

## COMMENT

### INHERENTLY COERCIVE ENTRY: ICE'S USE OF UNCONSTITUTIONAL RUSES

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*For the past several years, there have been reports of non-citizens lied to and coerced into allowing ICE agents to enter their homes based on false pretenses. ICE agents, equipped with weak administrative warrants, know that without a judicial warrant they must seek consent to enter a home. As a result, ICE conducts ruses to obtain consent to enter a non-citizen's home and subsequently, conduct an arrest. This tactic is an egregious violation of Fourth Amendment rights against unreasonable search and seizure and undermines notions of anti-commandeering under the Tenth Amendment.*

*This Comment outlines the Supreme Court and Federal Circuit's Jurisprudence on the Consent Doctrine to describe the fine line of permissible and impermissible acts. This Comment goes on to classify ICE ruses as impermissible misrepresentations that, in addition to violating the Fourth Amendment, undermine trust in local and state police in violation of Tenth Amendment principles. Finally, this Comment provides the steps that ICE and the various Courts must take to protect non-citizen's Fourth Amendment rights and balance federal and state powers.*

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## INTRODUCTION

In the fall of 2018, the mother of Osny Sorto-Vasquez Kidd, a 24-year-old Deferred Action for Childhood Arrival (DACA) recipient, was greeted at the apartment front door by a woman who professed to be a detective with the local police.<sup>1</sup> The woman claimed she was investigating a criminal whose address matched Kidd’s; she was dressed in a uniform that read “police,” and she presented a photo of the supposed suspect.<sup>2</sup> Kidd’s mother quickly agreed to allow the

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1. Roxana Kopetman, *Lawsuit Targets ICE Practice of Posing as Police*, ORANGE COUNTY REGISTER (Apr. 17, 2020, 7:32 AM), <https://www.ocregister.com/2020/04/16/lawsuit-targets-ice-practice-of-posing-as-police> [https://perma.cc/FLH4-AL4G]; Complaint for Damages, Declaratory and Injunctive Relief at 19, *Kidd v. Wolf*, 2020 WL 1905329 (C.D. Cal. 2020) [hereinafter *Kidd* Complaint].

2. Kopetman, *supra* note 1.

“detective” inside and to cooperate fully to help keep her family safe.<sup>3</sup> The woman was not a detective, and the photo was a fake.<sup>4</sup> In reality, the woman was a U.S. Immigration and Customs Enforcement (ICE) agent who, along with other ICE agents, began banging on doors and requesting the identification of all the apartment’s inhabitants.<sup>5</sup> Upon realizing that Kidd was not home, the ICE agents asked Kidd’s mother to call him.<sup>6</sup> Speaking with the ICE agent over his mother’s phone, Kidd agreed to meet with ICE agents two days later under the continued guise of helping investigate the dangerous criminal who was using Kidd’s address.<sup>7</sup> ICE agents met Kidd outside his home, checked his identification, and arrested Kidd for removal.<sup>8</sup> Then, Kidd was transported to a detention center in San Bernardino, California, where he was held for over two months and even denied his HIV medication.<sup>9</sup>

There’s a saying that a man’s home is his castle; likewise, the general public of the United States tends to expect security in their homes.<sup>10</sup> This expectation is especially true considering the limitations on law enforcement entering a home without a warrant.<sup>11</sup> Importantly, law enforcement uses consent searches as a semi-waiver of one’s Fourth Amendment right to be free from warrantless searches.<sup>12</sup> ICE agents,

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3. See *Kidd Complaint*, *supra* note 1, at 19 (explaining that Kidd’s mother was shocked to hear that a dangerous criminal had used their family’s address).

4. Kopetman, *supra* note 1.

5. See *Kidd Complaint*, *supra* note 1, at 19 (stating that Kidd’s siblings were between the ages of eleven and sixteen).

6. *Id.* at 20.

7. *Id.*

8. *Id.*

9. See *id.* (explaining that Kidd’s attorney secured his release from the Adelanto ICE Processing Center after two months); see also, Pilar Marrero, *DREAMer Held after Misdemeanor Arrest, Alleges Denial of HIV Medication in Detention*, LATINO REBELS (Nov. 15, 2018, 10:30 AM), <https://www.latinorebels.com/2018/11/15/dreamerheld> [<https://perma.cc/A4WS-U6K2>] (finding that Kidd had been detained for more than forty days and had been denied medical care including HIV prevention medication and treatment for a broken retainer).

10. *Minnesota v. Carter*, 525 U.S. 83, 94 (1998) (Scalia, J., concurring) (arguing that if a man’s house is his castle, there is a certain expectation of privacy and security against government intrusion).

11. See *Kentucky v. King*, 563 U.S. 452, 462–63 (2011) (describing various exceptions to the general requirement for a warrant which include exigent circumstances and special needs).

12. See Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 31 (2008) (“[C]onsent searches are popular because they allow police to exercise their discretion and power in contexts that affect literally

in particular, often use consent to bypass the warrant requirement to find and deport undocumented immigrants.<sup>13</sup> City officials across the United States accuse ICE of engaging in various unlawful tactics that bypass Fourth Amendment protections to enter a non-citizen's home.<sup>14</sup> Further, several victims of ICE ruses have spoken out to bring light to instances where ICE lies about who they are or under what circumstances they request to enter a person's home.<sup>15</sup>

This Comment argues that ICE's use of ruses violates the Fourth Amendment because ruses are inherently coercive and fail to induce voluntary consent. As a result, ICE undermines the Fourth Amendment's protections of privacy and security from unreasonable law enforcement intrusion. Additionally, this Comment articulates how ICE's practices are a violation of the anti-commandeering principles embedded in Tenth Amendment jurisprudence and the dire effects that allowing ICE to run afoul of the Fourth Amendment has on the public's trust in local law enforcement. This Comment will

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hundreds of thousands of persons where the target is unlikely to say 'no' to a request for a consent search.”).

13. See *infra* note 147 and accompanying text (describing the limitations of ICE warrants); *Know Your Rights: Immigrant's Rights*, ACLU, <https://www.aclu.org/know-your-rights/immigrants-rights> (last visited Oct. 19, 2022) (listing the rights that a person has when approached by ICE agents).

14. See *infra* notes 178–179 (describing city officials across the United States who have spoken out in opposition to ICE's ruses).

15. Kopetman, *supra* note 1 (“If federal agents are lying about who they really are, that undermines trust between local police and its community members . . .”); Ellen Moynihan & Larry McShane, *ICE Agents Pose as NYPD to Arrest Long-time New Yorker after 6 a.m. Manhattan Door Knock, Say Outraged City Officials*, N.Y. DAILY NEWS (Oct. 10, 2020), <https://www.nydailynews.com/new-york/ny-nypd-ice-immigration-raid-detainee-20201011-pln5koqtnjdqzj3u4omku3imiyi-story.html> [<https://perma.cc/UBY6-PUKQ>] (“Thinking she was speaking with NYPD officers, Maria provided the agents with Santos-Rodriguez’s cell phone number after they assured her the case could be resolved if they could see her husband’s ID.”); *ICE Sued For Alleged Warrantless Searches Impersonating Officers*, PATCH (Apr. 16, 2020, 12:53 PM), <https://patch.com/california/los-angeles/ice-sued-alleged-warrentless-searches-impersonating-officers> [<https://perma.cc/2UZ7-MTUB>] (“The plaintiffs allege in federal court that ICE officers also ‘routinely trespass on community members’ porches and other private areas surrounding their homes . . . without permission or a judicial warrant . . .”); Joel Rubin, *It's Legal for an Immigration Agent to Pretend To Be a Police Officer Outside Someone's Door. But Should It Be?*, L.A. TIMES (Feb. 20, 2017, 5:00 AM) <https://www.latimes.com/local/lanow/la-me-immigration-deportation-ruses-20170219-story.html> [<https://perma.cc/EM8H-QFCP>].

primarily focus on ICE intrusions into the homes of suspected non-citizens.<sup>16</sup>

Part I begins by describing the Supreme Court's and various circuit courts' Fourth Amendment jurisprudence concerning the Consent Doctrine and its application to non-citizens.<sup>17</sup> Part I further discusses Tenth Amendment values concerning anti-commandeering and political accountability principles.<sup>18</sup> Next, Part II discusses ICE's establishment, training practices, and various reports of ICE's tactics to obtain consent.<sup>19</sup> Part III argues that ICE ruses are impermissible misrepresentations incapable of supporting the existence of voluntary consent to search and seize.<sup>20</sup> Finally, Part III argues that there is a subsequent issue of distorted political accountability if ICE is allowed to continue engaging in ruses involving local police impersonation to obtain consent.<sup>21</sup>

## I. LEGAL BACKGROUND

In furtherance of appreciating the full complexity of Constitutional rights and exceptions that citizens and non-citizens alike face, this Part describes Fourth Amendment jurisprudence and focuses on various courts' interpretation of the Consent Doctrine. Then, to address the Federal government and State government's role in this area, this Part concludes with briefly describing the Tenth Amendment's call for political accountability.

### A. *History of Fourth Amendment Jurisprudence*

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable

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16. Arrests at home are not the only method ICE can employ to detain non-citizens. See Sarah Wise & George Petras, *The Process of Deportation*, USA TODAY (June 25, 2018), <https://www.usatoday.com/pages/interactives/graphics/deportation-explainer> [<https://perma.cc/B4X8-8U8L>] (explaining that a suspect can be arrested by local or federal police before contacting ICE to place the suspect in custody). ICE agents may also conduct a "sweep" of a non-citizen's home and make collateral arrests which this Comment does not specifically address or analyze. See generally Min K. Kam, *Ice Ruses: From Deception to Deportation*, 122 COLUM. L. REV. 125 (2022) (addressing ICE ruses in relation to collateral arrests).

17. *Infra* Section I.A–C.

18. *Infra* Section I.D.

19. *Infra* Section II.A–B.

20. *Infra* Section III. A–B.

21. *Infra* Section III.C.

cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”<sup>22</sup>

The Fourth Amendment is a product of disdain toward the British Empire’s use of “writs of assistance,” or general warrants, which authorized officials to widely search and seize entire villages.<sup>23</sup> The Founders sought protections from general warrants and crafted a requirement that warrants be justified, narrowly tailored, and approved by a magistrate based on probable cause.<sup>24</sup> Thus, began the public’s expectation of freedom from “unreasonable government intrusion.”<sup>25</sup> Accordingly, a search and seizure of a home without a warrant is presumptively unreasonable.<sup>26</sup> In *Katz v. United States*,<sup>27</sup> the Court reaffirmed that searches conducted without a judicial warrant are per se unreasonable and that the safeguard offered by an “objective predetermination of probable cause” cannot be bypassed.<sup>28</sup>

Nevertheless, numerous exceptions to the warrant requirement may excuse the government from obtaining a warrant before conducting a search or seizure.<sup>29</sup> Exigent circumstance is an exception to the

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22. U.S. CONST. amend. IV.

23. See Nathan Treadwell, *Fugitive Operations & the Fourth Amendment: Representing Immigrants Arrested in Warrantless Home Raids*, 89 N.C. L. REV. 507, 518–19 (2011) (explaining the Founders drafted the Amendment as a response to fears of a large government with powers similar to that of British rule).

24. See *id.* at 519 (stating that law enforcement must obtain a warrant from a “neutral and detached magistrate” in advance of conducting a search or seizure). Probable cause must be shown by law enforcement through an affidavit during the application process for a warrant to be issued by a magistrate. See *United States v. Leon*, 468 U.S. 897, 915 (1984).

25. *Silverman v. United States*, 365 U.S. 505, 511 (1961) (“At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”); see Treadwell, *supra* note 23, at 519 (noting the popularity of the Fourth Amendment upon its adoption, when the public was “still wary of broad authority to search”).

26. See *Payton v. New York*, 445 U.S. 573, 586 (1980) (discussing how the warrant requirement in certain circumstances minimizes unreasonable government intrusions); *Horton v. California*, 496 U.S. 128, 138 (1990) (discussing that the warrant requirement is of no cognizable inconvenience in a system that assumes warrantless searches to be per se unreasonable).

27. 389 U.S. 347 (1967).

28. *Id.* at 358 (quoting *Beck v. Ohio*, 379 U.S. 89, 96 (1964)).

29. See *e.g.*, *Kentucky v. King*, 563 U.S. 452 (2011) (holding that preventing the imminent destruction of evidence may justify a warrantless search); *Brigham City v. Stuart*, 547 U.S. 398 (2006) (holding that officers may be justified in a warrantless search when acting in a public safety capacity); *United States v. Flores-Montano*, 541 U.S. 149 (2004) (holding that reasonable suspicion of drugs crossing at the border may justify a warrantless search).

warrant requirement when an emergency or dangerous situation is at hand justifying a warrantless entry.<sup>30</sup> Examples of emergency situations exist wherein there is imminent destruction of evidence, searches conducted in the name of public safety, or searches conducted at the border.<sup>31</sup> The Supreme Court consistently grants higher deference to police when the acute needs of law enforcement outweigh the protection of warrantless entry.<sup>32</sup>

Consent provides yet another exception to the rule that warrantless searches are presumptively unreasonable.<sup>33</sup> Professor Susan A. Bandes sets forth that there is a consensus that a large portion of searches are conducted pursuant to consent.<sup>34</sup> Professor Bandes states that consent searches are convenient for law enforcement because they eradicate the need to apply for a warrant or undertake the mental calculus as to whether an exigent circumstance is at hand that would permit proceeding without a warrant.<sup>35</sup> Law enforcement has occasionally used “consent-to-search forms” to try and establish written proof of consent and avoid any challenges down the line.<sup>36</sup> The Arkansas Supreme Court stated that using a consent form “undoubtedly would

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30. See *supra* note 29.

31. See *supra* note 29.

32. See *Brigham City*, 547 U.S. at 403 (“[W]arrants are generally required to search a person’s home or his person unless ‘the exigencies of the situation’ make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.”) (quoting *Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978)).

33. See *supra* note 26 and accompanying text; *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (“It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.”).

34. See Susan A. Bandes, *Police Accountability and the Problem of Regulating Consent Searches*, 2018 U. ILL. L. REV. 1759, 1760 (2018) (citation omitted) (observing that “multiple scholars have estimated that consent searches comprise more than 90% of all warrantless searches by police . . .”).

35. See *id.* at 1761 (“Critics routinely refer to [consent] as a ‘major loophole’ and an ‘efficient end run’ around the Fourth Amendment that ‘either satisfies or waives whole swaths of constitutional text.’”) (citing Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 30 (2008), then Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 869–70 (2014)).

36. See Rocco Parascandola, *‘Consent to Search’ Forms, Now Available in Seven Languages, Allow Police to Bypass Warrant Process*, N.Y. DAILY NEWS (Oct. 1, 2011, 4:00 AM), <https://www.nydailynews.com/news/crime/consent-search-forms-languages-police-bypass-warrant-process-article-1.962160> [<https://perma.cc/9DM5-j2DP>].

be the better practice” for law enforcement to follow.<sup>37</sup> Regardless, the use of a consent to search form will not singlehandedly eliminate all challenges to coerced consent or covert force employed by police.<sup>38</sup>

*B. Supreme Court Jurisprudence on the Consent Doctrine*

The Supreme Court has crafted two frameworks for consent: voluntary consent and informed consent.<sup>39</sup> With informed consent, the subject must be reminded of their right to refuse and with voluntary consent, no such warning is necessary.<sup>40</sup> In both situations, overly coercive conditions can invalidate the given consent.<sup>41</sup>

*1. Voluntary consent and informed consent*

The cornerstone case of the Voluntary Consent Doctrine is *Schneckloth v. Bustamonte*.<sup>42</sup> In *Schneckloth*, the Court examined factors of voluntariness and coercion to hold that consent is a question of fact measured under a “totality of the circumstances” approach.<sup>43</sup> In *Schneckloth*, police pulled over Robert Bustamonte along with five other men in his vehicle at 2:40 in the morning.<sup>44</sup> Once pulled over, the police had the men step out of the car and two additional policemen arrived.<sup>45</sup> When police asked to search the car, one of the passengers stated “Sure, go ahead.”<sup>46</sup> The Court held that police are not required to inform the subject of a search about their right to refuse the police’s request to search.<sup>47</sup> The Court further determined that the onus is on the government to show that consent is in fact voluntarily given, but that the government need not show the “subject’s knowledge of a right to refuse.”<sup>48</sup>

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37. See *State v. Brown*, 156 S.W.3d 722, 732 (Ark. 2004) (holding that written consent is not required under the Arkansas Constitution).

38. *Id.*

39. *Infra* Section I.B.1.

40. *Infra* notes 47–48 and accompanying text.

41. *Infra* Section I.B.2.

42. 412 U.S. 218 (1973).

43. *Id.* at 227.

44. *Id.* at 220.

45. *Id.*

46. *Id.*

47. *Id.* at 248-49.

48. *Id.*; see *Florida v. Royer*, 460 U.S. 491, 497 (1983) (holding that the government must prove that consent was freely and voluntarily given and that the mere fact of lawful authority cannot satisfy the requirement). *But see* *United States v. Mendenhall*,

Additionally, the majority considered whether to extend *Miranda v. Arizona*'s<sup>49</sup> requirement for informed consent through explicit warning but concluded that the considerations informing the Court's holding in *Miranda* were inapplicable to the *Schneckloth* case.<sup>50</sup> In *Miranda*, the Court considered the inherently coercive conditions of police interrogation to hold that statements made to the police must be "voluntarily, knowingly, and intelligently" given.<sup>51</sup> Thus, the Court required a multitude of warnings to be given to a subject before police may conduct a custodial interrogation.<sup>52</sup>

In contrast, the *Schneckloth* Court determined that requests for consent to search do not present an inherently coercive situation like that of interrogation in *Miranda*.<sup>53</sup> In defense of requiring only voluntary consent, the *Schneckloth* Court addressed whether the Fourth Amendment's voluntary consent exception would become a tool of "the sophisticated, [] knowledgeable, and the privileged."<sup>54</sup> The Court argued that their definition of voluntariness would take into account factors such as: intelligence, schooling, and lack of effective warning.<sup>55</sup> The Court stated that the voluntariness of any statement would be "carefully scrutinized to determine whether it was in fact voluntarily given."<sup>56</sup> Further, the approach looked subjectively to the particularly vulnerable state of the consenting person to coercive treatment.<sup>57</sup> Thus, whether consent to a search was voluntarily given would be based on a question of fact, taking into account the police's potentially coercive tactics.<sup>58</sup>

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446 U.S. 544, 559 (1980) (describing that when officers inform individuals that they are "free to withhold [their] consent" the likelihood that their conduct appears to be coercive is "substantially lessened").

49. 384 U.S. 436 (1966).

50. *Schneckloth*, 412 U.S. at 246.

51. *Miranda*, 384 U.S. at 444.

52. *Id.* at 467. The warnings include the right to remain silent, reminder that any statement can be used against the subject in trial and, the right to assistance of counsel regardless of ability to pay. *Id.* at 472-73.

53. *Schneckloth*, 412 U.S. at 247-48.

54. *Id.*

55. *Id.* at 248.

56. *Id.*

57. *See id.* at 229 (discussing that the totality of circumstances approach would encapsulate particularly vulnerable people and consent as a product of police coercion would be filtered out); *see also* United States v. Calderon-Fuentes, 788 F. App'x 630, 634 (11th Cir. 2019) (stating that consent is involuntary if the subject is "particularly vulnerable—mentally or physically—to police coercion").

58. *Schneckloth*, 412 U.S. at 229.

The three dissents present several reasons why informed consent should be required.<sup>59</sup> Justice Marshall wrote:

My approach to the case is straight-forward and, to me, obviously required by the notion of consent as a relinquishment of Fourth Amendment rights. I am at a loss to understand why consent “cannot be taken literally to mean a ‘knowing’ choice.” . . . In fact, I have difficulty in comprehending how a decision made without knowledge of available alternatives can be treated as a choice at all.<sup>60</sup>

Justice Marshall went on to discuss the underpinnings of the majority’s approach as a ploy to allow police to “capitalize on the ignorance of citizens” in order to search what they would not be allowed to if the subject knew they could reject the search.<sup>61</sup> Justice Marshall argued that the majority intended to allow the police to ignore the goals of the Fourth Amendment in exchange for the ability to apprehend higher numbers of criminals albeit at the expense of potentially violating innocent people’s constitutional rights.<sup>62</sup>

## 2. *Coercive circumstances*

The Supreme Court has addressed coercive tactics that invalidate consent. *Bumper v. North Carolina*<sup>63</sup> informed the *Schneckloth* Court’s voluntariness test and further provides that falsely claiming to have a valid warrant to gain consent is one example of a coercive tactic that invalidates consent.<sup>64</sup> In *Bumper*, the Court considered the validity of consent obtained when a police officer falsely claims to have a warrant.<sup>65</sup> The Court held that by claiming to have a warrant, the officer wrongly “announces in effect that the occupant has no right to

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59. See *id.* at 275 (Douglas, J., dissenting) (arguing that “verbal assent” is not sufficient when the subject did not know an alternative existed); *id.* at 276–77 (Brennan, J., dissenting) (arguing that citizens should not be asked to waive a right “without ever being aware of its existence”); *id.* at 277 (Marshall, J., dissenting) (arguing that voluntary consent should include knowing consent).

60. *Id.* at 284 (Marshall, J., dissenting) (citation omitted).

61. *Id.* at 288; e.g., Christo Lassiter, *Consent to Search by Ignorant People*, 39 TEX. TECH L. REV. 1171, 1193–94 (2007) (“If the deaths of Romeo and Juliet served the purpose of motivating warring families to cease their strife, perhaps the tragedy of citizens consenting to searches in ignorance of their Fourth Amendment rights might too some day motivate the competing values of law and order and individual liberty to strike a balance in favor of informed consent.”).

62. *Schneckloth*, 412 U.S. at 288 (Marshall, J., dissenting).

63. 391 U.S. 543 (1968).

64. *Schneckloth*, 412 U.S. at 233–34 (citing *Bumper* as an example of invalid consent based on threats of force).

65. *Bumper*, 391 U.S. at 548.

resist the search.”<sup>66</sup> The Court went on to state that consent must be “freely and voluntarily given” and that “[a] search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid.”<sup>67</sup>

In *Florida v. Royer*,<sup>68</sup> the Court addressed whether consent to seizure may be given and then invalidated by conduct deemed to be “more intrusive than necessary.”<sup>69</sup> In *Royer*, police engaged in profiling when they approached Royer to ask for his airline ticket.<sup>70</sup> The police proceeded to ask for consent to collect Royer’s license and, while holding Royer’s airline ticket and license, asked Royer if he would accompany them to a police room in the airport.<sup>71</sup> In the room, the police conducted a search of Royer’s luggage upon receiving Royer’s non-verbal consent.<sup>72</sup> Here, the Court reasoned that Royer did not feel he was free to leave or refuse the police; thus, his consent was invalidated by unlawful confinement prior to the search of his luggage.<sup>73</sup> In holding that the search was not validated by consent, the Court found that consent may be destroyed by coercive circumstances that lead a person to feel they were not free to leave.<sup>74</sup>

### C. Federal Circuit’s Jurisprudence on the Consent Doctrine

The aforementioned Supreme Court decisions have stipulated that both voluntary consent and informed consent must be free from coercion.<sup>75</sup> Various federal circuit courts have provided additional guidance to decipher what acts or omissions by law enforcement rise to the level of unconstitutionality. The following will show that while

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66. *Id.* at 550.

67. *Id.* at 548–49; *see, e.g.*, *Hadley v. Williams*, 368 F.3d 747, 749 (7th Cir. 2004) (stating that police are barred from conducting “outright fraud” when extracting a confession and using the same reasoning to determine that the suspect’s consent was based on a material lie).

68. 460 U.S. 491 (1983) (plurality opinion).

69. *Id.* at 504.

70. *See id.* at 493 (discussing Royer’s appearance, mannerism, and actions that fit a “drug courier profile”).

71. *Id.* at 494.

72. *Id.*

73. *See id.* at 507–08 (reasoning the circumstances “surely amount to a show of official authority” that indicated Royer was not free to leave).

74. *See id.* at 501–03 (explaining that officers could ask for Royer’s ticket and license but once the officers retain the material and revealed their identity, Royer was seized without having given consent).

75. *Supra* Section I.B.1.

law enforcement may at times refrain from revealing the full scope of their investigations, consent to searches based on so-called “ruses” may be invalidated by impermissible misrepresentations or by the intent behind the withholdings.<sup>76</sup>

1. *Permissible deception and impermissible misrepresentation*

In *United States v. Bosse*,<sup>77</sup> the court distinguished between permissible deception and impermissible misrepresentation.<sup>78</sup> A licensed semi-automatic firearms dealer consented to a home inspection as part of the automatic machine gun license application process.<sup>79</sup> An Alcohol, Tobacco, and Firearms (ATF) agent accompanied the inspection by a California Department of Justice agent without identifying himself as an ATF agent or revealing his purpose in accompanying the inspection.<sup>80</sup> A week later, the ATF agent obtained a judicial search warrant and returned to the arm dealer’s home to investigate possible federal firearms violations.<sup>81</sup> The court determined that the agent’s initial “ruse entry” was not justified by consent when the government agent misrepresented the true nature of the investigation.<sup>82</sup> Thus, a permissible deception involves concealing one’s identity as a government agent while impermissible misrepresentation involves “a known government agent [concealing] his purpose for seeking entry.”<sup>83</sup>

Additionally, government officials may not use deceptive acts to engage in a search or seizure where there is no underlying legal authority.<sup>84</sup> In *United States v. Ramirez*,<sup>85</sup> FBI agents wore jackets marked “Police” and an agent called Ramirez’s phone, claiming to be

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76. *United States v. Bosse*, 898 F.2d 113, 115 (quoting *United States v. Phillips*, 497 F.2d 1131, 1135 n.4 (9th Cir. 1974)).

77. 898 F.2d 113 (9th Cir. 1990) (per curiam).

78. *Id.* at 116.

79. *Id.* at 114.

80. *Id.*

81. *Id.* at 114-15.

82. *Id.* at 115.

83. *Id.* at 116; see *United States v. Alvarez-Tejeda*, 491 F.3d 1013, 1017 (9th Cir. 2007) (“[W]e take a closer look when agents identify themselves as government officials but mislead suspects as to their purpose and authority. This is because people ‘should be able to rely on [the] representations’ of government officials.”) (quoting *Bosse*, 898 F.2d at 115).

84. See *United States v. Ramirez*, 976 F.3d 946, 957–59 (9th Cir. 2020) (holding that FBI agents engaged in deceit when using fictional circumstances to obtain consent to search).

85. 976 F.3d 946 (9th Cir. 2020).

investigating a fictional burglary, but received no answer.<sup>86</sup> The FBI revealed their true identity to Ramirez's mother and asked her to call Ramirez's home and present the burglary ruse to him.<sup>87</sup> Upon Ramirez's arrival home, the FBI agents frisked Ramirez and acquired his confession.<sup>88</sup> The court held that such deceit violated the Fourth Amendment because the FBI agents' ruse unlawfully invoked Ramirez's trust in the government, and the fake burglary induced Ramirez to return home.<sup>89</sup> Thus, misrepresentation of the scope of the investigation and the factual circumstances presented by law enforcement can be impermissible if it improperly induces trust in government officials.<sup>90</sup>

*Ortiz Becerra v. Garland*<sup>91</sup> is a case involving similar facts to *Ramirez* but with an opposite holding.<sup>92</sup> The *Ortiz Becerra* court held that ICE engaged in a permissible ruse when ICE agents claimed to be police in search of another man.<sup>93</sup> In *Ortiz Becerra*, ICE agents arrived at Ortiz Becerra's home with a search warrant for another person they claimed to be living at the home and obtained consent to enter the home by Ortiz Becerra's daughter.<sup>94</sup> The agents did not identify as ICE agents and Ortiz Becerra's daughter stated that the name told to her did not match the name on the warrant.<sup>95</sup> The court dismissed Ortiz Becerra's claims on several grounds and ultimately concluded that ICE did not engage in an impermissible misrepresentation.<sup>96</sup> First, the court found that "ICE officers did not need to identify themselves when they first made contact with Ortiz Becerra or his [adult] daughter because, at that time, they were merely conducting a knock-and-talk while looking for someone else."<sup>97</sup> In holding that no identity misrepresentation

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86. *Id.* at 950.

87. *Id.*

88. *Id.* at 950–51.

89. *See id.* at 956–57 ("Our cases make clear that a suspect's Fourth Amendment interests are at their zenith where, like here, 'government officials lie in order to gain access to . . . things they would otherwise have no legal authority to reach.'") (quoting *United States v. Alvarez-Tejeda*, 491 F.3d 1013, 1017 (9th Cir. 2007)).

90. *See id.* at 958–59.

91. 851 F. App'x 739 (9th Cir. 2021).

92. *See id.* at 743 (finding that where immigration officers identified themselves as no more than "police" there was no impermissible misrepresentation).

93. *Id.*

94. *Id.* at 742.

95. *Id.* at 743.

96. *Id.*

97. *Id.* at 742.

occurred, the court stated that immigration officers qualify as police for purposes of the Fourth Amendment, and that even if they are not technically viewed as police, posing as a police officer cannot be considered a “deliberate misrepresentation.”<sup>98</sup> Further, the court stated that, in any event, the ICE agents had badges that said “ICE” on them.<sup>99</sup> Finally, the court found the claim that ICE agents told Ortiz Becerra’s daughter a name that differed from the police report was unconvincing as the basis for an impermissible ruse.<sup>100</sup>

## 2. *Intent and perspective*

In addition to the line between permissive and impermissible, circuit courts call into question whether law enforcement’s actions were deliberate and whose perspective to weigh when evaluating the effects of a ruse. In *United States v. Tweel*,<sup>101</sup> the court held that the consent given by Tweel was obtained by impermissible misrepresentation when an Internal Revenue Service (IRS) agent failed to inform the suspect of the agent’s intent to conduct a criminal investigation.<sup>102</sup> Tweel claimed that his consent to a search was obtained by deception because unbeknownst to him, the audit he underwent was conducted at the request of the Department of Justice.<sup>103</sup> The court concluded that the IRS agent’s act was that of a “sneaky deliberate deception . . . and a flagrant disregard for [Tweel]’s rights.”<sup>104</sup> Further, the court went on to state that the omission of information was misleading and the IRS agent’s success in concealing the underlying criminal investigation was outside the expectation that the government would act in good faith.<sup>105</sup>

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98. *See id.* at 743 (identifying ICE agents as police and presenting a definition of police as “an organization engaged in the enforcement of official regulations in a specified domain” such as “transit police.”) (quoting NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010)).

99. *Id.* (“And in any event, the officers were wearing visible ICE badges, which would have identified them as immigration police specifically.”) (emphasis omitted).

100. *Id.*

101. 550 F.2d 297 (5th Cir. 1977).

102. *Id.* at 299.

103. *Id.* at 298.

104. *Id.* at 299 (discussing an IRS agent’s misrepresentation of an audit of criminal nature and presented as one of civil nature); *see also SEC v. ESM Gov’t Sec., Inc.*, 645 F.2d 310, 316 (5th Cir. 1981) (holding that a government agent may not invoke and betray a subject’s trust in the government to wrongly gain access to records).

105. *See Tweel*, 550 F.2d at 299–300 (“We cannot condone this shocking conduct by the IRS. Our revenue system is based upon the good faith of the taxpayers and the taxpayers should be able to expect the same from the government in its enforcement and collection activities.”).

In contrast, *United States v. Briley*<sup>106</sup> held there was no intentional misrepresentation when police stated their purpose, without more, as pertaining to an “important matter,” rather than to enable a warrantless arrest.<sup>107</sup> In *Briley*, the police acquired consent to enter an apartment unit from a third party living there and arrested Briley upon suspicion of his involvement in a bank robbery.<sup>108</sup> The court stated:

The officers’ cryptic statement that they had important matters to discuss with [the suspect] does not appear to have been said with the intention of tricking [the third-party] into consenting to an entry. At the time the officers made the statement, they were simply trying to locate [the suspect] . . . . The officers did not misrepresent the fact that they had no search or arrest warrant . . . . Nor did they threaten to obtain a search or arrest warrant if consent were withheld.<sup>109</sup>

Thus, the court determined that police had not intentionally or falsely stated their purpose.<sup>110</sup> The court went on to describe that the holding might be different had the police explicitly stated that the suspect was not going to be arrested at all.<sup>111</sup> Ultimately, the court held that the third party’s consent was voluntary and uncoerced under the totality of the circumstances approach as announced in *Schneckloth v. Bustamonte*.<sup>112</sup>

To determine whether consent was voluntary, courts may decide to evaluate the government actor’s intent or the perspective of the person subjected to the coercive activity. In *United States v. Spivey*,<sup>113</sup> the court found that the subjective motive of the officers is not relevant to the question of whether consent was uncoerced.<sup>114</sup> The perspective of the

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106. 726 F.2d 1301 (8th Cir. 1984).

107. *See id.* at 1304–05 (determining that the intent of police was not to trick the third-party into offering consent and further determining that the third-party was aware of the suspects crime).

108. *Id.* at 1303.

109. *Id.* at 1304–05 (citations omitted).

110. *Id.* at 1305.

111. *Id.*

112. *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 249 (1973)); *see supra* Section I.B.1. (discussing *Schneckloth* and the various factors to be weighed when determining voluntariness).

113. 861 F.3d 1207 (11th Cir. 2017).

114. *See id.* at 1215 (“Whether officers ‘deliberately lied’ ‘does not matter’ because the ‘only relevant state of mind’ for voluntariness ‘is that of [the suspect] himself.’”) (quoting *United States v. Farley*, 607 F.3d 1294, 1330 (11th Cir. 2010)). *Contra* *United States v. Tweel*, 550 F.2d 297, 299 (5th Cir. 1977) (finding deliberate deception by an

subject is the sole determining factor in a finding of voluntariness.<sup>115</sup> As a result, the *Spivey* court held that a ruse involving misrepresentation of the officer's identity was a "minor deception" lending itself to be immaterial in obtaining the suspect's consent to search.<sup>116</sup> Through this approach, an officer's intent or deliberate misrepresentation is essentially invalidated, and a minor deception will not rise to the level of coercion if the subject cannot be shown to have relied their consent on explicit or implicit assurances given by an officer.<sup>117</sup>

#### D. Tenth Amendment Values

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>118</sup>

In January 2017, President Trump issued an Executive Order that mandated sanctuary jurisdictions to comply with federal efforts to carry out immigration investigations and deportations at the risk of forfeiting federal grants if found outside of compliance.<sup>119</sup> The United States District Court for the Northern District of California enjoined the Trump administration from enforcing the provision threatening federal funds because the provision sought to "compel the states and local jurisdictions to enforce a federal regulatory program through coercion" in violation of the Tenth Amendment.<sup>120</sup>

The Tenth Amendment is extremely brief but carries with it ideals of constraint, anti-commandeering, and the hazardous tension

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IRS agent to be "flagrant disregard" for appellant's rights and "intentionally misleading and material").

115. *Spivey*, 861 F.3d at 1215.

116. *See id.* at 1215, 1217 (holding that under a totality of the circumstances approach the government presented "clear and positive testimony that the consents were voluntary, equivocal, specific, intelligently given, and uncontaminated by duress or coercion").

117. *See id.* at 1215 (discussing that the subjective purpose of officer's ruse was minor, and consent was voluntary).

118. U.S. CONST. amend. X (emphasis added).

119. Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (2017).

120. *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1215-16, 1219 (N.D. Cal. 2017), *aff'd in part, vacated in part*, 897 F.3d 1225 (9th Cir. 2018) (holding that record did not support nationwide injunction).

between the federal and state governments.<sup>121</sup> Specifically, the anti-commandeering principle enjoins the federal government from compelling a state government to enact and enforce a federal provision under the guise of being state action.<sup>122</sup> As an example, in *Printz v. United States*,<sup>123</sup> the Court invalidated a statute that required state and local law enforcement to conduct background checks on prospective handgun purchasers.<sup>124</sup> The Court found that the statute brought about a distortion in the political accountability of the state and local government.<sup>125</sup> The Court stated that the rule against commandeering served as a constitutional safeguard of liberty and further promoted political accountability.<sup>126</sup> Thus, the Constitution contemplated that a State government's role would be to "represent and remain accountable to its own citizens."<sup>127</sup> Expanding upon this principal, in *Murphy v. National Collegiate Athletic Ass'n*,<sup>128</sup> the Court stated:

When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred.<sup>129</sup>

Political accountability informs the anti-commandeering doctrine because the Court is concerned with the public's knowledge of whether the federal or state government is at play in any given act.<sup>130</sup> Even though, the handgun statute in *Printz* and the enjoined Trump

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121. See U.S. CONST. amend. X. See generally Charlotte S. Butash, Note, *The Anti-Commandeering Doctrine in Civil Rights Litigation*, 55 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 681, 683 (2020) (discussing the evolution of the anti-commandeering doctrine throughout the 1990's into 2018).

122. See *New York v. United States*, 505 U.S. 144, 161 (1992) (holding that Congress may not "commandeer" states into executing federal regulatory schemes).

123. 521 U.S. 898 (1997).

124. *Id.* at 935.

125. See *id.* at 920 (discussing that an important feature of federalism is that local and federal governments are not arranged in a hierarchy but, rather, each is accountable directly to the people).

126. *Id.* at 921.

127. *Id.* at 920.

128. 138 S. Ct. 1461 (2018).

129. *Id.* at 1477.

130. See *New York v. United States*, 505 U.S. 144, 168 (1992) ("Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.").

Executive Order are both affirmative federal acts, the Tenth Amendment's jurisprudence emphasizes political accountability and the need for a clear divide between the federal and state government actors.<sup>131</sup> Such ideals must be applied to federal government actions as carried out by the practices of ICE.<sup>132</sup>

## II. IMMIGRATION BACKGROUND

To conclude the necessary background, this Part briefly describes the establishment and state of immigration enforcement today. This Part focuses on detailing the training protocols that have made ICE's ruses possible and supplies real life examples of the training at work.

### A. *ICE's Establishment and Training*

Following the September 11, 2001 attack, Congress passed the Homeland Security Act of 2002<sup>133</sup> and established the Department of Homeland Security (DHS).<sup>134</sup> Subsequently, DHS absorbed various existing immigration-related agencies and created the Bureau of Immigration and Customs Enforcement, later known as United States Immigration and Customs Enforcement, or "ICE."<sup>135</sup> ICE has two primary divisions: Enforcement and Removal Operations (ERO) and Homeland Security Investigations (HSI).<sup>136</sup> ERO states its mission as "protect[ing] the homeland through the arrest and removal of noncitizens who undermine the safety of our communities and integrity of our immigration laws."<sup>137</sup> ERO employed approximately

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131. See generally James L. Buchwalter, *Construction and Application of 10th Amendment by United States Supreme Court*, 66 A.L.R. Fed.2d 159 (2012) (discussing Supreme Court jurisprudence analyzing the role of the Tenth Amendment in upholding the principal of federalism to ensure that "a state's government will represent and remain accountable to its own citizens").

132. *Infra* Section III.C.

133. Homeland Security Act of 2002, Pub. L. No. 107-296, 166 Stat. 2135 (2002).

134. E.g., *Honoring the History of ICE*, IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/features/history> [<https://perma.cc/UQS2-K2NK>] (last updated July 12, 2022) (detailing ICE's history from 2002 to 2021); Ron Nixon & Linda Qiu, *What Is ICE and Why Do Critics Want to Abolish It?*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/2018/07/03/us/politics/fact-check-ice-immigration-abolish.html> (last visited Oct. 4, 2022) (discussing the establishment of ICE).

135. *Honoring the History of ICE*, *supra* note 134.

136. *Id.*

137. *Enforcement and Removal Operations*, IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/about-ice/ero> [<https://perma.cc/AJ7S-84X6>] (last updated May

5,300 ERO officers and conducted 103,603 administrative arrests in 2020.<sup>138</sup> The Training Division, a subdivision of the ERO, undertakes all the training needs of the ERO through basic, advanced, and specialized trainings.<sup>139</sup>

One of the fundamental principles of the Fourth Amendment is that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation.”<sup>140</sup> The police are directed to request a warrant from a magistrate and, in doing so, acquire a judicial search or arrest warrant.<sup>141</sup> While ICE agents can apply for a judicial search warrant in line with Fourth Amendment requirements,<sup>142</sup> ICE agents also have the option to obtain their own self-issued administrative warrants (“ICE warrants”).<sup>143</sup> The major hurdle that ICE officers face is that ICE warrants do not confer the same authority as judicial warrants.<sup>144</sup> ICE

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13, 2022); *c.f.*, Em Puhl, *Overview of Deportation: A Guide for Community Members & Advocates*, IMMIGRANT LEGAL RES. CTR., (Dec. 2018), [https://www.ilrc.org/sites/default/files/resources/overview\\_deport\\_process-20181221.pdf](https://www.ilrc.org/sites/default/files/resources/overview_deport_process-20181221.pdf) (last visited Nov. 2, 2022) (providing a general description of the removal process including ICE’s role in detainment and the immigration court’s role in adjudication).

138. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2020 ENFORCEMENT AND REMOVAL OPERATIONS REPORT, IMMIGR. & CUSTOMS ENF’T12–13 (2021), <https://www.ice.gov/doclib/news/library/reports/annual-report/eroReportFY2020.pdf> [<https://perma.cc/CW4Q-9CFH>] (stating that the 5, 300 ERO officers are assigned across 24 offices); *see also* *The Cost of Immigration Enforcement and Border Security*, AM. IMMIGR. COUNCIL, 1 (Jan. 2021), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_cost\\_of\\_immigration\\_enforcement\\_and\\_border\\_security.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_cost_of_immigration_enforcement_and_border_security.pdf) [<https://perma.cc/D2UW-TYN7>] (detailing that the number of ICE agents has nearly tripled from 2003 to 2019).

139. *Enforcement and Removal Operations*, *supra* note 137.

140. U.S. CONST. amend. IV; *see supra* note 26 and accompanying text (providing case law holding warrantless searches of homes as presumptively unreasonable, notwithstanding exceptions).

141. *Katz v. United States*, 389 U.S. 347, 357 (1967).

142. Hillel R. Smith, *Immigration Arrests in the Interior of the United States: A Primer*, CONGRESSIONAL RSCH. SERV. 2-3 (2021), <https://sgp.fas.org/crs/homesecc/LSB10362.pdf> (discussing how Fourth Amendment jurisprudence applies to ICE officials when obtaining and exercising warrants).

143. *See infra* note 147 and accompanying text (describing ICE agent’s option of obtaining an administrative warrant).

144. *See Lopez-Lopez v. County of Allegan*, 321 F. Supp. 3d 794, 799 (W.D. Mich. 2018) (“Administrative warrants differ significantly from warrants in criminal cases because they do not require a detached and neutral magistrate. Instead, executive officers may issue an administrative warrant upon probable cause to believe a civil infraction has occurred.”) (citing *Abel v. United States*, 362 U.S. 217, 233 (1960)); *see also*, *Warrants and Subpoenas 101*, NAT’L IMMIGR. L. CTR. (Sept. 2020),

warrants are not issued by a judge or magistrate as called for in *Katz*,<sup>145</sup> but instead are issued by the Attorney General.<sup>146</sup> The Fugitive Operation Handbook reads in part: “[b]ecause neither a Warrant for Arrest of Alien (I-200) nor an administrative Warrant of Removal (I-205) authorizes [an ICE officer] to enter the subject’s residence or anywhere else affording a reasonable expectation of privacy, [the officer] must obtain voluntary consent before entering a residence.”<sup>147</sup>

Local law enforcement are not permitted to carry out an ICE warrant<sup>148</sup> and, without a judicial warrant, ICE requires “exigent circumstances” or the homeowner’s consent to enter a home and conduct a search or seizure.<sup>149</sup> Further, ICE agents are called to identify as an immigration officer when it is practical to do so:

- (iii) At the time of the arrest, the designated immigration officer shall, as soon as it is practical and safe to do so:
  - (A) Identify himself or herself as an immigration officer who is authorized to execute an arrest; and
  - (B) State that the person is under arrest and the reason for the arrest.<sup>150</sup>

Through a lawsuit and subsequent Freedom of Information Act (FOIA) request, the Immigrant Defense Project made internal ICE

<https://www.nilc.org/wp-content/uploads/2020/10/Warrants-and-Subpoenas-101.pdf> (distinguishing between judicial warrants and ICE warrants); Bess Chiu, Lynly Eyles, Peter L. Markowitz & Jaya Vasandani, *Constitution on ICE: A Report on Immigration Home Raid Operations*, CARDOZO IMMIGR. JUST. CLINIC (2009).

145. See *Katz*, 389 U.S. at 357 (stating that the Court has repeatedly required law enforcement to use the judicial process to obtain a warrant).

146. 8 U.S.C. § 1226(a) (“On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.”).

147. FUGITIVE OPERATIONS HANDBOOK, ENFORCEMENT AND REMOVAL OPERATIONS 16 (2010), <https://s3.documentcloud.org/documents/3288754/FugOps-Handbook-2010-Complete.pdf> [<https://perma.cc/KLQ7-TS4R>].

148. See *Arizona v. United States*, 567 U.S. 387, 408 (2012) (ruling that ICE warrants are to be “executed by federal officers who have received training in the enforcement of immigration law”).

149. See *supra* note 31 (discussing examples of exigent circumstances). See generally *ICE Warrants and Local Authority*, IMMIGRANT LEGAL RES. CTR. (May 2017), [https://www.ilrc.org/sites/default/files/resources/ice\\_warrants\\_may\\_2017.pdf](https://www.ilrc.org/sites/default/files/resources/ice_warrants_may_2017.pdf) [<https://perma.cc/6QB7-67ZU>] (discussing ICE warrants and their failings under the Fourth Amendment); see generally, Raquel Aldana, *Of Katz and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1113 (2008) (describing ICE home raid practices wherein ICE agents ask for proof of lawful presence of every person within the target suspect’s home).

150. Standards for Enforcement Activities, 8 C.F.R. § 287.8 (2021).

training documents and memos publicly available.<sup>151</sup> These documents reveal ICE's true tactics and techniques.<sup>152</sup> The HSI Search and Seizure Handbook focuses on protecting agents from constitutional challenges and provides techniques on how to obtain consent from investigative targets during a search.<sup>153</sup> The Handbook describes several elements of Fourth Amendment jurisprudence and describes how to conduct a consensual encounter between an agent and a subject.<sup>154</sup> The conduct recommendations include encouraging agents to be courteous, explain the purpose of the encounter, identify themselves as agents, and request cooperation from the subject.<sup>155</sup> Also discussed is the difference between a criminal search warrant and an administrative warrant.<sup>156</sup> Finally, the Handbook presents how to conduct a search without a warrant by describing exceptions to the warrant requirement.<sup>157</sup> The Handbook describes the "totality of the circumstances" approach to measuring the voluntariness of consent based on the subject's "age, education, intelligence, psychological stability, and sobriety of the consenting individual."<sup>158</sup> When obtaining

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151. ICE Ruses, <https://www.immigrantdefenseproject.org/ice-ruses> [https://perma.cc/QE9A-7LCP].

152. *Infra* note 153; e.g., *Immigration Nation* (Reel Peak Films 2020) (detailing tactics used by ICE to make home arrests and conduct deportations during the Trump administration).

153. The handbook was obtained and published by independent media outlet, Unicorn Riot, and validity was confirmed by ICE spokesperson, Matthew Bourke. See Eoin Higgins, *Confidential ICE Handbook Lays Out Paths for Investigators to Avoid Constitutional Challenges*, THE INTERCEPT (Feb. 23, 2018, 9:53 AM), <https://theintercept.com/2018/02/23/ice-search-seizure-handbook-manual-secret> [https://perma.cc/H27L-KVYR] ("The ICE handbook emphasizes the ease with which agents can satisfy constitutional requirements by following a few simple guidelines, such as requesting rather than demanding information from targets.").

154. SEARCH AND SEIZURE HANDBOOK, IMMIGR. & CUSTOMS ENF'T 16 (2010), <https://unicornriot.ninja/wp-content/uploads/2018/02/ice-hsi-search-seizure-handbook.pdf> [https://perma.cc/7SC7-XFBV] (discouraging making demands, displaying weapons, retaining identification for longer than necessary, and issuing *Miranda* warnings).

155. *Id.*

156. See *id.* at 25 (describing the steps to obtain a judicial warrant through an affidavit based on probable cause to a judge in comparison and stating that ICE agents "operating in a non-border environment should make every effort to obtain a warrant prior to searching, even if an exception to the warrant requirement appears to exist").

157. *Id.* at 36–43; see Higgins, *supra* note 153 (discussing that the 2012 version of the Handbook has not been made publicly available and that "internal training materials are law-enforcement sensitive, not publicly available").

158. SEARCH AND SEIZURE HANDBOOK, *supra* note 154, at 39.

consent to search, ICE agents are further instructed to be wary of coercive conditions such as the “number of officers at the door; weapons displayed; tone of voice; [and] language that is demanding/commanding.”<sup>159</sup>

One example of a tactic used by ICE agents is a ruse. The Fugitive Operation Handbook and an ICE memorandum on Use of Ruses During Arrest Operations, as written by ICE’s Acting Director in 2006, defines a ruse as a “tactic designed to control the time and location of a law enforcement encounter.”<sup>160</sup> The Fugitive Operation Handbook states that the intent in carrying out ruses is to improve agent safety and reduce the opportunity for the target to flee.<sup>161</sup> The Handbook further states that an appropriate ruse involves impersonating “a federal, state, local, or private sector employee” and the cover employer should grant permission to ICE agents.<sup>162</sup> However, the use of a ruse that involves an ICE agent misrepresenting themselves as “a religious worker, health and safety worker/inspector, or census takers” requires prior approval from the ICE Assistant Secretary.<sup>163</sup> As a result, ICE internally creates a peculiar framework for who can and cannot be impersonated or misrepresented based on permission from a cover employer or pre-approval by the ICE Assistant Secretary.<sup>164</sup>

### B. *Reports and Complaints Against ICE*

DHS last estimated that 11.4 million undocumented immigrants were living in the United States on January 1, 2018.<sup>165</sup> DHS categorizes undocumented immigrants as those who entered the United States without inspection or overstayed temporary approval.<sup>166</sup> Since ICE is mandated to find and deport undocumented peoples, the use of various tactics is prevalent.<sup>167</sup> Further, research has shown that undocumented immigrants are hesitant to assert their rights or call 911

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159. *ICE Ruses*, *supra* note 151.

160. FUGITIVE OPERATIONS HANDBOOK, *supra* note 147, at 16.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. BRYAN BAKER, ESTIMATES OF UNAUTHORIZED IMMIGRANT POPULATIONS RESIDING IN THE UNITED STATES: JANUARY 2015–JANUARY 2018, U.S. DEP’T HOMELAND SEC., 1 (2021), [https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Pop\\_Estimate/UnauthImmigrant/unauthorized\\_immigrant\\_population\\_estimates\\_2015\\_-\\_2018.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Pop_Estimate/UnauthImmigrant/unauthorized_immigrant_population_estimates_2015_-_2018.pdf) [<https://perma.cc/594C-6V57>].

166. *Id.*

167. *See supra* note 15 (discussing ICE ruses pertaining to police impersonations).

out of distrust for law enforcement and its connection to ICE's operations.<sup>168</sup> For example, a study found seventy percent of undocumented immigrants stated they were less likely to contact police if they were a victim of a crime out of fear that officers would inquire into their immigration status.<sup>169</sup>

Kidd's experience of ICE claiming to be investigating "a dangerous man" in an effort to arrest him is only one example of reports against ICE.<sup>170</sup> There have been instances where ICE agents posed as local police, detectives, and probation officers, all while presenting false subjects for investigation or false circumstances for their presence.<sup>171</sup> For example, Miguel was visited by ICE agents who claimed to be probation officers, beckoned Miguel to exit his apartment, and assured him that he would return to his apartment after looking over

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168. *US: Immigrants 'Afraid to Call 911'*, HUM. RTS. WATCH (May 14, 2014), <https://www.hrw.org/news/2014/05/14/us-immigrants-afraid-call-911> [<https://perma.cc/FH2F-ECBD>] (discussing that blurred lines between local law enforcement and ICE has brought about a fear in the undocumented population); Karen Hacker, Jocelyn Chu, Carolyn Leung, Robert Marra, Alex Pirie & Mohamed Brahimi et al., *The Impact of Immigration and Customs Enforcement on Immigrant Health: Perceptions of Immigrants in Everett, Massachusetts, USA*, 73 SOC. SCI. & MED. 7–8 (Aug. 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3159749> [<https://perma.cc/KL7R-75D7>] (revealing that there is prevalent fear in the immigrant population of deportation and collaboration between local law enforcement and ICE sufficient to impact the communities physical and mental condition); see Vanessa Rancaño & Ryan Levi, *'Know Your Rights': Immigrants Prepare for Increased Enforcement*, KQED (Feb. 27, 2017), <https://www.kqed.org/news/11332189/know-your-rights-immigrants-prepare-for-increased-enforcement> [<https://perma.cc/GTG7-4UR2>] (discussing educational programming that teaches non-citizens about their constitutional rights so they know what to do if confronted by immigration officials); Danyelle Solomon, Tom Jawetz, Sanam Malik, *The Negative Consequences of Entangling Local Policing and Immigration Enforcement*, THE CTR. FOR AM. PROGRESS (Mar. 21, 2017), <https://www.americanprogress.org/article/negative-consequences-entangling-local-policing-immigration-enforcement> (claiming that a failure to maintain trust and lines of communication with the public brings a lack of cooperation or information sharing with police).

169. NIK THEODORE, *INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT*, DEP'T URB. PLAN. & POL'Y U. ILL. CHI. 6 (2013), [https://www.policylink.org/sites/default/files/INSECURE\\_COMMUNITIES\\_REPORT\\_FINAL.PDF](https://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF) [<https://perma.cc/G92T-XM4E>].

170. See *supra* notes 7–8 and accompanying text.

171. See *supra* note 15 and accompanying text (detailing stories of non-citizens who experienced ICE's ruses).

paperwork.<sup>172</sup> In another instance, ICE agents visited Martinez's home and when Maria, Martinez's wife, opened the door, ICE agents told her not to fear because they were police from her local precinct.<sup>173</sup> The officers went on to show Maria a picture of another man and asked her to provide her husband's phone number so they could clear up the misunderstanding.<sup>174</sup> Much to Maria's surprise, her husband called her from ICE custody hours later.<sup>175</sup>

As ICE agents continue to impersonate local police, city officials across the nation have called upon ICE to end the practice.<sup>176</sup> In New York City, officials have spoken out against ICE's tactics, and Mayor Bill de Blasio sent a letter to ICE "demanding an end to agents posing as NYPD officers."<sup>177</sup> In California, the San Francisco Police Commissioner distinguished ICE federal agents from police and threatened to send a cease-and-desist order to ICE authorities.<sup>178</sup> In Los Angeles, City Attorney Mike Feuer addressed a letter to ICE in which

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172. Felipe de la Hoz, *The ICE Ruse: How Agents Impersonate Local Law Enforcement and Lie to Make Arrests*, DOCUMENTED (June 18, 2018), <https://documentedny.com/2018/06/18/the-ice-ruse-how-agents-impersonate-local-law-enforcement-and-lie-to-make-arrests> [<https://perma.cc/QH7T-V538>].

173. Beth Fertig, *Immigration Arrest Tactics Come Under Scrutiny for Mimicking NYPD*, GOTHAMIST (Oct. 28, 2020), <https://gothamist.com/news/immigration-arrest-tactics-come-under-scrutiny-mimicking-nypd> [<https://perma.cc/W6LR-U54X>].

174. *Id.*

175. *Id.*

176. *Infra* notes 178–179; *see, e.g.*, Sabrina Moreno, *He Thought the Blue Lights Meant Local Police. It Was ICE. Now He's Detained in a Virginia Detention Center*, RICHMOND TIMES-DISPATCH (Aug. 30, 2020), [https://richmond.com/news/local/he-thought-the-blue-lights-meant-local-police-it-was-ice-now-hes-detained-in/article\\_965a0dc7-92c9-56be-9f64-5044c0cde68d.html](https://richmond.com/news/local/he-thought-the-blue-lights-meant-local-police-it-was-ice-now-hes-detained-in/article_965a0dc7-92c9-56be-9f64-5044c0cde68d.html) [<https://perma.cc/3386-FXSZ>]; Larry M. Elkin, *Impersonating Police on Thin Legal ICE*, PALISADES HUDSON FINANCIAL GROUP (May 29, 2017), <https://www.palisadeshudson.com/2017/03/impersonating-police-on-thin-legal-ice> [<https://perma.cc/XT5E-KURR>].

177. *See* Moynihan & McShane, *supra* note 15 (stating that City Council member Ydanis Rodriguez inquired and confirmed that no NYPD officers were present at Santos-Rodriguez's arrest).

178. *See* Alex Emslie, *S.F. Police Commissioners Want ICE Agents to Stop 'Impersonating' Police*, KQED (Jan. 18, 2018), <https://www.kqed.org/news/11642905/s-f-police-commissioners-want-ice-agents-to-stop-impersonating-police> [<https://perma.cc/6PQ7-FD5X>] (stating that in 2017, the California state legislature passed a law declaring that ICE agents are not recognized as California peace officers but further, discussing that the bill is likely more symbolic than enforceable).

he claimed that ICE's impersonation of police undermined public confidence in the LAPD.<sup>179</sup>

### III. ANALYSIS

In consideration of the aforementioned Supreme Court and Federal Circuit jurisprudence in relation to ICE's use of ruses, this Part presents three grounds on which ruses are en masse unconstitutional. First, this Part argues that ICE ruses fit the category of impermissible misrepresentation in violation of non-citizens' Fourth Amendment rights.<sup>180</sup> Second, this Part argues that ICE ruses are fundamentally coercive based on the three factors of the totality of the circumstances approach.<sup>181</sup> Finally, this Part presents the subsequent issue of distorted political accountability in violation of the Tenth Amendment values.<sup>182</sup>

#### A. *ICE Ruses are Impermissible Misrepresentations*

ICE ruses are impermissible misrepresentations because of false circumstances presented or disingenuous identification of the subjects being investigated.<sup>183</sup> Whether ICE may lawfully impersonate police or other law enforcement is a weaker argument under the Fourth Amendment based on the Ninth Circuit's conflicting holdings in *Ramirez* and, later, *Ortiz Becerra*.<sup>184</sup> In *Ramirez*, the Ninth Circuit held that when FBI agents claim to be police officers investigating a fake burglary, the inducement of the subject's consent based on false identity and circumstances is invalid.<sup>185</sup> This degree of

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179. Frank Stoltze, *LA City Attorney Asks ICE Agents to Stop Saying They Are Police*, KPCC (Feb. 23, 2017, 9:09 PM), <https://www.kpcc.org/2017-02-23/la-city-attorney-asks-ice-agents-to-stop-saying-th> [<https://perma.cc/R7UC-73YM>] (describing that, as stated by the City Attorney Mike Feuer, in Los Angeles the term "police" is synonymous with LAPD and for ICE agents to represent themselves as police it is misleading because the public believe they are interacting with LAPD).

180. *Infra* Section III.A.

181. *Infra* Section III.B.

182. *Infra* Section III.C.

183. *See infra* note 185 and accompanying text.

184. *See* *United States v. Ramirez*, 976 F.3d 946, 955 (9th Cir. 2020) (holding that the FBI's ruse was an impermissible misrepresentation). *But see* *Ortiz Becerra v. Garland*, 851 F. App'x 739, 743 (9th Cir. 2021) (holding that ICE's ruse was a permissive deception).

185. *See Ramirez*, 976 F.3d at 953 ("Deception is unlawful when the government makes its identity as law enforcement known to the target of the ruse and exploits the

misrepresentation unlawfully incited the subject's trust in local police.<sup>186</sup> However, the court in *Ortiz Becerra* held that ICE agents did not engage in an impermissible ruse when the agents presented themselves as local police and presented a warrant for another person.<sup>187</sup> The *Ortiz Becerra* court failed to distinguish the case from *Ramirez* or explain why FBI agents could not impersonate local police while ICE agents could.<sup>188</sup> However, rather than focusing on impersonations in this section, impermissible misrepresentation of the factual circumstances for consent to search is alone sufficient to show unconstitutionality.<sup>189</sup>

An impermissible misrepresentation based on factual circumstances includes claiming to have a valid warrant while having no warrant at all or misrepresenting the purpose for seeking entry.<sup>190</sup> ICE's circumstantial ruses must be categorically barred from proving voluntary consent when ICE also uses false circumstances to induce a non-citizen's cooperation and gather information to arrest and deport.<sup>191</sup> In the various cases above, the subject relied on law enforcement's tale that they were looking for another suspect or presented a false emergency such as a burglary to give consent to search.<sup>192</sup> When misrepresenting the purpose for seeking entry, the subject's consent is induced on false pretenses and thus, improperly obtained.<sup>193</sup> The use of a fake burglary in *Ramirez* and the failure to

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target's trust and cooperation to conduct searches or seizures beyond that which is authorized by the warrant or other legal authority, such as probable cause.”).

186. *Id.*

187. *Ortiz Becerra*, 851 F. App'x at 743.

188. *Id.*

189. See *infra* Section III.C (discussing how impersonation of police undermines Tenth Amendment values).

190. See generally *Bumper v. North Carolina*, 91 U.S. 543, 548-50 (1968); *United States v. Bosse*, 898 F.2d 113, 115 (9th Cir. 1990) (per curiam).

191. See, e.g., *de la Hoz*, *supra* note 172 (reporting an instance where ICE agents presented the target with a photo of an unknown woman to obtain entry only to then switch the photo to one of the target's wife once inside the home); *Kopetman*, *supra* note 1 (reporting misrepresentation by ICE agents claiming to be searching for a dangerous criminal and showing a photo of the alleged suspect); *Patch*, *supra* note 15 (“Entire segments of our community cannot feel safe at home because they are vulnerable to unconstitutional searches and arrests by ICE.”).

192. See generally *United States v. Ramirez*, 976 F.3d 946, 950 (9th Cir. 2020); *Ortiz*, 851 F. App'x at 743; *Kidd* Complaint, *supra* note 1, at 19.

193. See *Bosse*, 898 F.2d at 115 (“A ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry cannot be justified by consent.”).

disclose the criminal nature of the investigation in *Tweel* precluded law enforcement from showing voluntary consent.<sup>194</sup> Likewise, Kidd's experience of being called home because ICE was pretending to investigate a dangerous criminal is the same situation that the *Ramirez* court held to be unlawful because it invoked the subject's trust in law enforcement to induce cooperation and consent.<sup>195</sup>

Similarly, Maria was shown the photo of another man and, as a result, ICE failed to disclose the true nature of their investigation in violation of Martinez's rights.<sup>196</sup> Here, like in *Ramirez* and *Tweel*, non-citizens relied on the pretenses of law enforcement to make a judgement on whether consent to search should be given.<sup>197</sup> As a result, ICE's chosen tactics unlawfully misrepresent the basis of their investigation, and whether it is an act or omission, ICE fails to obtain voluntary consent through these ruses.

The *Bosse* court called for "special limitations" when "a government agent obtains entry by misrepresenting the scope, nature or purpose of a government investigation."<sup>198</sup> ICE agents who employ a mix of circumstantial and identity ruses obtain entry through coercive tactics which must be limited to create a fairer environment for non-citizens.<sup>199</sup> When ICE agents employ ruses—whether it be pertaining to their identity, purpose, or both—it stems from the same intent to

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194. See *Ramirez*, 976 F.3d at 949; *United States v. Tweel*, 550 F.2d 297, 288 (5th Cir. 1977).

195. See *Ramirez*, 976 F.3d at 950 (discussing the FBI's impermissible misrepresentation through a burglary ruse); see also Kopetman, *supra* note 1 (discussing ICE's ruse that involved investigation of a fake suspect). Compare *Kidd* Complaint, *supra* note 1, at 19 (discussing how ICE agents used the ruse of investigating a dangerous criminal to convince Kidd to come home), with *Ramirez*, 976 F.3d at 953 (holding that it is unlawful to deceive a suspect when the identity of the officer is made known to the target and the officer exploits "the target's trust and cooperation").

196. See *supra* note 173 (discussing ICE's impersonation of NYPD to arrest Martinez).

197. See *Ramirez*, 976 F.3d at 950; *Tweel*, 550 F.2d at 299. Compare *Fertig*, *supra* note 173 (describing Maria's sense of betrayal when she was deceived into thinking that undercover ICE agents were local police agents "here to protect us"), with *Ramirez*, 976 F.3d at 950 (discussing ICE's use of a fabricated burglary as a ruse to induce Ramirez to return to his residence and search his car), and *Tweel*, 550 F.2d at 299 (finding that individual consented to search as a result of deceptive and misleading practices by law enforcement).

198. *Bosse*, 898 F.2d at 115.

199. See, e.g., *ICE Ruses*, *supra* note 151 (stating that ICE has few limits to how ICE agents may conduct a ruse and may shift tactics to employ ruses that avoid limitations).

bring about “deliberate misrepresentation of the nature of the government’s investigation” because the investigation is dependent on the non-citizen’s reliance and trust that ICE is not present and that they are not a risk of deportation.<sup>200</sup> The matter is further supported when the misrepresentation of the investigation is one where the non-citizen believes they are aiding local police’s effort only to find that they were ICE agents all along.<sup>201</sup>

The *Spivey* court held that an officer misrepresenting their identity was a minor deception immaterial to consent.<sup>202</sup> Yet whether a non-citizen is consenting to the entry of local law enforcement or several ICE agents is material to their potential arrest and deportation.<sup>203</sup> Because ICE is aware of this, ICE agents pose as police to induce reliance and obtain consent by misrepresenting the purpose or basis of their investigation. Otherwise, the non-citizen, upon being made aware that ICE was at their door, would be much more likely to open the door and refuse entry.<sup>204</sup> It is important to recall that the Fourth Amendment is intended to allow people, regardless of immigration status, to seek refuge within their own home.<sup>205</sup> As such, there must be a presumption that when ICE agents impersonate police, they are engaged in an impermissible misrepresentation because they induce a non-citizen’s misguided reliance on law enforcement.

*B. ICE Ruses are Fundamentally Intended to Coerce Consent*

The Fourth Amendment requires that consent be uncoerced and without “implied threat or covert force.”<sup>206</sup> ICE agents are fully capable

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200. See, e.g., *Bosse*, 898 F.2d at 115. See generally *Moreno*, *supra* note 176 (describing that ICE agents may not reveal they are indeed ICE until after an arrest has been conducted).

201. See *Fertig*, *supra* note 173 (quoting one victim of ICE’s ruse stating “I feel deceived, because they identified themselves as New York policemen . . . . We believe they are here to protect us, to take care of us. But, you know, right now I feel betrayed”).

202. See *United States v. Spivey*, 861 F.3d 1207, 1215 (11th Cir. 2017) (“The officers admittedly misrepresented [the agent’s] identity, but there is no evidence that his exact position within the hierarchy of criminal law enforcement was material to [the subject’s] consent.”).

203. *Id.*; see *supra* note 168 and accompanying text (discussing non-citizens’ fear of deportation and law enforcement efforts to deport).

204. See *Spivey*, 861 F.3d at 1215 (“Consent is about what the suspect knows and does, not what the police intend.”).

205. *Supra* note 25 and accompanying text (discussing the underlying intent of the Fourth Amendment as freedom from government intrusion in one’s home).

206. *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973).

of obtaining a judicial warrant, but instead, ICE willingly equips itself with a weaker ICE warrant and the need for consent to search.<sup>207</sup> As a result, ICE effectively proceeds warrantless when approaching a non-citizen's home, and ICE's best defense against a challenge to warrantless entry is voluntariness under the totality of the circumstances.<sup>208</sup> *Schneckloth* calls for a "totality of the circumstances" approach that takes into account age, intelligence, lack of warning, and coercive conditions.<sup>209</sup> Using this approach, three factors show involuntary consent to ICE ruses: the non-citizen's lack of constitutional knowledge, the lack of warning given to the non-citizen of their right to refuse, and the inherent coercion involved in impermissible misrepresentation.<sup>210</sup>

The combination of the non-citizen's lack of constitutional knowledge, lack of warning, and use of impermissible misrepresentation fails to show voluntariness under the totality of circumstances. While the non-citizen population is made up of people with various education levels, this population sits in a unique position as new arrivals in the country who lack awareness of their Fourth Amendment rights.<sup>211</sup> Justice Marshall, in dissent, expressed concern that the *Schneckloth* majority was allowing police to "capitalize on the ignorance of citizens," and in affirmance of Justice Marshall's concern,

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207. See *supra* note 35 (presenting the consent to search doctrine as a "loophole").

208. See *Schneckloth*, 412 U.S. at 227 (discussing warrantless searches and the need for voluntary consent to effectuate the search).

209. *Id.* at 233 ("Rather it is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced.").

210. There are a plethora of organizations working to make the immigrant population aware of their rights during an encounter with ICE. See, e.g., *Know Your Rights: Immigrant's Rights*, *supra* note 13 (listing the rights that a person has when approached by ICE agents); Rancaño & Levi, *supra* note 168 (highlighting that non-citizens are unaware of what to do if confronted by immigration officials); see also, Treadwell, *supra* note 23 ("Evidence now abounds that officers frequently enter without consent—that they threaten or intimidate residents, make misrepresentations of authority, push their way through open doors, or simply enter without waiting to speak to a resident at all. With no valid warrants, no exigent circumstances, and often no valid consent, one major plank of ICE's interior enforcement efforts depends on routine violations of a core constitutional guarantee."); *ICE Ruses*, *supra* note 151 (revealing that ICE's own training materials instruct ICE agents that the "consent-giver need not know of right to refuse" and that it is just one factor in the coercion analysis).

211. See Rancaño, *supra* note 168 (discussing the need for educational programming to teach non-citizens about their constitutional rights).

ICE agents are attempting to “capitalize on the ignorance” of non-citizens.<sup>212</sup>

In all of the previously described cases and reports, ICE never warned the subjects of their rights to refuse consent.<sup>213</sup> “[L]ack of any effective warnings to a person of his rights” is an explicit factor from *Schneckloth* and, as a result, if ICE fails to inform a non-citizen of their rights, it must weigh directly into the measure of the totality of circumstances.<sup>214</sup> The *Schneckloth* court knowingly opted not to require a *Miranda*-style informed consent warning because the coercive conditions found in interrogations are not equally present in requests for consent.<sup>215</sup> However, as discussed below, the coercive circumstances brought about by ICE ruses call for an explicit warning for voluntariness under the totality of the circumstances.<sup>216</sup>

Finally, coercive circumstances are incompatible with voluntary consent and are established by the nature of an impermissible misrepresentation based on induced reliance on local law enforcement or explicit and implicit assurances.<sup>217</sup> The *Spivey* court stated that the government is required to provide “clear and positive testimony that the consents were voluntary, unequivocal, specific, intelligently given, and uncontaminated by duress or coercion,” and, based on ICE’s tactics of using fake investigation or subjects to gain consent, this is altogether impossible.<sup>218</sup> These acts do not constitute just minor deceptions but rather are orchestrated to unfairly create a condition where the non-citizens are told that local police need their cooperation in investigating a matter or person separate from ICE’s

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212. *Schneckloth*, 412 U.S. at 288 (Marshall, J., dissenting) (expressing concern that the majority allows police to “capitalize on the ignorance of citizens”).

213. *See supra* Section I.B. (distinguishing between cases in which ICE obtains informed consent—which requires that the subject be notified of their right to refuse consent—and voluntary consent—which does not require such notification).

214. *Schneckloth*, 412 U.S. at 248.

215. *Id.* at 246-47.

216. *Id.* at 227.

217. *See infra* Part III.A.

218. *United States v. Spivey*, 861 F.3d 1207, 1217 (11th Cir. 2017).

goals.<sup>219</sup> As a result, there is coercion through reliance on local police and duress through the falsity of the ruse itself.<sup>220</sup>

C. *ICE Ruses Undermine the Trust in Local and State Police*

The “Standards for enforcement activities” mandate that ICE agents identify themselves as an “immigration officer”,<sup>221</sup> however, ICE agents have regularly impersonated police or other law enforcement to engender trust by non-citizens.<sup>222</sup> Although the *Ortiz Becerra* court stated that “[ICE] agents *are* police” and went on to argue that even if they are not police, the ICE agents at issue did not intend a “deliberate misrepresentation,” this holding is in violation of Tenth Amendment principles.<sup>223</sup>

There are two factors that undermine the assertion that ICE agents are equivalent to police. First, ICE agents are able to use an administrative arrest warrant that local police officers do not have access to.<sup>224</sup> Second, ICE’s own regulations recommend that they

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219. See Kam, *supra* note 16, at 162 (“Deception naturally erodes the trust between the government and its people and undermines the perception of government fairness and propriety.”); Rubin, *supra* note 15 (quoting a senior attorney of Dolores Street Community Services who stated, “[t]here is something fundamentally unfair about ICE exploiting local and state policies that are trying to improve public safety by promoting immigrants’ trust in law enforcement.”).

220. See ICE Ruses, *supra* note 151 (“As part of a ruse, ICE agents intentionally lie or mislead you about who they are and that their real intentions are to identify and arrest the non-citizen they have targeted.”).

221. See Standards for Enforcement Activities, 8 C.F.R. § 287.8(c) (2021) stating:

(iii) At the time of the arrest, the designated immigration officer shall, as soon as it is practical and safe to do so:

(A) Identify himself or herself as an immigration officer who is authorized to execute an arrest; and

(B) State that the person is under arrest and the reason for the arrest.

222. See *supra* note 15 (explaining that ICE agents present themselves as local law enforcement in order to benefit from the higher level of trust that undocumented people may have for local law enforcement).

223. *Ortiz Becerra v. Garland*, 851 Fed. App’x. 739, 743 (9th Cir. 2021) (emphasis added). *Contra* Stoltze, *supra* note 179 (discussing the LA City Attorney’s belief that, “[i]n Los Angeles, the term ‘police’ is synonymous with the [LAPD],” and it is misleading for ICE agents to represent themselves as police because the public believes they are interacting with the LAPD).

224. See 8 U.S.C. § 1226(a) (“On a warrant issued by the Attorney General, a [non-citizen] may be arrested and detained pending a decision on whether the [non-citizen] is to be removed from the United States.”).

identify themselves as immigration officers rather than police.<sup>225</sup> By contrast, local police authorities are intended to be trusted by non-citizens as officials whose primary goal is not deportation.<sup>226</sup>

ICE is an arm of the federal government, and, as ICE engages in impersonating local police, political distortion is the subsequent outcome.<sup>227</sup> Through *Printz*, the Court expressed a concern for blurred lines between the federal and state governments.<sup>228</sup> ICE impersonation of police is considered a permissive deception but the clear political accountability called for in *Printz* is in question when a non-citizen's trust is induced by a federal entity (i.e. ICE) roleplaying as a sovereign state entity (i.e. local police).<sup>229</sup> Courts must enjoin ICE ruses under the Fourth Amendment, but additionally must enjoin ICE ruses that undermine confidence in local police per the ideals of anti-commandeering embedded in the Tenth Amendment.

#### CONCLUSION

ICE ruses have effectively been used against non-citizens who wanted to trust that they were aiding local law enforcement efforts and opened their door with little thought that it would ultimately lead to their deportation. This Comment has argued that ICE ruses violate the Fourth Amendment rights of non-citizens to privacy and security from unreasonable searches and fail to induce voluntary consent. While the

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225. See generally Standards for Enforcement Activities, 8 C.F.R. § 287.8 (2021).

226. See *supra* note 168 (discussing non-citizen's fear in contacting police out of concern that police might work with ICE). Interestingly, the U-Visa and T-Visas are reliant on immigrant cooperation with the police. The U-Visa is a visa that is dependent upon noncitizens working closely with law enforcement and government officials in the investigation or prosecution of criminal activity. See *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Feb. 28, 2022), <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-criminal-activity-u-nonimmigrant-status> [https://perma.cc/T7Z4-4UU9]. Likewise, the T-Visa is a temporary visa geared toward victims of trafficking in persons that is granted for an initial period of up to four years for victims to comply with requests for assistance from law enforcement to investigate and prosecute the perpetrators. See *Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Oct. 20, 2021), <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-human-trafficking-t-nonimmigrant-status> [https://perma.cc/TJE3-BHPN].

227. See *supra* Section I.D (discussing anti-commandeering principles).

228. *Printz v. United States*, 521 U.S. 898, 920 (1997).

229. *Supra* Part III.A; see also de la Hoz, *supra* note 172 (“Yet advocates say that, as immigrants feel the lines start to blur between who is local law enforcement and who is ICE, they’re less likely to cooperate with anyone.”).

Fourth Amendment jurisprudence invalidates ruses based on misrepresentation of circumstances, this Comment argues that the Tenth Amendment is contravened when ICE impersonated local police to gain a non-citizen's trust and consent.

ICE as an institution should altogether be done away with,<sup>230</sup> but in the interim, ICE can enact three actions to avoid violating the Fourth and Tenth Amendment. First, do not imitate police. Second, obtain informed consent. Third, apply for a judicial warrant. Ultimately, fair treatment of non-citizens' rights is necessary.

While ICE agents have not been barred from imitating local law enforcement through the various Circuits' case law, it is important to emphasize that ICE agents are statutorily called to identify as "immigration officers" when it is "practical and safe to do so."<sup>231</sup> Mayor De Blasio of New York City wrote a letter to Tony Pham, acting head of ICE, stating that "[s]uch behavior negatively affects the public safety mission of [the New York Police Department] and erodes trust in our communities."<sup>232</sup> More attention on ICE's unlawful tactics will bring about the necessary pressure to enact systemic change. Therefore, more city officials should take similar steps to curb ICE's impersonation tactics.

Police and ICE agents, alike, are not required to inform a suspect that they can refuse a requested search.<sup>233</sup> However, Justice Marshall's dissent in *Schneckloth* encapsulates the benefit of obtaining informed consent, particularly in the case of non-citizens who are more unfamiliar with their legal protections.<sup>234</sup> Justice Marshall wrote: "I can think of no other situation in which we would say that a person agreed to some course of action if he convinced us that he did not know that there was some other course he might have pursued."<sup>235</sup> While it would

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230. E.g., Elaine Godfrey, *What 'Abolish ICE' Actually Means*, THE ATL. (July 11, 2018), <https://www.theatlantic.com/politics/archive/2018/07/what-abolish-ice-actually-means/564752/> [<https://perma.cc/72HN-WXW7>] (discussing the #AbolishICE movement based on the agency's record of inhumane treatment and violation of immigrant's rights); cf. BTS, *UGH!*, on MAP OF THE SOUL: 7 (Big Hit Music 2020) (highlighting that, ironically, oppressive actors sometimes generate sufficient societal rage to catalyze change).

231. Standards for Enforcement Activities, 8 C.F.R. § 287.8 (2021).

232. See *De Blasio Asks ICE to Ban Officers From Identifying as NYPD*, AP NEWS (Oct. 10, 2020), <https://apnews.com/article/new-york-bill-de-blasio-immigration-5ad6d66c315cd9fa800ae3496affeb14> [<https://perma.cc/H9JS-KGX9>].

233. *Schneckloth v. Bustamonte*, 412 U.S. 218, 247–48 (1973).

234. See *id.* at 285 (Marshall, J. dissenting).

235. *Id.*

not completely eliminate the issues of potential coercion, “consent-to-search forms” would more effectively put the non-citizen on notice that they can refuse ICE agents.<sup>236</sup>

A procedural change in ICE’s warrant use is, perhaps, equally the most radical and least radical recommendation. If ICE would like to get the benefits of posing as police, why not go the extra constitutional mile and obtain a judicial warrant? If “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment,” ICE can eliminate the need to obtain consent by taking part in the judicial process, showing probable cause, and obtaining a proper warrant for search or arrest.<sup>237</sup>

Justice Frankfurter in dissent put it best, “[h]istory bears testimony that [with] disregard . . . are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.”<sup>238</sup> ICE has been permitted to take advantage of uninformed non-citizens and undermine their trust in local law enforcement below the radar for too long. Through trainings, ICE has attempted to make use of consent-to-search loopholes and conduct unlawful arrests within one of the nation’s most vulnerable populations.

By highlighting a collection of the Fourth Amendment’s most prominent cases and language pertaining to consent, this Comment advances the notion that consent must be voluntary and, further, that “informed consent” is the most appropriate baseline when dealing with immigrant populations. Ultimately, the power is in the hands of the Government, local officials, courts, and advocates to demand fair practices from ICE. Only honest encounters with ICE agents can bring about voluntary consent. Otherwise, the immigrant population’s constitutional rights will be faced with disregard, “heedlessly at first, then stealthily, and brazenly in the end.”<sup>239</sup>

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236. Parascandola, *supra* note 36 (“Police sources said the paperwork, which the FBI and other law enforcement agencies have used for years, allows cops to counter claims, often raised at trial, that a suspect never gave police consent to search their home.”); *see* Lassiter, *supra* note 61, at 1192–93 (“If informed consent is the standard in medicine for operation or treatment procedures affecting the medical person, the same standard makes sense for the constitutional person and for the same principle that individuals are sovereign over their person the same as king over their home.”).

237. *Katz v. United States*, 389 U.S. 347, 357 (1967); *see, e.g.,* Chiu, *supra* note 144, at 28 (recommending that ICE obtain judicial warrants and encourage similar “high investigative standards” employed in worksite enforcement operations).

238. *Davis v. United States*, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting).

239. *Id.*