



PRACTICE ADVISORY¹

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MOTIONS TO SUPPRESS IN REMOVAL PROCEEDINGS: FIGHTING BACK AGAINST UNLAWFUL CONDUCT BY U.S. CUSTOMS AND BORDER PROTECTION

By The American Immigration Council²

Since 9/11, Congressional appropriations for border security have skyrocketed.³ This influx of resources to U.S. Customs and Border Protection (CBP) has corresponded with increased reports of pretextual arrests, racial profiling, excessive use of force, and coercive tactics to aid immigration enforcement along both borders.⁴ Although these enforcement practices often violate the constitutional, statutory or regulatory framework governing the conduct of CBP officers, they are rarely challenged in immigration court.

Since this practice advisory was initially published in 2013, reports of CBP abuses have continued apace.⁵ The Trump administration's increased emphasis on border security has the potential to exacerbate matters, as evidenced by the January 2017 executive order calling for CBP to hire 5,000 new Border Patrol officers and to significantly increase the use of detention.⁶

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³ *Budget in Brief*, DHS (Fiscal Year 2003 through Fiscal Year 2017) (noting that CBP's budget grew from \$5.9 billion in FY 2003 to \$13.94 billion in FY 2017).

⁴ *See infra*, note 77.

⁵ For examples of legal and administrative challenges to CBP abuses, please visit [Hold CBP Accountable](#), a website run jointly by the American Immigration Council, the ACLU of San Diego and Imperial Counties, the Northwest Immigrant Rights Project, and the National Immigration Project of the National Lawyers Guild.

⁶ *Border Security and Immigration Enforcement Improvements*, Exec. Order No. 13,767, 82 Fed. Reg. 8,793, 8,795 (Jan. 25, 2017).

This practice advisory discusses some of the factual scenarios that may give rise to successful motions to suppress evidence obtained unlawfully by CBP officers, including CBP inspectors stationed at ports of entry and Border Patrol agents, who operate between ports of entry. It also addresses some of the legal issues specific to motions to suppress evidence obtained at or near the border. If successful, a motion to suppress can prevent the government from using unlawfully obtained evidence to prove alienage, which may result in the termination of removal proceedings.

This advisory supplements a prior Council practice advisory on [Motions to Suppress in Removal Proceedings: A General Overview](#), which provides a more detailed discussion of the basic principles underlying motions to suppress, as well as information about how to file a motion to suppress. For that reason, those issues are not addressed in detail in this advisory, and practitioners are advised to read this advisory in conjunction with the more general one. For the sake of convenience, the relevant legal standards are summarized below:

- Evidence obtained by CBP may be suppressed if it was obtained through conduct that constitutes an “egregious” or “widespread” violation of the Fourth Amendment, or through conduct that would render use of the evidence “fundamentally unfair” and in violation of an individual’s due process rights under the Fifth Amendment.⁷
- Evidence may also be suppressed if it was obtained in violation of a federal regulation that “serves a purpose of benefit to the alien” and “the violation prejudiced interests of the alien which were protected by the regulation.”⁸
- The law is unsettled regarding whether motions to suppress can be based solely on violations of the Immigration and Nationality Act (INA), but evidence of such violations can be used to bolster arguments that CBP officers have exceeded the scope of their enforcement authority.

Wherever possible, you should allege constitutional, statutory and regulatory violations in a motion to suppress.

⁷ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984) (plurality op.). See also *Oliva-Ramos v. Attorney General*, 694 F.3d 259, 272, 275 (3d Cir. 2012). For a more comprehensive discussion of these standards, see American Immigration Council, [Motions to Suppress in Removal Proceedings: A General Overview](#), Parts II and III.

⁸ *Matter of Garcia-Flores*, 17 I&N Dec. 325, 325 (BIA 1980). See also *United States v. Matter of Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979). Prejudice may be presumed where compliance with a regulation is mandated by the Constitution or where an agency fails to comply with a procedural framework designed to ensure fair processing. *Matter of Garcia-Flores*, 17 I&N Dec. at 328-29. For a more comprehensive discussion of this standard, see American Immigration Council, *Motions to Suppress in Removal Proceedings*, at 12-13.

I. Legal Framework Governing CBP's Immigration Enforcement Activities

For purposes of immigration enforcement, CBP employs a variety of strategies, including surveillance on the border, traffic checkpoints on highways leading away from the border, and roving patrols within a reasonable distance of the border.⁹ In each of these contexts, CBP's authority is circumscribed by applicable provisions of the INA and corresponding regulations.¹⁰ For purposes of motions to suppress in immigration court, the most relevant provisions are:

- INA § 236(a), providing for the arrest and detention with a warrant of any noncitizen subject to removal;
- INA § 287(a), permitting questioning of individuals believed to be noncitizens about their immigration status, warrantless arrests of noncitizens under certain circumstances,¹¹ vehicle searches within a reasonable distance of the border, and searches of private lands (excluding dwellings) within twenty-five miles of the border;
- 8 C.F.R. § 287.5, specifying the scope of immigration officers' authority to interrogate and administer oaths, patrol the border, make arrests, conduct searches, execute warrants, and carry firearms; and
- 8 C.F.R. § 287.8, setting forth standards for the use of force, questioning and detention not amounting to arrest, arrests, transportation, vehicular pursuit, and site inspections.

As discussed below, these provisions must be construed in accordance with applicable constitutional protections,¹² which impact CBP's enforcement authority differently depending on the circumstances of a particular encounter.

⁹ CBP, [CBP Fiscal Year 2015 Performance and Accountability Report](#) (2015).

¹⁰ *United States v. Juvenile Female*, 566 F.3d 943, 948-50 (9th Cir. 2009).

¹¹ Three categories of noncitizens are subject to warrantless arrests — those in the act of entering illegally, those who an immigration officer has “reason to believe” are unlawfully present in the United States and likely to escape before arrest warrants can be obtained, and those who are reasonably believed to have committed a felony. INA § 287(a)(1), (3).

¹² *United States v. Brignoni-Ponce*, 422 U.S. 873, 877-78 (1975) (noting that, because “no Act of Congress can authorize a violation of the Constitution,” the Fourth Amendment can restrict immigration agents' statutory authority) (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973)).

II. Common Scenarios Involving CBP Enforcement Activity and Potential Fourth Amendment Violations

A. Roving Border Patrols

1. CBP's Authority

“Roving patrols” include vehicle stops and other types of encounters with Border Patrol agents beyond the border and its functional equivalent. For example, Border Patrol agents often question people who have pulled over to the side of the road or stopped at convenience stores, gas stations and other public places. Alleged misconduct by Border Patrol officers during such encounters is the most common basis for motions to suppress involving CBP.

Normally, any vehicle stop constitutes a “seizure” of both the driver and any passengers, whose rights are subject to Fourth Amendment protections.¹³ However, INA § 287(a)(1), which permits warrantless questioning of any “person believed to be an alien” about his or her immigration status, and INA § 287(a)(3), which, as interpreted by 8 C.F.R. § 287.1(a)(2), permits warrantless vehicle searches within “a reasonable distance,” defined by regulation as 100 air miles,¹⁴ of a U.S. border to prevent illegal entries, arguably give CBP officers greater latitude than the Fourth Amendment in this context. The Supreme Court reconciled this apparent conflict in *U.S. v. Brignoni-Ponce*, which held that, in the context of roving patrols, brief vehicle stops for immigration enforcement purposes must be based on “reasonable suspicion” that an individual is unlawfully present in the United States.¹⁵ This requirement is codified in 8 C.F.R. 287.8(b)(2), which clarifies that a vehicle stop also may be justified based on reasonable suspicion of involvement in criminal activity:

If the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning.

With respect to roving patrols that do not involve vehicle stops, Border Patrol agents’ authority varies depending on the nature of the encounter. Importantly, admissions during a consensual encounter may not be suppressed.¹⁶ An encounter is consensual if a reasonable person would not feel obligated to comply with the officer’s requests.¹⁷ During a consensual encounter, a law

¹³ *Brendlin v. California*, 551 U.S. 249, 251 (2007); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

¹⁴ 8 C.F.R. § 287.1(a)(2).

¹⁵ 422 U.S. at 884. Outside the immigration enforcement context, brief vehicle stops may be justified if a law enforcement officer has reasonable suspicion to believe that “criminal activity may be afoot.” *Terry v. Ohio*, 392 U.S. 1, 30 (1968). See also *United States v. Cortez*, 449 U.S. 411, 417 (1981).

¹⁶ *United States v. Mendenhall*, 446 U.S. 544, 559-60 (1980).

¹⁷ *Brendlin*, 551 U.S. at 255; *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *Mendenhall*, 446 U.S. at 553-54.

enforcement officer may, without reasonable suspicion, make inquiries about immigration status and other matters,¹⁸ ask to examine an individual’s identification documents,¹⁹ and request consent to search his or her luggage.²⁰

Brief investigatory detentions during which an individual is not free to leave—frequently called “Terry” stops—constitute seizures subject to the Fourth Amendment’s reasonableness requirements.²¹ Based on reasonable suspicion of unlawful presence, a Border Patrol agent may briefly detain an individual for questioning.²² Information obtained through such questioning may provide a basis for more prolonged detention, a vehicle search, or the subsequent arrest of a noncitizen, all of which normally require consent or probable cause.²³ However, an individual’s refusal to respond to questions during a Terry stop does not provide probable cause to arrest.²⁴

An initially consensual encounter may ripen into an investigative Terry stop requiring reasonable suspicion if a Border Patrol agent, by means of physical force or another display of authority, restrains an individual’s liberty.²⁵ Examples of conduct indicative of a Terry stop include: the threatening presence of several law enforcement officers, the display of a weapon, physical touching, the prolonged retention of identification or personal belongings, a request to accompany an officer to a separate room, or the use of language or a tone of voice indicating that

¹⁸ *Florida v. Royer*, 460 U.S. 491, 497-98 (1983) (plurality opinion); *INS v. Delgado*, 466 U.S. 210, 216 (1984); *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1987). See also INA § 287(a)(1), 8 C.F.R. § 287.8(b)(1).

¹⁹ *Royer*, 460 U.S. at 501; *Delgado*, 466 U.S. at 216; *United States v. Mendenhall*, 446 U.S. at 557-58; *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 n.2 (2d Cir. 2006) (noting that “a simple request for identification may not, without more, constitute a seizure”) (internal citation omitted).

²⁰ *Royer*, 460 U.S. at 501. For further discussion of “consensual” encounters, see American Immigration Council, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 22.

²¹ See *Terry*, 392 U.S. at 16-20. Even a brief intrusion to determine identity is a seizure if a person’s freedom is restrained. *Id.* at 16 (“whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”); cf. *United States v. Drayton*, 536 U.S. 194, 200 (2002) (a police officer’s request for identification is not a seizure if “a reasonable person would feel free to terminate the encounter”).

²² *Brignoni-Ponce*, 422 U.S. at 881-82. See also *United States v. Sugrim*, 732 F.2d 25, 30 (2d Cir. 1984). With respect to the permissible length of such detentions, the Supreme Court’s holding in *Brignoni-Ponce* was based on the government’s assurance that a roving border patrol stop usually lasts “no more than a minute.” 422 U.S. at 880.

²³ *Brignoni-Ponce*, 422 U.S. at 882; *Almeida-Sanchez*, 413 U.S. 266, 269-70 (1973). See also *Au Yi Lau v. INS*, 445 F.2d 217, 222 (D.C. Cir. 1971) (noting that for purposes of arrests under INA § 287(a), “reason to believe” is analogous to probable cause); *U.S. v. Sanchez*, 635 F.2d 47, 63 n.13 (2d Cir. 1980).

²⁴ *Royer*, 460 U.S. at 498. For further discussion of Terry stops, see American Immigration Council, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 23-25.

²⁵ *Delgado*, 466 U.S. at 215.

compliance with a law enforcement officer's request might be compulsory.²⁶ None of these factors is dispositive, and other evidence demonstrating that an officer has restrained an individual's liberty also may be relevant.

2. Reasonable suspicion

Reasonable suspicion determinations in the context of roving border patrol stops are highly fact-driven.²⁷ Indeed, the Supreme Court has cautioned that "because the mosaic which is analyzed for a reasonable-suspicion or probable cause inquiry is multi-faceted, one determination will seldom be useful precedent for another."²⁸ In an unpublished decision, the BIA found that Border Patrol agents lacked reasonable suspicion when they stopped a car solely because they "'smelled' undocumented aliens."²⁹ However, such determinations are rarely so clear-cut.

In making a reasonable suspicion inquiry, a court "must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing."³⁰ Under *Brignoni-Ponce*, relevant factors include the characteristics of the area, its proximity to the border, usual traffic patterns on the road, previous law enforcement experience with noncitizen traffic in the area, recent information about nearby illegal border crossings, the driver's behavior, appearance of the vehicle, the number of passengers, or such aspects of their appearance as dress and haircut.³¹ Officers are permitted to draw conclusions based on their experience and specialized training, which may lead them to analyze information differently than an untrained observer.³² An occupant's apparent race or ethnicity cannot be the sole basis for a stop and in some places cannot even be considered as a factor.³³

²⁶ *Mendenhall*, 446 U.S. at 554. See also *Benitez-Mendez v. INS*, 760 F.2d 907, 908-09 (9th Cir. 1983).

²⁷ See, e.g., *United States v. Lopez-Martinez*, 25 F.3d 1481 (10th Cir. 1994); *United States v. Gutierrez-Orozco*, 191 F.3d 578 (5th Cir. 1999); *United States v. Espinoza*, 490 F.3d 41 (1st Cir. 2007).

²⁸ *Ornelas v. United States*, 517 U.S. 690, 698 (1996) (internal quotation marks and citations omitted).

²⁹ *In re Enrique Soto-Garcia*, No. A087 534 842, 2013 WL 2610074, at *2-4 (BIA May 7, 2013) (unpublished).

³⁰ *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal quotation marks omitted).

³¹ *Brignoni-Ponce*, 422 U.S. at 884-85.

³² *Arvizu*, 534 U.S. at 273. See also *United States v. Quintana-Garcia*, 343 F.3d 1266, 1270 (10th Cir. 2003) (noting that determination whether an investigatory stop is supported by reasonable suspicion is "made from the perspective of the reasonable *officer*, not the reasonable *person*").

³³ *Brignoni-Ponce*, 422 U.S. at 885-86. See also *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) (en banc) (rejecting Hispanic appearance as a relevant factor in assessing reasonable suspicion given the large number of people who share this characteristic); *United States v. Manzo-Jurado*, 457 F.3d 928, 940 (9th Cir. 2006) (Border Patrol agents had no reasonable suspicion to question "a group of Hispanic-looking men, who appeared to be in a work crew, calmly conversing in Spanish to each other" in a parking lot of a football stadium

3. Egregious Violations of the Fourth Amendment

In the decades since *Brignoni-Ponce* was decided, a significant body of case law has addressed the question of when a Border Patrol agent on roving patrol has sufficient reasonable suspicion to justify a vehicle stop without committing an egregious violation of the Fourth Amendment.³⁴ Motions to suppress often allege that race or ethnicity were the sole basis for such stops. Typically, Border Patrol agents downplay their reliance on race and instead justify vehicle stops principally on the basis of the appearance and comportment of the driver and passengers. However, many courts have discounted such explanations in assessing reasonable suspicion for suppression purposes.³⁵ Courts tend to accord greater deference to agents' explanations and greater evidentiary weight to their claimed experience for stops that are closer to the border.

A motion to suppress based on unlawful conduct in the context of a roving patrol also may allege a violation of 8 C.F.R. § 287.8(c)(2)(i). This regulation provides that an arrest may be made “only when the designated immigration officer has reason to believe that the person arrested has committed an offense against the United States or is an alien illegally in the United States.” To succeed on a motion to suppress based on a violation of a regulation (such as this one), the

near the Canadian border). For further discussion of the types of conduct that can give rise to reasonable suspicion of unlawful activity, see American Immigration Council, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 19-21.

³⁴ See, e.g., *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 236-37 (2d Cir. 2006) (finding convenience store parking lot seizure by Border Patrol agent in violation of Fourth Amendment but denying motion to suppress in removal case because respondent offered no evidence that stop was race-based); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1451-52 (9th Cir. 1994) (finding a vehicle stop solely on the basis of race to be an egregious Fourth Amendment violation that warranted suppression).

³⁵ See, e.g., *United States v. Hernandez-Mandujano*, 721 F.3d 345, 349-50 (5th Cir. 2013) (finding no reasonable suspicion for stop by experienced Border Patrol agent on “a major corridor for illegal alien-smuggling” where driver’s posture was not relaxed; driver slowed down, stopped talking and failed to make eye contact when passing Border Patrol; vehicle was an SUV; and stop occurred 450 miles from the border); *United States v. Rangel-Portillo*, 586 F.3d 376, 381 (5th Cir. 2009) (finding no meaningful weight should be given, within the reasonable suspicion analysis, to whether passengers wore seatbelts, sat rigidly, or refrained from conversing with one another as they exited a Wal-Mart parking lot); *Gonzalez-Rivera*, 22 F.3d at 1446-47 (rejecting Border Patrol agent’s assertion that he had reasonable suspicion of unlawful presence based on driver’s failure to make eye contact, dry mouth, and Hispanic appearance); *United States v. Rodriguez*, 976 F.2d 592, 594-95 (9th Cir. 1992) (no reasonable suspicion where driver, a Hispanic male, failed to acknowledge Border Patrol agents’ vehicle but looked at them several times in his rear view mirror, vehicle appeared to be heavily loaded, and highway was a common smuggling route); *United States v. Peters*, 10 F.3d 1517, 1522 (10th Cir. 1993) (INS agent’s assertion that driver “was visibly nervous” based on his “gripping the wheel tightly and looking straight ahead at the road” does not establish reasonable suspicion).

individual must prove that the regulation was intended to protect noncitizens and that his or her interests were prejudiced as a result.³⁶

4. Border Patrol and Traffic Stops

Border Patrol agents lack authority to stop drivers for perceived violations of state traffic laws. As the Supreme Court acknowledged in *Brignoni-Ponce*:

Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways.³⁷

Therefore, state traffic law violations cannot alone justify a CBP roving patrol stop.³⁸ However, some courts have found that erratic driving in an evasive manner may support a reasonable suspicion of an immigration law violation and thereby justify a traffic stop.³⁹

B. Bus and Train Sweeps

Bus and train sweeps beyond the immediate vicinity of the border are often considered to be consensual encounters, and thus not seizures subject to Fourth Amendment protections, even though they involve questioning by law enforcement officers in a confined space.⁴⁰ Even in

³⁶ See *Matter of Garcia-Flores*, 17 I&N Dec. 325, 328-29 (BIA 1980). For further discussion of motions to suppress based on violations of federal regulations, see American Immigration Council, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 15-16.

³⁷ 422 U.S. at 883 n.8.

³⁸ See, e.g., *United States v. Rodriguez-Rivas*, 151 F.3d 377, 381 (5th Cir. 1998) (holding that a traffic infraction did not give a Border Patrol agent reasonable suspicion to stop a vehicle); *United States v. Valdes-Vega*, 685 F.3d 1138, 1145 & n.6 (9th Cir. 2012) (noting that Border Patrol agents have no authority to enforce California traffic laws and holding that erratic driving did not give rise to reasonable suspicion of smuggling). But see *United States v. Sealed Juvenile I*, 255 F.3d 213, 219 (5th Cir. 2001) (Customs agent authorized under Texas' citizen's arrest statute to stop a vehicle for traffic violations that rise to the level of breaching the peace, but cannot detain someone for a mere violation of traffic law).

³⁹ See, e.g., *Brignoni-Ponce*, 422 U.S. at 885 ("The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion."); *United States v. Bautista-Silva*, 567 F.3d 1266, 1274 (11th Cir. 2009) (driver's erratic driving supported a Border Patrol agent's reasonable suspicion that the vehicle contained unlawfully present noncitizens); *United States v. Diaz-Juarez*, 299 F.3d 1138, 1142-43 (9th Cir. 2002) (upholding stop in part due to driver's unusual driving behavior).

⁴⁰ *Bostick*, 501 U.S. at 435-440 (striking down a Florida Supreme Court ruling that all warrantless bus sweeps constituted impermissible seizures). See also *United States v. Angulo-Guerrero*, 328 F.3d 449, 451 (8th Cir. 2003) (affirming denial of motion to suppress noncitizen's statement that he was unlawfully present and finding there had been no seizure for the purposes of the Fourth Amendment when there was "simply no evidence that passengers would be

situations where an individual's freedom of movement is restricted by a factor independent of the conduct of law enforcement officers — such as being on a bus or train—the relevant inquiry is “whether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter.”⁴¹ Officers are not obligated to inform passengers of their rights, and their failure to do so does not transform a bus sweep into an unlawful seizure.⁴²

If questioning by Border Patrol agents during a bus or train sweep involves coercion, the encounter may be construed as a seizure subject to Fourth Amendment protections. However, the evidentiary threshold required to establish that a seizure occurred is quite high. Courts have found that the following situations do not constitute seizures:

- Border Patrol agent questions a seated passenger from the aisle of a bus, even where two different agents ask the same question.⁴³
- Agent orders person to disembark from a bus and claim luggage, under the guise of being a Greyhound employee, as long as the officer does not “demand, intimidate, threaten, or use force against” passengers.⁴⁴
- Border Patrol agent's holstered gun is not likely to transform an encounter into a seizure unless he draws it, on the theory that the public knows that most law enforcement officers are armed.⁴⁵

Given the broad latitude accorded to Border Patrol agents during bus and train sweeps, only explicitly threatening language or conduct likely will render an interaction nonconsensual. If an interaction involved a show of force, inappropriate physical touching, or prolonged detention, it might be sufficiently egregious to warrant suppression in removal proceedings.

A motion to suppress also might succeed if a seizure during a bus sweep was prompted by bare racial animus. However, the line between impermissible racial profiling and permissible mixed-motive suspicion is unclear and at times hypertechnical.⁴⁶

detained if they refused to answer [the agent's] questions”); *cf. United States v. Barbera*, 514 F.2d 294, 296 (2d Cir. 1975) (affirming grant of motion to suppress by Italian citizen taken off bus after he failed to respond to Border Patrol agent's questions regarding his citizenship at location not qualifying as functional equivalent of border).

⁴¹ *Bostick*, 501 U.S. at 436. *See also Mendenhall*, 446 U.S. 544.

⁴² *United States v. Drayton*, 536 U.S. 194, 207 (2002) (holding that a police officer is not required to inform bus passengers of their right to refuse a search).

⁴³ *United States v. Mendieta-Garza*, 254 Fed. App'x 307, 313 (5th Cir. 2007) (unpublished) (noting that the fact that a second officer “‘took another run’ at [the defendant] makes this a close case” (citation omitted)).

⁴⁴ *United States v. Ojeda-Ramos*, 455 F.3d 1178, 1183-84 (10th Cir. 2006).

⁴⁵ *Drayton*, 536 U.S. at 204-05. *See also Bostick*, 501 U.S. at 432.

⁴⁶ *See, e.g., Pinto-Montoya v. Mukasey*, 540 F.3d 126, 131-32 (2d Cir. 2008) (denying motion to suppress based on immigration officers' questioning at JFK airport of domestic

C. Encounters with Pedestrians

As previously discussed, admissions made during a consensual encounter with a Border Patrol agent cannot be suppressed.⁴⁷ However, you may be able to establish a Fourth Amendment violation if a Border Patrol agent restrained your client's freedom to walk away or took other action that would make a reasonable person feel obligated to stay and respond. In this case, the stop would constitute an investigative detention requiring reasonable suspicion of unlawful presence or criminal activity.⁴⁸ The *Brignoni-Ponce* factors apply, and reasonable suspicion cannot be based exclusively on race or ethnicity.⁴⁹ Moreover, if an officer observes a pedestrian entering a home, the officer must generally obtain a warrant or consent to enter the home.⁵⁰

Remember that a Fourth Amendment violation must be "egregious" or "widespread" to warrant the exclusion of evidence in removal proceedings. Courts' definitions of egregiousness vary, with some requiring aggravating circumstances⁵¹ and others requiring only conduct that a reasonable officer would have known to be lawful.⁵²

You should also consider arguing that a pedestrian encounter violated 8 C.F.R. § 287.8(b), which limits interrogations and seizures not amounting to arrest. As noted above, regulatory violations need not be egregious to warrant suppression, but you must show that the regulation was promulgated to benefit noncitizens and that the violation actually prejudiced interests protected by the regulation.

D. At the Border

CBP officers have broad authority at the border, which makes motions to suppress evidence obtained there very difficult. Routine stops and searches of persons and vehicles seeking entry to the United States are considered reasonable *per se* under the Fourth Amendment.⁵³ Thus, CBP

passengers with a "Mestizo physical appearance" on the basis that the encounters were consensual).

⁴⁷ See *supra*, notes 16-20.

⁴⁸ See *supra*, notes 21-24.

⁴⁹ See *supra*, notes 31-35.

⁵⁰ See American Immigration Council, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 26-28; cf. *U.S. v. Perea-Rey*, 680 F.3d 1179, 1185-87 (9th Cir. 2012); *U.S. v. Troop*, 514 F.3d 405, 409 (5th Cir. 2008).

⁵¹ *Almeida-Amaral*, 461 F.3d at 235-36; *Carcamo v. Holder*, 713 F.3d 916, 922-24 (8th Cir. 2013).

⁵² *Gonzalez-Rivera*, 22 F.3d at 1449.

⁵³ *United States v. Ramsey*, 431 U.S. 606, 619 (1977); *Carroll v. United States*, 267 U.S. 132, 154 (1925) ("Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."); *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) ("Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable

officers need not obtain a warrant or have reason to suspect a traveler is involved in illegal activity before conducting a routine stop or search at the border, which may include questioning about alienage and an individual's right to enter the United States.⁵⁴ However, border searches conducted in a particularly offensive manner — such as intrusive body cavity searches or strip searches — may still be subject to challenge under the Fourth Amendment,⁵⁵ and reasonable suspicion is required to detain a traveler at the border beyond the scope of a routine stop or search.⁵⁶ There is no clear authority on how long a person can be detained before being arrested or released.⁵⁷

Similar rules apply at the “functional equivalent” of the border, which includes fixed checkpoints near the border, intersections of two or more roads leading directly from the border, and international airports.⁵⁸ To justify searches at checkpoints or other locations considered the functional equivalent of the border, the government must show with “reasonable certainty” that the traffic in that area is primarily international and intercepts no more than a negligible number of domestic travelers.⁵⁹

cause, or warrant . . .”). Recently, CBP has begun invoking this authority on a large scale to conduct searches of electronic devices carried by individuals who present themselves at the border. *See, e.g.,* Sophia Cope, [Law Enforcement Uses Border Search Exception as Fourth Amendment Loophole](#), Electronic Frontier Foundation (Dec. 8, 2016). These searches raise a number of serious Fourth Amendment issues. *See* Stephanie Lacambra, [The Bill of Rights at the Border: Fourth Amendment Limits on Searching Your Data and Devices](#), Electronic Frontier Foundation (Apr. 3, 2017).

⁵⁴ *Ramsey*, 431 U.S. at 619. The border search exception to the Fourth Amendment is grounded in the government's recognized right to control who and what may enter the United States. *Id.* at 620.

⁵⁵ *Ramsey*, 431 U.S. at 618 n.13; *Montoya de Hernandez*, 473 U.S. at 540 n.3. *See also United States v. Irving*, 452 F.3d 110, 123 (2d Cir. 2006) (stating that reasonable suspicion would be necessary for a more invasive search, such as a strip search); *United States v. Whitted*, 541 F.3d 480, 485-86 (3d Cir. 2008) (contrasting “routine” “patdowns, frisks, luggage searches, and automobile searches” with “non-routine” “body cavity searches, strip searches, and x-ray examinations” that require reasonable suspicion).

⁵⁶ *Montoya de Hernandez*, 473 U.S. at 541-42 (requiring a “particularized and objective basis for suspecting the particular person” of illegal activity) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

⁵⁷ *Id.* at 543 (noting that the Court has “consistently rejected hard-and-fast time limits,” on length of detention and instead held that “common sense and ordinary human experience must govern over rigid criteria.”) (quoting *U.S. v. Sharpe*, 470 U.S. 675, 685 (1985)).

⁵⁸ *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973).

⁵⁹ *United States v. Jackson*, 825 F.2d 853, 859-860 (5th Cir. 1987) (en banc) (noting that “[w]hether a checkpoint merits functional equivalency status, therefore, depends entirely on the nature of the traffic passing through it”) *See also United States v. Santiago*, 837 F.2d 1545, 1548 (11th Cir. 1988) (requiring “reasonable certainty that the border was crossed” when determining whether a search took place at the functional equivalent of the border).

E. Checkpoints

CBP is authorized to operate checkpoints on roads leading away from the border to stem the flow of undocumented immigrants.⁶⁰ Even without individualized reasonable suspicion or a warrant, Border Patrol agents may conduct brief vehicle stops at fixed checkpoints to question the driver or passengers about their immigration status, request documents, or conduct a visual inspection of a car.⁶¹ They may also selectively refer individuals for secondary inspection, including on the basis of apparent Mexican ancestry.⁶²

As in the context of roving border patrols, CBP officers cannot prolong a stop beyond brief questioning or conduct a warrantless vehicle search without consent or probable cause to believe that a car contains unlawfully present immigrants or contraband.⁶³ Factors that may be considered in deciding whether there is probable cause to search a particular vehicle include the number of occupants, their appearance and behavior, their ability to speak English, their responses to a CBP officer's questions, the type of vehicle, and "indications that it may be heavily loaded."⁶⁴ The government has the burden of proof that consent was given freely and voluntarily.⁶⁵ If the government fails to sustain its burden of proof, you can establish a threshold Fourth Amendment violation. However, aggravating circumstances may be necessary to convince a court to grant a motion to suppress based on an egregious Fourth Amendment violation.

⁶⁰ *United States v. Martinez-Fuerte*, 428 U.S. 543, 545, 558-59 (1976) (noting that courts have deemed seizures at fixed checkpoints to be less intrusive than roving patrols because travelers are less likely to be taken by surprise). *See also United States v. Payan*, 905 F.2d 1376, 1378 (10th Cir. 1990) (applying the same constitutional standard to temporary checkpoints on the theory that "permanence of the physical structure is not required") (internal quotation marks omitted).

⁶¹ *Martinez-Fuerte*, 428 U.S. at 562-63, 566. *See also Melnitsenko v. Mukasey*, 517 F.3d 42, 47-48 (2d Cir. 2010) (finding no egregious violation where petitioner was stopped at a Border Patrol checkpoint and questioned for approximately three hours, although not deciding whether the seizure was a Fourth Amendment violation); *United States v. Garcia*, 616 F.2d 210, 211-12 (5th Cir. 1980) ("It is clear that, at permanent checkpoints, stopping and questioning and referral of motorists to a secondary inspection area are permissible under the Fourth Amendment, even in the absence of any individualized suspicion, much less probable cause."); *United States v. Rascon-Ortiz*, 994 F.2d 749, 753-55 (10th Cir. 1993) (noting that a Border Patrol agent may ask a few additional questions during the course of a routine inspection where "suspicious circumstances" exist).

⁶² *Martinez-Fuerte*, 428 U.S. at 563-64.

⁶³ *United States v. Ortiz*, 422 U.S. 891, 896-97 (1975); *Martinez-Fuerte*, 428 U.S. at 567.

⁶⁴ *Ortiz*, 422 U.S. at 897.

⁶⁵ *See, e.g., Royer*, 460 U.S. at 497 (noting that government must show more than "mere submission to a claim of lawful authority"); *cf. United States v. Bews*, 715 F. Supp. 1206, 1212 (W.D.N.Y. 1989) (holding that consent was not freely given where agents held defendant's identification, defendant was unfamiliar with U.S. law, and defendant was unlawfully detained at the time of consent).

F. Beyond the 100-Mile Limit

CBP's statutory authority to conduct searches of vehicles, vessels, railway cars, aircraft, and other conveyances must be carried out within a reasonable distance of the border. A "reasonable distance" is defined by regulation to mean "within 100 air miles from any external boundary of the United States."⁶⁶

As the Supreme Court has recognized, even roads that are proximate to the border "carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well."⁶⁷ Thus, proximity to the border, while significant, is one of many factors to be evaluated in determining whether a stop was based on reasonable suspicion.⁶⁸ In cases where the stop occurred far enough from the border to preclude an inference that the trip originated outside the country, the Fifth Circuit views other factors with heightened scrutiny.⁶⁹ Proximity to the border is of limited value where the border is itself in close proximity to a metropolitan area, or even smaller but densely populated cities.⁷⁰

The only other explicit geographical limitation on CBP's immigration enforcement authority is that an immigration officer may, within twenty-five miles of the border, have warrantless "access to private lands, but not dwellings" to prevent unlawful entries.⁷¹ Under the Fourth Amendment, however, law enforcement officers must have consent or a warrant not only to enter a home, but also to enter the immediately surrounding area, which is known as the "curtilage."⁷² Thus,

⁶⁶ See 8 C.F.R. § 287.1(a)(2) (interpreting the "reasonable distance" requirement in INA § 287(a)(3)).

⁶⁷ *Brignoni-Ponce*, 422 U.S. at 882.

⁶⁸ See, e.g., *United States v. Gutierrez-Orozco*, 191 F.3d 578, 581-83 (5th Cir. 1999) (finding that the *Brignoni-Ponce* factors apply beyond the 100-mile limit and that a stop more than 200 miles from the border was based on reasonable suspicion); *United States v. Olivares-Pacheco*, 633 F.3d 399, 402-05, 409 (5th Cir. 2011) (reversing denial of suppression motion because, considering all *Brignoni-Ponce* factors, Border Patrol agent did not have reasonable suspicion for a stop over 200 miles from the border); *United States v. Valdes-Vega*, 685 F.3d 1138, 1147-48 (9th Cir. 2012) (finding that a driver of a pickup truck with a Mexican license plate who committed a traffic infraction 70 miles north of U.S.-Mexico border and failed to look a Border Patrol agent in the eyes did not fit a category narrow enough to justify reasonable suspicion of smuggling).

⁶⁹ *United States v. Rico-Soto*, 690 F.3d 376, 380 (5th Cir. 2012) (examining other *Brignoni-Ponce* factors "charily" when stop occurred more than fifty miles from the border).

⁷⁰ *United States v. Sigmond-Ballesteros*, 285 F.3d at 1125-26 (9th Cir. 2002); *United States v. Venzor-Castillo*, 991 F.2d 634, 639-40 (10th Cir. 1993).

⁷¹ INA § 287(a)(3).

⁷² This is memorialized by regulation, see 8 C.F.R. § 287.8(f)(2), and reflected in case law. See *United States v. Romero-Bustamente*, 337 F.3d 1104, 1108-09 (9th Cir. 2003) (rejecting as absurd a reading of INA § 287(a)(3) that granted CBP unlimited warrantless search authority because Congress could not have intended to provide "agents the unchecked ability to enter every backyard in metropolitan San Diego, Detroit, Buffalo, and El Paso, all of which are well

unauthorized CBP activity within a home or its curtilage may provide a viable basis for a motion to suppress.

III. Widespread Fourth Amendment Violations

The Supreme Court has suggested that the Court’s conclusions about the application of the exclusionary rule in civil immigration proceedings might change if Fourth Amendment violations by immigration officers became “widespread.”⁷³ In recent years, courts have affirmed the possibility—at least in theory—of motions to suppress based on widespread Fourth Amendment violations.⁷⁴ In *Oliva-Ramos v. Attorney General*, the Third Circuit remanded to enable the Petitioners to present additional evidence of such violations, suggesting that, if substantiated, their allegations could warrant suppression of evidence based on egregious and widespread violations.⁷⁵ Following *Oliva-Ramos*, three other courts of appeal have reaffirmed the possibility of suppression based on widespread constitutional violations, but no circuit has actually granted suppression on this basis.⁷⁶ Therefore, we caution against moving to suppress evidence solely on this basis. Although both CBP and ICE have committed such violations with increasing frequency in recent years,⁷⁷ the authors are not aware of any decisions granting motions to suppress on this basis alone.

within twenty-five miles of external borders of the United States”); *United States v. Castellanos*, 518 F.3d 965, 971-72 (8th Cir. 2008).

⁷³ *Lopez-Mendoza*, 468 U.S. at 1050. See also *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 234 (2d Cir. 2006) (recognizing the exception for widespread violations).

⁷⁴ See, e.g., *Oliva-Ramos v. Attorney General*, 694 F.3d 259, 279-82 (3d Cir. 2012).

⁷⁵ *Id.* at 282. While pursuing relief before the BIA, *Oliva-Ramos* acquired documents through a Freedom of Information Act request, including an ICE memorandum specifying an arrest quota for “fugitive aliens” and permitting ICE agents to count collateral arrests of noncitizens found at a fugitive’s location towards their quota. *Id.* at 269. Because *Oliva-Ramos*’ arrest had been collateral, he then moved to remand his case to the immigration judge for a new suppression hearing, arguing that such a quota encouraged widespread Fourth Amendment violations. *Id.* The BIA denied his motion. *Id.*

⁷⁶ *Garcia-Aguilar v. Lynch*, 806 F.3d 671, 674 n2 (1st Cir. 2015) (endorsing in dicta the availability of suppression for widespread violations); *Cotzokay v. Holder*, 725 F.3d 172, 179 (2d Cir. 2013) (affirming in dicta the possibility of motions to suppress based on widespread violations and citing *Oliva-Ramos*); *Martinez Carcamo v. Holder*, 713 F.3d 916, 922 (8th Cir. 2013) (affirming possibility of suppression for widespread violations but declining to hold whether it would affirmatively compel exclusion).

⁷⁷ See Homeland Security Advisory Council, DHS, [Final Report of the Homeland Security Advisory Council](#) (2016); The Center For Latin American Studies, University of Arizona, [In The Shadow of the Wall: Family Separation, Immigration Enforcement and Security](#) 23-27 (2013); Kino Border Initiative, [Documented Failures: The Consequences of Immigration Policy on the U.S.-Mexico Border](#) (February 2013); Amnesty Int’l, [In Hostile Terrain: Human Rights Violations in Immigration Enforcement in the U.S. Southwest](#) 34–41 (2012). No More Deaths, [A Culture of Cruelty: Abuse and Impunity in Short-term U.S. Border Patrol Custody](#) 42–46 (2011); OneAmerica, [The Growing Human Rights Crisis Along Washington’s Northern Border](#) 11–13 (Apr. 2012); New York Civil Liberties Union, [Justice Derailed: What Raids on](#)

Nonetheless, we encourage attorneys to make arguments based on the prevalence of Fourth Amendment violations at the local, regional or national level. In the context of roving border patrols, for example, some attorneys have sought to establish a widespread pattern of investigatory stops and detentions of individuals without the requisite “reasonable suspicion” under the Fourth Amendment. Such allegations should be thoroughly documented with reports, declarations from other individuals subjected to similar treatment, or other evidence.

IV. Suppression of Evidence Under the Fifth Amendment

An immigration judge may suppress evidence under the Fifth Amendment if the manner of seizing the evidence was “so egregious that to rely on it would offend the [F]ifth [A]mendment’s due process requirement of fundamental fairness.”⁷⁸ Even where CBP conduct is not egregious, the Fifth Amendment may require suppression of evidence if officers’ actions “undermined the reliability of evidence in dispute.”⁷⁹

The Due Process Clause of the Fifth Amendment applies to interrogations in primary and secondary inspection, among other contexts. Motions to suppress under the Fifth Amendment often focus on whether confessions were involuntary or coerced, which would preclude their use in subsequent removal proceedings.⁸⁰

[New York’s Trains and Buses Reveal About Border Patrol’s Interior Enforcement Practices](#) 18–20 (Nov. 2011). *See also* Stella Burch Elias, *Good Reason to Believe: Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 Wisc. L. J. 1109 (2008).

⁷⁸ *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980).

⁷⁹ *Singh v. Mukasey*, 553 F.3d 207, 215 (2d Cir. 2009) (quoting *Almeida-Amaral*, 461 F.3d at 235). For further discussion of motions to suppress based on violations of the Fifth Amendment, see American Immigration Council, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 28-32.

⁸⁰ *See Singh*, 553 F.3d at 215-16 (finding that statements made to CBP were unreliable and should have been suppressed where officers held an individual in custody in an area with armed, uniformed guards for at least four hours in the middle of the night and pressured him with threats of imprisonment, among other factors); *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980) (respondent made prima facie showing that admissions were given involuntarily and the government presented no contrary evidence; proceedings terminated). *See also Navia-Duran v. INS*, 568 F.2d 803, 810 (1st Cir. 1977) (quoting *Bong Youn Choy v. Barber*, 279 F.2d 642, 646 (9th Cir. 1960) (“Expulsion cannot turn upon utterances cudged from the alien by governmental authorities; statements made by the alien and used to achieve his deportation must be voluntarily given.”)). *But see Gonzaga-Ortega v. Holder*, 694 F.3d 1069, 1072, 1076 (9th Cir. 2012), *amended and superseded by Gonzaga-Ortega v. Holder*, 736 F.3d 795 (9th Cir. 2013) (affirming denial of motion to suppress based on alleged Fifth Amendment violation where respondent was detained in secondary inspection for approximately 28 hours, fed only twice, prevented from contacting anyone outside the facility, and not informed of right to retain counsel or that his statements could be used against him in subsequent proceedings).

An involuntary or coerced confession could also give rise to a separate argument for suppression based on a violation of 8 C.F.R. § 287.8(c)(2)(vii), which prohibits the use of threats, coercion, or physical abuse to induce an individual to waive rights or make a statement. As discussed previously, suppression will be granted only if the regulatory violation prejudiced the rights of a noncitizen that the regulation was intended to protect.⁸¹

The BIA has not issued any published decisions granting motions to suppress based on alleged Fifth Amendment or related regulatory violations by CBP. However, in a set of unpublished decisions, the BIA found that suppression of coerced confessions made to CBP was appropriate under the Fifth Amendment, where minors were detained, prevented from contacting their parents or attorneys, then interrogated and threatened with deportation for nine hours.⁸²

Under current case law, immigration courts are unlikely to suppress statements even if individuals were not informed of their right to counsel, the reasons for their arrest, or that their statements can be used against them. Unlike in criminal cases, the failure to provide *Miranda* warnings prior to interrogations does not render subsequent statements inadmissible in removal proceedings.⁸³ 8 C.F.R. § 287.3(c) does require immigration officers to provide similar advisals, but the BIA has held that they need not be provided until after a Notice to Appear has been filed with the immigration court.⁸⁴ The Second, Fourth, Seventh, and Ninth Circuits have reached the same conclusion.⁸⁵

⁸¹ For further discussion of motions to suppress based on regulatory violations, see American Immigration Council, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 15-16.

⁸² See *Oscar J. Corona*, A095-422-301, 2006 Immig. Rptr. LEXIS 7854, *3-*5 (BIA Nov. 29, 2006); *Jaime H. Damian*, A095-422-307, 2006 Immig. Rptr. LEXIS 7890, *3-*5 (BIA Nov. 29, 2006); *Yuliana Huicochea*, A095-422-308, 2006 Immig. Rptr. LEXIS 8420, *3-*5 (BIA Nov. 29, 2006); *Luis Miguel Nava*, A095-422-302, 2006 Immig. Rptr. LEXIS 8918, *3-*5 (BIA Nov. 29, 2006).

⁸³ *Trias-Hernandez v. INS*, 528 F.2d 366, 368 (9th Cir. 1975); *Matter of Rojas*, 15 I&N Dec. 722, 724 (BIA 1976).

⁸⁴ *Matter of E-R-M-F-*, 25 I&N Dec. 580, 584-85 (BIA 2011).

⁸⁵ *Maldonado v. Holder*, 763 F.3d 155, 164 (2d Cir. 2014); *Yanez-Marquez v. Lynch*, 789 F.3d 434, 474 (4th Cir. 2015); *Aparicio-Brito v. Lynch*, 824 F.3d 674, 683 (7th Cir. 2016); *Samayoa-Martinez v. Holder*, 558 F.3d 897, 901-02 (9th Cir. 2009); cf. *Oliva-Ramos v. Attorney Gen. of U.S.*, 694 F.3d at 286 (citing *Samayoa-Martinez* for the proposition that the advisals in 8 C.F.R. 292.5 do not need to be given until a Notice to Appear has been filed with the immigration court).