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Now the Border is Everywhere: Why a Border Search Exception Based on Race Can No Longer Stand

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**NOW THE BORDER IS EVERYWHERE: WHY A BORDER
SEARCH EXCEPTION BASED ON RACE
CAN NO LONGER STAND**

Sarah Houston[†]

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I. INTRODUCTION

The faster we deport undocumented immigrants, the safer our country will be.¹ This belief has become a foundational tenant of the Trump administration’s immigration regime and its increased use of the expedited removal program.²

Expedited removal was originally introduced in 1996 as an amendment to the Immigration and Nationality Act (INA), granting the executive branch discretion to accelerate the deportation process in limited

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¹ Ahead of the 2016 elections, Trump “pledged a ‘deportation force’ that would remove millions of unauthorized immigrants,” stating that “We have at least 11 million people in this country that came in illegally. They will go out.” Muzaffar Chishti & Sarah Pierce, *Trump’s Promise of Millions of Deportations Is Yet to Be Fulfilled*, MIGRATION POLICY INSTITUTE (Oct. 29, 2020), <https://www.migrationpolicy.org/article/trump-deportations-unfinished-mission> [<https://perma.cc/DX32-8SFY>].

² *A Primer on Expedited Removal*, AM. IMMIGR. COUNCIL (July 22, 2019), <https://www.americanimmigrationcouncil.org/research/primer-expedited-removal> [<https://perma.cc/ES2V-LTZY>] (describing the surge in expedited removal deportations, which by 2017 accounted for thirty-five percent of all removals from the U.S.).

contexts.³ Under this fast-track program, undocumented immigrants who have entered the country in the last two weeks can be deported without any hearing or meaningful review, as long as they are apprehended within 100 miles of any U.S. border.⁴ However, the current administration was concerned that the program was not being utilized to its full statutory extent.⁵

On July 23, 2019, the Department of Homeland Security (DHS) announced a drastic expansion to the program by altering the geographic requirements of these fast-tracked deportations.⁶ Under this expanded policy, any undocumented individual, no matter how far they are from the border, can be placed into this fast-track system without an opportunity to be heard or any type of review.⁷ Professor Mary Holper argues that “expedited removal has been expanded to its maximum reach. The border is everywhere.”⁸ Several organizations immediately challenged this rulemaking. U.S. District Judge Ketanji Brown Jackson issued a preliminary injunction against the policy change after concluding that the government did not follow proper notice-and-comment procedures.⁹

Regardless of how the legal battle unfolds, President Trump’s expansion of expedited removal highlights a larger shift in immigration enforcement from the border to the interior of the country. U.S. Immigration policy has traditionally focused on the southern border, granting Customs and Border Protection (CBP) and federal agents the unique power to stop and detain anyone they suspect to be undocumented.¹⁰ However, the government’s use of these heightened enforcement measures has spread far past the borderlands, as DHS sends tactical teams to

³ CONG. RES. SERV., RL33109, IMMIGR. POL’Y ON EXPEDITED REMOVAL OF ALIENS (2009), <https://www.everycrsreport.com/reports/RL33109.html#fn18> [<https://perma.cc/NJ8J-6S2A>].

⁴ *Id.* (arguing that the program grants border agents unchecked authority and increases erroneous deportations).

⁵ Kat Lonsdorf, *Federal Judge Blocks Trump Move To Fast-Track Deportations*, NAT’L PUB. RADIO (Sept. 28, 2019), <https://www.npr.org/2019/09/28/765357363/federal-judge-blocks-trump-move-to-fast-track-deportations> [<https://perma.cc/C5Z6-H3UT>]. See Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 30, 2017).

⁶ Laurence Benenson, *Expanded Expedited Removal*, NAT’L IMMIGR. F. (July 25, 2019), <https://immigrationforum.org/article/expanded-expedited-removal/> [<https://perma.cc/TY9L-S9TD>].

⁷ *Id.*

⁸ Mary Holper, *Expanded Expedited Removal: Can Fourth Amendment “Border Exceptionalism” Be Everywhere Now?*, AM. CONST. SOC’Y: EXPERT F. (Aug. 8, 2019), <https://www.acslaw.org/expertforum/expanded-expedited-removal-can-fourth-amendment-border-exceptionalism-be-everywhere-now/> [<https://perma.cc/76AG-VAX3>].

⁹ Lonsdorf, *supra* note 5 (noting that the American Civil Liberties Union, American Immigration Council, and Simpson Thacher & Bartlett LLP were granted a preliminary injunction in the DDC on September 27, 2019).

¹⁰ CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 214 (Am. Bar Ass’n 2017) (2015) [hereinafter HERNÁNDEZ, CRIMMIGRATION].

sanctuary cities,¹¹ sets up checkpoints and patrols highways hundreds of miles from any border, and strategically increases the number of Immigration and Customs Enforcement (ICE) raids nationwide.¹² This dispersion of immigration enforcement power raises serious Fourth Amendment issues.¹³ Border officials who are legally justified in using race as a predictive factor because of their proximity to the border, as dictated by the seminal cases *United States v. Brignoni-Ponce*¹⁴ and *United States v. Martinez-Fuerte*,¹⁵ are highly unlikely to stop acting on these same race-based assumptions as they creep towards the interior.¹⁶ However, the judiciary never meant for the border exception to be used in such an expansive way.¹⁷ The Supreme Court's allowance of the use of race in key cases challenging law enforcement's treatment of Latinos at border stops and searches such as *Brignoni-Ponce*, *I.N.S. v. Delgado* and *United States v. Martinez-Fuerte* (referenced collectively as the "undocumented cases") is based on the outdated notion that geography, when paired with race, is predictive of illegality.¹⁸ Essentially, this notion suggests that anyone who is

¹¹ Caitlin Dickerson & Zolan Kanno-Youngs, *Border Patrol Will Deploy Elite Tactical Agents to Sanctuary Cities*, N.Y. TIMES (Feb. 14, 2020), <https://www.nytimes.com/2020/02/14/us/Border-Patrol-ICE-Sanctuary-Cities.html> [<https://perma.cc/SQZ6-C4Z9>] (describing how officers from the border are being re-assigned to interior regions to assist ICE and "to increase arrests in the sanctuary jurisdictions by at least thirty-five percent.").

¹² Franklin Foer, *How Trump Radicalized ICE*, THE ATLANTIC (Sept. 2018), <https://www.theatlantic.com/magazine/archive/2018/09/trump-ice/565772/> [<https://perma.cc/XRR6-ENBR>] (describing how border patrol has become a creeping and "regular presence in cities such as Las Vegas and San Antonio—and its officers can be seen cruising highways in northern Ohio.").

¹³ Holper, *supra* note 8 (arguing that "expanded expedited removal violates detainees' Fourth Amendment rights . . . [and] seizing and jailing thousands of people suspected of immigration violations who are found anywhere within the U.S. is a far cry from the brief stops of vehicles or persons, which the Court upheld when they occur near the border.").

¹⁴ *United States v. Brignoni-Ponce*, 422 U.S. 873, 885–86 (1975).

¹⁵ *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976).

¹⁶ Deborah Anthony, *The U.S. Border Patrol's Constitutional Erosion in the "100-Mile Zone"*, 124 PENN. ST. L. REV. 391, 402–03 (2020) (describing Border Patrol agents' targeting stops and interrogations towards individuals based on their apparent ethnicity.) These apparent biases are seen at both checkpoints near border areas and in locations hundreds of miles away. *Id.* at 411. Border Patrol agents have reportedly offered pretextual reasons for stopping particular motorists, including suspicion based on the way they hold the steering wheel or the time of day they are driving, among others. *Id.* In some cases, agents have reportedly admitted to profiling, with one agent stating a motorist was stopped for looking "Mexican." *Id.*

¹⁷ *Id.* at 423 (stating that in the context of Border Patrol operations, the Fourth Amendment is not functioning as a restraint, as intended).

¹⁸ *Id.* I adopt Carbado & Harris' categorization of these three cases that define the permissible use of race in border stops and searches as the "undocumented cases" which includes *Brignoni-Ponce*, 422 U.S. 873, *I.N.S. v. Delgado*, 466 U.S. 210 (1984), and *Martinez-Fuerte*,

located near the border and appears Latino is likely to be undocumented. The Court concluded that this notion's probability was high enough to justify a more lenient Fourth Amendment standard near the border, allowing race to be used as a permissible factor within provable cause analysis.¹⁹ This border search exception perpetuates a belief that agents have special skills to determine if someone looks "illegal" and reflects the Court's continuing ambiguity towards Latinos as a race.²⁰

The Trump administration's dramatic escalation of immigration enforcement nationwide forces us to confront the dangers of a Fourth Amendment exception based on probabilistic calculations in a rapidly changing environment. Any exception to the Fourth Amendment founded on race's relation to other loosely defined factors, such as proximity to the border, opens the exception to abuse. This notion is especially true when the Court does not revisit the predictive value of those factors. Indeed, the executive branch uses this judicial authorization of race along with the legislative authority given by the INA to push the border search jurisprudence beyond its intended use.

Although scholars and policymakers have questioned the "undocumented cases" for thirty years,²¹ the proposed expansion of expedited removal makes the "undocumented cases" even more untenable than before. As the Latino population disperses across the country in different migration patterns, and more CBP and ICE officials apply their border tactics in neighborhoods further from any border, it is evident that proximity to Mexico no longer holds the same predictive value. Geography can no longer be a justification for the use of race in the immigration enforcement context. It is time for the Court to strike down the outdated border search exception, which threatens Latinos' liberties across our nation.²²

428 U.S. 543; see also Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLAL. REV. 1543, 1550 (2011).

¹⁹ *Brignoni-Ponce*, 422 U.S. at 878, 881.

²⁰ Carbado & Harris, *supra* note 18, at 1597 (arguing that "the erasure of Latinos as a race has a long juridical history facilitated by their formal classification as white. Conceiving of Latinos as whites—as an ethnic rather than a racial group—has made their experience with racial profiling less legible as a racial practice.").

²¹ See, e.g., BERNARD E. HARCOURT, *THE ROAD TO RACIAL PROFILING WAS PAVED BY IMMIGRANTS: RACIAL CRIMINALIZATION OF MIGRANTS IN THE 21ST CENTURY* 237, 248–51 (Salvatore Palidda, ed. 2011); see also Kristen Connor, *Updating Brignoni-Ponce: A Critical Analysis of Race-Based Immigr. Enforcement*, 11(3) N.Y.U.J. LEGIS. & PUB. POL'Y 567, 591 (2008) (describing several congressional attempts to overrule *Brignoni-Ponce* and force Border Patrol agents to end racial profiling through the End Racial Profiling Act).

²² I use the term "Latino" throughout this paper as a blanket term to encompass persons from Mexico, Central, and South America. See Connor, *supra* note 21, at n.5 (adopting Latino in the same way, but acknowledging that the "term[] ignores the racial and cultural diversity of the Latino population, which includes people with various colors of skin, hair, and eyes.").

This paper first traces the enduring legacy of border exceptionalism in both the judicial and executive sphere. It then presents the three main reasons why race should no longer be deemed a justifiable factor in the immigration enforcement context. First, the make-up of the country is significantly different than when the “undocumented cases” were decided, decreasing the probability that a person who appears Latino will, in fact, be undocumented.²³ Second, the immigration enforcement regime has drastically expanded beyond the border region and its traditional federal focus, as state and local actors throughout the country take an active role in immigration enforcement through 287(g) agreements and state legislation.²⁴ The widening scope of this regime increases the likelihood that race is being used in contexts never condoned by the judiciary.²⁵ Finally, the immigration exception to racial profiling has been unequally applied by the lower courts,²⁶ resulting in an unregulated space in which drug and immigration enforcement converge.²⁷ As the immigration system expands in such drastic ways, courts must finally acknowledge that this jurisprudence has led to the mass incarceration of Latinos, who are significantly overrepresented in removal proceedings and jails.²⁸

II. HISTORICAL BACKGROUND

A. *History of Expedited Removal*

In 1996, Congress passed expedited removal as part of the Illegal Immigration Reform and Immigration Responsibility Act (IIRAIRA) “to combat what was perceived to be an abuse of the asylum system by

²³ Richard Fry and Kim Parker, *Early Benchmarks Show ‘Post-Millennials’ on Track to Be Most Diverse, Best-Education Generation Yet*, PEW RESEARCH CTR., SOC. & DEMOGRAPHIC TRENDS (Nov. 15, 2018), <https://www.pewsocialtrends.org/2018/11/15/early-benchmarks-show-post-millennials-on-track-to-be-most-diverse-best-educated-generation-yet/> [https://perma.cc/M8VX-LPZ2] (stating that the number of Latinos born in the U.S. has increased over time, with twenty-four percent of Latino Millennials having been born outside of the U.S. in 2002, compared to only twelve percent of Latino post-Millennials in 2018).

²⁴ State and local law enforcement are authorized to act as de facto immigration officers under 287(g) agreements, named for the section of the Immigration and Nationality Act of 1952. *National Map of 287(g) Agreements*, IMMIGRANT LEGAL RES. CTR., <https://www.ilrc.org/national-map-287g-agreements> [https://perma.cc/6CZC-WPPA].

²⁵ *Id.*

²⁶ See *infra* note 139 and accompanying text (listing cases that illustrate conflicting interpretations of the border search exception).

²⁷ See *infra* Part III.C (describing how border enforcement officers have become leading figures in drug enforcement efforts).

²⁸ See generally TANYA MARIA GOLASH-BOZA, *DEPORTED: IMMIGRANT POLICING, DISPOSABLE LABOR AND GLOBAL CAPITALISM* (2015) (observing that Latino males are significantly overrepresented in the number of deportees relative to their percentage of the immigrant population and the unauthorized immigrant population).

unauthorized migrants.²⁹ Expedited removal allowed low-level immigration enforcement officials to deport any non-citizen they apprehended within 100 miles of the border who had been present in the U.S. for less than two weeks.³⁰ As a policy, DHS has prioritized the expedited removal of Mexicans and Canadians with prior criminal records.³¹ But, unlike immigrants in removal hearings who have the right to present their case in front of an immigration judge in court and to appeal,³² those apprehended under expedited removal are given no opportunity to hire representation or explain themselves in a formal hearing.³³

Instead, the CBP officer who initially apprehends the individuals wears three hats: law enforcer, prosecutor, and judge.³⁴ They have unchecked authority to determine if the detainee fits the law's criteria, and the burden rests on the detainee to show they do not fit the criteria.³⁵ Without the time to gather evidence or call an attorney, most non-residents detained under this process are deported within one day.³⁶ Many critics of the policy argue that the lack of due process and the likelihood of erroneous deportation to a country where the person faces imminent harm or death is too great to take away the right to appeal the decision.³⁷ However, appealing an expedited removal determination is almost impossible.³⁸

²⁹ Am. Civ. Liberties Union, *American Exile: Rapid Deportations that Bypass the Courtroom* 1, 4 (2014), https://www.acLU.org/sites/default/files/field_document/120214-expeditedremoval_0.pdf [<https://perma.cc/SWL3-NW6D>].

³⁰ See 8 U.S.C. § 1225(b)(1) (stating that anyone at the border who makes misrepresentations and false claims of U.S. citizenship or lacks valid entry documents is subject to expedited removal).

³¹ 69 Fed. Reg. 48877–48881 (Aug. 11, 2004).

³² 8 U.S.C. § 1229a(a)(1).

³³ Kristin Macleod-Ball, Aaron Reichlin-Melnick, Trina Realmuto, Mary Kenney & Jennifer Chang Newell, *Practice Advisory-Expedited Removal: What has Changed Since Executive Order No. 13767, Border Security and Immigration Enforcement Improvements*, NAT'L IMMIGR. PROJECT 9 (Feb. 20, 2017), https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2017_17Feb-expedited-removal.pdf [<https://perma.cc/7M2C-KXGG>].

³⁴ *Id.* at 3.

³⁵ *Id.*

³⁶ *Fact Sheet: Expedited Removal*, NAT'L IMMIGR. F. (June 4, 2019), <https://immigrationforum.org/article/fact-sheet-expedited-removal/> [<https://perma.cc/PN6N-MUCA>].

³⁷ U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ASYLUM SEEKERS IN EXPEDITED REMOVAL – A STUDY AUTHORIZED BY SECTION 605 OF THE INTERNATIONAL RELIGIOUS FREEDOM ACT OF 1998 (2005), <https://www.uscirf.gov/reports-briefs/special-reports/report-asylum-seekers-in-expedited-removal> [<https://perma.cc/FT5T-SMQX>] (finding that border patrol officers were illegally turning people away who were seeking asylum with follow up reports seeing little improvements).

³⁸ The Immigration and Nationality Act (INA) bars appellate courts from reviewing expedited removal orders on petitions for review. See 8 U.S.C. §§ 1252(a)(2)(A), (e); see also *Shunaula v. Holder*, 732 F.3d 143 (2d Cir. 2013); *Khan v. Holder*, 608 F.3d 325 (7th Cir. 2010);

There has always been a geographical rationale underpinning the statute, and all successive extensions of the program “have focused almost exclusively on geographic location.”³⁹ The statute allows officers near the border to stop new entrants right when they enter the country,⁴⁰ saving U.S. tax dollars and preventing undocumented people from spending extended time in detention. It is the metaphorical plug that stops the undocumented immigrants’ flood before they travel to other areas where they are more difficult to apprehend. But proponents can no longer justify this process by calling on geography, arguing that those within 100 miles of the border are much more likely to be undocumented than anyone else. When President Trump issued an Executive Order⁴¹ exposing a much larger population to this fast-track system, he signaled to the entire country that the immigration priorities of the past no longer guided enforcement practices of the present.⁴² To better understand the dangers of an expedited removal process pushed to its statutory limit, it is necessary to first analyze the border exception that allows officers to target Latinos and place them on this fast track solely because of their race.

B. Immigration Exceptionalism on the Border

Although U.S. courts have agreed that “[r]acially selective law enforcement violates this nation’s constitutional values at the most fundamental level,”⁴³ they have carved out an exception when it comes to

Brumme v. I.N.S., 275 F.3d 443 (5th Cir. 2001). It does allow for Habeas petitions in very limited situations, but only if a petitioner can show they are a legal permanent resident, refugee, or were granted asylum. 8 U.S.C. §§ 1252(e)(2)(A)-(C).

³⁹ Ebba Gebisa, *Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, 1 U. CHI. LEGAL F. 565, 579 (2007) (noting how the 2002, 2004, and 2006 expansions applied the fast-track to larger swaths of land and sea, “conflict[ing] with the traditional due process framework whereby non-citizens who have already entered the United States are afforded traditional due process rights.”).

⁴⁰ 8 U.S.C. § 1225(a)(3).

⁴¹ Exec. Order No. 13,767, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8,793 (Jan. 25, 2017).

⁴² See Halimah Abdullah and Alexandra Jaffe, *Trump Signs Executive Orders Aimed at Cracking Down on Illegal Immigration*, NBC NEWS (Jan. 25, 2017, 4:40 PM), <https://www.nbcnews.com/news/us-news/trump-signs-executive-orders-aimed-cracking-down-illegal-immigration-n712096> [<https://perma.cc/N585-99ZL>].

⁴³ Marshall v. Columbia Lea Reg’l Hosp., 345 F.3d 1157, 1167 (10th Cir. 2003). See also Gratz v. Bollinger, 539 U.S. 244 (2003) (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 270 (1995), stating that “any person, of whatever race, has right to demand that any governmental actor subject to Constitution justify any racial classification subjecting that person to unequal treatment under strictest of judicial scrutiny.”); see generally WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 43-48 (1988); John P. Frank & Robert F. Mumro, *The Original Understanding of “Equal Protection of the Laws,”* 1972 WASH. U. L. REV. 421, 445-46.

law enforcement activity on the border.⁴⁴ Devon W. Carbado and Cheryl I. Harris argue that the Supreme Court has created an “immigration exceptionalism” within Fourth Amendment jurisprudence by constitutionalizing the use of race in the immigration context through its “undocumented cases.”⁴⁵ The “undocumented cases,” are not widely recognized or discussed as examples of racial profiling within criminal procedure scholarship.⁴⁶ But in each case, race is used as a predictive factor for illegality.⁴⁷ *Brignoni-Ponce* required an officer to have reasonable suspicion before stopping a vehicle but clarified that race could be one of several factors the officer relied on to overcome the reasonable suspicion bar if the stop was near the border.⁴⁸ The Court justified this exception to the Fourth Amendment’s prohibition on the use of race by emphasizing the importance of border control efforts in the national security arena, which required greater executive discretion in such a high-stakes context.⁴⁹ *Martinez-Fuerte* went a step further, establishing the rule that no reasonable suspicion was necessary for officers to refer a vehicle to a secondary inspection area near the border because “the intrusion is sufficiently minimal [so] that no particularized reason need exist to justify it.”⁵⁰ The Court ignored legitimate stigmatization concerns when it gave border patrol officers wide discretion to order anyone to a secondary site for further inspection, even if this order was based solely on their apparent Mexican ancestry.⁵¹ Justice Brennan lamented the majority’s decision in his clear dissent: “[t]hat law in this country should tolerate use of one’s ancestry as probative of possible criminal conduct is repugnant under any circumstances.”⁵² Bernard E. Harcourt argues that these early cases, still the only two Supreme Court cases to expressly approve of race as a factor in an officer’s decision to stop and investigate an individual, “paved the constitutional path to racial profiling.”⁵³ This path is firmly intact, as

⁴⁴ Carbado & Harris, *supra* note 18, at 1550.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975) (“The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.”).

⁴⁹ *Id.* at 878–81 (holding that stops are nothing more than a “minimal intrusion” and the “public interest demands effective measures to prevent the illegal entry of aliens at the Mexican Border”).

⁵⁰ *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976).

⁵¹ *Id.* at 562–64.

⁵² *Id.* at 571 n.1 (Brennan, J., dissenting).

⁵³ HARCOURT, *supra* note 21, at 251.

evidenced by the fact that virtually no federal constitutional challenges to racial profiling have prevailed since *Brignoni*.⁵⁴

When the Court rejected the heightened scrutiny traditionally applied to race-based determinations by overtly condoning it in the immigration context, it justified this deviation by emphasizing the border's centrality in the nation's fight for national security.⁵⁵ The Court's decisions reflect a belief that took hold of the nation in the late 1970s and early 1980s that "there is something uniquely difficult and uniquely dangerous about the border."⁵⁶ The "undocumented cases" were decided in a period when the war on drugs permeated the national consciousness, and the southwest border was viewed as the weak link facilitating the epidemic.⁵⁷ Politicians created a national discourse that amplified the border's dangerousness by blending drug and immigration concerns, justifying the increased power given to border patrol agents through the language of war.⁵⁸ According to César Cuauhtémoc García Hernández, "the Supreme Court's cases about stops at some distance from the international boundary make it clear that, in the justices' view, the border region is exceptional" and its officers, who are vastly outnumbered by stealth migrants, "need extraordinary flexibility if they are to successfully fight crime."⁵⁹ But this jurisprudence unintentionally strengthened long-held racial connections to exclusion. When the Court stepped outside the bounds of normal Fourth Amendment doctrine, it constitutionalized the idea that "apparent Latino ancestry renders a person presumptively an undocumented noncitizen" even if they are a U.S. citizen or lawful green card holder.⁶⁰

The executive branch has also routinely upheld the use of race to justify immigration enforcement encounters, even when it forbade racial

⁵⁴ *Id.*

⁵⁵ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 885–87 (1975); *Martinez-Fuerte*, 428 U.S. at 563; Carbado & Harris, *supra* note 18, at 1607 ("[T]he U.S. Department of Justice guidelines on racial profiling, which seek to ban the practice, cite [*Brignoni-Ponce*] as a basis for instructing officers that they may consider race in making investigatory stops at the borders or in connection with national security.").

⁵⁶ HERNÁNDEZ, CRIMMIGRATION *supra* note 10; see e.g., *United States v. Ramsey*, 431 U.S. 606, 619 (1977) ("Border searches, then, from before the adoption of the Fourth Amendment, have been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside.").

⁵⁷ HERNÁNDEZ, CRIMMIGRATION *supra* note 10, at 217.

⁵⁸ *Id.* (chronicling how border security became a top national security issue as "the language of war that was gaining popularity in the drug context was repurposed to discuss immigration").

⁵⁹ César Cuauhtémoc García Hernández, *Racial Profiling in Immigration Policing Lives on*, CRIMMIGRATION BLOG (Dec. 9, 2014) [hereinafter Hernández, *Racial Profiling in Immigration Policing*], http://crimmigration.com/2014/12/09/racial-profiling-in-immigration-policing-lives-on/#_ftnref2 [https://perma.cc/339E-N3QL].

⁶⁰ Carbado & Harris, *supra* note 18, at 1546.

considerations everywhere else. In 2014, the country was in a period of acute racial tension after police shot and killed Tamir Rice, Michael Brown, and Eric Garner, but none of the white officers were charged in the deaths of these three African American victims.⁶¹ The Department of Justice responded by expanding its prohibition on racial profiling.⁶² The 2014 DHS Guidance Memo to federal enforcement officials on the use of race, ethnicity, and other protected categories was praised as a step in the right direction towards the eradication of race in law enforcement decision making.⁶³ However, footnote two of the memo clarified that “this Guidance does not apply to interdiction activities in the vicinity of the border.”⁶⁴ The rationale underlying this caveat was that immigration officials, as frontline fighters in the border crisis, have developed a special skill to “know when and how racial markers provide evidence of immigration status.”⁶⁵ In *Brignoni-Ponce*, Justice Powell echoed this sentiment, accepting the government’s argument that “trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut.”⁶⁶

The DHS footnote two exception builds upon the “undocumented cases” to create a new construct of citizenship that is visibly inscribed on certain individuals’ bodies in place of traditional probable cause.⁶⁷ But we no longer live in a world where this exceptionalism is being deployed

⁶¹ Sari Horwitz, *Justice Dept. announces new rules to curb racial profiling by federal law enforcement*, WASH. POST (Dec. 8, 2014), https://www.washingtonpost.com/world/national-security/justice-dept-to-announce-new-rules-to-curb-racial-profiling-by-federal-law-enforcement/2014/12/07/e00eca18-7e79-11e4-9f38-95a187e4c1f7_story.html [<https://perma.cc/CMK4-YWYS>].

⁶² *Id.*

⁶³ See Hernández, *Racial Profiling in Immigration Policing*, *supra* note 59 (“Though there is much to laud in this announcement, the new guidance, as has been widely reported, leaves a gaping hole in the Justice Department’s attempts to remove race from federal officers’ criminal investigation calculus because it explicitly exempts immigration policing activity along the border.”).

⁶⁴ U.S. DEP’T OF JUST., *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity* (Dec. 2014), <https://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf> [<https://perma.cc/78R5-4P7Q>] (superseding the DOJ’s 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies).

⁶⁵ See Jennifer M. Chacón, *Criminalizing Immigration*, 1 REFORMING CRIMINAL JUSTICE: INTRODUCTION AND CRIMINALIZATION 205, 219 (Erik Luna ed., 2017) [hereinafter Chacón, *Criminalizing Immigration*]. *But see id.* at 220 (arguing it is impossible to use street policing or car stops to find illegal immigrants because it “requires not a ‘sense’ about national origin, but an awareness of an individual’s immigration status—a complex legal determination that can never be made by watching someone go about their daily business”).

⁶⁶ *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975).

⁶⁷ Mary Romero, *Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community*, 32 CRITICAL SOC. 447 (2006).

infrequently along the border.⁶⁸ The Trump administration has used the “undocumented cases” to justify enforcement actions far exceeding the Justices’ original intent.⁶⁹

After tracing the enduring legacy of border exceptionalism in both the judicial and executive spheres, this paper now presents three reasons why race can no longer be used to justify immigration stops and searches.

III. RACE CAN NO LONGER JUSTIFY IMMIGRATION STOPS AND SEARCHES

A. *Demographic Shift – Latinos as a Majority Presence*

First, the probative value of Latino appearance in probable cause analysis is drastically less than the Court posited in the 1970s because they are so many more people who fit under this distinction today.⁷⁰ Indeed, current demographic statistics reveal a much larger and more dispersed Latino population than when the “undocumented cases” were decided.⁷¹ In *Brignoni-Ponce*, and later *Martinez-Fuerte*, the Court adopted the government’s estimate that “85% of the aliens illegally in the country are from Mexico.”⁷² However, the 1970 census data and INS figures the Court relied on only represented the number of Mexican immigrants who were documented with the government in border states, but did not indicate the quantity of undocumented immigrants within the population of those with Hispanic appearance.⁷³ Meaning, the data did not indicate how many people with a Mexican appearance were actually undocumented immigrants.⁷⁴ By focusing only on undocumented individuals, the dataset only provided

⁶⁸ See Kavitha Surana, *How Racial Profiling Goes Unchecked in Immigration Enforcement*, PROPUBLICA (June 8, 2018, 5:00 AM), <https://www.propublica.org/article/racial-profiling-immigration-enforcement-pennsylvania> [<https://perma.cc/MWH3-RAQL>].

⁶⁹ See, e.g., Chacón, *Criminalizing Immigration*, *supra* note 65, at 212–14, 222 (describing how the Trump administration rolled back enforcement priorities of past presidencies, threatened to take away funding from sanctuary cities, and drafted state officers to enforce federal laws).

⁷⁰ See Robert Alan Culp, *The Immigration and Naturalization Service and Racially Motivated Questioning: Does Equal Protection Pick Up Where the Fourth Amendment Left Off?*, 86 COLUM. L. REV. 800, 817 (1986).

⁷¹ Luis Noe-Bustamante, Mark Hugo Lopez & Jens Manuel Krogstad, *U.S. Hispanic population surpassed 60 million in 2019, but growth has slowed*, PEW RES. CTR. (July 2, 2020), <https://www.pewresearch.org/fact-tank/2019/07/08/u-s-hispanic-population-reached-new-high-in-2018-but-growth-has-slowed/> [<https://perma.cc/5HUP-EF7X>].

⁷² *United States v. Brignoni-Ponce*, 422 U.S. 873, 879 (1975) (citing *United States v. Baca*, 368 F. Supp. 398, 402 (S.D. Cal. 1973), which based its estimation on a 1974 DOJ report); *United States v. Martinez-Fuerte*, 428 U.S. 543, 551 (1976) (citing *United States v. Baca*, 368 F. Supp. 398, 402 (S.D. Cal. 1973)).

⁷³ See Culp, *supra* note 70, at 816.

⁷⁴ *Id.*

exclusive analysis when “[i]nclusive analysis of statistics are far more pertinent for purposes of equal protection analysis since they reflect the probability that a particular individual is undocumented.”⁷⁵ In other words, the Court had no data to back up its assertion that the probability that any individual who appears Mexican is undocumented is high enough to make Hispanic appearance a probative factor.⁷⁶

Furthermore, such a high estimate was called into question when the 1980 census data revealed that only one-eighth of the Latino population in those border states was undocumented.⁷⁷ Only five years after the *Brignoni* decision, scholars concluded that “the probative connection between Hispanic appearance and undocumented status is much weaker than the Court perceived when it developed its standards of reasonable suspicion.”⁷⁸ The statistics justifying the border exception never rested on solid ground.

Notwithstanding the debates surrounding this data, it is evident that the numbers do not reflect the ethnic make-up of the undocumented population in America today. According to the U.S. Census Bureau, there are now more than 60 million Latinos across the country,⁷⁹ making up over 18 percent of the entire population.⁸⁰ This is a staggering increase from 1970 when the 9 million Latinos in the U.S. accounted for a mere 4.5 percent of the entire population.⁸¹ The probability that any person within this vast, more diverse Latino population is undocumented is even harder to rationalize than it was in 1975. In *United States v. Montero-Camargo*, the Ninth Circuit acknowledged this population shift as one of the central reasons for its rejection of Hispanic appearance as a permissible factor, citing a statistic that the Latino population in border states had increased five-fold since *Brignoni-Ponce* was decided.⁸² Under the current

⁷⁵ *Id.*

⁷⁶ Connor, *supra* note 21, at 575-76.

⁷⁷ Culp, *supra* note 70, at 817.

⁷⁸ *Id.*

⁷⁹ Noe-Bustamante et al., *supra* note 71 (finding from 2010-2019, Latino grew from 16% of total U.S. population to 18%, accounting for 52% of all population growth).

⁸⁰ CENSUS BUREAU, *Population Estimates Program: Quick Facts* (July 1, 2019), <https://www.census.gov/quickfacts/fact/table/US/PST045219> [<https://perma.cc/GG6G-STXB>] (noting that 18.5% of population reported race as “Hispanic or Latino”).

⁸¹ Carl Haub, *Changing the Way U.S. Hispanics Are Counted*, POPULATION REFERENCE BUREAU (Nov. 7, 2012), <https://www.prb.org/us-census-and-hispanics/> [<https://perma.cc/WKM5-G8MW>] (citing 1970 U.S. Census Bureau data that reported 9,072,602 Hispanics in the U.S. out of a total population of 203,211,926, which calculates to 4.5 percent).

⁸² *United States v. Montero-Camargo*, 208 F.3d 1122, 1133-34 (9th Cir. 2000) (“Hispanic appearance is of little or no use in determining which particular individuals among the vast Hispanic populace should be stopped by law enforcement officials on the lookout for illegal aliens.”).

demographics, Hispanic appearance alone can never be a meaningful factor to predict who is undocumented within the wider population.⁸³

Moreover, Latinos are much more dispersed across the nation than they were in 1975.⁸⁴ Ironically, the increased enforcement along the border has caused Mexican and other Latino migrants to spread across the country.⁸⁵ The traditional migration routes have been abandoned for new paths that place less traffic in the border states.⁸⁶ As a result of the border walls erected in California and increased militarization across the frontier, Mexican immigration “transformed from a largely circular movement of male workers going to three states into a settled population of families living in 50 states.”⁸⁷ Census data reflects this geographic diffusion.⁸⁸ From 2010 to 2019, the states that accounted for the largest Latino population growth rates were not located in the South, but in places like Washington, D.C. and North Dakota.⁸⁹ Latino populations of over one million now reside in non-border counties such as Miami-Dade, Florida; Cook County, Illinois; and Riverside County, California.⁹⁰ As more and more non-border municipalities become majority Latino, the likelihood that the border search exception will be misapplied to racially profile huge portions of these localities increases.

Continuing to allow officers to use Latino appearance as a proxy for illegality in areas with high concentrations of Latinos has led to liberty abuses against our citizens. U.S. citizens’ rights are being violated as they are searched, detained, and even deported on account of their Latino appearance.⁹¹ Jacqueline Stevens conducted a study finding that more than 20,000 U.S. citizens were wrongfully detained or deported between 2003

⁸³ *Id.* at 1134.

⁸⁴ *Id.* at 1133-34.

⁸⁵ See Douglas S. Massey, *The New Latino Underclass: Immigration Enforcement as a Race-Making Institution*, STAN. CTR. ON POVERTY AND INEQ. 1, 16-17 (2012).

⁸⁶ See *id.*

⁸⁷ *Id.* at 17.

⁸⁸ E.g., Jens M. Krogstad, *A view of the nation’s future through kindergarten demographics*, PEW RES. CTR. (July 31, 2019), <https://www.pewresearch.org/fact-tank/2019/07/31/kindergarten-demographics-in-us/> [<https://perma.cc/K98U-3F23>] (noting that in 18 states, Latino children accounted for 20% or more of the public school kindergarten population in 2017).

⁸⁹ Noe-Bustamante et al., *supra* note 71 (noting between 2010-2019, the states with the largest growth rates were North Dakota (129%), South Dakota (66%), Montana (50%), New Hampshire (48%), and the District of Columbia (42%)).

⁹⁰ *Id.* (listing U.S. counties with largest Hispanic populations).

⁹¹ See generally Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL’Y & L. 606, 608 (2011).

and 2010.⁹² In Miami, for example, the American Civil Liberties Union (ACLU) found that ICE issued 420 detainers on U.S. citizens between 2017 and 2019, wrongfully holding these citizens for deportation.⁹³ The ACLU report posits that “ICE may now be targeting hundreds of U.S. citizens each year in states like Florida.”⁹⁴ Furthermore, immigration officials have wrongfully imprisoned individuals with valid work and tourist visas, longtime residents with families who are U.S. citizens, children, and asylum seekers with legitimate, credible fear claims who are deported back to their deaths.⁹⁵ Many of those wrongfully held or deported brought class-action lawsuits challenging this discrimination, but most attempts have been dismissed for lack of standing.⁹⁶

The “undocumented cases” grant the Trump administration the legal safeguards to racially profile and wrongfully detain thousands of its citizens and legal residents without probable cause. Under the expanded expedited removal processes, those wrongfully detained have no right to a lawyer and are often coerced into signing life-altering legal documents they do not understand.⁹⁷ Even if one agrees that non-citizens should be afforded fewer rights than U.S. citizens, the border exception jurisprudence impedes on the rights of people that we have always agreed enjoy the full protection of our Constitution. The Fourth Amendment carve out can no longer be justified when it ignores and cheapens citizens’ and lawful residents’ protections, which are guaranteed by the Constitution and federal law. If the Court does not clarify and revise the scope of this exceptionalism, the Trump administration’s immigration regime will continue to apply it in environments never dreamed of by the Justices. Thus, in a nation of sixty million Latinos who dress, look, and act in such diverse ways, the

⁹² *Id.* (finding “that the banishment, and in some cases kidnapping, of U.S. citizens by immigration law enforcement agencies is continuing with an alarming albeit underreported frequency.”).

⁹³ Am. Civ. Liberties Union, *Citizens on Hold: A Look at ICE’s Flawed Detainer System in Miami-Dade County*, AM. CIV. LIBERTIES UNION FLA. 1, 2 (Mar. 20, 2019), <https://www.aclufl.org/en/publications/citizens-hold-look-ices-flawed-detainer-system-miami-dade-county> [https://perma.cc/GU2Z-5JAK].

⁹⁴ *Id.* at 6 (finding that “[i]f Miami’s experience is representative, ICE may now be targeting hundreds of U.S. citizens each year in states like Florida.”).

⁹⁵ *E.g.*, Am. Civ. Liberties Union, *supra* note 29 (providing the example of Laura S., who told border officials she had a credible fear of death but was sent back to Mexico, where she was murdered within days).

⁹⁶ *E.g.*, *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1044 (9th Cir. 1999) (holding the plaintiffs failed to show a likelihood that these discriminatory stops would occur again); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 95 F. Supp. 2d 723, 733 (N.D. Ohio 2000) (holding the Latino plaintiffs did not have standing to enjoin border patrol agents).

⁹⁷ Am. Civ. Liberties Union, *supra* note 29, at 2 (documenting the highly coercive environments detainees experience as they are lied to about their rights and threatened so they will sign papers without understanding the high-stakes consequences).

proposition that appearing Latino means you are likely to be illegal has no contemporary validity.⁹⁸

B. The Creeping Expansion of Immigration Enforcement Past the Border

Second, the Court's untouched border search jurisprudence has taken on new power as both the geographical area of enforcement and the number of officials with enforcement authority expands. When we examine the current geographical areas of enforcement, it is evident that CBP is pushing its purview past its original edict, subjecting countless U.S. residents to a border exceptionalism absent the geographic constraint.

Under the 100-mile rule, codified in section 287 of the INA, agents within 100 miles of any border can stop and search vessels without justifying these acts based on probable cause.⁹⁹ Federal law even allows agents to extend this "reasonable distance" line if the chief patrol agent "determines that such action is justified, [and] declare[s] such distance to be reasonable."¹⁰⁰ In practice, agents have not been required to justify stops or searches as they move closer to, or even past, the 100-mile mark.¹⁰¹ With its increased budget,¹⁰² the CBP has established thirty-five checkpoints that "operate deep in the interior," even as data proves these stops are ineffective

⁹⁸ See Noe-Bustamante et al., *supra* note 71.

⁹⁹ 8 U.S.C. § 1357(a)(3) (2018) (granting power to stop and search anywhere "within a reasonable distance from any external boundary," which was later defined as 100 miles through regulation). This 100-mile rule was first judicially applied in *Almeida-Sanchez v. United States*, 413 U.S. 266, 268, 272 (1973) (allowing for warrantless searches "within a reasonable distance from any external boundary of the United States.") (internal quotes omitted).

¹⁰⁰ 8 C.F.R. § 287.1(b) (2020).

¹⁰¹ *E.g.*, Senator Patrick Leahy was stopped at a checkpoint 125 miles south of the border, inspiring him to introduce legislation that would shrink the permissible border zone; see American Civil Liberties Union, *U.S. Border Patrol Interior Checkpoints: Frequently Asked Questions*, AM. CIV. LIBERTIES UNION BORDER LITIG. PROJECT, <https://www.aclusandiego.org/wp-content/uploads/2014/11/Border-Patrol-Checkpoint-FAQs.pdf> [https://perma.cc/97DR-MHER].

¹⁰² CBP's budget is the highest it has ever been, ballooning from \$5.9 billion in FY 2003 to \$17.1 billion in FY 2019. *The Cost of Immigration Enforcement and Border Security*, AM. IMMIGR. COUNCIL (July 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_cost_of_immigration_enforcement_and_border_security.pdf [https://perma.cc/S3G7-EHZF].

in apprehending illegal immigrants.¹⁰³ Yet courts have not held these stops to a different constitutional standard.¹⁰⁴

Even if we assumed that federal agents closely followed the 100-mile “reasonable distance” rule that the Supreme Court adopted several decades ago, there is strong reason to question the arbitrary nature of this distinction.

The 100-mile radius covers nine of the ten largest American cities and affects most Americans, as two-thirds of Americans now live within this orbit.¹⁰⁵ The ACLU has challenged this 100-mile rule as illogical in today’s environment, when “[t]he reality is that Border Patrol’s interior enforcement operations encroach deep into and across the United States, affecting the majority of Americans.”¹⁰⁶ CBP’s growing presence in non-border areas was made possible by a dramatic increase in the total number of border patrol officers, ballooning from 4,139 in 1992 to 21,000 in 2014.¹⁰⁷ As more CBP agents work farther away from the border, they are not given the proper training to know where this race exception ends, granting them the freedom to “routinely ignore or misunderstand the limits of their legal authority.”¹⁰⁸

¹⁰³ Melissa del Bosque, *Checkpoint Nation: Border Agents are Expanding Their Reach into the Country’s Interior*, HARPER’S MAG. (Oct. 2018), <https://harpers.org/archive/2018/10/checkpoint-nation-cbp-search-and-seizures-civil-rights-abuses/> [<https://perma.cc/T5N8-9HGQ>] (noting that “CBP’s own data suggests that its interior checkpoints do little to catch what it calls ‘unauthorized entrants’ and instead ensnare US citizens on minor drug charges.”); see generally U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-50, *Issues Related to Agent Deployment Strategy and Immigration Checkpoints* (2017), <https://www.gao.gov/assets/690/688201.pdf> [<https://perma.cc/3J5S-2M3Q>].

¹⁰⁴ Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L. J. 129, 141 (2010) [hereinafter Chacón, *Border Exceptionalism*], <https://ir.lawnet.fordham.edu/ulj/vol38/iss1/14> [<https://perma.cc/3HTW-W8R3>] (citing *Martínez-Fuerte* as an example of the court applying the same exception to a checkpoint almost 90 miles from the Mexican border).

¹⁰⁵ Am. Civ. Liberties Union, *The Constitution in the 100-Mile Border*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/other/constitution-100-mile-border-zone?redirect=node/4524> [<https://perma.cc/8AAX-7XEM>].

¹⁰⁶ *Id.* (noting 200 million people live within the 100-mile radius); see also Am. Civ. Liberties Union, *Customs and Border Protection’s (CBP’s) 100-Mile Rule*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/other/aclu-factsheet-customs-and-border-protections-100-mile-zone?redirect=immigrants-rights/aclu-fact-sheet-customs-and-border-protections-100-mile-zone> [<https://perma.cc/ETC4-UTFW>] (arguing for a change to the 100-mile rule because “[a]llowing CBP to divert its attention from the border distracts from its primary mission and results in widespread violations of Americans’ rights to property and liberty, including Fourth Amendment and other constitutional violations.”).

¹⁰⁷ Daniel Denvir, *Curbing the Unchecked Power of the U.S. Border Patrol*, BLOOMBERG CITY LAB (Oct. 30, 2015), <https://www.citylab.com/equity/2015/10/curbing-the-unchecked-power-of-the-us-border-patrol/413392/> [<https://perma.cc/5VL2-W5KW>] (arguing with this increase, “Border Patrol has normalized policing practices that would be considered patently unconstitutional if carried out by local police.”).

¹⁰⁸ Am. Civ. Liberties Union, *supra* note 29.

Furthermore, the type of actors involved in immigration enforcement has expanded. The exclusive jurisdiction the federal government held within the immigration realm is now a thing of the past. Local and state officials all over the country increasingly have the power to stop and question individuals based solely on their race.¹⁰⁹ This expansion began when federal officials started to recruit local law enforcement as “force multipliers” through the 287(g) program,¹¹⁰ which empowered local and state actors to question and detain suspected illegal immigrants contacted while on patrol or those already in custody. These federal-local partnerships have created a continuous information pipeline between federal and local officials, transforming the way immigration data is shared and used.¹¹¹ A 2011 study by Doris Provine and Gabriella Sanchez found that legislation bringing state and local law enforcement into the immigration sphere has created a new removal regime which “encourages ethno-racial profiling, hyper-surveillance, abusive stops, problematic searches and unwarranted detention of suspected unauthorised [sic] immigrants.”¹¹²

Alongside these 287(g) agreements, we have witnessed the rise of state and local immigration ordinances that went above and beyond any federal mandate.¹¹³ These federal-state partnerships emboldened many local

¹⁰⁹ Maria Christina Morales & Denise Delgado, *What is Your Citizenship Status? Racial and Citizenship Profiling by Law Enforcement along the U.S.-México Border*, 6 (2017) (unpublished manuscript) (on file with the University of Texas at El Paso Center for Inter-American and Border Studies) (finding that “[s]cholars have argued that the growth in immigration policing at the local level is a response to rapid increase in the growth of immigrant populations and/or the browning of the population.”).

¹¹⁰ President Trump revoked the Obama administration’s restrictions on the 287(g) agreements, which had prioritized only illegal immigrants with serious criminal histories or those who had just entered the country. Under President Trump’s new guidelines, anyone who is unauthorized is a priority. See Memorandum from Jeh C. Johnson, Sec’y of Homeland Sec., U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf’t (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [<https://perma.cc/PYG3-Y6YE>] (outlining new enforcement guidelines); see also David A. Martin, *Trump’s Order on the Deportation of Undocumented Residents, Annotated by an Immigration Law Expert*, VOX (Jan. 31, 2017), <https://www.vox.com/the-big-idea/2017/1/28/14416616/executive-order-immigrants-sanctuary-trump> [<https://perma.cc/T6Q4-GY8T>] (describing how the vague and sweeping terms of the Order erase any priority hierarchy).

¹¹¹ Doris Marie Provine & Gabriella Sanchez, *Suspecting Immigrants: Exploring Links Between Racialized Anxieties and Expanded Police Powers in Arizona*, 21 POLICING & SOC’Y 468, 477 (2011) (finding “[t]he number of federal immigration agents embedded in local departments has also been increasing. A series of three nationwide surveys of local police executives in cities and county sheriffs reveals that consultation between local police and federal officials is routine in connection with specific cases.”).

¹¹² *Id.* at 468.

¹¹³ See generally *2011 Immigration-Related Laws and Resolutions in the States*, NAT’L CONF. OF STATE LEGISLATORS 1 (Jan. 1–Dec. 7, 2011),

forces to the detriment of their communities. In fact, a 2009 U.S. Government Accountability Office report concluded some agencies were “using their 287(g) authority to process for removal of aliens who have committed minor crimes” even though ICE indicated 287(g)’s program objective was to enhance security by “addressing *serious* criminal activity committed by removable aliens.”¹¹⁴ One of the most infamous 287(g) agreements in Maricopa County, Arizona was invalidated when experts discovered that “Latino drivers were between four to nine times more likely to be stopped than similarly situated non-Latino drivers.”¹¹⁵ After the 287(g) agreement was signed, the Arizona legislature passed S.B. 1070, which criminalized acts that were neither civil nor criminal violations under federal law.¹¹⁶ In *Arizona v. U.S.*, the Supreme Court struck down parts of the state law.¹¹⁷ However, a key provision requiring state officers to inquire about immigration status during routine stops and provide this information to federal officials was left untouched.¹¹⁸ In this decision, “the Court unequivocally established that there was space for states to indirectly enforce immigration at the local level,” making it so any interaction with police could be used as a tool for mass deportation.¹¹⁹

<https://www.ncsl.org/documents/immig/2011ImmFinalReportDec.pdf> [<https://perma.cc/6GMV-9VGB>] (describing how “[f]ive states—Alabama, Georgia, Indiana, South Carolina and Utah—crafted omnibus laws following the example of Arizona’s 2010 bill, SB 1070,” which required state law enforcement to attempt to determine the citizenship of anyone involved in a lawful stop); *see also* Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 628 (2013) (“they have deployed a host of criminal laws and ordinances to achieve indirectly that which they cannot achieve directly: the regulation of immigration law in their states.”).

¹¹⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-109, *Immigration Enforcement: Better Controls Needed Over Program Authorizing State and Local Enforcement of Federal Immigration Laws*, 4 (2009).

¹¹⁵ Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Justice, to Bill Montgomery, Cty. Attorney, Maricopa Cty. 2 (Dec. 15, 2011), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf [<https://perma.cc/2SD9-8DBJ>].

¹¹⁶ Chacón, *Border Exceptionalism*, *supra* note 104, at 622.

¹¹⁷ 567 U.S. 387, 416 (2012).

¹¹⁸ *Id.* At 414.

¹¹⁹ Naomi Doraisamy, *Erasing Presence Through Reasonable Suspicion: Terry and Its Progeny as a Vehicle for State Immigration Enforcement*, 54 IDAHO L. REV. 409, 437 (2018).

The wave of state-led action has not subsided. Alabama,¹²⁰ Texas,¹²¹ and Idaho¹²² followed Arizona's path by introducing nearly identical bills to S.B. 1070, which assert state authority is separate from federal jurisdiction.¹²³ Upholding portions of the Arizona law meant that other states could now force their officers to inquire about citizenship status and undercut any local sanctuary policies.¹²⁴ In the first half of 2017 alone, more than 100 bills were introduced in thirty-six states to actively combat local sanctuary policies.¹²⁵ In these jurisdictions, "the resulting environment for Latino communities is so uncomfortable that the undocumented are held in a state of siege, and some are forced to leave."¹²⁶ Many states have embraced their new position within the immigration enforcement regime, but courts have not been a strong check against the resulting racial profiling on the local level.¹²⁷

Furthermore, federal courts all over the country have been inserted into the original civil removal process. Operation Streamline, introduced in 2005, required ICE officers to refer any illegal entry cases to the U.S. Attorneys' offices, where undocumented defendants would be criminally charged.¹²⁸ But unlike citizen defendants, these immigrants were brought before a judge en masse, with as many as 100 people appearing before a judge who would simultaneously read their rights.¹²⁹ In 2013, the Ninth

¹²⁰ Chacón, *Border Exceptionalism*, *supra* note 104, at 623 (stating that "Alabama's H.B. 56 is the most draconian state regulation to be enacted in the period before the Supreme Court's consideration of the Arizona law.").

¹²¹ See *Comparing Texas SB 4 to Arizona SB 1070*, NAT'L IMMIGR. F. (May 5, 2017), <https://immigrationforum.org/article/comparing-texas-sb-4-arizona-sb-1070/> [<https://perma.cc/3AEC-V3D7>] (showing a comparison chart of the two laws).

¹²² See, e.g., Betsy Z. Russell, *Proposed Law in Idaho Would Discourage Sanctuary Cities and Direct Law Enforcement to Question People's Immigration Status*, SPOKESMAN-REV. (Jan. 30, 2017), <http://www.spokesman.com/stories/2017/jan/30/idaho-house-panel-introduces-immigration-bill-targ/> [<https://perma.cc/2R8Z-MP4R>] (taking state action by discouraging sanctuary cities and permitting local law enforcement to check immigration status of those arrested).

¹²³ See Chacón, *Criminalizing Immigration*, *supra* note 65, at 215 (using state and local law enforcement to carry out immigration enforcement).

¹²⁴ Culp, *supra* note 70, at 817.

¹²⁵ Doraisamy, *supra* note 119, at 444-45 ("Bills targeting sanctuary jurisdictions start with broad strokes, prohibiting local entities from having any official policy of restricting immigration enforcement or compliance.").

¹²⁶ *Id.* at 447.

¹²⁷ *Id.* at 446-47.

¹²⁸ *Id.*

¹²⁹ See Donald Kerwin & Kristen McCabe, *Arrested on Entry: Operation Streamline and the Prosecution of Immigration Crimes*, MIGRATION POL'Y INST. (MPI) (Apr. 2010), <https://www.migrationpolicy.org/article/arrested-entry-operation-streamline-and-prosecution-immigration-crimes> [<https://perma.cc/6F42-TA4M>]; see e.g., *U.S. v. Arquetta-Ramos*, 730 F.3d 1133 (9th Cir. 2013) (holding that the plea court's collective group questioning of defendant and other defendants violated the rule requiring that the court address defendant personally in open court).

Circuit held that these hearings violated section 11(b) of the Federal Rules of Civil Procedure.¹³⁰ Then, in 2012, a fast-track plea system was instituted across the country, increasing the number of criminal immigration cases prosecuted in both border and non-border states.¹³¹ The Justices of the “undocumented cases” could never have imagined to what extent their border exception would be applied to prosecute individuals within federal criminal courts.¹³²

As more actors were charged with enforcement duties, many of the techniques traditionally used at the border were transplanted into interior communities by officers who had never set foot near the border.¹³³ Entrenching the presumed illegality of Latinos in the law allows federal officers to set up interior checkpoints, local actors to inquire about immigration status in routine encounters,¹³⁴ and prosecutors to oversee mass plea deals.¹³⁵ Now, if the expanded expedited removal program is not struck down, state and local actors across the country will be even more likely to use their power to stop, question, and detain individuals based solely on their perceived race.¹³⁶ A world without judicial intervention will be one in which those who appear Latino will be required to constantly prove their

¹³⁰ See *Arqueta-Ramos*, 730 F.3d at 1141-42 (citing FED. R. CIV. P. 11(b)).

¹³¹ See KiDeuk Kim, *Organizational Efficiency and Early Disposition Programs in Federal Courts*, THE URBAN INST. 3-6 (Dec. 2013), https://www.urban.org/research/publication/organizational-efficiency-and-early-disposition-programs-federal-courts/view/full_report [https://perma.cc/9LAQ-JM4H] (finding that from 2006-2009, almost every jurisdiction that adopted the fast track system saw an increase in the number of immigration offenses prosecuted).

¹³² *Id.* at 3-4, 14 (describing how “the increased enforcement of immigration laws have dramatically changed the landscape of the federal criminal justice system,” with immigration offenses now the most common offense type in a system which affords prosecutors great discretion to decide whether to bring cases or not “on the basis of practical considerations such as competing demands for service and resource constraints.”).

¹³³ See, e.g., Provine & Sanchez, *supra* note 111, at 475-76 (indicating the National Fugitive Operations Program highlights how immigration enforcement on the border has spread to the interior as the program was created to locate particularly dangerous non-citizens with old orders of deportation, but now has over 100 teams all over the country conducting house raids).

¹³⁴ *Id.* at 475-77; KiDeuk Kim, *supra* note 131, at 14-15.

¹³⁵ Grace Meng, *Turning Migrants into Criminals: The Harmful Impact of US Border Prosecutions*, HUMAN RIGHTS WATCH (May 2012), https://www.hrw.org/report/2013/05/22/turning-migrants-criminals/harmful-impact-us-border-prosecutions#_ftnref76 [https://perma.cc/TK23-KYJW] (finding that “[a] single proceeding may include two dozen defendants or more than 100, depending on the district. . . . the stages of a federal criminal court case that normally could take months or even years are truncated into a single day.”).

¹³⁶ Doraisamy, *supra* note 119, at 429-36.

legal status as Americans.¹³⁷ This is not the world that the Justices of the “undocumented cases” envisioned.¹³⁸

C. Vagueness Affords Discretion – How Judicial Confusion Granted the Executive Free Reign to Mass Incarcerate Latinos

i. Conflicting Applications of the Border Search Exception Among Lower Courts

Finally, the confusion surrounding the application of the “undocumented cases” has issued a new type of mass incarceration that must be stopped. The confusion among the lower courts regarding how to apply the “undocumented cases” allows the executive branch to capitalize off these unclear parameters and assume a dominant, unencumbered position in the border region. *Brignoni-Ponce* and *Martinez-Fuerte* have been read and applied differently by the lower courts, leading to confusion and conflicting interpretations.¹³⁹ The trend since September 11, 2001, has been for district courts to accept overt racial considerations,¹⁴⁰ but others have flatly rejected the logic put forth in the “undocumented cases.”¹⁴¹ Even within the same Circuit, the permissibility of race is an open question.¹⁴² Although the Ninth Circuit rejected the use of race in *Montero-Camargo*, it subsequently stepped back in *Manzo-Jurado* when it clarified that an officer may use race as one of many factors that, under the totality of circumstances, creates a reasonable suspicion.¹⁴³

It is also unclear how far courts will allow this Fourth Amendment loophole to reach past the border, as “[t]here is no geographic brightline . . .

¹³⁷ See generally *Immigrants and their children are more likely to be profiled for citizenship*, SPRINGER (July 17, 2018), <https://www.springer.com/gp/about-springer/media/research-news/all-english-research-news/immigrants-and-their-children-are-more-likely-to-be-profiled-for-citizenship/15941598> [https://perma.cc/8RUC-8PZA].

¹³⁸ See *supra* note 69 and accompanying text.

¹³⁹ See, e.g., *United States v. Sandler*, 644 F.2d 1163, 1168–69 (5th Cir. 1981) (mere suspicion justifies a pat-down search and the removal of outer garments); *United States v. Medina*, 295 F. App’x 702, 706 (5th Cir. 2008) (accepting *Brignoni* factors); *contra Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) (adopting a much narrower conception of the border zone when it concluded that 25 miles from a national boundary did not constitute a “functional equivalent” of the border); *United States v. Jackson*, 825 F.2d 853, 859 (5th Cir. 1987) (adopting the *Almeida* “functional equivalent” test).

¹⁴⁰ Connor, *supra* note 21, at 596.

¹⁴¹ See, e.g., *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2000) (holding that Hispanic appearance was not a proper factor to consider in determining whether Border Patrol agents had reasonable suspicion to stop defendants).

¹⁴² *Id.*

¹⁴³ See *United States v. Manzo-Jurado*, 457 F.3d 928, 935 n.6 (9th Cir. 2006) (citing *Montero-Camargo*, 208 F.2d at 1132 (holding that Latino appearance was probative in a city that had a Latino population of less than two percent)).

that confines the border search doctrine.”¹⁴⁴ Some courts have gone so far as to apply the border search doctrine to justify racially-motivated stops made 200 to 300 miles from the border.¹⁴⁵ This lack of guidance becomes even more worrisome when one considers the ambiguity surrounding expedited removal. Although the fast-track system has become increasingly embedded in U.S. immigration policy, “the exact procedural and geographical boundaries surrounding the enforcement of expedited removal remain unsettled.”¹⁴⁶

The Supreme Court has never taken the chance to clarify the border search doctrine. Indeed, Jennifer M. Chacón finds that:

[A]lthough some lower courts and immigration judges have occasionally intervened to suppress evidence in the face of egregious ICE illegality, the Supreme Court has largely written itself out of any supervisory role in immigration enforcement, and has provided no guidance to lower courts as to when such interventions might be appropriate.¹⁴⁷

With no higher guidance on how to supervise border officials, courts have largely refrained from doing so.¹⁴⁸ Many argue that replacing the DHS’s 100-mile rule with a new constitutionally-based version of reasonableness is the only thing that will “prevent CBP from continuing to use the liberties provided to it at the border . . . to search people in the interior without cause, and to finally stem CBP’s erosion of interior Fourth Amendment rights.”¹⁴⁹ This continued lack of judicial supervision grants executive actors the freedom to build a regime of mass criminal prosecution wholly removed from past civil deportation process.¹⁵⁰

ii. *Immigration and Drug Officials Fuel a New Type of Mass Incarceration*

Immigration policing and prosecution have expanded so drastically that it has become one of the top federally prosecuted crimes,¹⁵¹

¹⁴⁴ HERNÁNDEZ, *CRIMMIGRATION*, *supra* note 10, at 226.

¹⁴⁵ *Id.* at 227.

¹⁴⁶ Gebisa, *supra* note 39, at 572.

¹⁴⁷ Chacón, *Border Exceptionalism* *supra* note 104, at 147.

¹⁴⁸ *Id.*

¹⁴⁹ Hannah Robbins, Note, *Holding the Line: Customs and Border Protection’s Expansion of the Border Search Exception and the Ensuing Destruction of Interior Fourth Amendment Rights*, 36 *CARDOZO L. REV.* 2247, 2272 (2015).

¹⁵⁰ *Id.* at 2276–77.

¹⁵¹ See, e.g., U.S. SENTENCING COMM’N, *Overview of Federal Criminal Cases Fiscal Year 2016*, (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/FY16_Overview_Federal_Criminal_Cases.pdf [https://perma.cc/CXX6-TKWD] (showing that by 2011, immigration offenses were the

disproportionately impacting the Latino population.¹⁵² Starting in 1965, the INA amended the number of immigrants admitted from each country¹⁵³ and a “new Latino threat narrative” permeated the national consciousness as more and more Central Americans crossed the border and stayed in the U.S. without documentation.¹⁵⁴ This “threat narrative” ushered in the support necessary to allow for the mass incarceration of the Latino population, which steadily increased after September 11, 2001, as anti-immigrant hysteria was fueled by the war on terror.¹⁵⁵

As the government granted the INS and federal officials more power and funding to regulate this area, the number of Latino men in prison soared.¹⁵⁶ Douglas S. Massey argues that by 2010 “America’s immigration enforcement apparatus had become a central race-making institution for Latinos, on a par with the criminal justice system for African Americans.”¹⁵⁷ As a result, the Latino population is now grossly overrepresented in prisons and deportations.¹⁵⁸ Indeed, Chacón argues that:

The current focus on punishing immigration through the criminal justice systems at the federal and state levels does not just echo the policies of the failed war on drugs, but it actually opens up a new front in that war, raising the specter of a new wave of racialized mass incarceration.¹⁵⁹

single largest category of federal criminal prosecutions with the bulk of those prosecutions for misdemeanor illegal entry and felony reentry).

¹⁵² *Id.* at 8 (finding that Hispanics account for 96.2 percent of immigration offenders in 2016).

¹⁵³ See 8 U.S.C. § 1152 (granting authority to limit the number of immigrants from a specific country); Immigration and Nationality Act, Pub. L. No. 89-236, § 201(a) (1965) (codified at 8 U.S.C. § 1152).

¹⁵⁴ See Massey, *supra* note 85, at 7-11 (describing how this narrative has led to an increase in the number of anti-Hispanic hate crimes by 24% from 2002 to 2007 and the number of victims rose by 30%).

¹⁵⁵ See *generally id.* at 3, 8 (finding the “[g]overnment repression accelerated markedly after September 11, 2001 as the war on immigrants was increasingly conflated with the war on terror. . . . the conditions for popular xenophobia returned with a vengeance with the . . . terrorist attacks in 2001[.]”).

¹⁵⁶ HERNÁNDEZ, *supra* note 10, at 218 (describing how the Border Patrol became the main drug interdiction force at the same time that federal agencies became more involved in immigration enforcement).

¹⁵⁷ Massey, *supra* note 85, at 3.

¹⁵⁸ See, e.g., *supra* note 8, at 167-217 (finding that Latino males are significantly overrepresented in the number of deportees relative to their percentage of the immigrant population and the unauthorized immigrant population); Peter Wagner & Daniel Kopf, *The Racial Geography of Mass Incarceration*, PRISON POL’Y INITIATIVE (2015) (describing the racial disparities that define the Nation’s record growth in imprisonment, citing forty-one counties where the portion of the county that was Latino was at least ten times smaller than the percentage imprisoned).

¹⁵⁹ Chacón, *Criminalizing Immigration*, *supra* note 65, at 217.

Unfortunately, executive attempts at reining in overly-aggressive immigration policies, such as President Obama's Secure Communities program, have not targeted high-crime areas like they espouse, instead targeting areas with a large percentage of Hispanic residents.¹⁶⁰ This targeting persists even in light of "the Latina/o Immigrant Crime Paradox," with a growing body of research that shows Latino communities have comparatively low levels of crime.¹⁶¹

Criminal and immigration law intersect to create such a disparity. Federal drug prosecutions in the border region are conducted to meet wider border control goals as prosecutors employ high-volume drug plea offers that tend to be based more on the defendant's immigration status than the actual crime.¹⁶² Daniel Denvir finds that "mission creep is abundant," citing government data that reveals new checkpoints are more likely to find marijuana than undocumented individuals.¹⁶³ Mona Lynch's 2013 study unveils how drug cases on the border depart from prototypical federal drug enforcement cases, as the line between drug and immigration enforcement becomes indistinct.¹⁶⁴ This lack of distinction has driven huge spikes in the number of drug convictions in border states. For example, she found that a single southern border district's "possession convictions, alone, accounted for 83 percent of the nation's federal drug possession convictions" in 2014.¹⁶⁵ Without judicial guidance to constrain officers from blatantly using race as a proxy for illegality, Latino's mass incarceration under the guise of legitimate drug enforcement efforts will continue unabated.

IV. CONCLUSION - THE TIME IS NOW

When President Trump announced his anticipated expansion of expedited removal, eighteen attorneys general across the country joined

¹⁶⁰ See Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 89-90 (2013) (finding that "[h]igh-crime areas were, surprisingly, not a priority in the rollout . . . [but] early activation in the program correlates strongly with whether a county has a large Hispanic population."); see also Kevin R. Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder*, 48 U. MICH. J. L. REFORM 967, 975 (2015) (concluding that "the Obama administration's immigration enforcement agenda in fact operated to maximize removal numbers rather than to truly focus on the protection of the safety of the general public.").

¹⁶¹ Morales & Delgado, *supra* note 109, at 2-3.

¹⁶² See Mona Lynch, *Backpacking the Border: The Intersection of Drug and Immigration Prosecutions in a High Volume U.S. Court*, 57 BRIT. J. CRIMINOLOGY 112, 116-17 (2015).

¹⁶³ Denvir, *supra* note 107 (citing that "Border Patrol made 9,548 apprehensions and seized 156,239 pounds of marijuana at interior checkpoints, . . . [t]hat accounted for just under two percent of the total 486,651 apprehensions made by Border Patrol but more than eight percent of the total 1,922,545 pounds of marijuana seized.").

¹⁶⁴ See Lynch, *supra* note 162, at 113.

¹⁶⁵ *Id.* at 120.

together to amplify their dissent in an amicus brief for the ACLU's case challenging the act.¹⁶⁶ New York Attorney General, Letitia James, wrote, "[w]e are fighting back to ensure that every person is afforded appropriate protections under the law, and that this administration does not rip any more families apart."¹⁶⁷ This advocacy among some of the nation's top lawyers is a heartening indication that the national consensus around racial profiling of Latinos may be shifting. However, it is not enough to create systemic, long-term change.

Until the Supreme Court revisits its border search exception doctrine, executive officers will continue to use it as a judicially granted license, a free pass to employ race in key decision-making processes. For many, including the Court, this doctrine has not presented itself as ripe for review. But for millions of Latinos in the U.S. today, whether asylum seekers, children, green card holders, or even full-fledged citizens, this doctrine threatens their continued existence in the place they call home. With the threat of a nationwide fast-track deportation system looming on the horizon, the time for judicial intervention is now.

¹⁶⁶ Daniella Silva, *18 attorneys general support challenge of Trump rule expanding rapid deportations*, NBC NEWS (Aug. 22, 2019), <https://www.nbcnews.com/news/us-news/18-attorneys-general-support-challenge-trump-rule-expanding-rapid-deportations-n1045356> [<https://perma.cc/N2MT-96PK>].

¹⁶⁷ *Id.*

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