-pattern approach's treatment of geographic enforcement areas. The plaintiffs in *Diaz-Bernal* also sought to hold ICE's Assistant Field Office Director for the Hartford field office liable under the *Bivens* widespread-violations theory, relying on a *Boston Globe* article detailing ICE constitutional violations in a recent workplace raid.[252] But the court deemed this claim implausible because the article "could not have put [the assistant field office director] on notice that officers under his supervision were acting in violation of the Constitution because it involved raids by Massachusetts teams, and [he] is responsible for ICE officers in Hartford, Connecticut."[253] This is consistent with the logic of entity and supervisory liability as well as widespread-violations exceptions in exclusionary rule jurisprudence: because no evidence indicated such a complete failure of deterrence against the Hartford field office's agents that a pattern of constitutional violations had emerged, no deterrence-enhancing remedy was required.

The Ninth Circuit's analysis of a pattern-and-practice claim for injunctive relief against "widespread" violations in *International Molders' & Allied Workers' Local Union No 164 v Nelson*[254] lends further support to the policy-or-pattern approach to the widespread-violations exception. In that class action, the court reviewed the district court's decision to grant a preliminary injunction prohibiting the INS from continuing to engage in the practice of "factory surveys" in Northern California, which were part of a nationwide immigration-enforcement action called Project Jobs.[255] These factory surveys involved warrantless, nonconsensual searches and arrests in factories in which the INS believed undocumented aliens were employed.[256] Rejecting the INS's argument that injunctive relief was inappropriate because the evidence "merely [showed] sporadic violations of official policy by individual agents," the Ninth Circuit held that the evidence supported the district court's finding of "evident systematic policy and practice of [F]ourth [A]mendment violations" by the INS.[257] In a more extensive decision on a motion to dismiss on

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252 *Diaz-Bernal*, 758 F Supp 2d at 130–32.

253 Id at 132.

254 799 F2d 547 (9th Cir 1986).

255 Id at 550.

256 Id.

257 Id at 551.

remand, the district court held that the INS's "unconstitutional practices [were] so pervasive and widespread that . . . they constitute[d] an official policy."[258] The evidence leading to that conclusion is exactly the sort for which the policy-or-pattern approach would look. Specifically, the court was moved by the fact that "[a]ll but seven of the eighty-eight raids conducted during the week of Operation Jobs were warrantless raids,"[259] and that these actions were clearly tied to INS policy and acquiesced to by INS officials.[260]

International Molders helps confirm the usefulness of defining "widespread" with reference to policy and custom in order to achieve the deterrence goals of the exclusionary rule. Because an INS policy directly led to a pattern of illegal raids, an injunction was necessary to curtail those violations. As the court put it, the "extensive evidence of INS agents exceeding official policy can hardly be characterized as 'an ambiguous, isolated incident not warranting injunctive relief.'"[261] In the removal setting under such circumstances, the availability of the exclusionary rule based on widespread violations would serve to deter enforcement agencies from falling into similar patterns of violations in the future—redressing a system-level failure of deterrence.

2. The distinction between egregious violations and widespread violations.

As applied, the widespread-violations exception to *Lopez-Mendoza* is practically significant only if it captures violations that the egregiousness exception does not. In *Oliva-Ramos*, the Third Circuit thought that this would be a difficult line to draw, reasoning that most constitutional violations that could qualify as widespread are probably either fundamentally unfair enough or significant enough to undermine the credibility of consequent evidence of alienage such that they would also qualify as egregious.[262] But the court did not articulate a standard for the "narrow" class of violations that do not qualify as egregious but

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[258] *Pearl Meadows Mushroom Farm, Inc v Nelson*, 723 F Supp 432, 451 (ND Cal 1989).

[259] Id at 439.

[260] See id at 451.

[261] *International Molders*, 799 F2d at 551, quoting *Immigration and Naturalization Service v Delgado*, 466 US 210, 218 n 6 (1984) (brackets omitted).

[262] See *Oliva-Ramos*, 694 F3d at 280.

do fall under the widespread-violations exception.[263] Since a standard for widespread violations has now been elaborated, the circuit split over the proper formulation of the egregiousness exception ultimately determines the nature of the distinction between widespread and egregious Fourth Amendment violations.

The Ninth Circuit's bad-faith standard for egregious violations—which, recall, approximates a recklessness standard—might nearly swallow the widespread-violations exception.[264] Under this standard, it appears that only the most minor violations could qualify as widespread without also being deemed egregious and triggering that exception as well (knock-and-announce violations, for instance). By comparison, the Second Circuit's standard would find only racially motivated stops or those that are both baseless and particularly severe to be egregious.[265] The realm of possible widespread violations that are neither racially motivated nor particularly severe is broader here, but the most prominent form of allegedly widespread violations—those associated with warrantless predawn raids—appears to fall under the egregiousness category as well.[266]

The widespread-violations exception will do the most work when the egregiousness standard looks something like that used by the First Circuit. Under the First Circuit's egregiousness standard, violations deemed to be widespread would also be egregious only if they involved officer "threats, coercion or physical abuse."[267] Violations associated with predawn home raids, for instance, would be capable of qualifying as widespread but not egregious, as existing reports of violations in these raids tend not to depict threats, coercion, or physical abuse. Indeed, the Eighth Circuit, applying an egregiousness standard comparable to that of the First Circuit in *Martinez Carcamo v Holder*,[268] held that warrantless and consentless entry as well as searches in predawn raids are "not sufficiently egregious" to warrant suppression.[269] One can imagine myriad other types of Fourth Amendment violations that do not involve threats, coercion, or violence, and could thus be suppressed only if found to be widespread. In sum, although the widespread-violations exception may

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263 Id at 282.
264 See Part I.C.1.
265 See Part I.C.1.
266 See *Cotzojay v Holder*, 725 F3d 172, 183 (2d Cir 2013).
267 *Kandamar*, 464 F3d at 71.
268 713 F3d 916 (8th Cir 2013).
269 Id at 922.

sometimes be redundant depending on a court's conception of the egregiousness exception, the *Lopez-Mendoza* widespread-violations exception can cover a lot of ground in circuits that narrowly interpret the egregiousness exception. Indeed, the policy-or-pattern approach to the widespread-violations exception could actually make immigration law more uniform by evening out the classes of suppressible violations among circuits.

CONCLUSION

Fourth Amendment violations in immigration-enforcement operations are a serious problem. *Lopez-Mendoza* has been thought to stand in the way of a solution, except in cases of egregious deprivations of aliens' constitutional rights. The oft-overlooked–widespread-violations exception to *Lopez-Mendoza*, however, presents a possible means of remedying and deterring pervasive violations. The conundrum is that courts have yet to arrive at a standard for what makes certain violations "widespread." This Comment offers an answer.

The Supreme Court has created a widespread-violations exception to a general rule of nonsuppression in other areas of Fourth Amendment law. These existing incarnations of the widespread-violations exception are consonant with § 1983 standards for municipal liability and its parallels in § 14141, *Bivens* supervisory liability, and injunctive-relief claims against federal agencies for implementing unconstitutional policies or practices. Informed by these legal analogues and by the deterrence-centric goals of the exclusionary rule, this Comment argues for a policy-or-pattern approach. Widespread violations should be conceived of in terms of violations featured in agency policies and patterns within relevant immigration-enforcement areas. Violations that rise to the level of policy or custom indicate a systemic problem—a recurring miss—of the sort that *Lopez-Mendoza* and exclusionary rule jurisprudence in general aim to deter. Consistent with *Lopez-Mendoza*, violations that are merely isolated, on the other hand, do not justify the social costs of the exclusionary sanction.