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REMEDYING UNCONSTITUTIONAL IMMIGRATION ENFORCEMENT

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Fearmongering about "illegal immigration" has reached a fever pitch. There is a nearing bipartisan consensus among politicians that "stopping illegal immigration and securing the border"[1] is a paramount priority. The fact that many politicians and institutional actors have displayed animus in discussing immigration enforcement portends that many perils lie ahead. It is precisely during this time that constitutional rights must serve as a bulwark against government overreach.

This Essay contends that our constitutional rights framework, specifically its principal remedies for rights violations, are inadequate to protect against government malfeasance. In particular, I demonstrate that there are plausible scenarios where the government immigration authorities will flagrantly violate individuals' Fourth Amendment rights, yet face no consequences—leaving individuals with no recourse. That is because the main constitutional remedy—the

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1 *Stopping Illegal Immigration and Securing the Border*, DEP'T HOMELAND SEC., (Aug. 1, 2024), https://www.dhs.gov/archive/stopping-illegal-immigration-and-securing-border [https://perma.cc/AB7E-TGTN]; *see FACT SHEET: President Biden Announces New Actions to Secure the Border*, WH.GOV (June 4, 2024), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/06/04/fact-sheet-president-biden-announces-new-actions-to-secure-the-border [https://perma.cc/L8YN-XN74].

exclusionary rule—has doctrinal limitations in the area of immigration enforcement. I contend that this is inconsistent with the Court's own justifications for the exclusionary rule, and thus this state of affairs cannot stand. Consequently, I propose a more robust exclusionary rule—what I call the Proceeding Exclusionary Rule—for situations where the government engages in willful, widespread, egregious Fourth Amendment violations.

TABLE OF CONTENTS

INTRODUCTION

Imagine that U.S. Immigration and Customs Enforcement (ICE) decides to place officers at the turnstiles of every metro entrance in the City of Chicago, stopping individuals randomly to ask for their identification. If individuals comply and their identification reveals that they are unlawfully present in the country, then ICE enters them into removal proceedings. If individuals refuse to comply, officers are directed to act menacingly to obtain compliance. And if they still cannot obtain identification, they are to arrest the individual, and during that arrest process, they will likely obtain identifying information. Again, if this process reveals that they are unlawfully present in the country, ICE commences removal proceedings. This is unconstitutional,[2] yet plausible, under the Trump Administration.

It is commonplace that the Trump Administration is replete with animus against "illegal immigrants" and indeed immigration more generally.[3] His presidential campaign was fueled by such vitriol.[4] And that has continued on in the administration's governance.[5] Consider "border czar" Tom Homan's recent media attention.[6] Homan has threatened to prosecute local officials who do not aid in the Trump Administration's mass deportation efforts.[7] Under current law, this would

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2 Terry v. Ohio, 392 U.S. 1, 21–22 (1968); Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humboldt Cnty., 542 U.S. 177, 187–88 (2004).

3 *See, e.g.*, Amanda Terkel & Megan Lebowitz, *From "Rapists" to "Eating the Pets:" Trump Has Long Used Degrading Language Toward Immigrants*, NBC (Sept. 19, 2024), https://www.nbcnews.com/politics/donald-trump/trump-degrading-language-immigrants-rcna171120 [https://web.archive.org/web/20250401004500/https://www.nbcnews.com/politics/donald-trump/trump-degrading-language-immigrants-rcna171120].

4 *See, e.g.*, Memorandum from the Am. C.L. Union on Trump on Immigration: Tearing Apart Immigrant Families, Communities, and the Fabric of Our Nation 1 (June 6, 2024), https://www.aclu.org/publications/trump-on-immigration [https://perma.cc/U8QW-J29R].

5 *See, e.g.*, Exec. Order No. 14159, 90 Fed. Reg. 8443 (Jan. 20, 2025) (advocating for the protection of American people from the "unprecedented flood of illegal immigration" and stating that "[m]any of these aliens unlawfully within the United States present significant threats to national security and public safety, committing vile and heinous acts against innocent Americans.").

6 Matt Schooley & Logan Hall, *Tom Homan, President Trump's Border Czar, Says He's "Bringing Hell" to Sanctuary City Boston*, CBS NEWS (Feb. 23, 2025), https://www.cbsnews.com/boston/news/immigration-tom-homan-president-trump-sanctuary-city-boston [https://perma.cc/4BN4-M3KJ] (explaining Homan's targeting of Boston's sanctuary city policies).

7 Steve Benen, *The Problem(s) with Trump's "Border Czar" Threatening Prosecutions*, MSNBC (Dec. 16, 2024), https://www.msnbc.com/rachel-maddow-show/maddowblog/problems-trumps-border-czar-threatening-prosecutions-rcna184400 [https://perma.cc/LH3Z-KXSE].

likely be unconstitutional.[8] Similarly, he has clamored for the Department of Justice to investigate Representative Alexandria Ocasio-Cortez for hosting a "know your rights" webinar.[9] This too is very likely unconstitutional.[10] And Homan has threatened to "bring[] hell" to Boston on account of its sanctuary city policies.[11] It is unclear what that means, but it would be surprising if the practices of hell abided by the Constitution.

Under the Supreme Court's holdings, there is not much in the way to remedy these constitutional violations. The Court has recognized that the exclusionary remedy[12] is available in immigration proceedings, only if such violations were "widespread" or "egregious."[13] That said, even if the exclusionary rule is found applicable, this can be of little solace to the individual in the immigration action. That is because a key issue in the immigration proceeding is identity. With a person's identity, ICE and other immigration authorities can determine whether someone is unlawfully present and therefore removable. But, as a matter of longstanding doctrine, an individual's identity itself is not excludable—

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8 This is clear by the Supreme Court's anti-commandeering doctrine, as elaborated in *Printz v. United States*, 521 U.S. 898, 925–26, 935 (1997). The anti-commandeering doctrine holds that the federal government may not direct state officials to do the work of the federal government—absent some agreement by the states—that the federal government may not "commandeer" state officials. *Id.* Moreover, there simply are no relevant criminal statutes on the books that would allow for such a prosecution. *See Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENF'T (Apr. 24, 2025), https://www.ice.gov/identifyand- arrest/287g#:~:text=The%20287(g)%20Program%20enhances,to%20removal%20from%20the%20U.S. [https://perma.cc/LPX7-JDA9] (emphasizing that "ICE recognizes the importance of its relationships with its law enforcement partners to carry out its critical mission," and characterizing the relationship as a "collaboration" and "partner[ship]" between the parties instead of a legal obligation).

9 Peter Wade, *"Border Czar" Doubles Down on Asking if DOJ Should Prosecute AOC for Informing Immigrants of Their Rights*, ROLLING STONE (Feb. 16, 2025), https://www.rollingstone.com/politics/politics-news/border-czar-prosecute-aoc-immigrants-rights-1235269988 [https://perma.cc/E2N4-HG57].

10 Educating individuals about their constitutional rights is protected First Amendment activity. U.S. CONST. amend. I. Perhaps this was not always so obvious. Know-your-rights leafleting regarding the military draft was at issue in *Schenck v. United States*. 249 U.S. 47, 50–51 (1919). The Court upheld a criminal conviction for such leafleting as violating the Espionage Act, stating the speech created a clear and present danger. *Id.* at 52–53. But *Brandenburg v. Ohio*, 395 U.S. 444 (1969) made it more challenging for the government to satisfy this clear and present danger standard, thus allowing individuals to educate the public about their constitutional rights without threat of legal sanction. *Id.* at 448–49.

11 Schooley & Hall, *supra* note 6.

12 The exclusionary remedy essentially "excludes" the evidence arising from unconstitutional law enforcement conduct, particularly conduct that violates the Fourth, Fifth, and Sixth Amendments. *See infra* Part I.

13 I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984).

it is not a fact that is subject to the exclusionary rule.[14] Thus, even if the exclusionary remedy is granted, that would be of little help to the individual, because the government would be largely unimpeded in its objective. The resulting problem is that the exclusionary remedy is ineffective to deter law enforcement from engaging in constitutional violations, and therefore ineffective to prevent them. This is a constitutional travesty.

I propose the following constitutional remedy: the exclusionary rule should not simply exclude the particular evidence on identity but instead "exclude" the proceeding altogether. This is a robust remedy. But the foundations of the exclusionary rule, as explicated by the Supreme Court in *Mapp v. Ohio*,[15] amply justify this remedy. The Constitution and its rights protections are not merely a suggestion. Adhering to our constitutional system demands that we provide an effective exclusionary rule—to protect the rights of those in immigration proceedings, but just as importantly, to deter rights violations against all civilians who may be subject to rights-violating, dragnet operations.

This Essay begins with Part I, which outlines the exclusionary rule in criminal procedure.[16] Part II explains how the exclusionary rule extends (or more aptly does not extend) to immigration proceedings.[17] Part III explains the motivating problem, namely how the exclusionary rule cannot deter or remedy pellucid constitutional violations that may be employed by immigration authorities.[18] Part IV proposes a solution: create a more robust exclusionary rule, which I term the "Proceeding Exclusionary Rule," for immigration proceedings.[19]

I. THE EXCLUSIONARY RULE GENERALLY

The exclusionary rule was first recognized by the Supreme Court in 1914, in the case *Weeks v. United States*.[20] There, police arrested Fremont Weeks for transporting lottery tickets by the mail, a federal offense.[21] Police then searched Weeks' home without obtaining a warrant, seizing

14 *See, e.g.*, *id.*; *see also, e.g.*, United States v. Farias-Gonzalez, 556 F.3d 1181, 1189 (11th Cir. 2009) (applying Lopez-Mendoza to fingerprint and photograph evidence because it was evidence of identity).

15 367 U.S. 643 (1961).

16 *See infra* Part I.

17 *See infra* Part II.

18 *See infra* Part III.

19 *See infra* Part IV.

20 232 U.S. 383 (1914).

21 *Id.* at 386.

papers which were used to convict him.[22] The Court overturned the conviction and ordered a new trial, holding that the evidence obtained from the unconstitutional search had to be excluded from evidence presented at trial.[23] This resulted in a federal exclusionary rule for constitutional violations.[24]

The Supreme Court's decision in *Mapp v. Ohio*[25] extended that exclusionary rule to state prosecutions.[26] In that case, three Cleveland police officers arrived at Dollree Mapp's home on information that a bombing suspect and "policy paraphernalia" were hidden in her home.[27] The officers knocked on the door demanding to be let in, but Mapp, advised by counsel, refused unless they presented a warrant.[28] Officers remained there in surveillance.[29] After three hours, with more officers having arrived on the scene, law enforcement forced open a door to the home and entered the house.[30] Mapp demanded to see the warrant and officers showed her a paper, which she then grabbed and hid on her person.[31] Thereafter, officers handcuffed Mapp and thoroughly searched her home, including through drawers and suitcases.[32] They found purportedly obscene materials that resulted in her conviction of an Ohio law prohibiting the possession of "lewd and lascivious books, pictures, and photographs."[33] The Ohio Supreme Court considered reversing the conviction, because the methods used "offend[ed] a sense of justice," but ultimately did not do so because the evidence was not taken by "brutal or offensive physical force."[34] The Court granted certiorari, and the state of Ohio again made the argument, citing *Wolf v. Colorado*,[35] that "even if the search were made without authority, or otherwise unreasonably, it is

22 *Id.*

23 *Id.* at 398–99.

24 *Id.*

25 367 U.S. 643 (1961).

26 *Id.* at 655.

27 *Id.* at 644. The suspect was accused of bombing Don King's home, "who at the time was an alleged numbers racketeer," but would later become a famous boxing promoter. Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 UNIV. PA. L. REV. 1361, 1375 n.72 (2004).

28 *Mapp*, 367 U.S. at 644.

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.* at 644–45.

33 *Id.* at 643, 645.

34 *Id.* at 645.

35 338 U.S. 25, 33 (1949).

not prevented from using the unconstitutionally seized evidence at trial."[36]

In a 6–3 decision, authored by Justice Tom Clark, the Court reversed the decision of the Ohio Supreme Court and overruled *Wolf*.[37] The Court held that violations by the state of the Fourth Amendment (via the Fourteenth Amendment) would result in the evidence obtained from those violations being excluded from use in criminal prosecutions—the so-called "exclusionary rule."[38]

In so doing, the majority discussed the basis of the exclusionary rule as explicated in *Weeks v. United States*:[39] if the government could use the wrongfully seized evidence, the Fourth Amendment protections were truly of no value.[40] Thirty-five years later in *Wolf*,[41] the Court held that this rule would not be incorporated against the states. The *Wolf* Court principally did so on the basis that many states had not adopted the rule and had claimed that the incidence of police misconduct was too slight to justify the harsh deterrent remedy.[42] The majority found the reasoning of *Weeks* unconvincing. The majority noted that California, a state that had adopted the exclusionary rule, did so because it could not secure law enforcement compliance in any other way.[43] Ultimately, the majority found this reasoning controlling and stated that when *Wolf* recognized that there was a Fourth Amendment right incorporated against the states, that had to include the exclusionary remedy.[44]

> To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. Only last year the Court itself recognized that the purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[45]

After *Mapp*, the exclusionary rule quickly became ensconced as the appropriate remedy for other constitutional violations in criminal procedure. In the Court's watershed decision in *Miranda v. Arizona*,[46] the Court confronted several cases of law enforcement engaging in severe interrogation tactics, including isolating interrogees for long periods of

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36 *Mapp*, 367 U.S. 643, 645 (1961).

37 *Id.* at 660.

38 *Id.* at 660–61.

39 232 U.S. 383, 393 (1914).

40 *Mapp*, 367 U.S. at 647–48.

41 338 U.S. 25, 33 (1949).

42 *Mapp*, 367 U.S. at 651.

43 *Id.*

44 *Id.*

45 *Id.*

46 384 U.S. 436 (1966).

time, not informing interrogees of their rights to counsel, using deception, and other forms of coercive pressure.[47] The Court held that these forms of interrogation violated the Fifth and Sixth Amendments and that in order to prevent such tactics, law enforcement would have to give individuals in custodial interrogation a *Miranda* warning that informed individuals of their rights.[48] Furthermore, most relevant to us, the Court determined that statements obtained from interrogees resulting from Fifth and Sixth Amendment violations must be excluded from evidence, that the exclusionary rule extends to the Fourth, Fifth, and Sixth Amendments.[49] The exclusionary remedy applies to the so-called "fruit of the poisonous tree"—that is, if evidence that would be excluded leads to other secondary evidence, then that secondary evidence is also excluded.[50] But the exclusionary remedy does not apply when there is a break in the causal connection between the constitutional violation and the evidence.[51] The Court has recognized three circumstances for such a causal break: (1) when there was an independent source for the evidence not involving a constitutional violation; (2) when discovery of the evidence was inevitable and not involving a constitutional violation; and (3) when the constitutional violation is sufficiently attenuated, either because the violation is remote from the evidence collected or because there is some intervening event.[52]

II. THE EXCLUSIONARY RULE IN IMMIGRATION PROCEEDINGS

In general, the exclusionary rule applies to criminal proceedings.[53] In *United States v. Janis*, the Court set a framework to decide how the exclusionary rule may apply to other proceedings.[54] In so doing, the Court observed that the determination requires weighing the benefits—deterring unlawful police conduct—against the costs[55]—principally, the

47 *Id.* at 439–41.

48 *Id.* at 471–73.

49 *Id.* at 492; *see also* Massiah v. United States, 377 U.S. 201, 203 (1964). The Court has carved out exceptions to the exclusionary rule for some constitutional violations; for example, the Court has determined that violations of an individual's Fourth Amendment right against no-knock entry of the premises for, say, executing a search warrant, do not necessitate the exclusion of the evidence obtained in that search. Hudson v. Michigan, 547 U.S. 586, 588, 612 (2006).

50 Utah v. Strieff, 579 U.S. 232, 237 (2016); *see also* Nardone v. United States, 308 U.S. 338, 341 (1939).

51 *Strieff*, 579 U.S. at 237.

52 *Id.* at 238.

53 United States v. Janis, 428 U.S. 433, 434 (1976).

54 *Id.* at 453–54.

55 *Id.* at 446.

loss of probative evidence and the resulting inefficiencies.[56] *Janis* itself dealt with unlawfully seized evidence in a civil tax proceeding.[57] The Court held that the exclusionary rule did not apply because any deterrent effect was slight—since the evidence would be excluded from the criminal proceedings, a potent deterrent—while the cost was high because the evidence was relevant to the civil tax proceeding.[58]

In *I.N.S. v. Lopez-Mendoza*,[59] the Court used the *Janis* framework to analyze whether the exclusionary rule would apply in immigration proceedings.[60] In that case, U.S. Immigration and Naturalization Service (INS) agents,[61] acting on a tip, approached a transmission repair shop seeking to enter and search the premises.[62] The owner of the shop refused.[63] In response, one of the INS agents engaged in a conversation with the owner, while another INS agent entered and spoke to Lopez-Mendoza.[64] In that conversation, Lopez-Mendoza admitted that he was from Mexico and had no close ties in the United States.[65] The INS agents arrested him and after further interrogation, he admitted to being a Mexican national who entered without inspection by U.S. immigration authorities.[66] At a hearing before an immigration judge, Lopez-Mendoza sought to terminate the proceeding on account of the illegal arrest.[67] The immigration judge found it irrelevant and ordered him deportable.[68] The Board of Immigration Appeals similarly dismissed his appeal.[69] The Ninth Circuit vacated the deportation order and remanded to determine whether Lopez-Mendoza's Fourth Amendment rights were violated.[70] The Supreme Court then granted certiorari and reversed the Ninth Circuit's vacatur.[71]

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56 *Id.* at 448.

57 *Id.* at 435–37.

58 *Id.* at 447–55.

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

60 *Id*. at 1041–42.

61 The INS was reorganized into the Department of Homeland Security in 2003. *Overview of INS History*, U.S. CITIZENSHIP & IMMIGR. SERVS. OFF. & LIBR. 11 (2012), https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf [https://perma.cc/76K7-65HN].

62 *Lopez-Mendoza*, 468 U.S. at 1035. The case actually discussed two separate consolidated cases, those of Adan Lopez-Mendoza and Elias Sandoval-Sanchez. *Id.* at 1034. For simplicity and brevity, I address Lopez-Mendoza's case as the exemplar of the Court's exclusionary rule analysis.

63 *Id.* at 1035.

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.* at 1035–36.

69 *Id.* at 1036.

70 *Id.*

71 *Id.* at 1035, 1040.

The Supreme Court first observed that the deportation proceeding was civil, not criminal, in nature.[72] The Court also noted that the government bears the initial burden to show the person's identity and alienage.[73] With that in mind, the *Lopez-Mendoza* Court observed that a person's "identity" is never excludable.[74] Lopez-Mendoza had not challenged the evidence of alienage, but even had he, the Court claimed that the exclusionary rule would not be appropriate.[75] The Court observed the similarity to *Janis*, in that they both dealt with the civil complement of criminal proceedings.[76] But unlike *Janis*, the Court acknowledged there were very few criminal prosecutions of immigration violations; deportation, removal, or both, are the main government objectives and that is usually where the proceedings end.[77] Though this may suggest that the exclusionary rule could be a more effective deterrent against Fourth Amendment violations, the Court thought other factors mitigated any impact.[78] Principally, the Court observed that even if the exclusionary rule applied, the government could still bring deportation, removal, or both, proceedings using identity—which is not suppressible—and other independent evidence of alienage.[79] The Court also observed that the then-INS had developed regulations to prevent constitutional violations and the then-INS—being a singular entity in charge of removal—could be effectively sued for declaratory relief.[80] Based on this, and the importance of removal proceedings to the immigration system, the Court stated that balance was against use of the exclusionary rule in removal proceedings.[81] But the Court noted that if "Fourth Amendment violations by [immigration authorities] were widespread," or if there were "egregious violations of Fourth Amendment or other liberties," then its "conclusions concerning the exclusionary rule's value could change."[82]

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72 *Id.* at 1038.

73 *Id.* at 1039. There are indeed several grounds of inadmissibility, 8 U.S.C. § 1182, or deportability, 8 U.S.C. § 1227, that the government could use to enter an individual into removal proceedings.

74 *Lopez-Mendoza*, 468 U.S. at 1039.

75 *Id.* at 1040.

76 *Id.* at 1041–42.

77 *Id.* at 1042–43.

78 *Id.* at 1043.

79 *Id.*

80 *Id.* at 1045.

81 *Id.* at 1050.

82 *Id.*

III. A PROBLEM OF SAFEGUARDING OUR FOURTH AMENDMENT RIGHTS

Consider again our motivating hypothetical, further detailed: the Department of Homeland Security (DHS) Secretary, the Director of ICE, the Director of Customs and Border Protection (CBP), and the so-called "Border Czar" devise a policy on how to increase apprehensions of those unlawfully present in the United States. Among other things, officers from each of these entities will go to important civic centers in large cities, like libraries, government offices, and transportation centers (including metros), and ask everyone (or more feasibly some random assortment of individuals) for identification. To begin, officers will request identification. If people refuse or show hesitation, the officers should demand such identification—in a menacing manner, claiming the authority of law to enact consequences upon noncompliance. The reasons for such harsh methods are myriad: to obtain quick, "efficient" compliance in the instance case, to frighten others and deter them from noncompliance, and to enact cruelty upon so-called "invaders." Officers then also take pictures of the individuals (including their faces). Officers then use this identification information, along with large amounts of other data, to determine the person's nationality and lawful status. If there is insufficient information to confirm that they have lawful status, officers then proceed to detain them. The government can then, assuming it has the requisite quantum of evidence, initiate removal proceedings, where the government can present the identity of the individual and any information obtained through *only* the identity of the individual.

Here we see a blatant Fourth Amendment violation. Specifically, the suspicionless stop of all individuals in public places is unconstitutional. Such stops, wherein the individual is not free to leave—like here, because officers tell them they are commanded to stop and will be subject to sanction if they do not obey—are Fourth Amendment "seizures."[83] Per the text of the Fourth Amendment, such warrantless seizures must be reasonable.[84] There are numerous, narrow exceptions, and of those, the *Terry* stop is most pertinent. The *Terry* stop doctrine allows law enforcement to stop an individual if there is "reasonable suspicion" that

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83 *See* Terry v. Ohio, 392 U.S. 1, 16–19 (1968); United States v. Mendenhall, 446 U.S. 544, 554 (1980).

84 The Fourth Amendment reads:

> 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.

U.S. CONST. amend. IV.

the person is engaged in criminal activity.[85] Such reasonable suspicion must be particularized, with articulable reasons for thinking the person may be engaged in criminal conduct.[86] Here, in our hypothetical, there is no such reasonable suspicion—it is, after all, a dragnet operation. Thus, the stop in the first instance is an unconstitutional seizure.[87]

With that in mind, we can analyze what the courts would do in light of such widespread, egregious constitutional violations. At first glance, applying the *Janis* framework as the *Lopez-Mendoza* Court did,[88] the exclusionary remedy would not apply because removal proceedings are civil in nature. However, this hypothetical situation is unlike *Lopez-Mendoza*. Here, the government regulations are not constraining—instead, there is an explicit policy of committing Fourth Amendment violations to effectuate removals. Moreover, the fact that the government can be effectively sued is of little solace—because the violations are blatant and intentional, a court's judgment telling the government so does not add guidance. Certainly, I do not deny the court order requiring the government to comply does have an impact—if it does not, we are firmly in the territory of a constitutional crisis, where all bets are off. At the same time, we must acknowledge that when the government commits blatant unconstitutional acts, the deterrent effect of court judgments is considerably mitigated.

Indeed, for these reasons, I think this case fits into the exceptional cases of which the *Lopez-Mendoza* Court cautioned.[89] As the hypothetical is constructed, it is evident that the Fourth Amendment violations are widespread and, indeed, egregious. As posited in the hypothetical, DHS, ICE, and CBP are deploying this strategy nationwide, in all large cities and important civic centers. So, there is simply no question that these Fourth Amendment violations will be widespread.

Furthermore, in the hypothetical, DHS, ICE, and CBP order their officers to use menace in order to obtain quick compliance. I claim that this meets the measure of being "egregious." Now it is unclear exactly what the *Lopez-Mendoza* Court meant by "egregious," but the Court cited

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85 Illinois v. Wardlow, 528 U.S. 119, 122 (2000); *Terry*, 392 U.S. at 30.

86 Aliza Hochman Bloom, *Whack-A-Mole Reasonable Suspicion*, 112 CAL. L. REV. 1129, 1136 (2024).

87 Nor does the Court's holding in *Hiibel v. Sixth Judicial District Court of Nevada* offer any help to the government in such a hypothetical. 542 U.S. 177 (2004). In *Hiibel*, the Court stated that it was constitutional for a state to pass a law that criminalized failure to identify oneself if lawfully seized. *Id.* at 190–91. But here, because there was no lawful seizure, *Hiibel*'s holding is not triggered. Consequently, seeking identification as part of an unlawful stop remains a constitutional violation. *See id.* at 181–82.

88 *See* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1041–43 (1984).

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

the case *Rochin v. California*[90] in support of the proposition.[91] There, the Court found that the officers' conduct—storming into someone's home in blatant violation of the Fourth Amendment, forcibly putting their hands in the individual's mouth to attempt to remove evidence, and then directing a doctor to pump the nonconsenting individual's stomach at the hospital to obtain evidence—constituted a constitutional violation of Due Process.[92] Here, the blatant violation of the Fourth Amendment, combined with the designed use of menace to obtain compliance, should meet the *Rochin* standard.[93]

Yet even if a court were to decide, per the admonition of the government in *Lopez-Mendoza*, that widespread or egregious Fourth Amendment violations leading to removal proceedings would require the exclusionary remedy, that would be of little help to the individual whose rights were violated in our framing hypothetical. That is because the exclusionary rule is limited in what kinds of evidence can be excluded.[94] Specifically, the exclusionary rule does not apply to an individual's identity.[95] But recall, the government's strategy is to wrongfully seize individuals in order to determine their identity *alone*.[96] Then the

90 342 U.S. 165 (1952).

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

92 *Rochin*, 342 U.S. at 166–69.

93 Lower courts have addressed what kind of conduct "egregious" could entail. In *Millan-Hernandez v. Barr*, 965 F.3d 140, 143 (2d Cir. 2020), the Second Circuit stated, "[i]f the constitutional violation 'was based on race (or some other grossly improper consideration),' it qualifies as 'egregious.'" In *Pretzantzin v. Holder*, 736 F.3d 641, 646 (2d Cir. 2013), the Second Circuit stated that a "nighttime, warrantless raid of person's home by government officials may, and frequently will, constitute an egregious violation of the Fourth Amendment . . . ." *See also* Oliva–Ramos v. Att'y Gen. of U.S., 694 F.3d 259, 279 (3d Cir. 2012) (describing characteristics for evaluating egregiousness). These cases suggest that the kind of hypothetical I have proffered would qualify as "egregious."

94 *See, e.g.*, Maryland v. King, 569 U.S. 435, 451 (2013); *Pretzantzin*, 736 F.3d at 650–51; *Lopez-Mendoza*, 468 U.S. at 1043; *cf.* Davis v. Mississippi, 394 U.S. 721, 723–24 (1969); Hayes v. Florida, 470 U.S. 811, 814–16 (1985).

95 *See* United States v. Del Toro Gudino, 376 F.3d 997, 1000–01 (9th Cir. 2004) (holding identity is an inherently different kind of evidence that may not be suppressed as a result of an egregious constitutional violation); Lopez-Gomez v. Lynch, 627 F. App'x 596, 597 (9th Cir. 2015) (stating that identity may not be suppressed).

96 There has been some question about what constitutes "identity" evidence. In *Maryland v. King*, the Supreme Court broadly recognized a "variety of relevant forms of identification, including name, alias, date and time of previous convictions and the name then used, photograph, Social Security number, or CODIS profile." *King*, 569 U.S. at 451. At the same time, the Court has prior held that fingerprint evidence—a type of identity evidence—may be suppressed if procured as a result of a constitutional violation. *Davis*, 394 U.S. at 723–24; *Hayes*, 470 U.S. at 814–16. And, as the Second Circuit noted in *Pretzantzin*, 736 F.3d at 649, the Court's expansive view on identity evidence would render the booking exception to the warrant requirement superfluous. So, in short, the notion of what exactly counts as identity evidence may be in flux. But that is of little

government uses the individual's identity alone to determine all the other facts, related to alienage, that would ultimately result in the government's showing that the individual is deportable. Indeed, the Court in *Lopez-Mendoza* presaged this very consequence when it explained, "[s]ince the person and identity of the respondent are not themselves suppressible, the [government] must prove only alienage, and that will sometimes be possible using evidence gathered independently of, or sufficiently attenuated from, the original arrest."[97]

Thus, the exclusionary rule would not result in any hindrance to the government's removal actions, despite their blatant, widespread, egregious Fourth Amendment violations.[98] This, I contend, is a serious problem. The Court makes the exact point in *Lopez-Mendoza*[99] that if the government were to engage in widespread, egregious constitutional violations, it would consider implementing an exclusionary remedy—yet that remedy stands too weak to make any impact on unlawful government behavior. That cannot stand.

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solace still, because it is fairly clear that with enhanced data collections, in many cases, one's name and birthdate—squarely in the category of "identity"—along with other independently procured information, will be enough for the government. *See Lopez-Mendoza*, 468 U.S. at 1043. Moreover, even if that is not enough for the government's case at that moment, once the government knows who the person is, at that point the government may have enough to accomplish its objective. That is, the government will continue to know who the person is. Thus, even if there is a termination of the proceeding without prejudice because of some lack of evidentiary showing, the government can simply restart the case—using only the identity information that is allowable. That is why we need a more robust remedy.

97 *Lopez-Mendoza*, 468 U.S. at 1043. Indeed, the government proffered this kind of argument to justify ICE agents' conduct that looked to have blatantly violated the Fourth Amendment in *Pretzantzin v. Holder*, 736 F.3d 641 (2d Cir. 2013). There, the Second Circuit determined that evidence showing alienage had not been adequately shown by the government to have been procured only through "identity." *Id.* at 645. But the Court confirmed that if the government does make that showing, the argument would proceed to insulate wrongful conduct by law enforcement that violates the Fourth Amendment. *Id.* at 646–47.

98 Indeed, there is a more basic point with respect to the reach of the exclusionary rule. Suppose the government has established its case—say, for deportation or for some criminal claim—and simply wishes to apprehend the individual—that is, their "body." To do so, the government commits a Fourth Amendment violation and apprehends the individual. That kind of constitutional violation is also beyond the reach of the exclusionary rule because a person's "body" is not suppressible. Frisbie v. Collins, 342 U.S. 519, 522 (1952); Ker v. Illinois, 119 U.S. 436, 444 (1886). This is known as the *Ker–Frisbie* doctrine—"that a court's power to try a defendant is ordinarily not affected by the manner in which the defendant is brought to trial." United States v. Best, 304 F.3d 308, 311 (3d Cir. 2002); *see also* Roberto Iraola, *Jurisdiction, Treaties, and Due Process*, 59 BUFF. L. REV. 693, 693 (2011). Indeed, in *Lopez-Mendoza*, when the Court recognized that identity was not suppressible, it did so by relying on *Frisbie*. *Lopez-Mendoza*, 468 U.S. at 1040.

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

IV. A MORE ROBUST EXCLUSIONARY RULE

So, we are in need of some effective remedy to combat widespread, wanton, egregious Fourth Amendment violations. This is possible through a more robust exclusionary rule, one that excludes the proceeding itself. Specifically, I envision that in situations where the government—as the hypothetical laid out—engages in willful, widespread, and egregious Fourth Amendment violations to identify individuals for removal, the government will be prohibited from bringing the removal proceeding. I call this the "Proceeding Exclusionary Rule." This, I recognize, is a costly remedy for the government, but it is amply justified by the Court's own reasoning about the exclusionary rule.

Foundationally, as discussed above, the Court observed in *Mapp* itself that there is a need to deter the government from engaging in Fourth Amendment violations through some way.[100] In the criminal context, the majority noted that the experience of various States demonstrated that alternatives did not succeed and that the exclusionary rule was singularly potent in obtaining government compliance.[101] Now, in the civil context, based on the reasoning in *Janis*[102] and *Lopez-Mendoza*,[103] we can identify the following factors on whether an exclusionary remedy is unnecessary to safeguard rights: (1) whether there are other forums where the government may be restricted in using unlawfully obtained evidence, in particular criminal cases; (2) whether the government could be sued effectively for declaratory relief; and (3) whether the government could achieve its desired results, even if the exclusionary rule were to apply. We consider them in turn.

First, in *Lopez-Mendoza*, the Court noted that the exclusionary rule might still apply in criminal immigration violation cases.[104] Though acknowledging that such cases might be rare, since civil removal proceedings are usually the desired end of the government, the Court seemed to still think this provided some deterrence for the government. But this may be mistaken. Consider 8 U.S.C. § 1325, which says in relevant part:

> Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully

100 Mapp v. Ohio, 367 U.S. 643, 652–53 (1961).

101 *Id.* at 651–53.

102 United States v. Janis, 428 U.S. 433, 447–55 (1976).

103 I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1041–44 (1984).

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

> false or misleading representation or the willful concealment of a material fact, shall [be punished].[105]

Seemingly nothing prevents the government from running the same dragnet operation, with the same gambit to circumvent the Fourth Amendment. And it very well could be that the government is able to, based on the person's identity alone, develop the rest of the evidence on the requisite elements—for example, that they entered in an undesignated area or time. In that situation, the exclusionary rule would not operate *even in the criminal context*, and thus, unlike in *Janis*,[106] there is no potential for even that level of deterrence to government actors who may be worried about sabotaging their criminal case. This adds to the need for an exclusionary remedy, and one with teeth.[107]

Second, it is highly uncertain that any kind of civil suit against the government would serve as a meaningful remedy. As an initial matter, a suit seeking declaratory relief, which hypothetically claims that this same dragnet operation is unconstitutional, does not add much. By assumption, the conduct here is flagrant, and so the government authorities are not simply unaware that what they are doing is unconstitutional. Of course, a court order saying so, and the opprobrium of violating court orders, carries weight—if it does not, we are beyond the bounds of law. But we maintain the need for a greater deterring effect—if there was no such need, there would be no need for an exclusionary remedy in any forum.[108]

What about civil suits for monetary relief? Section 1983 suits allow for those whose constitutional rights have been violated by state officers to sue for monetary damages.[109] In cases where one's rights are violated by federal officers, the Supreme Court created a judicial remedy—known as a *Bivens* claim—that allows one to sue for monetary damages.[110] Setting aside that the *Bivens* claim has received a narrow construction by the Court,[111] and indeed may be overturned *in toto*,[112] the data suggests

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105 8 U.S.C. § 1325.

106 *See* 428 U.S. at 447–48 (discussing what parties will be deterred by the exclusionary rule).

107 In this context, my contention is that the civil immigration proceeding—for removal or deportation—requires a stronger remedy, namely the Proceeding Exclusionary Rule. But indeed, if it is the case that similar *criminal* immigration proceedings are brought through widespread, egregious Fourth Amendment violations to determine someone's identity, I contend that the Proceeding Exclusionary Rule should *also* apply to prohibit those prosecutions.

108 *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 648 (1961) (describing the exclusionary rule as a "deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words.'")

109 42 U.S.C. § 1983.

110 Bivens v. Six Unknown Named Agents, 403 U.S. 388, 390 (1971).

111 *See* Egbert v. Boule, 596 U.S. 482, 490–92 (2022).

112 *Id.* at 502 ("And, more recently, we have indicated that if we were called to decide Bivens today, we would decline to discover any implied causes of action in the Constitution.").

that *Bivens* claim do not generally fare well.[113] Beyond the fact that once brought, such claims do not often succeed,[114] a more fundamental problem is the transactional costs in bringing such a suit to begin with—it costs money, time, and effort, which most people do not have. Indeed, this is why the exclusionary remedy works so well—because it operates when the government initiates the (usually criminal) case, and so it does not require the tenuous assumption that people will independently raise their claims of unconstitutional treatment. Again, the presence of monetary remedies is not new, it existed at the time of *Mapp*, so the fact that the Court recognized the need for an exclusionary remedy should tell us that monetary remedies were not enough to curb wrongful official conduct.[115] That remains true here.

Third and finally, the Court's recognition that if the ordinary exclusionary rule applied it could be circumvented is not a reason to refuse to apply the ordinary exclusionary rule. It is a reason to fashion a more robust rule that will actually do the work of deterrence for the protection of our constitutional rights. It is perhaps the key role of the judiciary.[116] Thus, I suggest the Proceeding Exclusionary Rule.

One way of understanding the Proceeding Exclusionary Rule in this context is as follows: we observe that the government may design its Fourth Amendment violations to obtain doctrinally nonexcludable information—namely, a person's identity. The reason that the information is nonexcludable is seemingly because the Court has recognized that identity is, in some sense, basic, immutable information that the government is entitled to know.[117] Moreover, identity is quintessentially the kind of information that can be obtained through an independent source (even if it were to take substantial effort).

The Proceeding Exclusionary Rule recognizes all that, but nevertheless, for purposes of deterring the government from engaging in constitutional violations, contends that the government should be prevented from making the showing itself. Indeed, I think this is an

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113 Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 809, 845 (2010).

114 *Id.*

115 Richard Briffault, *Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1167–73 (1977) (discussing the history of Section 1983 claims and their limitations).

116 THE FEDERALIST NO. 78 (Alexander Hamilton) ("This independence of the judges is . . . requisite to guard the Constitution and the rights of individuals . . . ."); CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 125–27 (1997); LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 199 (2004).

117 *See, e.g.*, United States v. Del Toro Gudino, 376 F.3d 997, 1001 (9th Cir. 2004) ("[T]he simple fact of who a defendant is cannot be excluded . . . .").

instantiation of what Ronald Dworkin recognized as a basic principle of the law: "No man [or government] may profit from his own wrong."[118]

One concern that the Supreme Court has echoed consistently is that these immigration proceedings, and the ability to deport individuals, are critical to the government.[119] I am somewhat skeptical of the Court's full-throated endorsement of this proposition. Nevertheless, assuming it arguendo, some may suggest that our Proceeding Exclusionary Rule is too harsh, as it hinders an important government function. To this practical objection, I have two responses: first, we must remember the context. We are not simply talking about run-of-the-mill Fourth Amendment violations. As we have seen, the Court has made clear that such violations do not merit any exclusionary rule remedies.[120] Here, we are talking about blatant, widespread, egregious violations. In such a case, the best solution is a directive to the government: stop violating the Constitution. Immigration enforcement is a matter of importance; so is having a law-abiding government.

Second, one way of mitigating the cost of the Proceeding Exclusionary Rule is to impose a time limitation on its operation, so that the government cannot bring the removal proceeding arising from a wanton, egregious Fourth Amendment violations for some period of time but can thereafter. I think this could be implemented categorically, such that the Proceeding Exclusionary Rule operates for, say, one year, or that it could apply in a particularized way, with judges balancing the specific facts of the government's Fourth Amendment violations and tailoring a time period accordingly. One might suggest that this solution is ad hoc, but indeed it is in accord with the doctrine of attenuation with respect to the exclusionary rule. As noted, that doctrine states that the exclusionary rule does not apply if the government's constitutional violations are sufficiently "attenuated" from the evidence collected, due to remoteness

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118 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 26 (1978); *see also* Colby Furniture Co. v. Overton, 299 So. 3d 259, 265 (Ala. Civ. App. 2019) (discussing the clean hands doctrine, which "prevent[s] a party from asserting his . . . rights under the law when that party's own wrongful conduct renders the assertion of such legal rights 'contrary to equity and good conscience.'").

> The governing principle is "that whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy."

Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 244–45 (1933).

119 *See, e.g.*, I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1048–50 (1984); United States v. Brignoni-Ponce, 422 U.S. 873, 878–79 (1975).

120 *See* Lopez-Mendoza, 468 U.S. at 1050 (holding the costs of applying the exclusionary rule to civil deportation hearings outweigh the benefits).

or an intervening event.[121] Here, I think a properly tailored time period can ensure that the constitutional violation's bite and harm is distanced from the ultimate removal proceeding. Consequently, the Proceeding Exclusionary Rule imposes an appropriately tailored cost to constitutional violations, to deter the government from engaging in such lawless behavior, while still allowing the government to pursue important objectives.

In a similar vein, some may be concerned that the Proceeding Exclusionary Rule does not recognize the complications that arise when individuals are removable for other specific, and particularly deleterious, reasons. For example, suppose an individual is deportable due to the fact that they have committed a crime of moral turpitude or because they have engaged in terrorist activities.[122] Here, constitutional rights are still paramount—and they cannot and should not simply be scared away by the bogeymen of crime or terrorism. Indeed, when the exclusionary rule is deployed in the criminal law, it knows no exception for horrible crimes. So, I would not be inclined to make an exception to the Proceeding Exclusionary Rule for these circumstances. But I understand that such cases may pose distinct concerns that alter the balancing of the exclusionary rule. To accommodate these concerns, the Proceeding Exclusionary Rule could be tailored to be offense-specific—it can apply to most of the bases for removal proceedings, except for those bases that involve deportable criminal offenses, engagement with terrorist activity, and the like.

Finally, this Proceeding Exclusionary Rule is in no sense a panacea. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[123] amended the Immigration and Nationality Act (INA)[124] and set forth an expedited removal process for certain classes of noncitizens—for example noncitizens who have entered without inspection, have not been admitted or paroled, and have been present in the United States for less than two years.[125] I would propose that the Proceeding Exclusionary Rule would apply in expedited removal proceedings. Suppose an individual caught up in an unconstitutional dragnet operation is in expedited removal proceedings and credibly raises

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121 Brown v. Illinois, 422 U.S. 590, 592 (1975).

122 8 U.S.C. § 1227(a)(2)(A)(i) (deportability for crimes of moral turpitude); 8 U.S.C. § 1227(a)(4)(B) (deportability for engagement with terrorist activities).

123 Pub. L. No. 104–208, 110 Stat. 3009 (codified as amended at 8 U.S.C. §§ 1-1778).

124 Immigration and Nationality Act of 1952, Pub. L. No. 82–414, 66 Stat. 163.

125 *Expedited Removal Explainer*, AM. IMMIGR. COUNCIL (Feb. 20, 2025), https://www.americanimmigrationcouncil.org/research/expedited-removal [https://perma.cc/738N-ME5N]. Indeed, since the enactment of IIRIRA, the government has expanded the classes of noncitizens that could be subject to expedited removal. *Id.*

their Fourth Amendment claim; I think that would require further review and the application of the Proceeding Exclusionary Rule, if appropriate. However, in *Department of Homeland Security v. Thuraissigiam*,[126] the Supreme Court held that an individual immigration officer's determination—that a putative asylee's claim of a "credible fear of persecution or torture" was not credible—was final and not appealable or subject to habeas review.[127] Thus, in our analogous type of case, if an immigration officer—who may have been involved in the unconstitutional action themselves—determines the individual's claim deserves no further attention, that simply may be the final word. Thus, per current Court doctrine, the Proceeding Exclusionary Rule is highly unlikely to apply in expedited removal proceedings. That limits the utility of our Proceeding Exclusionary Rule but also any remedy for any constitutional or Due Process violation.[128] This, I contend, is a constitutional travesty—and tragedy. But it is what the Court has held—and wrought.

CONCLUSION

As President Trump has taken office, we have seen a shocking level of animus and vitriol against immigrants—especially, so-called "illegal immigrants"—in the administration's statements and conduct.[129] President Trump and his appointees have continually stressed that they are willing to take severe actions to curb "illegal immigration."[130] Indeed, President Trump and so-called Border Czar Tom Homan have made exceedingly clear that they have no particular fidelity to constitutional rights in pursuing their ends.[131] Against this backdrop, this Essay has set out a frightening, plausible situation—where immigration authorities could engage in widespread, egregious Fourth Amendment violations to enact mass deportation yet face no consequences to deter or

126 591 U.S. 103 (2020).

127 *Id.* at 106–13, 153.

128 One might argue that levying the Proceeding Exclusionary Rule may further incentivize the government to engage in expedited removal proceedings. I think that's an unlikely result, because the government is already so incentivized to engage in expedited removal proceedings—the Proceeding Exclusionary Rule likely does not alter the balance. Indeed, the Trump Administration has already made clear that it is expanding the use of expedited removal. *See* Designating Aliens for Expedited Removal, 90 Fed. Reg. 8139-01 (Jan. 24, 2025).

129 *See supra* notes 2–9 and accompanying text.

130 *See generally* Memorandum from the Am. C.L. Union on Trump on Immigration: Tearing Apart Immigrant Families, Communities, and the Fabric of Our Nation, *supra* note 4; Exec. Order No. 14159, 90 Fed. Reg. 8443 (Jan. 20, 2025); Schooley & Hall, *supra* note 6; Wade, *supra* note 9.

131 *See supra* notes 2–9 and accompanying text.

disincentivize these constitutional violations. That is because if an unconstitutional dragnet operation is aimed only at obtaining the critical fact of someone's identity, Supreme Court case law has stated the fact of one's identity is not subject to the exclusionary rule remedy. Consequently, we are in a constitutional sinkhole where there is a purported right but no effective remedy for its violation.

This Essay contends that such a constitutional quagmire is intolerable. To that end, I suggest a new remedy in this immigration context—called the Proceeding Exclusionary Rule—that would prohibit immigration authorities from bringing a removal proceeding, at least for some period of time, where there are widespread, egregious constitutional violations afoot. This is a harsh remedy, which is indeed by design. If the government may flagrantly violate our Fourth Amendment rights of personal liberty, with no effective sanction or limitation, then we do not have those rights at all. Taking our Constitution and its Bill of Rights seriously demands that we hold the government accountable when it violates those rights.