GERARD E. LYNCH, Circuit Judge, dissenting:

As the majority correctly holds, a respondent in removal proceedings who seeks the suppression of evidence must come forward with a prima facie case of an egregious Fourth Amendment violation before the government will be required to justify the manner in which it obtained its evidence.[1] See Cotzojay v. Holder, 725 F.3d 172, 178 (2d Cir. 2013). The egregiousness inquiry, we have held, mandates a "flexible[,] case-by-case" approach, which turns on a non-exhaustive list of factors, including, among others, whether the seizure was without plausible legal ground or based on grossly improper considerations such as race or ethnicity. Id. at 182-83. Petitioners here have offered evidence that, if true, suggests that after a multi-year harassment campaign targeted at Danbury's Hispanic residents generally, and its Ecuadorian residents specifically, petitioners were arrested without plausible legal justification based solely on their ethnicity, national origin, and status as day laborers. Nevertheless, the majority denies petitioners an evidentiary hearing.

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[1] In removal proceedings, it is obviously the respondent who seeks to suppress evidence. By the time these cases reach this Court on appeal, however, the alien subject to an order of removal is the petitioner, since he is petitioning for review of a final order of removal. For the sake of consistency, and in conformity with the usual usage of this Court's prior decisions, I shall refer to the alien seeking suppression as the petitioner.

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Worse, the majority further holds that even if the petitioners had been given such a hearing, they could not have proven an egregious Fourth Amendment violation because, in the immigration context, law enforcement's reliance on petitioners' status as apparently Latino day laborers, when shuffled together with the supposed experience of local law enforcement and a free-floating governmental interest in traffic safety, was not grossly improper. That result threatens to deprive persons placed in removal proceedings of the basic level of fundamental fairness that the Constitution demands. Because the majority's nearly insuperable barrier to obtaining an evidentiary hearing rests on a cramped definition of egregiousness that is inconsistent with our precedent, I respectfully dissent.

I

I begin by emphasizing several record facts that the majority downplays. Around 6:30 in morning of September 19, 2006, Danbury police officers and detectives met with United States Immigration and Customs Enforcement ("ICE") agents at the Danbury Police Department headquarters to prepare for a sting operation at Danbury's Kennedy Park. The park, a frequent gathering spot for Danbury's Ecuadorian population, was also a site at which many persons

sought work as day laborers. The sting operation was the culmination of a multi-year effort to combat what some Danbury officials and residents viewed as a growing influx of undocumented immigrants. In 2004, for example, Danbury's mayor wrote to United States Customs and Immigration Services, explaining that Danbury was "attracting a large number of undocumented immigrants," and asked that "enforcement resources" be focused on the city. J.A. 35. The following year, Danbury's mayor reached out to Connecticut's then-Governor requesting an agreement under 8 U.S.C. § 1357(g), which would have allowed state or local police officers to enforce federal immigration law under the supervision of ICE officials. Those efforts were rebuffed.

Danbury officials then intensified the enforcement of local ordinances, targeting housing code violations and attempting to shutdown sporting events that were popular among many of the city's Hispanic residents. Local officials also increased their efforts to control the solicitation of day labor near Kennedy Park. Although the ostensible reason for this targeted enforcement was traffic safety, the record does not reflect that any such efforts were undertaken to control day laborers at nearby Minas Carne, a different location that was more heavily frequented by the city's better-assimilated Brazilian immigrant

population.

It was against that backdrop that on that September 2006 morning, a Danbury police officer, dressed as a contractor, drove to Kennedy Park in an unmarked car, where he was then approached by men soliciting work. Once several men entered the vehicle, under the misapprehension that they would be taken to a work site, the detective, without asking the men any questions, drove them to an abandoned parking lot where seven Danbury police officers and three ICE agents awaited them. As the men left the vehicle, they were surrounded by armed law enforcement officers, shouting "[Y]ou're under arrest." J.A. 523. The undercover police officer made two other such trips to Kennedy Park that day, resulting in the arrest of 11 men, five of whom are the petitioners in these consolidated cases.

Petitioners were driven to the Danbury Police Headquarters, where they were questioned, fingerprinted, and held in detention cells. Some were denied an opportunity to telephone their family to notify them of their whereabouts or to arrange for the assistance of counsel. Petitioners eventually made incriminating statements about their immigration status, were placed in removal proceedings, and ordered removed from the United States, having entered the country without

inspection.[2]

II

In INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), the Supreme Court held that generally, the exclusionary rule does not apply to removal proceedings. A bare majority of the Court reached that conclusion after balancing the deterrent effects of the exclusionary rule against the social costs of extending its application to civil removal proceedings. A plurality of the Justices limited the Court's holding, however, specifically noting that its balancing discussion did not govern "egregious" violations of the Fourth Amendment or other fundamental rights, or cases involving "widespread" Fourth Amendment violations by immigrations officials. Id. at 1050-51.

Although this Court has not yet had occasion to consider what might constitute "widespread" Fourth Amendment violations, we have since held that

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[2] The majority complains that I focus on the conduct of the Danbury Police without detailing the actions of ICE agents. But those agents appear to have simply delegated the round-up of Kennedy Park day-laborers to the Danbury Police. Nor is this a case in which the suppression of evidence in immigration proceedings would have no deterrent effect on local police officers. The record makes clear that the Danbury officers were motivated not by the prospect of state criminal proceedings, but precisely by their desire to use federal immigration law against people like the petitioners. The majority's reliance on United States v. Janis, 424 U.S. 433 (1976) is therefore misplaced. Majority Op., ante, at 23-24.

1 evidence obtained by "egregious" Fourth Amendment violations may be
2 suppressed in removal proceedings. See Almeida-Amaral v. Gonzales, 461 F.3d
3 231, 234 (2d Cir. 2006); see also Pinto-Montoya v. Mukasey, 540 F.3d 126, 131 (2d
4 Cir. 2008) ("We have adopted the reservations of the Lopez-Mendoza plurality as
5 part of the law of our circuit . . . .") (quotation marks omitted).
6 In order to accommodate the competing interests of the government in
7 streamlined removal proceedings, while simultaneously guarding individuals
8 against egregious Fourth Amendment violations, we have approvingly cited the
9 BIA's burden-shifting framework. Under that framework, in removal
10 proceedings, "a petitioner raising a question about the admissibility of evidence
11 must come forward with proof establishing a prima facie case before the
12 Government will be called on to assume the burden of justifying the manner in
13 which it obtained the evidence." Cotzojay, 725 F.3d at 178 (internal quotation
14 marks and brackets omitted). Then, "if the petitioner offers an affidavit that *could*
15 support a basis for excluding the evidence in question, it must then be supported
16 by testimony." Id. (internal quotation marks omitted; emphasis added). If the
17 petitioner establishes a prima facie case, the burden then shifts to the government
18 to show why the evidence in question should be admitted. Id. To suppress

evidence resulting from a Fourth Amendment violation, the movant must make a prima face showing of an egregious Fourth Amendment violation. See id. at 179. We have not precisely defined the boundaries of "egregious" violations, but it is clear that the concept is not limited to cases of physical abuse. "[E]ven where the seizure is not especially severe," it may qualify as "egregious" if based on race or other "grossly improper" considerations. Almeida-Amaral, 461 F.3d at 235.

III

The panel opinion's fundamental flaw is its unwillingness to properly apply and respect the purposes of "the Cotzojay burden-shifting framework." Majority Op., ante, at 11. To be clear, I have no quarrel with that framework, which is settled law. Properly applied, the framework would serve to maintain the proper functioning of the nation's immigration enforcement system while protecting the constitutional rights of those who become ensnared in removal proceedings. First, removal proceedings are necessarily streamlined, and therefore do not carry all of the protections of criminal proceedings. See United States v. Lopez, 445 F.3d 90, 100 (2d Cir. 2006). As a general matter, suppression hearings, which are often "unnecessary, expensive, and protracted," Matter of Tang, 13 I. & N. Dec. 691, 692 (B.I.A. 1971), are problematic in that process. The

1 affidavit requirement ensures that a suppression hearing will not be convened
2 because a petitioner's attorney has been misled by unsworn representations of his
3 client. Id. Second, requiring the petitioner's testimony prior to shifting the
4 burden of proof to the government adds an extra hurdle, ensuring that a full-
5 fledged hearing is not triggered by a mere declaration that the petitioner was
6 seized for no reason at all or based on a grossly improper consideration. Finally,
7 the egregiousness standard itself, which is limited to conduct that "by
8 definition[,] is very bad indeed," Majority Op., ante, at 7, ensures that evidentiary
9 hearings and suppression will remain rare.
10 But the proper application of the burden-shifting framework also ensures
11 that in cases where all of the facts that would prove egregiousness are not within
12 the personal knowledge of the petitioner, the petitioner will have an adequate
13 opportunity to secure such evidence. Thus, while establishing a prima facie case
14 for suppression requires an offer of proof containing information personally
15 corroborated by petitioner, that requirement "cannot extend to information the
16 [petitioner] does not have," Cotzojay, 725 F.3d at 178.
17 We have rejected the view that Fourth Amendment violations require
18 "physical injury or the threat thereof." Id. at 182. Instead, we have adopted a

1 non-exhaustive list of factors to guide that assessment, including "whether the
2 violation was intentional; whether the seizure was gross or unreasonable and
3 without plausible legal ground; . . . and whether the seizure or arrest was based
4 on race or ethnicity." Id. (internal quotation marks omitted). Plainly, evidence
5 regarding the intentionality of a violation, the officers' motivation in conducting
6 the raid at issue, and whether the petitioner's race, or ethnicity were a motivating
7 factor for the governmental action would not and could not be within the
8 petitioner's knowledge at the prima facie stage. But such evidence would be
9 critical to proving that their arrest was without plausible legal grounds or based
10 on a grossly improper consideration, factors suggestive of an egregious Fourth
11 Amendment violation. Id. Because removal proceedings must comport with
12 basic notions of fundamental fairness, I cannot agree with the majority's
13 conclusion that in order to obtain an evidentiary hearing, petitioners must
14 personally attest to first-hand knowledge of facts that, if true, would establish an
15 egregious Fourth Amendment violation. See Majority Op., ante, at 13.
16 The majority attempts to limit Cotzojay to its facts by noting that an
17 evidentiary hearing was warranted in that case because the "deliberate,
18 nighttime, warrantless entry into an individual's home, without consent and in

the absence of exigent circumstances," is "appalling under any standard." Majority Op., ante, at 8 (internal quotation marks omitted). While Fourth Amendment protections are "at their zenith in the home," Cotzojay, 725 F.3d at 181, at the prima facie stage, a petitioner need not aver "appalling" facts, but simply facts that, taken as true, could establish an egregious Fourth Amendment violation.

Cotzojay affirmed the principle that the egregiousness inquiry "is intended to be broad," id. at 182, and thus emphasizes that egregious Fourth Amendment violations may come in many forms. The majority's attempt to impose an even more stringent standard at the prima facie stage, therefore, is inconsistent with this Court's precedent.[3]

IV

As I have explained, if the purposes underlying the prima facie case requirement are to be respected, a party seeking suppression must do more than swear to facts that simply call into question the constitutionality of the agents'

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[3] The majority appears to suggest that an egregious Fourth Amendment violation must "shock the conscience." Majority Op., ante, at 7. To the extent that this language may be read to require conduct as flagrant as that in Rochin v. California, 342 U.S. 165 (1952), that conclusion is also inconsistent with our precedent. Cotzojay, 725 F.3d at 181.

conduct. These petitioners have done so. The affidavits submitted by the petitioners and the 27 exhibits attached thereto, taken as true, strongly suggest that their arrests were without plausible legal grounds and may well have been based on their ethnicity, national origin, and status as day laborers.[4]

It is not apparent to me on what basis the police and ICE agents undertook to arrest petitioners. Generally, "it is not a crime for a removable alien to remain present in the United States." Arizona v. United States, 132 S.Ct. 2492, 2505 (2012). Thus, "[i]f the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent." Id. In any event, there is no suggestion in this record that either the undercover officer or the arresting officers in the parking lot knew anything at all about any of the petitioners who entered the car other than that they were willing to engage in casual labor (and,

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[4] I cannot agree with the majority's suggestion that the exhibits attached to the affidavits may not be considered. See Majority Op., ante, at 14. The Federal Rules of Evidence do not apply in removal proceedings. See, e.g., Aslam v. Mukasey, 537 F.3d 110, 114 (2d Cir. 2008). Even if some of the exhibits might be excluded as hearsay under a strict application of those rules, there is no basis in law or logic to ignore evidence relevant to petitioners' prima facie case, thereby further stultifying the purposes of the burden-shifting framework. It is only by ignoring these exhibits that the panel can assert that "the dissent leaves out a lot." Majority Op., ante at 25. Rather, the majority "leaves out a lot" when it fails to note that the assertion that "aliens with Warrants of Removal would be encountered in Kennedy Park," which comes from the Danbury Police Department's Special Investigations Division, J.A. 5, does not appear to be supported by any specific record evidence.

presumably, that they appeared Hispanic). Moreover, neither the government nor the majority has identified a single traffic ordinance – let alone any more serious criminal law – that these petitioners might have been suspected of violating.[5] It therefore appears that prior to their arrest and interrogation, the arresting officers did not have any reasonable basis to suspect that petitioners had violated any state, federal, or local law, the bare minimum required for a lawful seizure. See Terry v. Ohio, 392 U.S. 1, 27 (1968). Surely such a seizure could be regarded as "without plausible legal ground," Cotzojay, 725 F.3d at 182, and thus trigger the need for an evidentiary hearing.[6]

V

The panel majority opinion seeks to avoid that obvious conclusion on at least two separate but related grounds. The majority contends that petitioners were "self-selected" for arrest first, because they entered the undercover vehicle

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[5] To the extent that the government suggests that some persons soliciting day labor at Kennedy Park engaged in violations of traffic laws, such as jaywalking, in the absence of a record based on an evidentiary hearing, there is certainly no evidence that any or all of these petitioners committed any such violations.

[6] Whether the Fourth Amendment seizure occurred when petitioners (who voluntarily entered the vehicle), were transported to a location and for a purpose to which they manifestly had not consented, or when they were handcuffed in the abandoned parking lot is immaterial, since the officers and agents knew nothing more at the latter point than they did when petitioners entered the car.

without duress, and second because they were members of a targeted group that was "assembled to offer themselves for day labor, an occupation that is one of the limited options for workers without documents," and is "likely correlated with undocumented status." Majority Op., ante, at 10-11. I cannot agree.

The contention that the petitioners were "self-selected" – which attempts to avoid the implication that they were targeted by the authorities on an impermissible basis – ignores the evidence that ethnic prejudice may have played a role in the decision to target Kennedy Park. Petitioners offer evidence that the City of Danbury engaged in a campaign of harassment against Hispanic immigrants in the years prior to the operation, and that the police specifically targeted the Ecuadorian immigrants who gathered at Kennedy Park, as opposed to the mostly Brazilian workers gathered at Minas Carne. To hold that law enforcement officials can target a specific area on the basis of improper considerations such ethnicity and national origin, and then suggest that particular individuals selected themselves for arrest by engaging in lawful conduct is to condone ethnic harassment.

Moreover, petitioners "selected" themselves from others gathered in the park only by volunteering to accept an implicit offer of employment. They

neither volunteered themselves for arrest nor engaged in any illegal activity. I reject the notion that the solicitation of day labor in itself gives rise to a reasonable suspicion of illegal presence in the country. The panel offers no empirical support for its assertion that anyone who offers to engage in casual or "off-the-books" work is likely to be an undocumented immigrant. And in any event, a mere statistical correlation between entirely unsuspicious, lawful behavior and some form of illegal activity does not give rise to individualized reasonable suspicion or probable cause.

The solicitation of work is in itself constitutionally-protected speech. See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 945 (9th Cir. 2011) (en banc), citing Intl' Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 677-78 (1992); see also Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993) (holding that begging is a form of constitutionally protected-speech). Moreover, when combined with its "self-selection" theory, the majority's rule admits of no apparent limiting principle, and could subject citizens and aliens in any number of occupations to indiscriminate seizure based on nothing more than their occupational status. Would any person seeking to mow someone's lawn be subject to seizure, on the theory that undocumented

1 workers commonly seek such labor? Any person who seeks work as either an in-
2 home or hotel domestic? Dishwashers or busboys at restaurants? Any person
3 holding a sign that says "Iraq Veteran: Will Work for Food"?
4 Of course, it is not difficult to imagine the de facto limiting principle that
5 will be utilized. It is hard to imagine immigration officers detaining and
6 questioning a blond, stringy-haired young man of vaguely Euro-American
7 appearance in an Army surplus jacket simply because he carried such a sign. But
8 if the man were short, dark-complected, black-haired, and looked to the officer
9 vaguely Latino, the calculus might well change. Petitioners contend that this is
10 exactly what led the officials planning the Danbury sting to target Kennedy Park.
11 The majority's apparent response to those questions is that in the
12 immigration context such seizures would be permissible so long as law
13 enforcement displayed no "race-based animus." Majority Op., ante, at 15. (As I
14 have already explained, given the majority's disregard for the proper application
15 of the burden-shifting framework, it is difficult to know how any such race-based
16 animus could ever be proved.) Further, the majority appears to suggest that such
17 seizures would be entirely permissible if they were based on factors such as
18 apparent ethnicity or national origin, combined with the general experience of

1 local police officers. See Majority Op., ante, at 15 (asserting that race is the only
2 "grossly improper consideration" posited in Almeida-Amaral).
3 Aside from its irreconcilability with Cotzojay's express conclusion that
4 whether a seizure was based on ethnicity is a relevant factor in the egregiousness
5 inquiry, 725 F.3d at 182, the suggestion that ethnicity can be a factor that, in
6 combination with the solicitation of casual employment, supports rather than
7 undermines the legality of police detention is dangerous. Tolerating arrests on
8 such a basis puts all citizens and legal residents who appear to police officers or
9 immigration agents to share a national origin with a large number of
10 undocumented immigrants at grave risk. Whatever criteria law enforcement
11 officials might use to guess a person's ethnic background by casual visual
12 inspection, legal residents and citizens of Latin American origin will likely bear
13 the brunt of that risk.
14 The majority's attempt to distinguish between "race" on the one hand, and
15 ethnicity and national origin on the other utterly fails. Worse, it appears to
16 condone ethnically-targeted enforcement campaigns based on generalized

notions of physical appearance and cultural stereotypes.[7] I have little trouble concluding that ethnically-based targeting of day laborers constitutes an "egregious" constitutional violation. Immigration enforcement that is based not on individualized suspicion but on ethnic generalizations teeters on the verge of "the ugly abyss of racism." Korematsu v. United States, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting).

The majority states that its tolerance for such broad-brush generalizations is necessary, because without it, law enforcement officials would be forbidden from conducting "raids on sweatshops, forced brothels, and other settings in which illegal aliens are exploited and threatened – and much worse." Majority Op., ante, at 15. It is doubtless true that protecting undocumented workers, and any other person, from unsafe and illegal working conditions is a legitimate law enforcement interest, as is enforcing the immigration laws themselves. But a targeted raid on an establishment where there is concrete evidence that undocumented workers are hired differs from indiscriminate sweeps based on the assumption that *anyone* willing to work for cash on a daily basis (or at least

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[7] Indeed, in this very case, there is evidence suggesting that local officers specifically targeted backyard volleyball games, in part, because that sport was believed to be popular among Hispanic residents.

anyone who looks "foreign" to a police officer or customs agent) is an undocumented immigrant.[8]

VI

At bottom, the majority's analysis in this case is primarily driven by its fear that "[n]o system of immigration enforcement can run," Majority Op., ante, at 15, where the Government is forced in every removal proceeding to justify the manner in which it obtained its evidence. I do not disagree. It is precisely for that reason that application of the Fourth Amendment's exclusionary rule in the context of removal proceedings is limited to cases of egregiousness, and that proper application of the burden-shifting framework would ensure that the nation's immigration enforcement system would not grind to a halt. But no *fair* system of immigration enforcement can exist where these petitioners, who have plausibly alleged that law enforcement officials have committed egregious

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[8] The majority contends that my approach would "foreclose altogether the consideration of nationality in immigration enforcement." Majority Op., ante, at 26. Such a view might well be "absurd," id. But the panel attacks a straw man. I do not suggest that the immigration authorities may not investigate particular ethnically-organized groups of smugglers or patterns of illegal immigration from particular countries. But that is not the same thing as targeting one of two otherwise similar groups of potential undocumented workers based on apparent nationality, or utilizing apparent ethnicity as a putative basis for deciding that certain day-laborers are likely to be present illegally.

Fourth Amendment violations by conducting targeted enforcement schemes based on grossly improper considerations such as ethnicity, national origin, and day-laborer status are not even permitted an evidentiary hearing. The Fourth Amendment applies to citizens and aliens alike, and if it is to retain its vitality, its basic protections should not be so needlessly and promiscuously diminished. Under the totality of the circumstances in this case, I conclude that the evidence presented here entitled petitioners to an evidentiary hearing. I would therefore grant the petitions for review and remand these cases to the Board of Immigration Appeals with instructions to remand to the Immigration Judge for an evidentiary hearing. I respectfully dissent from the majority's contrary conclusion.