

NOTE

“TRAVELING WHILE HISPANIC”: BORDER PATROL IMMIGRATION INVESTIGATORY STOPS AT TSA CHECKPOINTS AND HISPANIC APPEARANCE

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INTRODUCTION

In 1896, Justice Harlan dissented against the “separate, but equal” doctrine established by *Plessy v. Ferguson*,¹ saying,

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens.

¹ 163 U.S. 537 (1896).

There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, *all citizens are equal before the law.*²

It took the Supreme Court over sixty years to finally overrule the "separate, but equal" doctrine in *Brown v. Board of Education*,³ but only twenty-one years later in 1975, the Court itself established another doctrine that downgraded people of Hispanic origin to second-class citizens.

In *United States v. Brignoni-Ponce*,⁴ the Supreme Court sanctioned the use of "apparent Mexican ancestry" as a valid factor in an immigration law enforcement officer's analysis on whether to detain a suspected undocumented immigrant because "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor."⁵ Through the years, this ethnic classification has evolved without any explanation in the courts into its current vague and all-encompassing form: "Hispanic appearance."⁶ This unclear and over-generalized ethnic classification is still widely used today by the United States Border Patrol (USBP) in their immigration investigatory stops⁷ and upheld on a daily basis by federal courts around the country, especially those courts located in the southern border.

The "Hispanic appearance" classification must raise concerns for all people of Hispanic origin and minority groups around the country. Both 8 U.S.C. § 1357 and 8 C.F.R. § 278.1 authorize USBP to conduct immigration investigatory stops of individuals suspected to be aliens within a 100-mile border zone along the United States border.⁸ While most of the immi-

² *Id.* at 559 (Harlan, J., dissenting) (emphasis added).

³ 347 U.S. 483, 495 (1954).

⁴ 422 U.S. 873 (1975).

⁵ *Id.* at 885–87.

⁶ See *Nicacio v. INS*, 797 F.2d 700, 701 (9th Cir. 1985).

⁷ The label of "immigration investigatory stops" throughout the Note refers to those *Terry* investigatory stops conducted by USBP officers to question individuals about their immigration status. See *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

⁸ With respect to powers of the immigration officers and employees, 8 U.S.C. § 1357 (1994) provides:

(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

...

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance or vehicle, and within a distance of twenty-five miles

gration investigatory stops take place within the southern border, the 100-mile border zone extends the USBP's authorization to conduct these stops within 100 air miles of the Canadian border, the Atlantic, Pacific, and Gulf coasts, as well as within the perimeters of Alaska and Hawaii.⁹ According to the American Civil Liberties Union, "[r]oughly two thirds of the United States population lives within the 100-mile border zone[,] . . . [t]hat's about 200 million people."¹⁰ As these figures suggest, USBP officers patrol more than just the border.

Although the USBP's mission of finding and locating undocumented immigrants has been an issue for the agency since its inception, the recent harsh immigration policies of the Trump Administration have sparked fear in immigrant communities nationwide. Under the Obama Administration, immigration law enforcement agencies were previously instructed to prioritize locating and deporting undocumented immigrants with criminal backgrounds.¹¹ However, the Trump Administration now has issued new guidelines to these agencies that empower them to "target, detain and deport any of the millions of immigrants currently in the United States without documentation, including those without past criminal convictions."¹² In addition, some of the Trump Administration's objectives in immigration law enforcement include recruiting 5,000 new USBP

from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent illegal entry of aliens into the United States; [and]
(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, or expulsion of aliens.

The Attorney General has authorized Border Patrol officers to act as Immigration officers. 8 C.F.R. § 103.1(i) (1974). The "reasonable distance" mentioned in § 1357(a)(3) is 100 air miles. 8 C.F.R. § 287.1 (a)(2) (1999).

⁹ See *Area Search Warrants in Border Zones*: Almeida-Sanchez and Camara, 84 YALE L.J. 355, 357-58 (1974).

¹⁰ *The Constitution in the 100-Mile Border Zone*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/other/constitution-100-mile-border-zone> [<https://perma.cc/74MP-ZAZ6>] (last visited Sept. 20, 2019). Nine of the ten largest U.S. metropolitan areas fall within the 100-mile border zone: New York City, Los Angeles, Chicago, Houston, Philadelphia, Phoenix, San Antonio, San Diego and San Jose. *Id.*

¹¹ See Wesley Lowery, *Federal Agents Ask Domestic Flight Passengers to Show IDs in Search for Immigrant Ordered Deported*, WASH. POST (Feb. 24, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/02/23/federal-officers-ask-domestic-flight-passengers-to-show-ids-in-search-for-undocumented-immigrant/?utm_term=.3065ccffdc28 [<https://perma.cc/8RNY-LM2D>].

¹² *Id.*

officers by lowering their hiring standards¹³ and “[i]ncreas[ing] northern border security.”¹⁴

On their face, these policies seem to only target undocumented immigrants nationwide. However, the reality is that immigration law enforcement agencies currently enforce these policies in a way that also harms U.S. citizens and documented immigrants from minority groups.¹⁵ Current enforcement of these immigration policies harms members of minority groups because of deeply flawed and outdated legal standards—like the Hispanic appearance classification—that should not persist under today’s vastly different circumstances.

There is no better example that illustrates the insidiousness of the enforcement of these flawed and outdated legal standards than the USBP’s immigration investigatory stops on domestic travelers at the Transportation Security Administration’s (TSA) pre-boarding screening checkpoints at airports, typically along the southern border. These immigration investigatory stops occur frequently and are based solely on the travelers’ race and ethnicity,¹⁶ but perhaps most importantly,

¹³ See Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017); Vivian Kay & Ron Nixon, *To Detain More Immigrants, Trump Administration to Speed Border Hiring*, N.Y. TIMES (Apr. 12, 2017), <https://www.nytimes.com/2017/04/12/us/trump-immigration-border-hiring.html> [<https://perma.cc/3D8Y-CEXA>].

¹⁴ *Trump Administration Immigration Policy Priorities*, OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE (Oct. 8, 2017), <https://www.whitehouse.gov/briefing-statements/trump-administration-immigration-policy-priorities> [<https://perma.cc/GR3D-ESSW>].

¹⁵ See, e.g., Alvaro Huerta, *The ‘War on Immigrants’: Racist Policies in the Trump Era*, HUFFINGTON POST (Aug. 7 2017), https://www.huffingtonpost.com/entry/the-war-on-immigrants-racist-policies-in-the-trump_us_5980bf68e4b0d187a596909b [<https://perma.cc/8TUF-B9S8>] (arguing that the immigration policies of the Trump Administration have become highly “racialized” through the President’s rhetoric of “anti-Mexicanism and Islamophobia”); NANCY MORAWETZ, ANNA SCHOENFELDER & NATASHA RIVERA SILBER, N.Y.U. L. IMMIGRANT RTS. CLINIC, UNCOVERING USBP: BONUS PROGRAMS FOR UNITED STATES BORDER PATROL AGENTS AND THE ARREST OF LAWFULLY PRESENT INDIVIDUALS 1 (2013) [hereinafter “UNCOVERING USBP”] (“Those caught in USBP’s dragnet include U.S. citizens, lawful permanent residents, tourists, student visa-holders and persons with proper authorization to work in the United States.”).

¹⁶ See, e.g., Jinjoo Lee, *Cornell Graduate Students Arrested Near U.S.-Mexico Border*, CORNELL DAILY SUN (Mar. 27, 2013), <http://cornellsun.com/2013/03/27/cornell-graduate-students-arrested-near-u-s-mexico-border/> [<https://perma.cc/BHV8-UKLJ>] (describing how two Cornell graduate students were arrested after they refused to answer a USBP officer’s questions at the TSA checkpoint about their citizenship status at a Texas airport); Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N.Y. TIMES (Jan. 26, 2000), <http://www.nytimes.com/2000/01/26/us/some-texans-say-border-patrol-singles-out-too-many-blameless-hispanics.html?mcubz=3> [<https://perma.cc/KVA3-YXGG>] (describing how USBP even stopped and refused to let Cameron County Judge Gilberto Hinojosa board a plane to Houston until he stated his citizenship).

the circumstances under which the USBP conducts these immigration investigatory stops and the legal basis sanctioning them render the Fourth Amendment's safeguards of domestic travelers ineffective.¹⁷

TSA pre-boarding screening checkpoints usually follow the same security procedures in every airport in the United States.¹⁸ Travelers wait in line with their carry-on luggage along corridors formed by retractable belt stanchions to be called by TSA officers at their podiums.¹⁹ Once at the podiums, travelers must show a form of identification and their airline tickets to the TSA officer before proceeding to the conveyor belt, where travelers place their belongings—including their shoes—and proceed to an x-ray scanner.²⁰ After successfully passing through these security procedures, travelers proceed to a boarding gate and board their flight.²¹ However, some airports located near the U.S.-Mexico border are different from other airports around the country in that USBP officers are stationed at these TSA checkpoints.²² Officers position themselves between the TSA podiums and the conveyor belt, and they take advantage of the compulsory circumstances of the TSA checkpoint environment to conduct their own “random” immigration investigatory stops on unsuspecting travelers.²³ With an upcoming surge in recruitment for USBP officers and a harsher enforcement of these immigration policies,²⁴ potentially all airports in most major U.S. cities within the 100-mile border zone will have USBP officers stationed at their TSA pre-boarding screening checkpoints, who will be authorized to arbitrarily stop and harass millions under the pretext of border security.

This Note argues that USBP immigration investigatory stops conducted in TSA pre-boarding screening checkpoints at airports in the southern border are unreasonable under the Fourth Amendment and that the current standard for USBP to conduct an immigration investigatory stop is antiquated and violates the Equal Protection Clause. Part I briefly discusses

¹⁷ See *infra* Parts III and IV.

¹⁸ See, e.g., JBG TRAVELS, *3046 Going Through TSA Security Check Point*, YOUTUBE (Dec. 18, 2016), <https://www.youtube.com/watch?v=t7fBqju2GJY> [<https://perma.cc/MM27-TAWX>] (depicting the TSA security screening process at an airport in Milwaukee).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See Yardley, *supra* note 16 (“[USBP] [a]gents are posted in the airport and bus station and along highways . . .”).

²³ See *infra* Part III.

²⁴ See Yee & Nixon, *supra* note 13.

the history of the USBP and its focus on Mexican and Hispanic immigrants. Part II examines law enforcement's application of the Fourth Amendment and the reasonable suspicion standard, focusing on its application in the context of immigration law enforcement and each of the different types of immigration investigatory stops delineated by the Supreme Court. Part III examines the legal standards sanctioning TSA pre-boarding screening checkpoints and describes how USBP details conduct immigration investigatory stops in these checkpoints. Part IV argues that the USBP's immigration investigatory stops at TSA pre-boarding screening checkpoints are unreasonable under the Fourth Amendment because of the compulsory conditions of the TSA checkpoint and the manner by which USBP officers conduct these stops. Finally, Part V argues that the Hispanic appearance classification in the current reasonable suspicion standard to stop suspected undocumented immigrants violates the Fourteenth Amendment's Equal Protection Clause because it is not narrowly tailored to further border security and reduce overall illegal immigration.

I

A BRIEF HISTORY OF THE UNITED STATES BORDER PATROL AND ITS IMPACT IN THE SOUTHERN BORDER

A. The Early Beginnings of the United States Border Patrol

The USBP was formed in 1924 to enforce U.S. immigration restrictions by patrolling the borderland regions to prevent unauthorized border crossings and arresting people defined as unauthorized immigrants by the Immigration Act of 1917.²⁵ Most of the USBP's first members were part of the Anglo-American working class who had all grown up in the southern borderlands and with white violence against Mexicans.²⁶ In the early days, although the agency's migration control mandate came from Washington, D.C., the USBP started as a decentralized outfit with practices and priorities that were "primarily local creations."²⁷ The decentralized practices of the agency's outfits and the broad migration control mandate gave the USBP a rough start "defined by disorganization and an overarching lack of clarity."²⁸

²⁵ 8 U.S.C. § 142–155 (1917); KELLY LYTLE HERNÁNDEZ, *MIGRA! A HISTORY OF THE U.S. BORDER PATROL* 1–2 (2010).

²⁶ LYTLE HERNÁNDEZ, *supra* note 25, at 42–43.

²⁷ *Id.* at 8.

²⁸ *Id.* at 34.

Just one year later, USBP officers already had a broad authority to interrogate, detain, and arrest any person they suspected of committing a violation of U.S. immigration law. In 1925, Congress enacted legislation establishing the USBP's law enforcement authority, which invested USBP officers with broad powers of arrest without a warrant of suspected aliens entering or attempting to enter the country in violation of immigration law.²⁹ Although initially restricted to the borderlands,³⁰ court holdings helped extend the USBP's authority to conduct arrests without a warrant beyond the border crossings and into the interior of the country. For instance, in *Lew Moy v. United States*,³¹ the Eighth Circuit held that the consummation of a conspiracy to bring undocumented immigrants does not take place at the illegal border crossing, but until the undocumented immigrants reach their destination in the interior of the country.³² Through this interpretation of illegal immigration, the holding gave the early USBP mandate an undefined massive jurisdiction to work on around the country.³³ Consequently, USBP officers started patrolling backcountry trails, conducting traffic stops on major borderland roadways, and conducting warrantless arrests of suspected aliens beyond the borderlines and into the greater borderlands region.³⁴

B. The United States Border Patrol's Focus on Mexican Immigrants

The USBP's focus on targeting Mexican immigrants first began during the 1920s, when population figures for border communities with people of Mexican descent were compared to the government's estimates of unsanctioned border crossers that had evaded the USBP.³⁵ Any estimates of growth in these Mexican communities were attributed to illegal immigration, and therefore, government agencies concluded that no other

²⁹ *Id.* at 35 (“[USBP] officer[s] [were] authorized to ‘arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission of aliens, and to take such alien immediately for examination before an immigrant inspector or other official having authority to examine aliens as to their rights to admission to the United [S]tates.’”).

³⁰ *See id.*

³¹ 237 F. 50 (8th Cir. 1916).

³² *Id.* at 52 (“Successfully to consummate the unlawful introduction of the prohibited aliens required more than the mere bringing of them across the line. It was necessary to evade the immigration officials by transporting them into the interior and concealing their identity.”).

³³ LYTLE HERNÁNDEZ, *supra* note 25, at 35.

³⁴ *Id.* at 46.

³⁵ *Id.*

group but Mexican nationals in the southern border had been engaging in unauthorized border crossings in the region.³⁶ This narrow enforcement of immigration laws in the borderland regions, sanctioned by the government in Washington, linked illegal immigration directly to Mexicans and people of Mexican descent.³⁷ As USBP officers were pulled back from the borderline to start patrolling the greater borderland regions, they started questioning hundreds of thousands of local people, broadly policing Mexican mobility rather than patrolling the political boundary between the United States and Mexico.³⁸

As a result of the agency's link between illegal immigration and Mexican descent, the USBP started using race and ethnicity as an indicator of illegal entry or the individual's immigration status.³⁹ USBP officers would use the stereotypical profile of the "Mexican Brown"—"about 5'5" to 5'8"; dark brown hair; brown eyes; dark complexion"—to detain individuals and inquire about their immigration status.⁴⁰ Ironically, many Mexican immigrants were actually "white and even blue-eyed" and did not fit with this stereotypical profile given their mixed-race roots because of their Native American and European origins.⁴¹ USBP also used the profile of "Mexican Brown" as an excuse to enforce their other border responsibilities, like smuggling and contraband, both activities that intersected with undocumented immigration.⁴² USBP Chief Inspectors and Commissioners continuously upheld the USBP officers' use of race and ethnicity while reviewing cases involving people of Mexican descent—even in those cases which, according to Chief Inspector Chester C. Courtney from the El Paso Station in 1927, would have been thrown out on account of illegal searches "[h]ad the . . . persons been white Americans."⁴³

³⁶ *Id.*

³⁷ *Id.* at 50.

³⁸ *Id.* at 46.

³⁹ *Id.* at 48.

⁴⁰ *Id.* at 10.

⁴¹ *Id.* at 30. Social class was also a factor behind the stereotype of "Mexican Brown." In the highly racialized social organization of the South, middle-class people of Mexican descent were described as "Spanish" or "Spanish American" and were considered equals among whites, while, in contrast, lower-class people like Mexican laborers were poor, were dark-skinned, and did not speak English. *Id.* at 30, 42–43.

⁴² See Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1585 (2011).

⁴³ LYTLE HERNÁNDEZ, *supra* note 25, at 48.

C. The United States Border Patrol Today

By the 1960s, the USBP had become a complex law enforcement agency with a massive infrastructure built around the focus of illegal immigration in the southern border.⁴⁴ Training for the officers in immigration law enforcement also improved, but the practice of using the “Mexican Brown” profile was still in use and deeply rooted in the practices of USBP.⁴⁵ For USBP officers, “any connection between whiteness and illegal[] [immigration]” was laughable, and as one officer is quoted saying:

[A]fter 13 years of doing this, I can't really describe, it's a gut feeling, a hunch. I can walk downtown El Paso and walk by a lot of people and know they are legal . . . [and] all of a sudden, one will be by me or passing in front of me, that I just know doesn't have documents.⁴⁶

Meanwhile, statistics showed that there was a drop in the number of apprehensions of undocumented immigrants.⁴⁷

Then, in July 1960, Edgar C. Niehbur—the assistant chief of USBP at the time—researched birth and immigration records from people of Mexican origin in the borderland states, and according to his research, he found that many people claiming to be U.S. citizens were actually false claimants, and thereby “fraudulent citizens.”⁴⁸ Niehbur’s purported findings provided an explanation for the drop in the number of apprehensions of undocumented immigrants, reflecting how “illegals who once swam, climbed, and hiked across the border” were now avoiding detection under the cover of fraudulent documents.⁴⁹ By 1964, all USBP officers were trained in analyzing and identifying fraudulent documents and were instructed to “find the frauds who were hiding among the citizens and legal immigrants,” intensifying the link between illegality and Mexican origin.⁵⁰ Toward the 1980s and '90s, Mexican-American com-

⁴⁴ *Id.* at 198.

⁴⁵ *Id.* at 199.

⁴⁶ *Id.* at 199–201.

⁴⁷ *Id.* at 203–04.

⁴⁸ *Id.* According to Niehbur, “one in four filings for birth certificates between May of 1954 and April of 1957 were fraudulent claims to American birth or citizenship. Considering that between 1940 and 1960 the state of Texas issued one hundred and ninety thousand birth certificates to persons of Mexican origin, [he] argued that a considerable number of persons . . . were actually . . . fraudulent citizens.” *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 204. This issue continues to this day, as passport applicants with official U.S. birth certificates—most, if not all, Hispanic—are being jailed in immigration centers and entered into deportation proceedings after being accused of

munity leaders began to complain about the continuous USBP practices of harassing Mexican-Americans and legal immigrants in business districts and residential areas within border cities.⁵¹

After the creation of the Department of Homeland Security (DHS) in 2003, in the aftermath of terrorist attacks on September 11, 2001, all the immigration-related functions performed by the INS were transferred to three new agencies under the command of the DHS: U.S. Customs and Border Protection (CBP) (the head branch of the USBP), U.S. Citizenship and Immigration Service (USCIS), and U.S. Immigration and Customs Enforcement (ICE).⁵² By 2014, USBP had over 21,000 officers, almost all of them along the U.S.-Mexico border.⁵³ Although the number of USBP officers along the U.S.-Canada border has historically been more limited, the current "Mexicanization" of the northern border has driven security anxieties of the USBP and led the agency to increase the number of officers from a few hundred in the 1990s to over 2,200 in 2014.⁵⁴

II

THE FOURTH AMENDMENT IN IMMIGRATION LAW ENFORCEMENT

A. The Fourth Amendment and the Decision to Detain a Suspect

In 1891, Justice Gray wrote about the Fourth Amendment that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."⁵⁵ The Fourth Amendment protects people from unreasonable searches and seizures and estab-

using fraudulent birth certificates since they were born. See Kevin Sieff, *U.S. Is Denying Passports to Americans Along the Border, Throwing Their Citizenship into Question*, WASH. POST (Sept. 13, 2018), https://www.washingtonpost.com/world/the_americas/us-is-denying-passports-to-americans-along-the-border-throwing-their-citizenship-into-question/2018/08/29/1d630e84-a0da-11e8-a3dd-2a1991f075d5_story.html?noredirect=on&utm_term=.9e9c731ee8aa [http://perma.cc/W5AD-V6NY]. Even a current state prison guard who was a former service member and also a USBP agent was denied a U.S. passport and accused of using a fraudulent birth certificate. *Id.*

⁵¹ LYTLE HERNÁNDEZ, *supra* note 25, at 228.

⁵² Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 11 (2014).

⁵³ *Id.* at 12.

⁵⁴ *Id.* at 13.

⁵⁵ *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

lishes that no warrants shall issue unless supported by oath or affirmation setting forth facts that establish probable cause.⁵⁶ Accordingly, courts have reasoned that warrantless searches and seizures are reasonable as long as they are supported by probable cause.⁵⁷ The probable cause requirement is fulfilled when “‘facts and circumstances within [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.”⁵⁸

All arrests are seizures, but not all seizures are arrests. Brief detentions short of traditional arrest are deemed seizures.⁵⁹ Law enforcement officers effectively seize people whenever the officers accost individuals and restrain their freedom to walk away.⁶⁰ The Supreme Court’s decision in *Terry v. Ohio* created a less stringent standard than probable cause for temporary investigatory seizures and patdowns called “reasonable suspicion.”⁶¹ This new standard requires only that “[law enforcement] officer[s] observe[] unusual conduct which leads [them] reasonably to conclude in light of [their] experience that criminal activity may be afoot.”⁶² Whether officers have developed sufficient reasonable suspicion to conduct these investigatory stops depends on the totality of the circumstances.⁶³ When assessing individuals, trained and experienced law enforcement officers make objective observations and consider the modes or patterns of certain lawbreakers, which lead the officers to draw inferences and make deductions that might not be discerned by the untrained or inexperienced individual.⁶⁴ However, when a “stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.”⁶⁵

⁵⁶ U.S. CONST. amend. IV. The protections of the Fourth Amendment are enforceable against the states through the Due Process Clause of the Fourteenth Amendment because they are “implicit in ‘the concept of ordered liberty.’” *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949).

⁵⁷ See *Wong Sun v. United States*, 371 U.S. 471, 479–80 (1963).

⁵⁸ *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (alterations in original) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

⁵⁹ See *Davis v. Mississippi*, 394 U.S. 721, 727 (1969) (stating that the Fourth Amendment is implicated even when an officer’s conduct falls short of a “technical arrest” or a “full-blown search”).

⁶⁰ *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

⁶¹ See *id.* at 26–27.

⁶² *Id.* at 30.

⁶³ See *United States v. Cortez*, 449 U.S. 411, 417–18 (1981).

⁶⁴ *Id.*

⁶⁵ *Brown v. Texas*, 443 U.S. 47, 52 (1979).

Although probable cause is more stringent than reasonable suspicion, both standards deal with probabilities and not hard certainties.⁶⁶ Given other facts observed, whenever law enforcement officers notice any additional relevant facts that increase the likelihood that an individual has committed, is committing, or will be committing a crime, then they develop sufficient probable cause or reasonable suspicion to perform a seizure.⁶⁷ Therefore, probability acts as a constraint in the totality of circumstances analysis, as law enforcement is forced to separate those facts that contribute to the likelihood of criminal conduct from those that do not.⁶⁸ The calculations of these probabilities are neither mathematical nor technical, but rather are factual and practical considerations that are "commonsense" to trained and experienced law enforcement officers.⁶⁹ For example, a police officer might observe a person running down the street and make no inference from that fact alone. However, if the police officer had previously heard on dispatch that someone was mugged in the street from where the running person came from, then the likelihood that the running person was involved in the mugging increases.

The combinations of facts that can increase the likelihood that an individual has committed, is committing, or will commit a crime are unlimited. Law enforcement officers conduct investigatory stops by relying on their observations of the individual's characteristics and conduct and of the environment where they observe the individual.⁷⁰ However, the reasonable suspicion standard is supposed to consider the totality of these observed circumstances *objectively*, but it is only through the individual law enforcement officer's mental process that these circumstances are analyzed, and thereby, the totality of the circumstances test constantly runs the risk of becoming *subjective*.⁷¹ The main problem with the standard becoming more subjective is that a law enforcement officer's suspicion may be impacted by the officer's own bias or misperception—whether conscious or unconscious—and not necessarily by enhanced intuition obtained through police training or experience.⁷² For

⁶⁶ See *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

⁶⁷ See Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 217 (1983).

⁶⁸ See *id.*

⁶⁹ See *Cortez*, 449 U.S. at 418.

⁷⁰ See Johnson, *supra* note 67, at 218.

⁷¹ See *Brown v. Texas*, 443 U.S. 47, 52 (1979).

⁷² See Andrew Jay Flame, *Criminal Procedure—Drug Courier Profiles and Terry-Type Seizures—United States v. Hooper*, 935 F.2d 484 (2d Cir.), cert. denied, 112 S. Ct. 663 (1991), 65 TEMP. L. REV. 323, 336–37 (1992).

instance, a white law enforcement officer might describe in court an otherwise normal behavior of a Hispanic individual as a “furtive gesture,” which might only be a misconstruction probably originating from the cultural differences between the officer and the individual.⁷³ Indeed, this oversight of the standard sometimes gives way to “permissible” racial profiling of suspects.

Furthermore, the deference that courts give law enforcement officers in the reasonable suspicion analysis exacerbates the problem of the standard becoming subjective. When officers need to justify an investigatory stop that may be borderline unreasonable, they may do so by either “reciting characteristics that [they] know[] the court will accept . . . [or by] fabricat[ing] characteristics in order to meet the reasonable suspicion standard.”⁷⁴ This issue is constantly raised in drug courier cases, where law enforcement officers stationed at airports watch for travelers matching the “drug courier profile”: a set of characteristics and behaviors which officers, based on their collective experience, have identified as typical of people carrying illicit drugs.⁷⁵ Some courts have recognized that the “drug courier” profile characteristics are often difficult to distinguish from “reasonable innocent behavior” and that officers tend to classify their suspects’ conduct and demeanor as “nervous,” “brisk[,],” or “furtive[]” in order to fit them within the profile’s characteristics and justify their stop.⁷⁶

For instance, in *United States v. Lopez*,⁷⁷ two USBP agents stopped a vehicle because they became suspicious after the driver avoided eye contact with them.⁷⁸ In *Lopez*, the Fifth Circuit explained that in a previous case, it held that the appellant glancing repeatedly and nervously at a USBP agent was a valid factor raising the agent’s suspicion of wrongdoing.⁷⁹ Now, in *Lopez*, the government was asking the Fifth Circuit to find that a driver’s failure to look at the USBP officers was also a valid factor raising an agent’s suspicion of wrongdoing.⁸⁰ The court explained that by holding that both factors were valid in

⁷³ See Johnson, *supra* note 67, at 239.

⁷⁴ See Flame, *supra* note 72, at 336–37.

⁷⁵ *Id.* at 323 n.7.

⁷⁶ See *United States v. Millan*, 912 F.2d 1014, 1018 (8th Cir. 1990); *United States v. Garvin*, 576 F. Supp. 1110, 1112 n.1 (N.D. Ill. 1983); *United States v. Westerbann-Martinez*, 435 F. Supp. 690, 699 (E.D.N.Y. 1977).

⁷⁷ 564 F.2d 710 (5th Cir. 1977).

⁷⁸ *Id.* at 711.

⁷⁹ *United States v. Barnard*, 553 F.2d 389, 391–92 (5th Cir. 1977).

⁸⁰ See *Lopez*, 564 F.2d at 712.

the reasonable suspicion analysis, all drivers would be placed in "a most precarious position."⁸¹ Therefore, the Fifth Circuit held that where a reasonable suspicion factor and its opposite can both be used by law enforcement officers to justify stopping an individual, then both factors lose their probative value.⁸² These flaws in the reasonable suspicion standard are only compounded when law enforcement officers are allowed to use race and ethnicity as a valid supporting factor in their decision to detain a suspect, especially in the context of immigration law enforcement, as the next section will explain.⁸³

B. The Decision to Detain a Suspect in the Context of Immigration Law Enforcement

Immigration law enforcement agencies derive their authority from the Immigration and Nationality Act, which authorizes them to exercise certain powers without a warrant.⁸⁴ Immigration officers have broad interrogation powers that authorize them to interrogate, without a warrant, any aliens or people they believe to be aliens as to their immigration status.⁸⁵ Immigration officers also have broad search powers that authorize them to board and search "any vessel[,] . . . railway car, aircraft, conveyance, or vehicle . . . for the purpose of patrolling the border to prevent the illegal entry of aliens."⁸⁶ Yet, these broad interrogation and search powers can only be exercised "within a reasonable distance from any external boundary of the United States,"⁸⁷ which the United States Attorney General defined to be 100-air miles.⁸⁸ However, the Supreme Court has defined the scope and limits of these powers according to three different situations and their particular circumstances.

⁸¹ *Id.*

⁸² *See id.* at 712–13.

⁸³ Another huge issue is raised when law enforcement is allowed to use race or ethnicity as a valid factor raising reasonable suspicion: pretext to conduct a stop. *See, e.g., Whren v. United States*, 517 U.S. 806, 813 (1996) ("[T]he Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

⁸⁴ *See* 8 U.S.C. § 1357 (1994).

⁸⁵ *Id.* § 1357(a)(1).

⁸⁶ *Id.* § 1357(a)(3).

⁸⁷ *Id.*

⁸⁸ *See* 8 C.F.R. § 287.1 (1999).

1. *International Ports of Entry and Functional
Equivalents of the Border*

The first situation involves border crossings at international ports of entry. Immigration law enforcement officers are not required to have a warrant, probable cause, or reasonable suspicion when conducting stops of individuals, vehicles, and conveyances at the border or at international port of entries because these stops are considered to be "reasonable" since "the person or item . . . entered into our country from outside."⁸⁹ According to the Supreme Court, this border search exception "is grounded in the recognized right of the sovereign to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country."⁹⁰ Congress recognized this right of the sovereign and extended the Executive branch "plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country."⁹¹ Furthermore, whenever considering any balancing test, the "Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border"⁹² and therefore, "the expectation of privacy is less at the border than it is in the interior."⁹³

Yet the Supreme Court has held that different legal standards apply for detentions of property and individuals when these detentions go beyond the scope of routine border searches. In *United States v. Flores-Montano*,⁹⁴ the Court upheld the search of a vehicle in which the border authorities disassembled it and removed its gas tank, seizing thirty-seven kilograms of marijuana as a result.⁹⁵ The Court's reasoning was that the interference with the possessory interest in a vehicle crossing the border into the country is justified by the "Government's paramount interest in protecting the border."⁹⁶ However, in *United States v. Montoya de Hernandez*,⁹⁷ the Court did require officers to have reasonable suspicion of pos-

⁸⁹ See *United States v. Ramsey*, 431 U.S. 606, 619 (1977).

⁹⁰ *Id.* at 620.

⁹¹ *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (citing *Ramsey*, 431 U.S. at 616-17).

⁹² See *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004).

⁹³ *Id.* at 154.

⁹⁴ *Id.* at 149.

⁹⁵ *Id.* at 150.

⁹⁶ *Id.* at 155.

⁹⁷ 473 U.S. 531 (1985).

sible drug smuggling whenever the detention of travelers at the border "[goes] beyond the scope of a routine customs search and inspection."⁹⁸ *Montoya de Hernandez* involved the detention of a traveler who had arrived at the Los Angeles International Airport from a flight that departed from Colombia and aroused the suspicion of customs officials for being a drug smuggler.⁹⁹ Although her traveling documents were in order, the officials were suspicious of the traveler's peculiar answers to their questions about her trip, for which they conducted a patdown and strip search that eventually led to the discovery of balloons containing cocaine hidden in her alimentary canal.¹⁰⁰ Therefore, even at the border, officials are required to have reasonable suspicion for those prolonged detentions that are more intrusive in nature for individuals than the routine detentions that are expected in the border.

Montoya de Hernandez also shows another important aspect of the border search exception: the exception also applies to the "functional equivalents" of the border.¹⁰¹ The Supreme Court has held that "functional equivalents" of the border can include: (1) stations near the border at a point marking the confluence of two or more roads that extend from the border—which can be both permanent and temporary—and (2) stations in airports located inside the country where incoming international flights arrive after a nonstop flight from a foreign country.¹⁰² But the Court did not enumerate a list of factors to determine what stations were "functional equivalents" of the border, except for holding that a roving patrol did not fall within the definition.¹⁰³ The lack of clarity on what stations fit the classification of a "functional equivalent" of the border has frustrated lower courts in their attempts to classify the different kinds of stations—including domestic fixed checkpoints¹⁰⁴—in their controlling districts.

For instance, the Fifth and Ninth Circuits are split on what circumstances make an interior checkpoint a "functional

⁹⁸ *Id.* at 541.

⁹⁹ *Id.* at 533–34.

¹⁰⁰ *Id.* at 534–36.

¹⁰¹ See *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

¹⁰² *Id.* It is important to note that the Court in *Almeida-Sanchez* did not hold that *any* airport inside the country and its installations as a whole where nonstop international flights arrive is a functional equivalent of the border. The Court only established that the "passengers and cargo of an airplane arriving" at an interior airport are within the functional equivalent of a border search.

¹⁰³ *Id.*

¹⁰⁴ See *infra* II.B.2.

equivalent” of the border. In *United States v. Jackson*,¹⁰⁵ the Fifth Circuit held that for an interior checkpoint to fit the classification of functional equivalent of the border, “the government must demonstrate with ‘reasonable certainty’ that the traffic passing through the checkpoint is ‘international’ in character.”¹⁰⁶ In contrast, in *United States v. Bowen*,¹⁰⁷ the Ninth Circuit held that if the interior checkpoint was “at a location where *virtually everyone searched* has just come from the other side of the border, [then] the [interior checkpoint] is a functional equivalent of a border search.”¹⁰⁸ Although both circuit courts set different standards, both had the same rationale in mind. The Fifth Circuit explained that the purpose of the *reasonable certainty* standard is to limit the functional equivalents of the border to “intercept no more than a negligible number of domestic travelers.”¹⁰⁹ Like the Fifth Circuit, the Ninth Circuit explained that the purpose was to limit functional equivalents of the border from intercepting “a significant number of . . . domestic travelers going from one point to another within the United States.”¹¹⁰ Moreover, both circuit courts agree that if any interior checkpoint oversteps this limitation, then they lose their classification as functional equivalents of the border.¹¹¹

Finally, it is important to note that since circuit courts have different standards for classifying stations or interior checkpoints as functional equivalents of the border, this fact means that not all stations or interior checkpoints are functional equivalents of the border. Furthermore, this fact also means that those stations and interior checkpoints that have been classified by courts to be functional equivalents of the border might lose their classification depending on the nature of the traffic crossing these checkpoints. In fact, in *Jackson*, the Fifth Circuit was not only changing its standard for functional border equivalency, but also changing the classification of the Sierra Blanca checkpoint located in Texas.¹¹² Ultimately, these classifications are subject to change depending on the district’s population in which the checkpoints are located, and therefore, the larger the concentration of domestic

¹⁰⁵ 825 F.2d 853 (5th Cir. 1987).

¹⁰⁶ *Id.* at 860 (emphasis added).

¹⁰⁷ 500 F.2d 960 (9th Cir. 1974), *aff’d on other grounds*, 422 U.S. 916 (1975).

¹⁰⁸ *Id.* at 965 (emphasis added).

¹⁰⁹ *See Jackson*, 825 F.2d at 860.

¹¹⁰ *See Bowen*, 500 F.2d at 965.

¹¹¹ *See id.*; *Jackson*, 825 F.2d at 859–60.

¹¹² *See Jackson*, 825 F.2d at 854.

travelers crossing these checkpoints, the more likely courts will avoid classifying them as functional equivalents of the border.

2. *Domestic Fixed Checkpoints*

As explained briefly above, the second situation involves domestic fixed checkpoints in the interior of the country. Immigration law enforcement agencies conduct surveillance in two types of checkpoints: "[p]ermanent checkpoints . . . maintained at certain nodal intersections" and "temporary checkpoints [that] are established from time to time at various places."¹¹³ These interior checkpoints were implemented by immigration law enforcement agencies, specifically USBP, to contain the flow of undocumented immigrants within the districts closest to the border¹¹⁴ because "[o]nce the illegal alien gets settled in a big city far away from the border it becomes very difficult to apprehend him."¹¹⁵ Their primary purpose is "to intercept vehicles or conveyances transporting illegal aliens, or nonresident aliens admitted with temporary border passing cards."¹¹⁶ Therefore, USBP selects the locations for permanent checkpoints based on the following set of factors:

1. A location on a highway just beyond the confluence of two or more roads from the border, in order to permit the checking of a large volume of traffic with a minimum number of officers. This also avoids the inconvenience of repeated checking of commuter or urban traffic which would occur if the sites were operated on the network of roads leading from and through the more populated areas near the border.
2. Terrain and topography that restrict passage of vehicles around the checkpoint, such as mountains
3. Safety factors: an unobstructed view of oncoming traffic, to provide a safe distance for slowing and stopping; parking space off the highway; power source to illuminate control signs and inspection area, and bypass capability for vehicles *not* requiring examination.
4. . . . [T]he checkpoints, as a general rule, are located at a point beyond the 25 mile zone in order to control the unlawful movement inland of such visitors.¹¹⁷

USBP uses the same factors when selecting locations for their temporary checkpoints, although the two distinguishing factors between permanent and temporary checkpoints are that

¹¹³ See *Almeida-Sanchez v. United States*, 413 U.S. 266, 268 (1973).

¹¹⁴ See *United States v. Baca*, 368 F. Supp. 398, 404 (S.D. Cal. 1973).

¹¹⁵ *Id.* at 405.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

temporary checkpoints are located on roads where traffic is less frequent and that they are “set up at irregular intervals and intermittently so as to confuse the potential violator.”¹¹⁸ Finally, these domestic fixed checkpoints have similar accouterments, like warning signs ahead of the checkpoints indicating their existence and informing travelers crossing the checkpoint of the officials’ authority and that they may be stopped for a limited inquiry.¹¹⁹

The Supreme Court has also set different standards for stops and searches of vehicles crossing through these checkpoints. In *United States v. Ortiz*,¹²⁰ the Court held that USBP cannot, in the absence of consent or probable cause, search vehicles at these interior checkpoints and the functional equivalents of the border.¹²¹ The Court’s reasoning was based on the notion that “a search, even of an automobile, is a substantial invasion of privacy.”¹²² However, for immigration investigatory stops, the Court held in *United States v. Martinez-Fuerte*¹²³ that USBP officers at these checkpoints and at functional equivalents of the border¹²⁴ were able to conduct immigration investigatory stops, including referrals to a secondary inspection area for a limited nonintrusive inquiry, without a warrant, probable cause, or reasonable suspicion.¹²⁵ The Court’s reasoning in *Martinez-Fuerte* was that requiring these stops to be based on reasonable suspicion would be impractical to enforce due to the heavy flow of traffic and because it would not effectively deter the “well-disguised” operations of smugglers and undocumented immigrants traveling to the interior of the country.¹²⁶

Furthermore, the Court held in *Martinez-Fuerte* that these investigatory stops were not intrusive searches because “[a]ll that is required of the vehicle’s occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States”—although

118 *Id.*

119 *Id.* at 407.

120 422 U.S. 891 (1975).

121 *Id.* at 896–97.

122 *Id.* at 896.

123 428 U.S. 543 (1976).

124 It is important to note that *Martinez-Fuerte* did not hold that these domestic fixed checkpoints are functional equivalents of the border. The Supreme Court has not offered any guidance on how to classify what checkpoints can be functional equivalents of the border, and therefore the circuit courts are currently split on the factors supporting such a classification. See *supra* Part II.B.1.

125 See *Martinez-Fuerte*, 428 U.S. at 562–64.

126 *Id.* at 557.

the Court did not explain which documents could prove this.¹²⁷ The Court also explained that these checkpoints are less intrusive and frightening than roving patrols because "motorist[s] can see that other vehicles are being stopped, [they] can see visible signs of the officers' authority, and [they are] much less likely to be frightened or annoyed by the intrusion."¹²⁸ Moreover, the Court explained that these checkpoints have: (1) minimum potential interference with legitimate traffic because "[m]otorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of these checkpoints and will not be stopped elsewhere;" and (2) a regularized manner of operations that "appear to and actually involve less discretionary enforcement activity" and is "reassuring to law-abiding motorists[] that the stops are duly authorized and believed to serve the public interest."¹²⁹ Consequently, the Court concluded that with these considerations in place, it was unlikely for USBP officials to locate a domestic fixed checkpoint "where it bears arbitrarily or oppressively on motorists as a class."¹³⁰

Finally, the Court in *Martinez-Fuerte* held that neither type of checkpoint requires prior authorization by warrant because the reasonableness of their stops depends on factors like the location of the checkpoints and the methods used in their operation.¹³¹ Therefore, this last holding in *Martinez-Fuerte* allows the review of the stops conducted by USBP at these checkpoints based on the factors listed previously in the opinion.¹³²

3. Roving Patrols

Lastly, the third situation occurs during roving patrols—whenever immigration law enforcement officers stop a moving vehicle already inside the United States to question the occupants about their citizenship.¹³³ In *United States v. Brignoni-Ponce*,¹³⁴ the Supreme Court held that the standard of reasonable suspicion applies whenever officers conduct roving patrols, holding that "officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with

¹²⁷ *Id.* at 558 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975)).

¹²⁸ *Id.*

¹²⁹ *Id.* at 559.

¹³⁰ *Id.*

¹³¹ *Id.* at 565.

¹³² *Id.* at 565–66.

¹³³ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 877 (1975).

¹³⁴ *Id.* at 873.

rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.”¹³⁵ The Court found that requiring reasonable suspicion for these stops “allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference” and concluded that it is not “‘reasonable’ under the Fourth Amendment to make such stops on a random basis.”¹³⁶

The holding in *Brignoni-Ponce* also provided immigration law enforcement agencies with a set of valid factors in the reasonable suspicion standard to consider in their decision to stop a vehicle for purposes of immigration law enforcement.¹³⁷ Among these include: (1) “characteristics of the area in which they encounter a vehicle” (proximity to the border, patterns of traffic, and previous experience with alien traffic); (2) “information about recent illegal border crossings in the area”; (3) “[t]he driver’s behavior” (erratic driving or attempts to evade officers); (4) “[a]spects of the vehicle itself” (certain vehicles with large compartments may be used for transporting concealed aliens, the appearance that the vehicle might be heavily loaded, or the extraordinary number of passengers); and, most importantly, (5) an individual’s “apparent Mexican ancestry.”¹³⁸

Although the Court made clear that conducting an investigatory stop solely relying on the “apparent Mexican ancestry” of those individuals stopped would neither justify a reasonable belief that they were aliens or were concealing other aliens illegally in the country, it nevertheless allowed ethnicity to be a valid factor in the reasonable suspicion standard.¹³⁹ To sup-

¹³⁵ *Id.* at 884.

¹³⁶ *Id.* at 883.

¹³⁷ *Id.* at 884–85.

¹³⁸ *Id.* at 884–86. Another one of the holdings in *Martinez-Fuerte* was that even if referrals to secondary inspection by USBP officers in domestic fixed checkpoints were largely based on an individual’s “Mexican appearance,” the use of race and ethnicity did not violate the Constitution. The Court reasoned that these types of intrusions (stops and secondary inspections) are sufficiently minimal when used in a combination to the other factors delineated by the Court in its opinion in *Martinez-Fuerte*. See *supra* Part II.B.2. However, as this Note argues, the use of race and ethnicity through the “Hispanic appearance” factor *does* violate the Constitution. See *infra* Part V.

¹³⁹ See *Brignoni-Ponce*, 422 U.S. at 885. Allowing immigration law enforcement to use race or ethnicity in the reasonable suspicion standard allows officers to use federal immigration enforcement as a pretext for investigating other crimes, like drug distribution or possession, even if the basis for the immigration “crime” was weak. See Carbado & Harris, *supra* note 42, at 1585; see also *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that a police officer’s subjective intentions to conduct a stop play no role in Fourth Amendment analysis as long as the stop was supported objectively).

port this holding, the Court cited population statistics from the southern-border states of people of Mexican origin and those registered as aliens,¹⁴⁰ and concluded that "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor."¹⁴¹ Moreover, the Court endorsed the Government's assertion that trained immigration law enforcement officers "can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut."¹⁴²

The "apparent Mexican ancestry" factor in *Brignoni-Ponce* has transformed over the years in the courts. First, the standard set by the Court in *Brignoni-Ponce* only applied to vehicles, but was later extended to pedestrian stops by the Seventh Circuit.¹⁴³ Then, the term "apparent Mexican ancestry" evolved into "Mexican appearance,"¹⁴⁴ later equated first to "Latin extraction,"¹⁴⁵ and then to the term used today by the majority of the courts: "Hispanic appearance."¹⁴⁶ However, neither the courts nor immigration law enforcement agencies have ever explained why these terms have been equated or whether officers are trained or experienced enough to distinguish between them. To this day, the Ninth Circuit has been the only court to recognize that "Hispanic appearance," just like any other factor in the reasonable suspicion standard, loses its probative value as it is "likely to sweep many ordinary citizens into a generality

¹⁴⁰ See *Brignoni-Ponce*, 422 U.S. at 886 n.12.

¹⁴¹ *Id.* at 886.

¹⁴² *Id.* at 885. The Court cited the Reply Brief for the United States in the case *United States v. Ortiz* where the Government asserted the following:

The Immigration and Naturalization Service has informed us that experienced Border Patrol officers look for persons with the characteristic appearance of Mexican residents an appearance that distinguishes those persons from the thousands of Mexican aliens who lawfully reside in this country and the thousands of American citizens of Mexican ancestry. Illegal Mexican entrants commonly appear thin, their hands are rough and work-worn, their hair is cut in a characteristic fashion, and they are frequently dressed in full-cut and coarsely-woven material. Experience has shown we are told, that illegal entrants may exhibit obvious nervousness or affect excessive nonchalance as they approach a checkpoint.

Reply Brief for the United States, *United States v. Ortiz*, 422 U.S. 891 (1975) (No. 73-2050), 1975 WL 184933, at *12-*13.

¹⁴³ See *Ill. Migrant Council v. Pilliod*, 540 F.2d 1062, 1070 (7th Cir. 1976) (holding that "Mexican appearance" alone did not provide the basis for reasonable suspicion in pedestrian stops).

¹⁴⁴ See *United States v. Martinez-Fuerte*, 428 U.S. 543, 571 (1976).

¹⁴⁵ See *United States v. Munoz*, 604 F.2d 1160, 1160 (9th Cir. 1979).

¹⁴⁶ See *Nicacio v. INS*, 797 F.2d 700, 701 (9th Cir. 1985).

of suspicious appearance,”¹⁴⁷ and therefore, has found that “Hispanic appearance” is, in general, of such little probative value that it may not be considered as a relevant factor in determining whether reasonable suspicion exists to justify an investigatory stop.¹⁴⁸

Considering these three types of immigration investigatory stops, this next section of the Note will now describe how stops are conducted at the TSA pre-boarding screening checkpoints. The section that follows it will then argue that the stops conducted at TSA checkpoints closely match and resemble roving patrol stops because of the surrounding circumstances behind them.

III

HOW USBP IMMIGRATION INVESTIGATORY STOPS AT TSA CHECKPOINTS ARE UNIQUE

A. The Airport Environment and TSA Checkpoints

Since September 11, 2001, airport security has become more than ever a primary concern for Congress and the Executive branch. In reaction to the 9/11 terrorist attacks, Congress passed the Aviation and Transportation Security Act in November 2001.¹⁴⁹ The Act established the TSA and gave the agency the responsibility of “detecting and thwarting potential terrorists” through the use of pre-boarding screening procedures at all U.S. airports.¹⁵⁰ In fact, by statute, the Under Secretary of the TSA requires airports to refuse transporting travelers who are not subjected to a search that is intended to detect if they are carrying or concealing “a dangerous weapon, explosive, or other destructive substance.”¹⁵¹

¹⁴⁷ See *United States v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000) (citing *United States v. Rodriguez*, 976 F.2d 592, 595–96 (9th Cir. 1992)).

¹⁴⁸ *Id.* at 1135; see also *Farag v. United States*, 587 F. Supp. 2d 436, 463–64 (E.D.N.Y. 2008) (citing *Montero-Camargo* with approval, and noting that it would be particularly inappropriate to extend its statistical rationale to circumstances involving the seizure of persons of Arab ancestry at an airport where “the likelihood that any given airline passenger of Arab ethnicity is a terrorist is so negligible that Arab ethnicity has no probative value”).

¹⁴⁹ See 49 U.S.C. § 44901(a)–(c) (2016); Bethany A. Gulley, Note, *Criminal Law—No Right to Revoke and Avoid Search—Ninth Circuit Rules that Consent to Airport Screening Cannot Be Revoked in an Administrative Search*, *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007), 31 U. ARK. LITTLE ROCK L. REV. 515, 521 (2009).

¹⁵⁰ See Gulley, *supra* note 149, at 521.

¹⁵¹ See 49 U.S.C. § 44902(a)(1) (2001).

1. *TSA Checkpoints and the Administrative Search Exception*

These searches conducted by TSA officers at the pre-boarding screening checkpoints in airports are constitutional under the Fourth Amendment based on the administrative search exception.¹⁵² The Supreme Court first established the constitutionality of the administrative search exception in *Camara v. Municipal Court of City and County of San Francisco*,¹⁵³ where it held that administrative searches are reasonable under the Fourth Amendment because they are conducted as part of general regulatory schemes to further an administrative purpose rather than as part of a criminal investigation to obtain evidence of a crime.¹⁵⁴ The Court in *Camara* also held that the need to search must be balanced against the intrusion it entails for these searches to fall under the administrative search exception.¹⁵⁵ The Supreme Court later held that searches could be classified as administrative searches "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports and at entrances to courts and other official buildings."¹⁵⁶

Then, the Ninth Circuit held in *United States v. Davis*¹⁵⁷ that the searches conducted at the TSA pre-boarding screening checkpoints were constitutional under the administrative search exception because:

[The] screening searches of airline passengers are conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings. The essential purpose of the scheme is not to detect weapons or explosives or to apprehend those who carry them, but to deter persons carrying such material from seeking to board at all.¹⁵⁸

Furthermore, the Ninth Circuit in *Davis* found that pre-boarding screening searches met the balancing test for reasonableness in *Camara* because "[t]he need to prevent airline hijacking

¹⁵² See *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973).

¹⁵³ 387 U.S. 523 (1967).

¹⁵⁴ *Id.* at 538.

¹⁵⁵ *Id.* at 536–37.

¹⁵⁶ See *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (citing *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 674–76, 675 n.3 (1989)).

¹⁵⁷ 482 F.2d 893 (9th Cir. 1973), *overruled on other grounds by United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007).

¹⁵⁸ *Id.* at 908.

was unquestionably grave and urgent” and that the search of all passengers and their carry-on articles was “reasonably necessary to meet the need.”¹⁵⁹ However, the court also held that the pre-boarding screening searches were only constitutionally reasonable as long as they were “no more extensive nor intensive than necessary, in light of current technology, to detect the presence of weapons or explosives.”¹⁶⁰ The Ninth Circuit also recognized that “routine airport screening searches will lead to discovery of contraband and apprehension of law violators” but that nonetheless, if “the screening of passengers and their carry-on luggage for weapons and explosives [is] subverted into a general search for evidence of crime,” then courts would exclude the evidence obtained.¹⁶¹

Finally, in *United States v. Aukai*, the Ninth Circuit held that the reasonableness of a pre-boarding screening search does not depend on a traveler’s consent, and thus, the only requirement for the search to be reasonable was the traveler’s election to attempt to enter the “secured area” of an airport, which is under current TSA regulations and procedures, when a traveler walks through the magnetometer or places items on the conveyer belt of the x-ray machine.¹⁶²

B. USBP Officers Stationed at TSA Checkpoints

USBP officers conduct immigration investigatory stops at the TSA pre-boarding screening checkpoints under unique circumstances that are not relatable to those in the other three types of immigration investigatory stops described earlier. At airports in cities located within the 100 miles from the southern border, TSA checkpoints have USBP “details” that station their officers within the bounds of the TSA checkpoint.¹⁶³ Since the purpose of the TSA officers is to detect the presence of weapons, explosives, or any object that travelers might smuggle or conceal in their belongings or persons—including drugs or currency—and local police officers are present to arrest any

¹⁵⁹ *Id.* at 910.

¹⁶⁰ *Id.* at 913.

¹⁶¹ *Id.* at 908–09; *see also* *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1245 (9th Cir. 1989) (holding that an airport pre-boarding screening search was outside the scope of an administrative search because the search was a tool of a criminal investigation where law enforcement officers and Flight Terminal Security (FTS) personnel were working together, and if an FTS officer found criminal activity while searching passengers, then the FTS officer would get a reward).

¹⁶² *United States v. Aukai*, 497 F.3d 955, 961 (9th Cir. 2007).

¹⁶³ *See, e.g.*, Transcript of Motion to Suppress Evidence Hearing at 15–16, *United States v. Mangal*, No. 16-CR-00324 (W.D. Tex. May 18, 2016) (describing what these airport USBP details are).

traveler who is discovered of attempting to do so, the only inferred purpose explaining the USBP's presence at TSA checkpoints is to conduct immigration investigatory stops.¹⁶⁴

1. *The Typical TSA Checkpoint in an Airport Located in the Southern Border*

Typically, TSA checkpoints start at the lines formed by the retractable belt stanchions at the entrance to the boarding gate area, for which all travelers must pass through the TSA checkpoint without exception.¹⁶⁵ Along the retractable belt stanchions, there are warning signs about TSA safety procedures and protocols, informing travelers about the checkpoint's purpose and procedures and informing them of the items that are permitted or prohibited at the checkpoint.¹⁶⁶ No warning signs informing travelers of USBP presence, purpose, procedure, or authority are present.¹⁶⁷ After travelers wait in line along the corridors formed by the retractable belt stanchions, they are then called by TSA officers at their podiums.¹⁶⁸ Once at the podiums, travelers must show a form of identification and their airline tickets to the TSA officer before proceeding to the conveyor belt, where travelers place their belongings, including their shoes, and then proceed through the x-ray scanner.¹⁶⁹

TSA requires every traveler who is eighteen years old and older to show valid identification in order to travel.¹⁷⁰ TSA has a list of valid forms of identification that may be shown to the TSA officer at the podium in order to travel, which includes driver's licenses from all states, passports (U.S. or foreign-is-

¹⁶⁴ *Id.* at 16 ("The airport detail entails assisting TSA. And we check—we oversee the people that are traveling have proper documents to travel within the United States."); *see also* *What Does Border Patrol Do at Airports, Other Domestic Checkpoints?*, MERCURY NEWS (July 17, 2014), <https://www.mercurynews.com/2014/07/17/what-does-border-patrol-do-at-airports-other-domestic-checkpoints/> [<https://perma.cc/3TWU-MKM4>] ("[USBP agents] check passports, green cards, and other forms of identification while standing over the shoulder of a TSA agent. Essentially, agents are on the lookout for suspicious behavior such as extreme nervousness or appearing to be lost. If an agent sees that such a person presents a green card but looks nervous, the agent would likely question that person.").

¹⁶⁵ *See* JBG TRAVELS, *supra* note 18.

¹⁶⁶ *Id.*

¹⁶⁷ *See, e.g.*, Transcript of Motion to Suppress Evidence Hearing, *supra* note 163 at 54–55 (describing how there are no warning signs alerting to the presence, purpose, procedure, or authority of USBP officers at the airport).

¹⁶⁸ *See* JBG TRAVELS, *supra* note 18.

¹⁶⁹ *Id.*

¹⁷⁰ *See* *Identification*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/travel/security-screening/identification> [<https://perma.cc/GV4Y-SMNR>] (last visited Aug. 25, 2019).

sued), USCIS-issued identifications for legal aliens (permanent resident card, employment authorization), and border crossing cards for nonresident alien Mexican nationals, among others.¹⁷¹ Accordingly, as long as these individuals show any of the other forms of valid identification, TSA does not require individuals who are traveling domestically to show their passport to board their flights.¹⁷² However, this policy does not apply to non-resident aliens, who either will show their foreign-issued passports or border crossing cards in the case of Mexican nationals.¹⁷³ In addition, TSA does not require legal aliens who are traveling domestically to show their USCIS-issued identifications or their foreign-issued passports to board their flight, as long as legal aliens show any of the other forms of valid identification, most commonly a state driver's license or ID and even a U.S. Department of Defense ID for those legal aliens serving in the Armed Forces.

When travelers present their valid forms of identification and their airline tickets to the TSA officer at the podium, the TSA officer first checks that the names in the airline tickets matches the ones in the travelers' form of identification and then that the form of identification is valid and not fraudulent, verifying the micro prints and other features of the IDs with the help of special lighting equipment.¹⁷⁴ After the TSA officer in the podium verifies the travelers' IDs, travelers proceed to the conveyor belt where they place their belongings, including their shoes, in trays for them to be scanned by the x-ray scanner. After placing their belongings in the trays, travelers wait for another TSA officer to call them to go through a magnetometer and a CAPS-II body scanner.¹⁷⁵ If any issues arise during these procedures, TSA officers might refer travelers to further inspections in an attempt to solve any issues. After travelers and their belongings successfully pass through all security procedures, including any further inspections, then the TSA officer allows them to grab their belongings and proceed to their boarding gate.

¹⁷¹ *Id.*

¹⁷² *See Four Tips to Remember When Checking Your ID at Airport Security*, TRANSP. SEC. ADMIN. (Aug. 2, 2018), <https://www.tsa.gov/blog/2018/08/02/four-tips-remember-when-checking-your-id-airport-security> [<https://perma.cc/855V-JZYR>] (noting that TSA just requires one acceptable form of identification).

¹⁷³ *Id.*

¹⁷⁴ *See* JBG TRAVELS, *supra* note 18.

¹⁷⁵ *Id.*

2. USBP Officers and Their Activities in the TSA Checkpoints

As mentioned above, USBP officers are stationed within the bounds of the TSA checkpoint but they are not specifically assigned to a specific area, since the officers are usually walking around the TSA checkpoint and approaching individuals to question them.¹⁷⁶ USBP officers commonly position themselves around the area between the TSA podiums and the conveyor belts.¹⁷⁷ Some USBP officers stand right beside or behind the TSA officers at the podiums to inspect the travelers and their identification.¹⁷⁸ The purpose is to observe the forms of identification travelers show to TSA to discern which travelers are aliens and then decide whether to question them about their legal right to be in the country.¹⁷⁹

If USBP officers cannot immediately discern whether travelers are aliens through the IDs they showed at the TSA podium, officers will use other means to identify travelers that might be aliens and that need to be questioned about their right to be in the country.¹⁸⁰ The most obvious factors USBP officers most likely will observe first from travelers are their race and ethnicity. Officers then might likely observe the travelers' behavior as they approach them. Just like in the other types of immigration investigatory stops, USBP officers watch out for any behavior from the travelers that the officers interpret as "nervous," "brisk," or "furtive."¹⁸¹ Furthermore, many travelers board flights accompanied by relatives or friends, allowing USBP officers to listen carefully to the way travelers are speaking and to perceive whether they are speaking in a lan-

¹⁷⁶ See, e.g., Transcript of Motion to Suppress Evidence Hearing, *supra* note 163 at 16, 56 (describing where USBP details position themselves at the El Paso International Airport); Transcript of Jury Trial Testimony at 12, *Texas v. Figueredo*, No. 2013-CCR-5357-C (Cameron Cty. Ct. Apr. 7, 2014) (describing where USBP officers stand at the Brownsville South Padre International Airport).

¹⁷⁷ See, e.g., Transcript of Motion to Suppress Evidence Hearing, *supra* note 163, at 16, 56 (describing where USBP details position themselves at the El Paso International Airport).

¹⁷⁸ See, e.g., Omar Figueredo (@elOmarFigueredo), TWITTER (Apr. 5, 2018, 1:00 AM), <https://twitter.com/elOmarFigueredo/status/981803872325795840/photo/1> [<http://perma.cc/C88G-ETZB>] (depicting a USBP officer standing right next to a TSA officer at a podium).

¹⁷⁹ See Transcript of Motion to Suppress Evidence Hearing, *supra* note 163, at 16–17.

¹⁸⁰ See Transcript of Motion to Suppress Evidence Hearing, *supra* note 163, at 58–61.

¹⁸¹ *Id.* (describing what USBP officers look for to justify an immigration investigatory stop at the airport).

guage other than English, English with a “foreign accent” or with a poor ability to speak English.¹⁸²

USBP officers also regularly interact with the travelers as they go through the TSA checkpoint. Sometimes USBP officers might directly approach travelers and start asking them about their travel plans or immigration status.¹⁸³ However, most of the time, USBP officers interact with travelers as they go through the TSA checkpoint under the guise of aiding travelers in following the TSA procedures or in speeding up the screening process.¹⁸⁴ The real purpose behind these interactions is for travelers to expose themselves by revealing information that USBP officers might interpret and use in their decision to detain and question them for their immigration status or right to be in the country. For example, USBP officers would walk between the TSA podiums and the conveyor belt, approach travelers that look disoriented or those not following TSA procedures appropriately, and tell these travelers what to do.¹⁸⁵ Finally, USBP officers are also just walking around these two checkpoint areas and making themselves available for any questions the travelers might have, which might be more convenient for the officers when they later detain a traveler and explain in their reports that it was the traveler who initiated a “consensual” interaction with them.¹⁸⁶

C. Omar and Nancy

The story of Omar Figueredo and Nancy Morales illustrates how USBP officers conduct these immigration investigatory stops at the TSA pre-boarding screening checkpoints. In addi-

¹⁸² See, e.g., Alexia Fernandez Campbell, *Stopping Americans for Speaking Spanish: The Latest Evidence That Border Patrol Agents Have Too Much Power*, VOX (May 21, 2018), <https://www.vox.com/2018/5/21/17376436/border-patrol-agents-stop-american-women-speaking-spanish-montana> [http://perma.cc/J739-9ZKW] (reporting that two American women were stopped in a small town in Montana after they were speaking Spanish); Deyvid Morales, *Greyhound and Border Patrol*, YOUTUBE (Jan. 30, 2012), <https://www.youtube.com/watch?v=d0DjPpTrZfY> [http://perma.cc/ZHU6-WDNN] (depicting a passenger who asks a USBP officer conducting an immigration investigatory stop inside an Amtrak train what would raise their suspicion of undocumented immigrants, and the USBP officer answers “Accent.”).

¹⁸³ See, e.g., Transcript of Motion to Suppress Evidence Hearing, *supra* note 163, at 17 (describing the types of “basic questions” they ask travelers as they go through the TSA checkpoint).

¹⁸⁴ *Id.* at 19.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 63. Although these USBP techniques do not appear to be unreasonable at first, this Note will argue why these techniques are unreasonable under the Fourth Amendment. See *infra* Part IV.

tion, their story shows an example of the legal consequences of refusing to answer a USBP officer's immigration questions, and how the USBP "free-rides" on the conditions of the TSA checkpoint and the airport environment to coerce travelers into answering their questions about immigration status.

In March 2013, two Hispanic Cornell University students, Omar Figueredo and Nancy Morales, traveled to Brownsville, Texas to visit family.¹⁸⁷ After the couple stayed with Omar's family for a couple of days, Omar and Nancy were ready to fly back to Ithaca, New York to resume their studies.¹⁸⁸ Their flight was departing from the Brownsville South Padre Island International Airport, just a couple of miles away from the southern border across the Mexican city of Matamoros.¹⁸⁹ Omar and Nancy arrived at the airport early in the morning, checked in their luggage, and then proceeded to the pre-boarding TSA screening checkpoint.¹⁹⁰

The pre-boarding security checkpoint at Brownsville South Padre Island International Airport follows the same security procedures as any other airport in the United States.¹⁹¹ However, the TSA checkpoint at the Brownsville South Padre Island International Airport had USBP officers stationed within its bounds.¹⁹² The USBP officers in this case were walking around the retractable belt stanchions and would position themselves right between the end of the waiting line and the TSA podiums.¹⁹³

Omar and Nancy were making the way along the retractable belt stanchions towards the TSA checkpoint, until they were stopped by a USBP officer before they could reach the podium.¹⁹⁴ The USBP officer then asked Omar and Nancy whether they were U.S. citizens, but Omar politely refused to answer the question. Omar has had enough previous encounters with the USBP throughout his lifetime to know that the USBP kept harassing him because of the way he looks.¹⁹⁵

187 See Transcript of Jury Trial Testimony, *supra* note 176, at 54.

188 *Id.*

189 *Id.*

190 *Id.* at 54–56.

191 *Id.* at 57.

192 *Id.* at 6 ("[T]he two border patrol agents that are on duty, they're assigned to check citizenship or ask for U.S.—they ask 'U.S. Citizen?'"), 58 ("There were two border patrol agents standing several paces ahead of the TSA agents that we were going to—that we were planning to show our IDs and boarding passes to.").

193 *Id.* at 11–12. In fact, after waiting in line, travelers must first pass through the USBP area before getting to the TSA podiums. *Id.* at 26.

194 *Id.* at 58.

195 *Id.* at 68–69.

Omar, a proud American,¹⁹⁶ was tired of living in fear and believed he was standing up for his rights under the Constitution by refusing to answer the question.¹⁹⁷ During previous encounters with the USBP in different circumstances, like roving patrols, Omar had politely refused to answer the same question and he was let go without any consequences.¹⁹⁸

Yet, the USBP officer surprised Omar by telling him and Nancy that he was not going to let them through because they refused to answer his question.¹⁹⁹ Confused, Omar asked the officer why they could not go through if they were not under arrest, and the officer then told him that he, Omar, was being detained.²⁰⁰ After Omar and Nancy had a lengthy discussion with the USBP officer that made the travelers in the line behind them angry, the officer eventually let Omar and Nancy return to airport's main entrance to allow other travelers through.²⁰¹ Regardless, the damage was already done because Omar and Nancy had already missed their flight.²⁰²

After they were let go and later rebooked their flight, Omar and Nancy waited in line along the retractable belt stanchions once again to proceed to the TSA checkpoint.²⁰³ However, they were both stopped again by another USBP officer, who also asked them about their immigration status.²⁰⁴ Omar again politely refused to answer the question.²⁰⁵ The officer detained them again and told them they would not be able to go through until they answered the question.²⁰⁶ Another lengthy discussion ensued, but by now, local police had been alerted by the USBP officers about the situation.²⁰⁷ In the end, the local police officers arrested Omar for obstructing a public passageway

¹⁹⁶ *Id.* at 96.

¹⁹⁷ *Id.* at 64, 68–69, 77–80. Even while in northern New York, Omar has been stopped by the USBP officers to inquire about his citizenship. *Id.* at 64.

¹⁹⁸ *Id.* at 67–68.

¹⁹⁹ *Id.* at 59, 61, 62.

²⁰⁰ *Id.* at 62.

²⁰¹ *Id.* at 61.

²⁰² *Id.*

²⁰³ *Id.* at 69–70. Omar's testimony also corroborates that the only way to get to the TSA podiums was to go through the area where the USBP officers were stationed. *Id.* at 89.

²⁰⁴ *Id.* at 70.

²⁰⁵ *Id.* at 71.

²⁰⁶ *Id.* at 21, 71–72, 85, 91–92. In fact, the USBP officer told Omar numerous times that he was being detained and that he was not free to leave because "he was not following the protocol at the airport for the border patrol agent." *Id.* at 21.

²⁰⁷ The police officer had advised Omar that his conduct could be considered disorderly conduct or breach of the peace and could be arrested. *Id.* at 28.

and Nancy for interference with public duties.²⁰⁸ Nancy was able to record the moment officers arrested Omar, and Nancy, frustrated and defenseless, kept asking: "What is the crime?! What is the crime?!"²⁰⁹

IV

USBP IMMIGRATION INVESTIGATORY STOPS AT THE TSA CHECKPOINTS ARE UNCONSTITUTIONAL UNDER THE FOURTH AMENDMENT

A. USBP Immigration Investigatory Stops at TSA Checkpoints Closely Match and Resemble Stops Made During Roving Patrols

The manner in which USBP officers conduct immigration investigatory stops at the TSA checkpoints does not match or resemble the conditions of stops made at the international ports of entry, functional equivalents of the border, or domestic fixed checkpoints. Therefore, this Note argues that these stops most closely match or resemble the conditions of a roving patrol. Consequently, USBP officers are required to have sufficient reasonable suspicion that an individual is illegally present in the country before conducting an immigration investigatory stop. Considering the objective inference that travelers within the TSA checkpoint who are questioned about their immigration status are not free to leave until they relent and answer the officers' questions, and the limited articulable facts USBP officers can observe and obtain under these circumstances to raise their suspicion of undocumented immigrants, these immigration investigatory stops are unreasonable under the Fourth Amendment.

1. *The USBP Immigration Investigatory Stop at the TSA Checkpoint Does Not Match or Resemble the Characteristics of a Stop at an International Port of Entry or a Functional Equivalent of the Border*

Immigration investigatory stops conducted by USBP officers at TSA pre-boarding screening checkpoints do not fit

²⁰⁸ *Id.* at 32. The police officer that arrested Omar testified that he knew the USBP officer who had stopped Omar the second time was planning on taking him into custody as soon as the flight he was supposed to board finished boarding. *Id.* at 22.

²⁰⁹ See Democracy Now!, *EXCLUSIVE: U.S. Citizens Arrested at Airport for Refusing Border Patrol Questions*, YOUTUBE (Mar. 27, 2013), https://www.youtube.com/watch?v=_koO3eXwaCA.

under the border search exception of the Fourth Amendment because airports, as a whole, are not international ports of entry or functional equivalents of the border. Since all airports are inside the boundaries of the United States and travelers using U.S. airports as their airport of origin are not entering the country from the outside, the TSA checkpoints cannot be international ports of entry.²¹⁰ Even those airports located within 100 air miles from the border are still not considered international ports of entry because 8 U.S.C. § 1357(a)(3) explicitly limits the power of immigration employees to “board and search for aliens” inside dwellings without a warrant or probable cause.²¹¹

Furthermore, no TSA pre-boarding screening checkpoint is likely to be classified as a functional equivalent of the border because interior airports do not meet the standards of the Fifth Circuit or the Ninth Circuit. While the Supreme Court held in *Almeida-Sanchez* that searches of “the passengers and cargo of [the] airplane[s]” from incoming flights that arrived after a non-stop flight from a foreign country to an interior airport are the “functional equivalent of a border search,” the Court did not hold that the search of any people and cargo of airplanes inside any of the interior airports’ installations were the functional equivalents of a border search.²¹² Indeed, even the three interior airports that are closest to the U.S.-Mexico border in Texas that have USBP details stationed in their TSA checkpoints—located in Brownsville, McAllen, and El Paso—fail to meet the Fifth Circuit’s stricter reasonable certainty standard.²¹³ For

²¹⁰ See *United States v. Ramsey*, 431 U.S. 606, 619–20 (1977) (holding that stops on individuals at the border or at international ports of entry are reasonable because the individuals entered the country from the outside and because of the recognized right of the sovereign to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country).

²¹¹ See 8 U.S.C. § 1357(a)(3) (1994) (“Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant . . . within a [one hundred air miles] from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent illegal entry of aliens into the United States . . .”).

²¹² *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973) (“[A] search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.”).

²¹³ See *United States v. Jackson*, 825 F.2d 853, 860 (5th Cir. 1987) (“[T]he government must demonstrate with ‘reasonable certainty’ that the traffic passing through the checkpoint is ‘international’ in character.”). Since the Fifth Circuit’s standard is stricter and narrower than the Ninth Circuit’s, these three interior

instance, Figure 1 shows passenger traffic statistics for the last seven years from the Bureau of Transportation Statistics—a subdivision from the United States Department of Transportation—for the Brownsville South Padre International Airport, where Omar Figueredo and Nancy Morales were stopped.

FIGURE 1²¹⁴

Year	Domestic	International	Total
2012	80,801	4,117	84,918
2013	88,872	813	89,685
2014	94,828	0	94,828
2015	106,525	123	106,648
2016	100,811	27	100,838
2017	102,629	0	102,629
2018	107,128	0	107,128

In *Jackson*, the Fifth Circuit overruled its own precedent after using the reasonable certainty standard and finding that the classification of the Sierra Blanca checkpoint located in Texas as a functional equivalent of the border was erroneous.²¹⁵ The Fifth Circuit explained that the purpose of the reasonable certainty standard was to limit the classification of functional equivalent of the border for those checkpoints that “intercept no more than a negligible number of domestic travelers.”²¹⁶ Considering the Fifth Circuit’s purpose behind the standard, even when international passenger traffic was the highest in 2012 at the Brownsville South Padre Island International Airport with 4,117 passengers, domestic passenger traffic still accounted for 95.15% of overall passenger traffic at the

airports also fail to meet the Ninth Circuit’s standard. See *United States v. Bowen*, 500 F.2d 960, 965 (9th Cir. 1974), *aff’d on other grounds*, 422 U.S. 916 (1975) (“[A]t a location where *virtually everyone searched* has just come from the other side of the border, [then] the [interior checkpoint] is a functional equivalent of a border search.” (emphasis added)).

²¹⁴ *Passengers All Carriers—Brownsville, TX: Brownsville South Padre Island International (Origin Airport)*, U.S. DEP’T OF TRANSP., BUREAU OF TRANSP. STATS., https://www.transtats.bts.gov/Data_Elements.aspx?Data=1 [<https://perma.cc/PW5L-VVKQ>] (last visited Sept. 4, 2018).

²¹⁵ See *Jackson*, 825 F.2d at 854. (“The en banc court now decides that the Sierra Blanca checkpoint should not have been regarded as a border equivalent. We further hold that the plenary searches presently conducted at the Sierra Blanca checkpoint are unreasonable under the Fourth Amendment.”).

²¹⁶ *Id.* at 860.

airport.²¹⁷ As such, the Brownsville South Padre Island International Airport fails to meet the reasonable certainty standard of the Fifth Circuit—as well as the less strict standard of the Ninth Circuit—for the classification of functional equivalent of the border. Therefore, the border search exception does not apply to the USBP immigration investigatory stops at the pre-boarding TSA screening checkpoint at the Brownsville South Padre Island Airport.

Figures 2 and 3 show passenger traffic statistics for the last seven years for the McAllen Miller International Airport and the El Paso International Airport, respectively.

FIGURE 2²¹⁸

Year	Domestic	International	Total
2012	325,656	128	325,784
2013	334,359	5,448	339,807
2014	374,211	7,488	381,699
2015	385,377	4,909	390,286
2016	347,362	6,217	353,579
2017	326,602	7,627	334,229
2018	338,871	5,173	339,044

FIGURE 3²¹⁹

Year	Domestic	International	Total
2012	1,399,252	11	1,399,263
2013	1,330,998	41	1,331,039
2014	1,358,028	16	1,358,044
2015	1,350,744	1	1,350,745
2016	1,380,933	23	1,380,956
2017	1,421,551	22	1,421,573
2018	1,587,192	0	1,587,192

²¹⁷ See *supra* Figure 1.

²¹⁸ *Passengers All Carriers—Mission/McAllen/Edinburg, TX: McAllen Miller International (Origin Airport)*, U.S. DEP'T OF TRANSP., BUREAU OF TRANSP. STATS., https://www.transtats.bts.gov/Data_Elements.aspx?Data=1 [https://perma.cc/58HR-VRAC] (last visited Sept. 4, 2018).

²¹⁹ *Passengers All Carriers—El Paso, TX: El Paso International (Origin Airport)*, U.S. DEP'T OF TRANSP., BUREAU OF TRANSP. STATS., https://www.transtats.bts.gov/Data_Elements.aspx?Data=1 [https://perma.cc/ZP7W-RPY9] (last visited Sept. 4, 2018).

Like the statistics from Brownsville South Padre Island Airport, the statistics for these two airports show that their TSA pre-boarding screening checkpoints would also fail to meet the Fifth Circuit's standard, even during those years when international passenger traffic was the highest. As such, assuming that USBP evaluated the conditions in these airports located closest to the border to decide whether to assign details to them, it is highly likely that all other interior airports will fail to meet the standards of the Fifth Circuit and the Ninth Circuit for the classification of functional equivalent of the border. Therefore, the border search exception is most likely inapplicable to the USBP immigration investigatory stops at the TSA pre-boarding screening checkpoints.

2. *The USBP Immigration Investigatory Stop at the TSA Checkpoint Does Not Match or Resemble the Characteristics of a Stop at a Domestic Fixed Checkpoint*

Immigration investigatory stops conducted by USBP officers at TSA pre-boarding screening checkpoints do not fit the characteristics of a stop at a domestic fixed checkpoint because neither the TSA checkpoints nor the USBP details stationed in them are permanent or temporary checkpoints as described in *Martinez-Fuerte*. First, the congressional mandate authorizing TSA checkpoints at the airport does not extend the authorization to enforce immigration law,²²⁰ but rather only to detect and thwart potential attacks and prospective terrorist attacks by detecting concealed weapons, explosives, or other destructive substances.²²¹ Furthermore, searches at TSA checkpoints by TSA officers are reasonable under the Fourth Amendment under the administrative search exception because they are conducted as part of a general regulatory scheme to further an administrative purpose—"to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings"²²²—rather than as part of a criminal investigation to obtain evidence of a crime.²²³ Therefore, any immigration investigatory stops conducted within the bounds of TSA checkpoints with the purpose to obtain evidence of a crime—namely

²²⁰ See 49 U.S.C. § 44901(a)–(c) (2016).

²²¹ See Gulley, *supra* note 149, at 521; see also 49 U.S.C. § 44902(a)(1) (2001) (requiring airports to refuse to transport passengers who do not consent to a search).

²²² *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973), *overruled on other grounds by* *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007).

²²³ See *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 538 (1967).

illegal immigration²²⁴—would be outside the scope of an administrative search because the search would be a tool of a criminal investigation.²²⁵

Second, the presence of the USBP details within the bounds of the TSA checkpoint and their activities do not match the description of the domestic fixed checkpoints in *Martinez-Fuerte*. Although it may be argued that the presence of the USBP details in TSA checkpoints serves the same purposes of a domestic fixed checkpoint²²⁶ and that prior authorization of a warrant is not required,²²⁷ TSA checkpoints lack the core features that characterize immigration investigatory stops conducted in domestic fixed checkpoints as less intrusive and frightening in contrast to those conducted during roving patrols.²²⁸ The Court in *Martinez-Fuerte* explained that stops at domestic fixed checkpoints are less intrusive because travelers can see that others are being stopped and that there are visible signs of the USBP officers' authority.²²⁹ Furthermore, these visible signs reassure legitimate travelers that these stops have a minimum of potential interference with legitimate traffic and that operations in the checkpoint are conducted in a regularized manner that does not resemble discretionary enforcement activity, and therefore, legitimate travelers are reassured that these stops are duly authorized and believed to serve the public interest.²³⁰

Although TSA checkpoints do have warning signs at airports warning travelers about the TSA's authority and all travelers see that every single traveler is searched, there are no warnings signs at airports informing travelers about the presence or authority of USBP officers, and travelers see that only a few travelers—mostly members of minority groups²³¹—are

²²⁴ See 8 U.S.C. § 1325 (1996).

²²⁵ See *Davis*, 482 F.2d at 908. Logically, this conclusion means that TSA officers may not purposely aid USBP officers in any way to conduct their immigration investigatory stops. See *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1245 (9th Cir. 1989) (holding that an airport pre-boarding screening search was outside the scope of an administrative search because the search was a tool of a criminal investigation where law enforcement officers and Flight Terminal Security (FTS) personnel were working together, and if an FTS officer found criminal activity while searching passengers, then the FTS officer would get a reward).

²²⁶ See *United States v. Baca*, 368 F. Supp. 398, 405 (S.D. Cal. 1973).

²²⁷ See *United States v. Martinez-Fuerte*, 428 U.S. 543, 565 (1976).

²²⁸ *Id.* at 558 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975)).

²²⁹ *Id.*

²³⁰ *Id.* at 559.

²³¹ See UNCOVERING USBP, *supra* note 15, at 17 ("The I-44 data shows that USBP's arrest practices affect lawfully present noncitizens from all over the globe.

stopped and questioned by USBP officers.²³² Therefore, the presence of USBP details at TSA checkpoints "bears arbitrarily or oppressively"²³³ on members of minority groups as a class because USBP details interfere with a large portion of legitimate traffic²³⁴—exclusively from members of minority groups—and their operations are not conducted in a regularized manner that appear to involve less discretionary enforcement activity.²³⁵ Ultimately, legitimate travelers who are members of minority groups are not reassured that these immigration investigatory stops are "duly authorized and believed to serve the public interest."²³⁶

Consequently, neither TSA checkpoints nor the presence of USBP details within their bounds fit the description of domestic fixed checkpoints in *Martinez-Fuerte*, and therefore, the holding in *Martinez-Fuerte* that dispenses with the reasonable suspicion standard for immigration investigatory stops does not apply in these stops at the TSA checkpoints.

3. *The USBP Immigration Investigatory Stop at the TSA Checkpoint Matches and Resembles the Characteristics of a Stop Made During a Roving Patrol*

Since USBP immigration investigatory stops at TSA pre-boarding screening checkpoints do not fall under the other two categories of immigration investigatory stops, these stops must fall under the category of roving patrols described by the Supreme Court in *Brignoni-Ponce*. This conclusion is supported by the manner in which USBP officers conduct these stops because officers do not approach every single traveler at TSA checkpoints²³⁷ and actually only target specific travelers—

The greatest impact, however, appears to be on noncitizens of color. The vast majority of those wrongfully arrested were from South Asian, East Asian, African, and Caribbean backgrounds." (footnotes omitted).

²³² See, e.g., Transcript of Motion to Suppress Evidence Hearing, *supra* note 163, at 54–55 (describing that there are no warning signs alerting to the presence, purpose, procedure, or authority of USBP officers at the airport).

²³³ *Martinez-Fuerte*, 428 U.S. at 559.

²³⁴ According to the Bureau of Transportation statistics of the Department of Transportation for Brownsville South Padre International Airport, McAllen Miller International Airport, and El Paso International Airport, nearly 95–99% of passenger traffic was domestic for the last seven years. See *supra* Figures 1–3. Therefore, USBP officers overwhelmingly interfere with legitimate traffic.

²³⁵ See *Martinez-Fuerte*, 428 U.S. at 559.

²³⁶ *Id.*

²³⁷ See, e.g., Transcript of Motion to Suppress Evidence Hearing, *supra* note 163 at 16 ("Q. Do you talk to everyone who comes through TSA? A. Not everyone.").

most, if not all, members of minority groups²³⁸—in part because of the approval of the use of “Hispanic appearance” as a valid factor in the analysis.²³⁹

Whenever USBP officers approach travelers within the bounds of the TSA pre-boarding screening checkpoint to ask them questions about their citizenship, these interactions are in fact stops and not consensual interactions because travelers are seized under the Fourth Amendment for two reasons: (1) the compulsory conditions of the checkpoint; and (2) USBP officers ask questions that elicit a potentially self-incriminating response from travelers.

First, the compulsory conditions at the TSA pre-boarding screening checkpoint render travelers objectively “seized” under the Fourth Amendment. Indeed, the compulsory conditions at the TSA checkpoint present a completely different set of circumstances from those found “on the street or in another public place” where law enforcement officers may approach individuals and ask them questions without triggering the Fourth Amendment.²⁴⁰ Unlike individuals walking on the street or in another public place, travelers going through a TSA checkpoint have their liberty restrained after they yield to the TSA’s “show of authority” to search them for weapons and explosives.²⁴¹ In effect, travelers are not “free to leave” because the holding in *United States v. Aukai* and current TSA regulations render TSA’s questioning and searches reasonable per the administrative search exception once travelers have entered the “secured area” of the airport, after which travelers cannot elect not to undergo the TSA search.²⁴² In other words, the travelers’ consent to the questioning and searches at the TSA checkpoints is irrelevant. Therefore, unlike the bus passengers in *Florida v. Bostick*²⁴³ and the workers in *INS v. Del-*

²³⁸ See UNCOVERING USBP, *supra* note 15, at 17.

²³⁹ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975). This Note argues that the manner in which USBP applies the vague “Hispanic appearance” factor also puts members of minority groups at risk of being stopped for their immigration status. See *infra* Part V.B.

²⁴⁰ See *Florida v. Royer*, 460 U.S. 491, 497 (1983) (“[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions . . .”).

²⁴¹ See *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

²⁴² See *supra* note 162 and accompanying text.

²⁴³ 501 U.S. 429, 436–37 (1991) (finding that the “free to leave” analysis for seizures was not applicable in defendant’s situation because his freedom of movement was limited by a factor independent of police conduct—being a bus passenger—even though the police officers blocked the entrance to the bus).

gado,²⁴⁴ the travelers' freedom of movement is restricted by state action—the TSA officers and the checkpoint itself—and not by a factor independent of state action—namely, by being travelers wishing to board an airplane.²⁴⁵

Second, when USBP officers ask travelers about their citizenship status, these questions are intrusive because officers are throwing the travelers' citizenship into question and are eliciting potentially self-incriminating responses from travelers.²⁴⁶ It is true that in *Martinez-Fuerte*, the Supreme Court found that asking vehicle occupants in a domestic checkpoint "a brief question or two and possibly the production of a document evidencing a right to be in the United States" was not intrusive.²⁴⁷ However, the Court made clear that this type of questioning was not intrusive because "motorist[s] can see that other vehicles are being stopped, [they] can see visible signs of the officers' authority, and [they are] much less likely to be frightened or annoyed by the intrusion."²⁴⁸ As mentioned above, none of these warning signs stating the USBP's authority are present at the TSA checkpoint, and most importantly, *not all* of the travelers are stopped.²⁴⁹ Moreover, since the Court never established what kind of documents would evidence a right to be in the United States, even U.S. citizens—particularly those with Hispanic ancestry—might be unable to prove they are rightfully in the country only with their state

²⁴⁴ 466 U.S. 210, 219–20 (1984) (finding that workers inside a factory were not seized when INS agents visited the factory at random and stationed agents at the exits, while others questioned the workers).

²⁴⁵ See *Bostick*, 501 U.S. at 436.

²⁴⁶ Undocumented immigrants are not the only ones at risk of giving self-incriminating responses. See, e.g., Sieff, *supra* note 50 (reporting about a growing number of U.S. citizens along the southern border—mostly, if not all, of Hispanic ancestry—that hold U.S. birth certificates but are being denied passports, jailed in immigration detention centers, and entered into deportation proceedings after being accused of using a fraudulent birth certificate). As Omar's story illustrates, throwing one's citizenship into question can provoke anxiety and proved to be more intrusive than believed, especially if it is not the first time this has happened. See *infra*, Part III.C; cf. *Illinois v. Lidster*, 540 U.S. 419, 425 (2004) ("[I]nformation-seeking highway stops are less likely to provoke anxiety or to prove intrusive. The stops are likely brief. The police are not likely to ask questions designed to elicit self-incriminating information.").

²⁴⁷ See *United States v. Martinez-Fuerte*, 428 U.S. 543, 557–58 (1976).

²⁴⁸ *Id.* at 558.

²⁴⁹ See, e.g., Transcript of Motion to Suppress Evidence Hearing, *supra* note 163, at 54–55, 58–61 (describing that there are no warning signs alerting to the presence, purpose, procedure, or authority of USBP officers at the airport, and what USBP officers look for to justify an immigration investigatory stop at the airport).

ID.²⁵⁰ And most importantly, in *Brignoni-Ponce*, the Court required USBP officers to have reasonable suspicion that an individual is *a suspected illegal alien* before they conduct an immigration investigatory stop, but they declined to resolve whether USBP officers “also may stop persons reasonably believed to be *aliens when there is no reason to believe they are illegally in the country.*”²⁵¹ So, it does not follow that—for those stops made during roving patrols—USBP officers do not need reasonable suspicion to stop individuals they suspect *only to be aliens* if the officers have no reason to believe they are illegally in the country.

Hence, whenever USBP officers approach travelers and ask them questions at the TSA checkpoint, these interactions are not consensual and constitute a stop. USBP officers essentially “free-ride” on the checkpoint’s compulsory conditions because travelers have already been forewarned of the TSA’s authority, and travelers understand and expect to be questioned and searched by TSA before boarding their flights. Since travelers are objectively “seized” under the Fourth Amendment and understand that they must follow TSA security procedures to board their flights, they understandably expect to be questioned and searched by any of the authorities within the bounds of the checkpoint. Certainly, the common traveler will not understand which government officers can conduct what kinds of stops and searches or their permissible scope. Not surprisingly, travelers will equate following required TSA security procedures with following instructions and answering questions from any of the authorities present at the checkpoint, especially those coming from uniformed USBP officers with holstered weapons who address travelers in an authoritative tone.²⁵² USBP officers are in fact using the compulsory

²⁵⁰ Even the citizenship of those citizens who were born in the United States, who hold a U.S. birth certificate, and who have served in the military might be thrown into question. See, e.g., Sieff, *supra* note 50 (reporting that a current state prison guard who was a former service member and also, ironically, a USBP agent, was denied a U.S. passport and accused of using a fraudulent birth certificate).

²⁵¹ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 n.9 (1975) (emphasis added).

²⁵² According to the Supreme Court, even though the workers in *Delgado* were not “free to leave” without being questioned first, the officers’ conduct gave the employees “no reason to believe that they would be detained if they gave truthful answers to the questions put to them or *if they simply refused to answer.*” See *INS v. Delgado*, 466 U.S. 210, 218 (1984) (emphasis added). Unlike the workers in *Delgado*, travelers wishing to board their flights do not know whether they would be detained for refusing to answer the USBP officers’ questions about their citizenship because there are no warning signs about the scope of their authority and

conditions of the checkpoint to elicit answers to their intrusive questions and travelers will reasonably feel compelled to answer any questions from them, even those that might seem potentially troubling, under the guise of consensual interactions.²⁵³

As such, these interactions between USBP officers and travelers at the TSA pre-boarding screening checkpoint must fall under the category of stops, and not consensual interactions. Therefore, USBP officers must have objective articulable facts amounting to reasonable suspicion to conduct these immigration investigatory stops at TSA checkpoints. However, the particular circumstances surrounding the TSA checkpoint, combined with the manner in which USBP officers to conduct these stops, make these stops unreasonable under the Fourth Amendment.

B. USBP Officers Conducting Immigration Investigatory Stops at the TSA Checkpoint Cannot Possibly Satisfy the Reasonable Suspicion Standard

USBP officers solely rely on their observations within the TSA checkpoint to obtain sufficient valid articulable facts that amount to reasonable suspicion to detain travelers they suspect to be undocumented aliens. This Note argues that, with the exception of those situations in which USBP officers are able to discern whether travelers are aliens based on the forms of identification they show to the TSA officer,²⁵⁴ officers cannot

because travelers understand that they must go through the checkpoint and follow all of the TSA security procedures before being able to board their flights. In fact, Omar’s story illustrates how USBP officers detain travelers who refuse to answer their questions about citizenship. See Transcript of Jury Trial Testimony, *supra* note 176, at 59, 61, 62.

²⁵³ The USBP officers’ conduct goes beyond what the Fourth Amendment allows. See *Florida v. Bostick*, 501 U.S. 429, 434–35 (1991) (“We have stated that even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, . . . ask to examine the individual’s identification, . . . and request consent to search his or her luggage . . . —as long as the police do not convey a message that compliance with their requests is required.” (emphasis added)).

²⁵⁴ However, in these situations, USBP officers are able to discern the forms of identification that travelers show at the podiums because the TSA officers allow them to do so. In other words, TSA officers are complicit in helping USBP officers investigate criminal activity—namely, illegal immigration—and therefore, their screening procedures go beyond the scope of the administrative search and such information must be excluded. See *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 538 (1967); *United States v. Davis*, 482 F.2d 893, 908–09 (9th Cir. 1973), *overruled on other grounds by United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007); see also *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1245 (9th Cir. 1989).

possibly satisfy the reasonable suspicion standard solely on their observations. According to the Supreme Court's decision in *Brignoni-Ponce*, the following set of factors would be valid factors that USBP officers will consider in their decision to stop pedestrian travelers²⁵⁵ at the TSA checkpoint to question them about their immigration status: (1) characteristics of the area where they encounter the traveler (proximity to the border, patterns of traffic, and previous experience with alien traffic); (2) information about recent illegal crossings in the area; (3) the traveler's behavior (erratic behavior or attempts to evade officers); and (4) the traveler's "Hispanic appearance."²⁵⁶ In general, since the "area" where these roving patrols are conducted is strictly within the bounds of the TSA checkpoints, only traveler traffic that is boarding flights from the airport need be considered.

For illustration purposes, consider the circumstances of Brownsville South Padre International Airport, where Omar Figueredo and Nancy Morales were detained. First, the proximity of Brownsville South Padre International Airport to the border with Mexico is about 5.5 miles,²⁵⁷ and the patterns of traveler traffic inside the airport are virtually all domestic, and thus previous experience with alien traffic is negligible.²⁵⁸ Second, the airport's information about recent illegal crossings would also be negligible considering that virtually all traveler traffic is domestic.²⁵⁹ Third, although behavior depends on each particular traveler, the compulsory conditions of the TSA checkpoint must be taken into account, as well as their effect on the travelers' behavior. People are not regularly under the compulsory conditions of a TSA checkpoint, and thus their behaviors might not be as they would under a setting free of those compulsory conditions. Accordingly, the same issues that arise in "drug courier profile" cases are present in these situations because the behaviors of travelers under the compulsory conditions of a TSA checkpoint might be easily classi-

²⁵⁵ See *Ill. Migrant Council v. Pilliod*, 540 F.2d 1062, 1070 (7th Cir. 1976) (holding that "Mexican appearance" alone did not provide the basis for reasonable suspicion in pedestrian stops).

²⁵⁶ See *Brignoni-Ponce*, 422 U.S. at 884-87; *Nicacio v. INS*, 797 F.2d 700, 701 (9th Cir. 1985); *United States v. Munoz*, 604 F.2d 1160, 1160 (9th Cir. 1979).

²⁵⁷ *About BRO*, BROWNSVILLE S. PADRE ISLAND INT'L AIRPORT, <http://flybrownsville.com/about-bro/about-us/> [<https://perma.cc/CLE9-MT9Y>] (last visited Sept. 5, 2018).

²⁵⁸ See *supra* Figure 1.

²⁵⁹ *Id.*

fied as "nervous," "brisk," or "furtive."²⁶⁰ Therefore, suspicious behaviors will be difficult to distinguish from "reasonable innocent behaviors" that can be expected from travelers at the checkpoint.²⁶¹

Finally, USBP officers at the Brownsville South Padre International Airport would consider the travelers' "Hispanic appearance" as a factor in their decision to detain them as suspected aliens.²⁶² Since airports do not collect information about the races and ethnicities of travelers, and the domestic passenger traffic in the Brownsville South Padre Island Airport in particular is over 95%,²⁶³ the population statistics for the city of Brownsville are the best proxy variable available. According to U.S. Census Bureau, in 2015, the total population of Brownsville was 177,795 and from that figure, over 166,000 people or 93.1% of the total population identified as Hispanic or Latino.²⁶⁴ Since over 90% of the population of Brownsville identifies as Hispanic or Latino and over 95% of travel at Brownsville South Padre International Airport is domestic, the factor of "Hispanic appearance" in this area loses its probative value in the reasonable suspicion analysis in its entirety.²⁶⁵ Consequently, "Hispanic appearance" is of such little probative value that, although it might be relevant, it is not a reliable factor to justify an immigration investigatory stop at the TSA checkpoint.²⁶⁶

Since USBP officers conduct immigration investigatory stops when they are unable to observe sufficient articulable facts that amount to reasonable suspicion that travelers are undocumented immigrants, officers are either arbitrarily conducting these stops or relying entirely on the travelers' race and

²⁶⁰ See *United States v. Millan*, 912 F.2d 1014, 1018 (8th Cir. 1990); *United States v. Garvin*, 576 F. Supp. 1110, 1112 n.1 (N.D. Ill. 1983); *United States v. Westerbann-Martinez*, 435 F. Supp. 690, 699 (E.D.N.Y. 1977).

²⁶¹ See *Flame*, *supra* note 72, at 338; see also *United States v. Lopez*, 564 F.2d 710, 712 (5th Cir. 1977) (holding where a reasonable suspicion factor and its opposite can both be used by law enforcement officers to justify stopping an individual, in that case glancing repeatedly and avoiding eye contact with a USBP officer, then both factors lose their probative value).

²⁶² See *Brignoni-Ponce*, 422 U.S. at 884-87; *United States v. Munoz*, 604 F.2d 1160, 1160 (9th Cir. 1979); *Nicacio v. INS*, 797 F.2d 700, 701 (9th Cir. 1985).

²⁶³ See *supra* Figure 1.

²⁶⁴ *Brownsville, Texas (City)*, STAT. ATLAS, <https://statisticalatlas.com/place/Texas/Brownsville/Race-and-Ethnicity> [<https://perma.cc/SM7Q-8MTT>] (last visited Dec. 1, 2017).

²⁶⁵ See *United States v. Montero-Camargo*, 208 F.3d 1122, 1129, 1135 (9th Cir. 2000) (holding that "Hispanic appearance," just like any other factor in the reasonable suspicion standard, loses its probative value when it is likely to sweep many ordinary citizens into a generality of suspicious appearance).

²⁶⁶ *Id.*

ethnicity, and therefore, conducting unreasonable stops under the Fourth Amendment. Oddly enough, this conclusion was reached by assuming that USBP officers were using the “Hispanic appearance” factor in the way the Supreme Court intended the classification to be used. But in this next section, this Note will expose that even the Court’s foundations for the “Hispanic appearance” factor are more astounding—and absurd—than initially thought.

V

THE “HISPANIC APPEARANCE” FACTOR IN THE REASONABLE
SUSPICION STANDARD VIOLATES THE
FOURTEENTH AMENDMENT’S EQUAL
PROTECTION CLAUSE

The “Hispanic appearance” factor in the reasonable suspicion standard set by the Supreme Court in 1975 is an outdated, extremely flawed, and stereotypical ethnic classification that violates the Equal Protection Clause. As explained above, law enforcement officers conduct investigatory stops by relying on their observations of an individual’s characteristics and conduct and of the environment where they observe the individual, all of which are later considered in the totality of the circumstances test.²⁶⁷ In the case of the reasonable suspicion standard in the context of immigration law enforcement, all else equal, an immigration law enforcement officer is more likely to stop an individual with a “Hispanic appearance” than someone who does not have one.²⁶⁸ Therefore, since this ethnic classification exists on the face of the law—a USBP practice approved by the Supreme Court’s opinion in *Brignoni-Ponce*—and it “curtail[s] the civil rights of a single [ethnic classification],”²⁶⁹ the “Hispanic appearance” classification is “immediately suspect.”²⁷⁰

All racial or ethnic classifications imposed by the government must be analyzed under strict scrutiny.²⁷¹ To pass strict

²⁶⁷ See Johnson, *supra* note 67, at 218.

²⁶⁸ Ironically, Justice Powell, the author of the *Brignoni-Ponce* opinion, would have agreed that an ethnic classification such as the “Hispanic appearance” factor would be found unconstitutional. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–90 (1978) (“The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.”).

²⁶⁹ *Korematsu v. United States*, 323 U.S. 214, 216 (1944); see also Carbado & Harris, *supra* note 42, at 1576.

²⁷⁰ See *Korematsu*, 323 U.S. at 218.

²⁷¹ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995).

scrutiny, the government must prove that the ethnic classification is a narrowly tailored measure to further compelling government interests.²⁷² Although policing the border for illegal immigration to further national security might be a compelling governing interest,²⁷³ the use of an individual’s “Hispanic appearance” is not a narrowly tailored measure that furthers national security because the classification is overinclusive, underinclusive, and the government has never argued that border security can be achieved through any less discriminatory alternative.²⁷⁴ The “Hispanic appearance” classification is overinclusive, underinclusive, and extremely troubling for a number of reasons, but most prominently because: (1) it was established by the use of misleading population statistics; and (2) its legal definition is ludicrous and defies logic.

A. Misleading Population Statistics

As explained above in Part II, when the Court first announced this ethnic classification in *Brignoni-Ponce*, its first formulation was “apparent Mexican ancestry.”²⁷⁵ The Court added this ethnic classification to the reasonable suspicion standard for searches and seizures of undocumented immigrants because the Court concluded that “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor.”²⁷⁶ The only support the Court had for this broad claim were the population statistics cited in a footnote within the opinion:

The 1970 census and the INS figures for alien registration in 1970 provide the following information about the Mexican-American population in the border States. There were 1,619,064 persons of Mexican origin in Texas, and 200,004 (or 12.4%) of them registered as aliens from Mexico. In New Mexico there were 119,049 persons of Mexican origin, and 10,171 (or 8.5%) registered as aliens. In Arizona there were 239,811 persons of Mexican origin, and 34,075 (or 14.2%)

²⁷² *Id.* at 227.

²⁷³ See *Korematsu*, 323 U.S. at 223 (holding that the exigencies of war and the threat to national security were a compelling government interest that justified the evacuation and internment of Japanese Americans during World War II). But see *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (“The forcible relocation of U.S. citizens to concentrations camps, solely and explicitly on the basis of race, is objectively unlawful . . . *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution.”).

²⁷⁴ See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986).

²⁷⁵ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975).

²⁷⁶ *Id.* at 887.

registered as aliens. In California there were 1,857,267 persons of Mexican origin, and 379,951 (or 20.4%) registered as aliens These figures, of course, do not present the entire picture. The number of registered aliens from Mexico has increased since 1970, . . . and we assume that very few illegal immigrants appear in the registration figures. On the other hand, many of the 950,000 other persons of Spanish origin living in these border States . . . may have a physical appearance similar to persons of Mexican origin.²⁷⁷

Based on this footnote, it can be assumed that the Court reasoned that these population statistics of people with Mexican origin for the states along the southern border were a good proxy for estimating the probability of immigration law enforcement encountering undocumented immigrants. However, the Court's use of the term "aliens" and the relevant statistics is misleading because it erroneously assumes that the percentages of registered "aliens" in the southern-border states are reliable indicators of the presence of undocumented immigrants in the region without having any available statistics on undocumented immigrants in these states. Hence, the Court improperly insinuated that since a fraction of registered "aliens" in the southern-border was of Mexican origin, then an individual's Mexican origin was correlated to that individual's probability of being an alien illegally in the country—completely disregarding the deeply-rooted Mexican American population in these states.²⁷⁸ This conclusion lacks not only a factual, but also a logical basis. This faulty logic led to the Court's atrocious reasoning for the "apparent Mexican ancestry" classification and to sanction the USBP's practice of equating "aliens illegally in the country" with people of Mexican origin.

To make matters worse, the Supreme Court clearly misunderstood—or blatantly ignored—how the Attorney General's 100-mile border definition applies not only to the southern-border states, but to the perimeter of the *entire country*, including the perimeters of Alaska and Hawaii.²⁷⁹ If the Court had really contemplated how the 100-mile border definition applied throughout the country, it would have realized that the "apparent Mexican heritage" classification was sanctioning the in-

²⁷⁷ *Id.* at 886–87 n.12.

²⁷⁸ See Carbado & Harris, *supra* note 42, at 1594 ("To begin, the presence of Mexicans in the United States was largely a consequence of the movement of a border rather than the movement of people. The delineation of the border was the result of the U.S.–Mexican war.")

²⁷⁹ See AM. CIVIL LIBERTIES UNION *supra* note 10.

creased likelihood of every person of Mexican origin living in most of the densest cities in America being stopped by immigration law enforcement.²⁸⁰ The Court also inappropriately considered the Mexican/Non-Mexican composition of the *entire population* of these southern-border states, rather than the Mexican/Non-Mexican composition of the *population of the counties affected* by the 100-mile definition. Today for instance, according to statistics, the 100-mile “border zone” is “home to 65.3 percent of the entire U.S. population, and around 75 percent of the U.S. Hispanic population.”²⁸¹ The Court also blatantly ignored the fact that most counties located within the “border zone” along the southern border have overwhelming percentages of Mexican population—effectively becoming the majority of the population in these counties²⁸²—and that the probative value of “apparent Mexican ancestry” for illegal immigration was basically worthless.²⁸³

Therefore, the Court’s assertion that “apparent Mexican ancestry” was a relevant factor in policing undocumented immigration that was supported by the population statistics in the footnote in *Brignoni-Ponce* was plainly erroneous. Yet, this assertion supported by misleading statistics was not the Court’s worst mistake in approving this ethnic classification, but rather, how the ethnic classification was itself defined and would be applied by individual immigration law enforcement officers.

B. Ludicrous Legal Definition

When the Court approved of the government’s use of the “apparent Mexican ancestry” factor in the reasonable suspicion analysis, it cited to the following excerpt of the government’s reply brief in *United States v. Ortiz* to support its holding:

²⁸⁰ See Tanvi Misra, *Inside the Massive U.S. ‘Border Zone’*, CITY LAB (May 14, 2018), <https://www.citylab.com/equity/2018/05/who-lives-in-border-patrols-100-mile-zone-probably-you-mapped/558275/> [<http://perma.cc/2WPF-ZAD4>].

²⁸¹ *Id.* However, people of Mexican origin are not the only ones at risk. Any individual belonging to a minority group in the United States is at risk of being stopped as an undocumented alien. See *infra* Part V.B.

²⁸² Compare AM. CIVIL LIBERTIES UNION *supra* note 10, with *Race and Ethnicity in Texas (Map of Race and Ethnicity by County in Texas—Hispanics)*, STAT. ATLAS, <https://statisticalatlas.com/state/Texas/Race-and-Ethnicity> [<https://perma.cc/S93R-BVTB>] (depicting that the composition of the Hispanic population in most, if not all, of the counties within the “border zone” in Texas consists of more than 50%).

²⁸³ See *United States v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000) (citing *United States v. Rodriguez*, 976 F.2d 592, 595–96 (9th Cir. 1992)).

The Immigration and Naturalization Service has informed us that experienced Border Patrol officers look for persons with the characteristic appearance of Mexican residents, an appearance that distinguishes those persons from the thousands of Mexican aliens who lawfully reside in this country and the thousands of American citizens of Mexican ancestry. Illegal Mexican entrants commonly appear thin, their hands are rough and work-worn, their hair is cut in a characteristic fashion, and they are frequently dressed in full-cut and coarsely-woven material. Experience has shown we are told, that illegal entrants may exhibit obvious nervousness or affect excessive nonchalance as they approach a checkpoint.²⁸⁴

With this excerpt, the government attempted to provide the Court with some “guidelines” on how the immigration status of people with Mexican origin is apparent to USBP officers based on people’s physical characteristics like body constitution, roughness of hands, haircut, or style of dress. Evidently, it is absurd to believe that any reasonable human being can distinguish who is unlawfully in the United States just by looking at the person’s physical appearance, even more so, at the person’s clothing, haircut, or hands. In fact, the government’s “guidelines” seem to conjure the image of a poor rural laborer rather than a person with Mexican ancestry—unmistakably, a remnant of the “Mexican brown” stereotype USBP used in its early days.²⁸⁵ Indeed, the government’s argument that these “guidelines” were effective in identifying undocumented immigrants breaks down by including a simple and obvious factor left out from them: skin color.

For obvious reasons, the government did not include skin color in its “guidelines” to avoid the inference that immigration law enforcement officers were racially profiling people of Mexican origin and associating them with illegal immigration. Yet, the “guidelines” achieve exactly that result because only someone with a darker skin tone fits the description in the “guidelines” in such a way to be suspected as an undocumented immigrant.²⁸⁶ If instead, people with light skin color and blue

²⁸⁴ Reply Brief for the United States, *supra* note 142, at *12–*13.

²⁸⁵ See LYTLE HERNÁNDEZ, *supra* note 25, at 10 (“[A]bout 5’5” to 5’8”, dark brown hair, brown eyes, dark complexion . . .”).

²⁸⁶ The USBP officers’ application of the “Hispanic appearance” factor in their decision to detain a suspected undocumented immigrant has evolved into something extremely different from these “guidelines,” a factor that includes any apparent characteristic they tend to associate with Hispanics, including skin color. See, e.g., Yardley, *supra* note 16 (describing how USBP has even stopped and refused to let Cameron County Judge Gilberto Hinojosa board a plane to Houston

eyes fit the description in the "guidelines,"—"appear thin, their hands are rough and work-worn, their hair is cut in a characteristic fashion, and they are frequently dressed in full-cut and coarsely-woven material"—they conjure the image of a white farmer, and not an undocumented immigrant.

The term "apparent Mexican ancestry" itself is extremely problematic because how exactly can someone's Mexican ancestry be apparent? Most people in Mexico or of Mexican descent are *mestizos*, "meaning they have a mixture of indigenous, European, and African ancestry."²⁸⁷ As the population continues to grow, these ancestries mix even further to the point that, to be able to illustrate the degree to which people in Mexico or of Mexican descent are different from each other, "[i]magine if people from Kansas and California were as genetically distinct from each other as someone from Germany is from someone from Japan."²⁸⁸ Clearly, if attempting to define "apparent Mexican ancestry" ends in utter failure, then attempting to use "apparent Mexican ancestry" as a tool for immigration law enforcement is a downright disaster.

To exacerbate this disaster further into a catastrophe, through time, the term "apparent Mexican ancestry" evolved in the courts into its current form: "Hispanic appearance." No court in the country has ever provided any explanation on why "apparent Mexican ancestry" evolved into "Mexican appearance,"²⁸⁹ later equated first to "Latin extraction,"²⁹⁰ and then to "Hispanic appearance."²⁹¹ But this bizarre evolution of the term can be traced back to the Supreme Court's opinion in *Brignoni-Ponce*, where in the same footnote in which the Court cited population statistics to support the approval of this ethnic classification,²⁹² the Court extended the boundaries of logic

until he stated his citizenship, and also stopped Federal District Court Judge Filemon B. Vega with his entourage after a USBP officer mistook him for an undocumented immigrant or a drug smuggler). It would be extremely absurd to believe that any of these two judges: (1) appeared thin; (2) their hands were rough and work-worn; (3) their haircut was characteristic; and (4) they were dressing in full-cut and coarsely-woven material.

²⁸⁷ See Lizzie Wade, *People from Mexico Show Stunning Amount of Genetic Diversity*, SCI. MAG. (Jun. 12, 2014), <http://www.sciencemag.org/news/2014/06/people-mexico-show-stunning-amount-genetic-diversity> [http://perma.cc/CV9G-RCUY]. To complicate matters further, Mexico also has sixty-five different indigenous ethnic groups, some "as different from each other as Europeans are from East Asians." *Id.*

²⁸⁸ *Id.*

²⁸⁹ See *United States v. Martinez-Fuerte*, 428 U.S. 543, 571 (1976).

²⁹⁰ See *United States v. Munoz*, 604 F.2d 1160, 1161 (9th Cir. 1979).

²⁹¹ See *Nicacio v. INS*, 797 F.2d 700, 701 (9th Cir. 1985).

²⁹² See *supra* Section V.A.

after it stated that “many of the 950,000 other persons of Spanish origin living in these border States . . . may have a physical appearance similar to persons of Mexican origin.”²⁹³ In other words, the Court carelessly likened the physical appearance of people of Spanish origin with those of Mexican origin. Following this logic, since the USBP “guidelines” stated that legal status *and* Mexican ancestry are apparent to experienced officers because undocumented immigrants commonly “appear thin, their hands are rough and work-worn, their hair is cut in a characteristic fashion, and they are frequently dressed in full-cut and coarsely-woven material[,]”²⁹⁴ then legal status *and* Spanish ancestry are also apparent to experienced officers because of exactly the same factors. Such an outlandish conclusion cannot possibly stand.

Even today, the United States Census Bureau has not been able to provide a clear definition of what Hispanic origin means: “Hispanic origin can be viewed as the heritage, nationality, lineage, or country of birth of the person or the person’s parents or ancestors before arriving in the United States. . . . People who identify as Hispanic, Latino, or Spanish may be any race.”²⁹⁵ Further, the United States Census Bureau uses a code list containing “over 30 Hispanic or Latino subgroups” to categorize people who identify as Hispanic according to their national origin.²⁹⁶ As explained above, if Mexican ancestry alone—with its incredibly diverse makeup of mixed races and ethnicities—cannot possibly be apparent, how can Hispanic ancestry—a term that encompasses people of nearly twenty-one different Spanish-speaking countries around the world,²⁹⁷ each with their own unique mixture of ancestries coming from all continents—be apparent?²⁹⁸ If no training or experience

²⁹³ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 886, n.12 (1975).

²⁹⁴ See Reply Brief for the United States, *supra* note 142, at 12–13 (emphasis added).

²⁹⁵ *Hispanic or Latino Origin*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/note/US/RHI725218> [<https://perma.cc/DZ97-DBR4>] (last visited Aug. 25, 2019).

²⁹⁶ *Hispanic Origin*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/population/hispanic-origin.html> [<http://perma.cc/75K6-EGJ2>] (last visited Sept. 7, 2018).

²⁹⁷ See Niall Quinn, *21 Spanish Speaking Countries: From Largest to Smallest*, BASELANG, <https://baselang.com/blog/travel/spanish-speaking-countries/> [<http://perma.cc/P7BJ-QGBA>] (last visited Sept. 14, 2018).

²⁹⁸ For example, just consider the makeup of mixed races and ethnicities from Spain, from where the term “Hispanic” derives. *Hispanic*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Hispanic> [<http://perma.cc/HQZ2-V6KL>] (“[O]f or relating to the people, speech, or culture of Spain . . .”). Spain has been conquered and settled by a mix of different civilizations through-

can possibly enable someone to identify an individual's Hispanic ancestry by looking at skin tone or physical traits, how could training or experience enable someone to identify an individual's Hispanic ancestry *and* whether the individual is legally in the United States by merely looking at physical characteristics like body constitution, roughness of hands, haircut, or style of dress?

Consequently, since the "Hispanic appearance" classification is such an indefinite concept, it is not a surprise that immigration law enforcement officers are unable to apply the classification *objectively* as required by the totality of the circumstances. As explained in Part II.A, the totality of the circumstances test constantly runs the risk of becoming *subjective* because an individual officer's suspicion may be impacted by the officer's own bias or misperception—whether conscious or unconscious—and not necessarily by enhanced intuition obtained through police training or experience.²⁹⁹ As a result, USBP officers are likely to have their own interpretation of who may have a "Hispanic appearance" based on their experiences not as law enforcement officers but as members of society, experiences possibly affected by social stereotypes and institutional practices.³⁰⁰ Predictably, USBP officers mostly stop people of minority groups because "Hispanic appearance" is typically associated with people with a darker skin tone and not with white, blonde, or blue-eyed people.³⁰¹ This permissible profiling should raise concern to populations of minority groups around the country because 72% of the U.S. minority population lives within the 100-mile border zone, and those areas with the highest concentration of minority population are the same areas where USBP presence is the heaviest.³⁰²

out the centuries, from "Visigoths from northern Europe, the Phoenicians, Greeks and Romans from the Mediterranean region[,] and the Moors from northern Africa." Jaime Gonzalez, *I'm White in Barcelona but in Los Angeles I'm Hispanic?*, PRI'S WORLD, Oct. 28, 2015, <https://www.pri.org/stories/2015-10-28/im-white-barcelona-los-angeles-im-hispanic> [<http://perma.cc/5B7H-D6G9>]. These racial and ethnic combinations in Spain alone cannot be apparent. Now consider that those same racial and ethnic combinations in Spain were mixed further with the different American indigenous ethnic groups. See *id.* ("[T]here are also white Hispanics, as well as black Hispanics or Asian Hispanics.")

²⁹⁹ See Flame, *supra* note 72, at 336.

³⁰⁰ See LITTLE HERNÁNDEZ, *supra* note 25, at 199–201.

³⁰¹ See *id.* at 55–56; UNCOVERING USBP, *supra* note 15, at 17 ("The I-44 data shows that USBP's arrest practices affect lawfully present noncitizens from all over the globe. The greatest impact, however, appears to be on noncitizens of color. The vast majority of those wrongfully arrested were from South Asian, East Asian, African, and Caribbean backgrounds.")

³⁰² See Misra, *supra* note 280.

Therefore, neither the “Hispanic appearance” classification, nor any of its previous formulations, can withstand strict scrutiny. Policing the border for illegal immigration to further national security might be a compelling government interest, but the use of an individual’s “Hispanic appearance” is clearly not a narrowly tailored measure that furthers national security. The classification is enormously overbroad: USBP officers are more likely to stop and question *all* people of Hispanic origin—and of other minority groups for reasons explained above—for their immigration status only because a few might be undocumented immigrants.³⁰³ The classification is also enormously underinclusive: USBP officers are likely to ignore and not stop people from other ethnicities and races not typically associated with illegal immigration.³⁰⁴ USBP’s own data corroborates that the “Hispanic appearance” classification is not even an effective tool to reduce illegal immigration:

Between 2008 and 2018, many, many more people with legal status were taken into custody at the internal checkpoints—some years, almost twice as many During the same period, apprehensions of people who are deportable dropped by 50 percent. . . . A 2017 Government Accountability Office . . . review of checkpoints requested by Congress also found that arrests at these sites between 2013 and 2016 were a drop in the bucket—2 percent of total arrests of unauthorized entrants in that time.³⁰⁵

CONCLUSION

In *Brignoni-Ponce*, the Supreme Court intended to reduce the risk of arbitrary and abusive immigration investigatory stops against people of Mexican origin, but paradoxically, it ended up sanctioning the USBP’s discriminatory practice of enforcing immigration law enforcement by means of an individ-

³⁰³ *Id.* (“[S]ome Arivaca residents started documenting [USBP’s] interactions with locals [,] . . . analyzed 2,000-plus interactions, and found that vehicles with Latinos in them were 26 times more likely to be asked for ID than white motorists. They were also 20 times more likely to be sent in for a secondary inspection.”). While it is true that USBP officers stop Hispanics more frequently for their immigration status, this fact is not an example of the classification’s success or of the USBP’s accuracy in its application. The majority of illegal immigration policing occurs in the counties of southern-border states in which, as stated above, Hispanics constitute the majority of the population.

³⁰⁴ Almost half—45%—of undocumented immigrants are already in the United States when they go into undocumented status, mostly by overstaying their visas. The majority of this population is non-Hispanic. Kristin Connor, *Updating Brignoni-Ponce: A Critical Analysis of Race-Based Immigration Enforcement*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 567, 587 (2008).

³⁰⁵ Misra, *supra* note 280.

ual's ethnicity. Once the Supreme Court sanctioned the USBP's ethnic profiling, the classification later evolved into its current, more vague and imprecise form that correlated Hispanic origin with illegal immigration. Unsurprisingly, the government is now continuously suspicious of people of Hispanic origin and constantly throws their citizenship into question. Even after nearly seventy years since the legal doctrine of "separate, but equal" was abolished, the government still treats people of Hispanic origin as second-class citizens because of the outdated, extremely flawed, and stereotypical "Hispanic appearance" factor that is still enforced and alive today. Moreover, the term's imprecise and obfuscated definition, combined with the broad subjectivity with which USBP applies it, puts the populations of minority groups at risk of the same arbitrary and abusive treatment.

No better example illustrates the insidiousness of the use of the "Hispanic appearance" than the USBP immigration investigatory stops at the TSA pre-boarding screening checkpoint. Before conducting these immigration investigatory stops on travelers, USBP officers need reasonable suspicion. USBP details at TSA checkpoints are not functional equivalents of the border and do not fall under the border search exception because the dwellings of airports are neither international ports of entry nor functional equivalents of the border—with the exception of the dwellings of airports where incoming international flights arrive after a nonstop flight from foreign country. Furthermore, the presence of USBP details at the airport are not domestic fixed checkpoints because, although their purpose is similar, core features of domestic fixed checkpoints that characterize the immigration investigatory stops conducted there are not present at the airport.

Hence, USBP officers conduct these immigration investigatory stops in a manner resembling or matching roving patrols, and therefore, USBP officers must obtain sufficient objective articulable facts that satisfy the reasonable suspicion standard before conducting the stops. However, USBP officers cannot possibly obtain sufficient reliable objective articulable facts that amount to reasonable suspicion according to the Court's standard in *Brignoni-Ponce* because of the particular compulsory conditions present at the TSA checkpoints at these southern border airports. Moreover, none of these interactions between USBP officers and travelers are objectively consensual because whenever travelers enter a TSA checkpoint, they are effectively "seized" under the Fourth Amendment. Accordingly,

USBP officers “free-ride” on the TSA checkpoint’s compulsory conditions when they interact with travelers to purposefully elicit answers from them about their immigration status or to obtain sufficient information from them to conduct a valid immigration investigatory stop, and therefore, travelers have no option but to relent to the USBP officers’ requests for fear of legal consequences.

The Supreme Court must overrule the “Hispanic appearance” classification pursuant to the Equal Protection Clause and hold that the USBP immigration investigatory stops at TSA pre-boarding screening checkpoints in the southern border are unreasonable under the Fourth Amendment. These legal issues must raise great concern around the country because nearly all major U.S. cities are within the “reasonable distance” designation of 100 air miles of the border, and if the Trump Administration one day decides to station USBP details in all of those cities airports, the Fourth Amendment rights of millions of U.S. citizens and legal aliens that are members of minority groups will be violated on a daily basis.