No. 10-3849

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

[redacted],

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

REPLY BRIEF FOR PETITIONER-APPELLANT

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PRELIMINARY STATEMENT

Petitioner [redacted] seeks a remedy for the numerous constitutional and regulatory violations that took place during the course of a warrantless night-time raid on his home and his subsequent questioning by Immigration and Customs Enforcement ("ICE") officers, as well as the deprivation of a full and fair hearing of his claims before the agency. In adjudicating Mr. [redacted]'s claims, the agency applied erroneous legal standards, refused to consider evidence that was properly presented, and made findings that would not have been supported by substantial evidence had the correct legal standards been applied. None of the government's incorrect interpretations of law should defeat Mr. [redacted]'s call for remand.

Contrary to the government's contentions, this petition does not require the Court to reach any novel legal issues. With respect to suppression based on egregious Fourth Amendment violations, Mr. [redacted] seeks nothing more than the application of settled Fourth Amendment law, as the federal courts—and the agency itself—have done in numerous removal proceedings under *INS v. Lopez-Mendoza*, 468 U. S. 1032 (1984). In addition, the government's reading of *Lopez-Mendoza* fails to recognize that the Supreme Court's language provides for an alternative basis for suppression in a case, like Mr. [redacted]'s, that arose out of widespread constitutional violations.

Similarly, Mr. [redacted]'s claim for termination on the basis of regulatory violations seeks nothing more than the application of the correct legal standards to the record. Such application demonstrates that, based on the uncontested facts, entry into Mr. [redacted]'s home was not consensual, that he was seized without probable cause when he was compelled to produce identity documents, that he was coerced into waiving his rights, and that he was deprived of his right to counsel.

To the extent that any gaps remain in the factual record, they are the result of multiple due process violations in the proceedings below, which infringed on Mr. [redacted]'s right to a full and fair hearing of his claims. During his removal proceedings, Mr. [redacted] was deprived of an opportunity to paint a complete picture of what occurred on the day of his arrest in his home and his subsequent questioning. Freedom of Information Act ("FOIA") litigation separate from Mr. [redacted]'s case revealed that the raid on his home was part of a nationwide program that created incentives for ICE officers to engage in widespread constitutional and regulatory violations. The Board of Immigration Appeals ("BIA") wrongly refused to consider this evidence, despite the fact it would have corroborated his claims.

The government's attempt to recast the agency's findings as based in factual conclusions should not distract the Court from reviewing the agency's many legal errors. Therefore, this Court should grant Mr. [redacted]'s petition for review.

ARGUMENT

I. Contrary to the government's assertions, the agency erred in failing to evaluate properly whether evidence may be suppressed based on egregious or widespread constitutional violations of the Fourth Amendment.

A. Mr. [redacted] seeks the correct application of existing Fourth Amendment law to his case, not a "reexamination of the applicability of the exclusionary rule."

The government misapprehends the scope of Mr. [redacted]'s claims before this Court, presenting them solely as an invitation to reexamine "the applicability of the exclusionary rule" in removal proceedings. (Resp't's Br. 31.) The government conflates two independent bases for suppression, stating that Mr. [redacted] seeks application of the exclusionary rule based on "widespread egregious violations." (Resp't's Br. 30.) This is an inaccurate presentation of Mr. [redacted]'s arguments.

Mr. [redacted]'s first claim is that evidence in his case should be suppressed on the basis of "egregious" constitutional violations, a category of violations acknowledged in *Lopez-Mendoza* as providing a basis for suppression. (Pet'r's Br. 23–25.) This claim involves application of well-established Fourth Amendment doctrine. As the doctrine has developed in the circuits and the BIA, a

noncitizen moving to suppress evidence on this basis must establish that (1) the challenged evidence was procured through violations of the Constitution, and that (2) said violations were "egregious." *Id.*

Here, it was reversible error for the agency to decline to engage in this analysis. The agency did not evaluate properly whether the search of Mr. [redacted]'s home and seizure of his person violated the Fourth Amendment, and did not reach the issue of "egregiousness." The government argues that it is permissible for the agency to adjudicate these types of claims under a "due process analysis" rather than a Fourth Amendment analysis, (Resp't's Br. 31), even as it cites to cases where the BIA has applied the Fourth Amendment to removal proceedings. *See also* (Pet'r's Br. 24–25.) The government does not explain why it is permissible for the agency to engage in inconsistent forms of adjudication, providing only some respondents the opportunity to fully litigate their Fourth Amendment claims.

Mr. [redacted]'s second claim for suppression is that evidence in his case was procured through a program that resulted in widespread constitutional violations nationwide. This claim is distinct and addresses the factual question left open by *Lopez-Mendoza*. (Pet'r's Br. 23–25.) To this end, Mr. [redacted] persistently sought evidence regarding National Fugitive Operations Program ("NFOP") tactics, particularly evidence of arrest quotas, which would prove

institutional pressures to arrest people without individualized suspicion and to label searches and seizures as consensual.

Mr. [redacted] sought evidence through FOIA (J.A. 772–75; A.R. 756–59)[1]; ICE improperly withheld the evidence. (J.A. 352–55[2]; A.R. 336–39) Mr. [redacted] sought it through requests to subpoena witnesses and documentary evidence (J.A. 574, 566–69, 750–52; A.R. 558, 550–53, 734–36); the IJ failed to rule on the motions. When ICE finally released the long-requested information after separate FOIA litigation, Mr. [redacted] proffered that evidence to the BIA (J.A. 42–61; A.R. 26–45.); the BIA declined to consider it, or at the very least remand so that the IJ could take the evidence into account. (J.A. 11; A.R. 11.) As is explained *infra*, Part III.B, this too was reversible error—the agency summarily dismissed this claim without ever giving Mr. [redacted] an opportunity to present this evidence.

This Court should remand so that the agency may properly adjudicate the merits of Mr. [redacted]'s Fourth Amendment claims and consider all the evidence that he has proffered.

[1] For convenience, we cite to both the Joint Appendix and Administrative Record.
[2] This document is mistakenly cited as J.A. 336–39 in opening brief. (Pet'r's Br. 7 n.1.)

i. The agency erred as a matter of law in evaluating the question of consent, which requires an analysis of whether consent was freely and voluntarily given under the circumstances.

The government's position that the immigration judge ("IJ") properly found that ICE officers received consent to enter the home, (Resp't's Br. 32–35), is premised on a misunderstanding of the applicable legal standard as well a misreading of the IJ opinion and the record. The IJ's opinion shows that she was only looking for some level of assent, and not evaluating whether Ms. [redacted] ("[redacted]") *freely and voluntarily* consented to the search of the home under the circumstances—the relevant inquiry under the Fourth Amendment. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); (Pet'r's Br. 25–27.)

First, the IJ states that Ms. [redacted]'s affidavit "attested to the fact that [she] gave her consent for the officers to enter the residence." (J.A. 38; A.R. 22.) The analysis stops right there. The government's claim that the IJ considered Ms. [redacted]'s "description of how she was roused from sleep, where she encountered the officers, her observations, attire and personal feelings," (Resp't's Br. 33), in addition to the larger context of the raid is based on a misreading of the IJ opinion.

Second, the IJ impermissibly relied on the government's assertions, both in the documentary evidence and in the testimony of Officer Belluardo ("Belluardo"). In dismissing Mr. [redacted]'s arguments, the IJ stated: "Furthermore, the government asserts that consent was obtained prior to immigration officers

entering the Respondent's residence from a 'person in control of the site to be inspected,' namely, the Respondent's sister [redacted]." (J.A. 38; A.R. 22.) The IJ then credited the testimony of Belluardo "who prepared the Respondent's I-213" and "testified that the I-213 clearly indicates that consent to enter the residence was obtained from [redacted]" and that "obtaining consent prior to entry is consistent with training ICE officers, including her, receive." *Id.* The IJ did so despite noting that Belluardo "has no independent recollection of the specific events." *Id.*

Mr. [redacted] previously identified the factors that courts are required to consider in evaluating the voluntariness of consent. (Pet'r's Br. 27.) None of the factors comprising the inquiry have anything to do with the law enforcement officers' view of the circumstances, and for good reason—such an inquiry would defeat the purpose of evaluating the freeness and voluntariness of a person's consent. *See United States v. Crandell*, 554 F.3d 79, 85 (3d Cir. 2009) ("The Supreme Court requires us to evaluate all the objective circumstances surrounding the encounter from the perspective of the "reasonable" person who is the recipient of the police attention. . .The subjective intent underlying an officer's approach does not affect the . . . analysis.") (internal citations omitted); *see also Pareja v. Att'y Gen.*, 615 F.3d 180, 196 (3d Cir. 2010) (legal error for BIA to give weight to "impermissible factor").

Having failed to apply all relevant factors to the record, the IJ found portions of Mr. [redacted]'s testimony and Ms. [redacted]'s affidavit "consistent with the testimony of Officer Belluardo and the I-213 that consent to enter the residence . . . was properly obtained." (J.A. 38; A.R. 22.) *See Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 149 (2d Cir. 2006) ("legal errors such as failure to consider the entire record or reliance on factors that have no nexus to the finding made, ordinarily will require vacatur and remand for further consideration") (citation omitted).

The BIA failed to correct this legal error in relying on the IJ's finding of consent. This Court should reverse for application of the correct legal standard to the record.[3] (Pet'r's Br. 28–32.)

ii. The government concedes that Mr. [redacted] was seized when asked to produce identification in his apartment, and its reliance on inapposite case law fails to demonstrate that probable cause supported that seizure.

The government concedes that Mr. [redacted] was seized during the apprehension in his apartment. (Resp't's Br. 38–39.) However, the government then argues that because reasonable suspicion justified Mr. [redacted]'s detention, neither the Constitution nor the agency's own regulations were violated. The government's arguments not only are a post-hoc rationalization of the BIA's

[3] This Court should also provide guidance on when constitutional violations may be deemed "egregious" for the purposes of suppression. (Pet'r's Br. 38–41.)

legal conclusions, but also rely on inapposite case law and flawed Fourth Amendment analysis.

The BIA assumed away the answer to the critical question of when ICE officers arrested Mr. [redacted] by concluding that he was seized only *after* being asked to produce identifying documentation. (Pet'r's Br. 36.) The government shifts its argument on appeal, citing *Terry v. Ohio*, 392 U.S. 1 (1968) for the proposition that officers can seize individuals on less than probable cause. (Resp't's Br. 36, 38–39.)[4] The government should not be permitted to supplement the BIA's legal reasoning with its own justification for the agency's conclusion. *See SEC v. Chenery*, 443 U.S. 194, 196 (1947) (holding that if basis of agency decision is "inadequate or improper, the court is powerless to affirm the administrative action by substituting . . . a more adequate or proper basis.").

Moreover, the government acknowledges that a seizure requires individualized suspicion. (Resp't's Br. 38–39.) In response to Mr. [redacted]'s reasons as to why ICE officers lacked the requisite suspicion, (Pet'r's Br. 37–38.), the government claims that Mr. [redacted]'s residence at the address of a person with a final order of removal and his ability to speak Spanish were sufficient bases for detaining him for questioning. (Resp't's Br. 37.) These facts do not aid in

[4] The questions of when a seizure occurred and whether probable cause supported the seizure are legal conclusions reviewed *de novo*. *See United States v. Williams*, 413 F.3d 347, 351 (3d Cir. 2005) (citing *Ornelas v. United States*, 517 U.S. 690, 699 (1996)).

justifying ICE officers' conduct. *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) ("mere propinquity" to others suspected of criminal conduct does not support reasonable suspicion); *cf. United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975) ("apparent Mexican ancestry," standing alone, is impermissible justification for stop); *Leveto v. Lapina*, 258 F.3d 156, 165 (3d Cir. 2001) (holding that merely being "resident of the premises being searched" did not justify pat-down search).

The government relies on *Babula v. INS*, 665 F.2d 293 (3d Cir. 1981), even though that case's facts distinguish it from Mr. [redacted]'s case. In *Babula*, the INS had received two tips from separate sources that a company was employing *multiple* undocumented noncitizens at a worksite. *Id.* at 294. The INS backed up their tips with further investigation of the site. *Id.* Those crucial facts led the Court to hold that suspicion based off the location's "milieu" sufficed. *Id.* at 296.

However, this Court explicitly distinguished circumstances where the "sanctity of private dwellings" was at issue, recognizing Fourth Amendment protections are greatest within the home. *Id.* (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)); *see also United States v. Myers*, 308 F.3d 251, 258 (3d. Cir. 2002) (questioning whether *Terry* applies fully within home). Given that Mr. [redacted]'s detention took place in the context of a night-time raid on his residence, the government's contention that particularized suspicion is not required fails.

Assuming *arguendo* that ICE officers had even a quantum of particularized suspicion necessary to detain Mr. [redacted] for questioning, such a detention must be reasonably related to its purposes. *Florida v. Royer*, 460 U.S. 491, 500 (1983) (["[T]he search must be limited in scope to that which is justified by the particular purposes served"); *Carrasca v. Pomeroy*, 313 F.3d 828, 836 (3d Cir. 2002) (requiring detention to be "carefully tailored" to justification). Otherwise, the detention ripens into an arrest requiring probable cause. *See Dunaway v. New York*, 442 U.S. 200, 212 (1979). The uncontested facts disclose that Mr. [redacted]'s detention amounted to an arrest, (Pet'r's Br. 36–37), a claim unanswered by the government. During the home raid, ICE officers brought Mr. [redacted] and his family members into a room surrounded by armed guards posted at all exists, ordered them to respond to questioning, prevented them from exercising freedom of movement, and forbade them from assisting one another. (J.A. 31–32, 495; A.R. 15–16, 479.) ICE officers demanded identification from Mr. [redacted] and an armed officer accompanied him to his bedroom to ensure his compliance. (J.A. 32; A.R. 16.) Those facts, among others, elevated this seizure into an arrest requiring probable cause, which the government lacked when the arrest commenced. *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

The agency's findings rest on a misapprehension of the Fourth Amendment's dictates, and this Court should remand for application of the correct legal standards to the record.

iii. Remand is warranted in order for the agency to properly address Mr. [redacted]'s claim for suppression on the basis of widespread constitutional violations committed during the course of NFOP home raids.

The government argues that this Court lacks a sufficient "factual predicate" in order to adjudicate Mr. [redacted]'s claim for suppression on the basis of widespread constitutional violations committed during the course of NFOP home raids. The agency did not engage with this question directly, dismissing the "widespread violations" claim as grounded in dicta. (J.A. 5; A.R. 5) As Petitioner and *amici curiae* argue, this error of law warrants remand so that the agency can properly consider Mr. [redacted]'s claim.[5] (Pet'r's Br. 38–41; Amicus Br. 3.)

The existing record, supplemented by the public information cited by *amici curiae*, provides a sufficient basis for deciding the question of whether widespread Fourth Amendment violations warrant suppression. However, if this Court decides that the factual record is not sufficiently developed on this issue, then the case should be remanded for the agency to consider the evidence that Mr. [redacted]

[5] The government comments that the exclusionary rule's application would be better adjudicated on appeal from a district court's ruling. (Resp't's Br. 31.) Since appeals from final orders are challenged through petitions for review, this issue would not be decided except through a case like Mr. [redacted]'s. 8 U.S.C. § 1252(a)(5).

presented to the agency (and that it refused to hear). *Amici* cite at least one instance in which the agency has considered evidence of ICE officers' widespread violations of the Fourth Amendment while executing home raids, and granted suppression on that basis. (Amicus Br. 21.) If any doubt remains regarding the facts relevant to this claim, remand is appropriate.

B. The correct application of law to the record would reveal that the agency's findings are unsupported by substantial evidence.

i. Had the agency applied the correct legal standard to the record, it would have found that ICE officers did not obtain free and voluntary consent prior to executing the warrantless raid of Mr. [redacted]'s home.

Contrary to the government's assertion, the IJ's finding of consent is unsupported by substantial evidence. Applying the correct standard, the evidence supports the conclusion that Ms. [redacted] did not freely and voluntarily consent to the search of Mr. [redacted]' home and thus ICE officers violated the Fourth Amendment. On the basis of the factual record as it stands, the IJ's finding of consent is inexplicable. As explained *supra,* Part I.A.i, it is premised on application of the wrong standard and undue reliance on the government's self-serving assurances that consent was obtained.

The IJ's finding of consent also does not account for the undisputed facts in the record regarding the circumstances of the raid. (Resp't's Br. 11–17.) "The [agency] may not simply overlook evidence in the record that supports the

applicant's case." *Espinosa-Cortez v. Att'y Gen.*, 607 F.3d 101, 113 (3d Cir. 2010). In evaluating consent, the IJ did not consider, for example, that this was a raid that was executed by multiple armed, uniformed officers at 4:30 in the morning. (J.A. 31; A.R. 15.) They awakened Ms. [redacted] by buzzing the apartment doorbell incessantly. (J.A. 492; A.R. 476 at ¶ 4.) As she stepped out of the apartment in her sleepwear to see who was approaching, she unknowingly locked herself out. (*Id.* at ¶ 7.) An ICE officer displayed a piece of paper claiming they had an arrest order for [redacted], and asked if they could enter. (*Id.* at ¶ 10.) Ms. [redacted] was wearing only her pajamas and folded her arms over her chest because she was self-conscious. (*Id.* at ¶ 9.) When an ICE officer asked if they could enter the residence, Ms. [redacted] said they could. (J.A. 494; A.R. 478.)[6] When she realized she had locked herself out, she started banging the apartment door, pleading to be let in. (J.A. 494; A.R. 478 at ¶ 25.) Such facts were not considered by the IJ in evaluating the issue of consent. By "mischaracterizing and understating the evidence in the record, the [IJ] succeeded in reaching a conclusion not supported by substantial evidence,"

[6] She further attested that in this situation, where she was surrounded by multiple armed ICE agents acting under the authority of an agency removal order, she felt trapped, scared, and did not believe she had a right to refuse. (J.A. 492–94; A.R. 476–78 at ¶¶ 12 - 23.) The government disputes this account, arguing it was reasonable to assume that Ms. [redacted] had familiarity with law enforcement, and that therefore her will was not overborne. (Resp't's Br. 33–34 at n. 33.) This Court should not draw such conclusions. At most, it may instruct the agency to conduct further fact-finding on this issue.

such that Mr. [redacted]'s petition for review must be granted. *Chavarria v. Gonzalez*, 446 F.3d 508, 517–18 (3d Cir. 2006).

To the extent there is any ambiguity about these facts, that ambiguity is partly due to the fact that Mr. [redacted] was deprived of an opportunity to present critical evidence about the context in which this raid was executed. *See infra*, Parts III.A and B. Mr. [redacted] was deprived of such an opportunity *twice*. *Id.* The government now asks this Court to both ignore the significance of this evidence, and to hold that the findings below were supported by substantial evidence. This Court should reject both requests.

ii. Had the agency applied the correct legal standard to the record, it would have found that Mr. [redacted] was unlawfully seized without probable cause when he was asked to produce identification.

The BIA's finding that Mr. [redacted] was properly seized similarly runs contrary to a host of facts that the agency was obligated to consider. As noted previously, the BIA's analysis of the question was premised on the notion that Mr. [redacted] was not seized until *after* he had produced his identification documents. (Pet'r's Br. 36.) However, the question of when a seizure occurred is a rigorous inquiry requiring consideration of *all* available evidence.

As such, the BIA should have considered the circumstances in which the encounter took place. The raid was a night-time operation designed to find individuals at a time when they were likely to be asleep and disoriented. The

officers in the apartment were all visibly armed with guns and displayed ICE uniform badges. (J.A. 31–32; A.R. 15–16.) The officers corralled all the residents into a central living room, sealed off the exits, and proceeded to question all present individuals. (J.A 32, 495; A.R. 16, 479.) They were yelled at, prevented from using the bathroom without supervision, and forbidden from assisting one another. (J.A. 32, 496; A.R. 16, 480.)

The BIA's flawed analysis also invalidates its particularized suspicion inquiry. (Pet'r's Br. 37.) Had the agency considered a range of relevant facts, it would have found that at the time the seizure occurred, ICE officers lacked any reasonable basis for believing that Mr. [redacted] was engaged in unlawful conduct. Both the BIA's numerous errors of law and its misapplication of law to fact warrant remand to the agency for application of the correct standard to the record.

II. The agency erred in failing to terminate proceedings based on numerous regulatory violations committed during the home raid and Mr. [redacted]'s subsequent detention.

A. The BIA's unpublished decision lacks the force of law and is not entitled to deference.

This Court need not accord deference to the BIA's legal conclusions regarding termination based on regulatory violations for three reasons. First, an unpublished, nonprecedential decision of the BIA is not entitled to the same deference as a precedent decision issued with the full "force of law." *See United*

States v. Mead Corp., 533 U.S. 218, 226–27 (2001). When an agency issues a decision that has no binding effect on future agency action, it does not act in the confines of its statutorily delegated authority. *See id.* at 230–32. Other circuits have withheld deference to unpublished BIA decisions on this basis. *See, e.g.*, *Carpio v. Holder*, 592 F.3d 1091, 1097–98 (10th Cir. 2010) (refusing to accord deference to nonprecedential BIA decision); *Rotimi v. Gonzales*, 473 F.3d 55, 58 (2d Cir. 2007) (same).

Second, the language the government cites to from *Chong v. INS*, 264 F.3d 378, 389 (3d Cir. 2001) does not require deference to the agency's interpretation of its own regulations in this case. *Chong* addressed a regulation *not* rooted in constitutional or statutory rights, *id.* at 390, whereas all the regulatory violations raised in this appeal are so rooted. (Pet'r's Br. 43.) When the agency violates regulations founded in such rights, *Leslie v. Att'y Gen.*, 611 F.3d 171 (3d Cir. 2010) holds that termination is warranted. The *Leslie* Court noted that "[t]his rule balances the inherent tension between the well-established deference due administrative agencies . . . and judicial oversight of agency implementation of regulations." *Id.* at 179 (citing *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). Because *Leslie* already incorporates deference considerations, this Court need not accord the agency's interpretation any further weight.

Finally, deferring to the agency's interpretation is inappropriate when the regulations incorporate established constitutional standards. All of the regulations at issue here are rooted in the Fourth Amendment and the Fifth Amendment's Due Process Clause. *See Lee v. INS*, 590 F.2d 497, 500 (3d Cir. 1979) (noting that 8 U.S.C. § 1357(a)(1) is "limited by the strictures of the fourth amendment."). This Court need not defer when defining the scope of the Constitution's fundamental guarantees.

B. The BIA's finding that no regulations were violated during the home raid and Mr. [redacted]'s detention was fraught with legal error.

i. The BIA misconstrued applicable constitutional standards in evaluating whether ICE officers violated multiple regulations during the home raid and seizure of Mr. [redacted], and application of the correct legal standards would reveal that the agency's findings are not supported by substantial evidence.

The government states that the agency offered "a detailed analysis" of Mr. [redacted]'s claims that ICE officers violated 8 C.F.R. § 287.8(f)(2) (consent requirement for warrantless searches) and 8 C.F.R. § 287.8(b)(1) (authorizing questioning if "freedom . . . to walk away" is not restrained). These regulations incorporate Fourth Amendment consent, seizure, and particularized suspicion standards, and Mr. [redacted]'s arguments regarding those points are laid forth in Part I.A.

Moreover, the government fails to respond to Mr. [redacted]'s argument regarding 8 C.F.R. § 287.8(c)(2)(i), which governs when a noncitizen can be

arrested for reason to believe that he is not present in the United States legally. The organic statute for that regulation requires probable cause both for the noncitizen's arrest, and for believing that the noncitizen is likely to escape. (Pet'r's Br. 45). Part I.A.ii discusses the reasons why the government's arguments regarding probable cause are unavailing; the government leaves unchallenged Mr. [redacted]'s claim that ICE officers lacked reason to believe Mr. [redacted] was a flight risk.

ii. Analyzing whether ICE officers coerced Mr. [redacted] into waiving rights in violation of 8 C.F.R. § 287.8(c)(2)(vii) requires a close examination of all the relevant facts, not merely the select few that the government cites in response.

The government's response regarding whether Mr. [redacted] was coerced in violation of 8 C.F.R. § 287.8(c)(2)(vii) adds little to explain the BIA's analysis of this issue. The coercion analysis is a rigorous, "fact-specific inquiry," *Rajah v. Mukasey*, 544 F.3d 427, 445 (2d Cir. 2008), demanding more than the agency's and the governments' cursory conclusions.

First, the BIA's analysis regarding 8 C.F.R. § 287.8(c)(2)(vii) was limited to the home raid and did not address the examination at the ICE office. *See Navia-Duran v. INS*, 568 F.2d 803, 809 (1st Cir. 1977) (remanding to agency where court "examined the *totality* of facts surrounding [petitioner's] treatment by the INS") (emphasis added). The government's attempts to cover this flaw in the BIA's reasoning should not distract this court from requiring the agency to apply the law correctly. *See Chenery*, 443 U.S. at 196.

Second, the government's cited facts do not defeat Mr. [redacted]'s claim. The government points to two pieces of his testimony at the suppression hearing, (J.A. 246, 249; A.R. 230, 233.), arguing that because Mr. [redacted] did not think of refusing ICE officers' demands, he was not coerced. Insofar as Mr. [redacted]'s lack of intention to disobey the officers is considered, it must be weighed against *all* circumstances surrounding the encounter. *Compare United States v. Griggle*, 105 Fed. Appx. 431, 435 (3d Cir. Aug. 6, 2004) (assessing defendant's subjective belief in light of other objective factors).

The other facts the government cites are that the arresting officer "allowed [redacted] to dress" and that Belluardo generally told interviewees that they could stop answering questions if they felt uncomfortable. (Resp't's Br. 38.) These facts do not ameliorate the coercive atmosphere of the home raid and the processing interview. (Pet'r's Br. 47.) The agency was obligated to consider *all* relevant circumstances, *Navia-Duran*, 568 F.2d at 807, including officers' intimidating conduct in the apartment, (J.A. 32, 495, 502; A.R. 16, 479, 486.), and prevention of Mr. [redacted] from eating for 24 hours. (J.A. 33; A.R. 17.) This Court should remand for correct application of the law.

iii. The right to counsel during examination under 8 C.F.R. § 292.5(b) applies to custodial interviews prior to removal proceedings.

The government argues that Mr. [redacted] was not protected by 8 C.F.R. § 292.5(b) during his investigatory interview, because the regulation should not be

read to cover "post-arrest processing." This reading is incorrect for several reasons. First, the government concedes that the regulation "does not identify what is meant by 'examination,'" (Resp't's Br. 41.), indicating that the term's definition is not limited. Moreover, the regulation refers to an "examination," not "removal proceedings." The latter term is one that the agency could have used if they had wished to cabin 8 C.F.R. § 292.5(b)'s scope.[7]

Second, the right to be advised of the right to counsel is distinct from being deprived of the right to counsel after expressing a wish for representation. *Compare Samayoa-Martinez v. Holder*, 558 F.3d 897, 901-902 (9th Cir. 2009) (holding that right to be advised of right to counsel does not attach until removal proceedings) *with Kandamar v. Gonzales*, 464 F.3d 65, 71 (1st Cir. 2006) ("By regulation, Kandamar does have a right to be represented by counsel at examinations by immigration officers . . . ."). Mr. [redacted]'s case falls into the latter category, since he clearly expressed his wish to be represented by an attorney during his interview. (J.A. 503; A.R. 487.) ICE officers then told him that he was *required* to respond to questioning without the presence of an attorney, and implying that his right to counsel in removal proceedings was predicated on answering their questions. (J.A. 503; A.R. 487.) The information Belluardo

[7] This interpretation of the regulation is the government's not the agency's. The BIA stated only that § 292.5(b) does not apply prior to removal proceedings, citing to *Samayoa-Martinez*, 558 F.3d at 897, which is inapposite. (J.A. 9; A.R. 9.)

gathered from that examination resulted in the I-213, which the government used against Mr. [redacted] in his removal proceedings. This conduct impeded Mr. [redacted]'s access to counsel within the regulation's meaning.[8]

III. The proceedings below violated Mr. [redacted]'s statutory and due process right to a full and fair hearing of his claims.

A. The government's response that the IJ did not abuse her discretion in failing to rule on the subpoenas for witnesses and documents ignores the cumulative effect of agency and ICE actions that deprived Mr. [redacted] of his right to a full and fair hearing of his claims.

In addressing the IJ's failure to issue subpoenas in isolation, the government contends with part of the picture only, arguing that IJ's are entitled to "broad discretion" in conducting trial proceedings and concluding that the IJ must have deemed subpoenas inessential. (Resp't's Br. 43.). Missing from the government's

[8] The government asserts that Mr. [redacted]'s lack of counsel would not have prejudiced his case because "disclosure of his identity . . . was not suppressible in any event." (Resp't's Br. 41 (citing *Lopez-Mendoza*, 468 U.S. at 1039). However, 8 C.F.R. § 292.5(b) protects a noncitizen's right to counsel under the Fifth Amendment, and no showing of prejudice is required. *Leslie*, 611 F.3d at 180.

Moreover, the government's assertion is untrue. The cited language in *Lopez-Mendoza* refers only to the court's ability to assert *jurisdiction* over the defendant or respondent, not to the suppressibility of an individual's identity. *See United States v. Olivares-Rangel*, 458 F.3d 1104, 1111–1112 (10th Cir.2006) ("illegal police activity affects only the admissibility of evidence; it does not affect the jurisdiction of the trial court or otherwise serve as a basis for dismissing the prosecution.") (emphasis added); *United States v. Oscar-Torres*, 507 F.3d 224, 227–230 (4th Cir. 2007) (holding same); *United States v. Guevara-Martinez*, 262 F.3d 751, 753–755 (8th Cir. 2001) (same); *but see United States v. Bowley*, 435 F.3d 426, 430–431 (3d Cir. 2006) (declining to suppress defendant's identity where it connected him with preexisting immigration file, but recognizing availability of suppression for "egregious" constitutional violations). *Id.* at 430.

analysis is the sequence of events below that violated Mr. [redacted]'s statutory and due process right to a full and fair hearing of his claims.[9] *See Abdulrahman v. Ashcroft*, 330 F.3d 587, 596 (3d Cir. 2003); 8 U.S.C. § 1229a(b)(4)(B). At various stages in his removal defense, Mr. [redacted] faced substantial hurdles in his efforts to obtain necessary evidence. In this context, the IJ's failure to rule on the subpoenas was not only an abuse of discretion, but a due process violation. (Pet'r's Br. 50–54.)

The government argues that the IJ's failure to rule on the motion to subpoena documents was proper because "[redacted] could request them under FOIA." (Resp't's Br. 43). The government overlooks that Mr. [redacted] did just that, to no avail. Mr. [redacted] submitted a FOIA request to ICE for its home raid policies and practices (J.A. 772–75; A.R. 756–59); ICE improperly withheld evidence that would have shown that ICE officers were operating under systemic pressures to arrest, regardless of individualized suspicion. (J.A. 352–55; A.R. 336–39.)

The government argues that the motion to subpoena witnesses was inessential because "ICE counsel indicated that it would produce 'all witnesses' needed for the suppression hearing." (Resp't's Br. 43.) In response to Mr. [redacted]'s request that it produce the officers who executed the raid of Mr. [redacted]

[9] The government does not dispute that Mr. [redacted] met the prerequisites for the issuance of the subpoenas. (Pet'r's Br. 50–54.)

[redacted]'s home, (J.A. 572; A.R. 556), ICE counsel actually reserved the right to "present whatever witnesses its [sic] deems appropriate" in the absence of a "prima facie determination by the court that such evidentiary requests are warranted." (J.A. 574; A.R. 558.)

Finally, the government argues that "[redacted] failed to demonstrate any prejudice," (Resp't's Br. 43), overlooking aspects of the record that show otherwise. First, the government overlooks the burden of proof that Mr. [redacted] faced in moving to suppress evidence and to terminate on the basis of regulatory violations. The IJ made it clear that Mr. [redacted] would have to establish "some sort of egregious actions on the part of the Government" and that the actions were "such that it shocked the conscience of the, of [sic] a reasonable person." (J.A. 234; A.R. 218.)[10] Once it became evident that administrative channels would not yield the evidence needed to meet this burden, Mr. [redacted] filed subpoena motions. (J.A. 574, 566–69, 750–52; A.R. 558, 550–53, 734–36.)

Second, the government fails to consider how the suppression hearing unfolded in the absence of subpoenas. Mr. [redacted] could not produce agency documents at the suppression hearing that would have supported his claims of egregious and widespread constitutional violations. Additionally, DHS produced

[10] As explained *supra*, Part I.A a noncitizen moving to suppress must first establish a Constitutional violation, and then that the violation was "egregious."

only one witness at the suppression hearing, who despite being listed as an arresting officer on the I-213, testified that she had no recollection of the home raid. (J.A. 309; A.R. 293.) As explained *supra*, Part I.A.i, the IJ impermissibly relied on the government's assertions in ruling that ICE officers did not violate Mr. [redacted]'s rights during the search and subsequent arrest.

Lastly, the government overlooks the probative and impeachment value of the documentary evidence that ICE finally disclosed as part of separate FOIA litigation, discussed *infra*, Part III.B. The legal standards for search and seizure require evaluation of *all* the circumstances. *See supra* Part I.A.i and ii. Had Mr. [redacted] been provided a full opportunity to present his claims, and had the agency applied the correct legal standards to those claims, the agency would have found that the home raid and seizure of Mr. [redacted] violated the Fourth Amendment, and that ICE officers violated a number of agency regulations during the course of their enforcement actions.

B. The government fails to address Mr. [redacted]'s argument that his statutory and due process right to a full and fair hearing of his claims was further infringed by the BIA's refusal to consider the evidence that Mr. [redacted] sought in his immigration court proceedings.

The government fails to address an independent ground for granting this petition for review—the BIA's error in failing to remand for consideration of evidence that had been improperly withheld from Mr. [redacted] (Pet'r Br. 54–

55.) The government states only that "the Board found it unnecessary to consider the exhibits." (Resp't's Br. 8.) When Mr. [redacted] proffered the evidence that he had persistently sought during his immigration court proceedings and which became available as a result of separate FOIA litigation, (J.A. 42–61; A.R. 26–45.), the BIA had an opportunity to correct the due process violation described *supra*, Part III.A, but failed to do so. This further deprived Mr. [redacted] of his right to a full and fair hearing of his claims. (Pet'r's Br. 54–55); *see also Figueras v. Holder*, 574 F.3d 434, 437–438 (7th Cir. 2009) (holding BIA erred in failing to remand to IJ for consideration of evidence that IJ did not permit petitioner to present).

The proffered evidence included agency memoranda showing that at the time of the raid at issue, Fugitive Operations Teams ("FOT") were held to inflated annual quotas of 1,000 "fugitive" apprehensions, 500 of which they could meet through "collateral" arrests. (J.A. 52–54; A.R. 36–38.) The BIA summarily dismissed the motion on the basis that "goes chiefly to establishing a Fourth Amendment exclusionary rule premised on a theory of widespread DHS Fourth Amendment violations." (J.A. 11; A.R. 11.)

The government similarly discounts the significance of this evidence. (Resp't's Br. 45.) The finding that the evidence "goes chiefly" to the issue of "widespread DHS Fourth Amendment violations" was in error in that it overlooked

aspects of the record below. Specifically, the BIA erred in failing to consider the relevance of these documents to Mr. [redacted]'s *individual case*, and in doing so violated Mr. [redacted]'s right to present evidence.

First, the evidence demonstrated that at the time Mr. [redacted] was arrested, the Newark ICE FOT was subject to the annual quota policy presented above. This is the precisely the type of evidence that Mr. [redacted] needed to meet his burden of establishing "some sort of egregious actions on the part of the Government." (J.A. 234; A.R. 218)

Second, the BIA also overlooked the impeachment value of the evidence. Belluardo testified that during the course of home raids, it was agency practice to locate all occupants and bring them to a central location in the residence "to have a central area for the safety of them, for everyone present in the house." (J.A. 328; A.R. 312.) The IJ relied on her testimony in finding the search of the home and seizure of Mr. [redacted] proper. *See supra* Section I.A.i. The proffered evidence would have provided crucial context and undermined the safety rationale: FOT officers faced institutional pressures to arrest as many people as possible, regardless of whether or not they were "fugitives." As such, the evidence was not solely concerned with establishing "widespread DHS Fourth Amendment violations," but also with establishing constitutional and regulatory violations in Mr. [redacted]'s individual case.

At minimum, BIA's denial of remand was an abuse of discretion. *See Kortynyuk v. Ashcroft*, 396 F.3d 272, 282–85 (3d Cir. 2005). Denying remand for consideration of evidence is an abuse of discretion where the "IJ may never have seen material evidence that should have been before him," *Kortynyuk* , 396 F.3d at 293, such as in this case, where the IJ made it known to Mr. [redacted] that he needed to show egregious government actions. *See also Huang v. Att'y Gen.*, 620 F.3d 372, 391 (3d Cir. 2010) (BIA's "dismissive treatment" of new evidence an abuse of discretion). As in *Kortynyuk*, counsel below "tried at least twice" to get critical evidence before the IJ. *Id.*

Here, the denial of remand was also a statutory and due process violation, given both the IJ and the BIA's refusal to permit Mr. [redacted] to present evidence that would have further developed the "factual predicate" the government now claims is lacking. (Resp't's Br. 31.) And for the reasons discussed *supra*, Part III.A, Mr. [redacted] was substantially prejudiced by this violation. While the record as it stands provides sufficient support for Mr. [redacted]'s claims of constitutional and regulatory violations, this Court should remand with instruction for the agency to consider this evidence and its bearing on Mr. [redacted]'s arguments.

C. The government's argument that the Mr. [redacted] failed to establish prejudice as a result of translation errors fails to consider the due process violations that made it urgent that Mr. [redacted] testify effectively on his own behalf.

The government similarly views Mr. [redacted]'s claim of translation errors in isolation, overlooking the fact that ICE's refusal to turn over evidence through FOIA and produce all the officers, as well as the IJ's refusal to rule on the subpoenas, made it more significant that he receive a competent translation in order to "place his claim before the judge." *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984). In the face of these obstacles, his testimony became his primary evidence of establishing "some sort of egregious actions" on the part of ICE. Considered in this broader context, the translation errors below were prejudicial. (Pet'r's Br. 57–58.) To remedy the due process violations described in this section, this Court should remand and instruct to provide Mr. [redacted] with a full and fair hearing of his claims, including if necessary, a new hearing before a different IJ.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. [redacted]'s petition for review.

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Respectfully Submitted,

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