Inherently Coercive: ICE’s Use of Unconstitutional Ruses

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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 front door of their apartment by a woman who professed to be a detective with the local police.¹ 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.² Kidd’s mother quickly agreed to allow the “detective” inside and to cooperate fully to help keep her family safe.³ However, the woman was not a detective and the photo was a fake.⁴ 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.⁵ Upon realizing that Kidd was not home, the ICE agents asked Kidd’s mother to call him.⁶ Speaking

² Kopetman, supra note 1.
³ See 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 Complaint, supra note 1, at 19 (stating that Kidd’s siblings were between the ages of eleven and sixteen).
⁶ Complaint, supra note 1, at 20.
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.\(^7\) ICE agents met Kidd outside his home, checked his identification, and arrested Kidd for removal.\(^8\) Then, Kidd was transported to a detention center in San Bernardino, California where he was held for over forty days and even, denied his HIV medication.\(^9\)

There’s a saying that a man’s home is his castle and likewise, the general public of the United States tends to expect security in their homes.\(^10\) This expectation is especially true when one considers the various limitations under which law enforcement may enter a home without first securing a judicial warrant.\(^11\) Importantly, law enforcement uses consent to searches as a semi-waiver of one’s Fourth Amendment rights to be free from warrantless searches.\(^12\)

\(^7\) Kopetman, supra note 1.

\(^8\) Id.

\(^9\) See id. (explaining that Kidd’s attorney secured his release from the Adelanto ICE Processing Center after two months); e.g., Pilar Marrero, DREAMer Held After Misdemeanor Arrest, Alleges Denial of HIV Medication in Detention, Latino Rebels (Nov. 15, 2018), https://www.latinorebels.com/2018/11/15/dreamerheld/ (stating that Sorto-Vazquez was issued an order of removal and detained for over 40 days).


\(^11\) See infra note 31 (describing various exceptions to the general requirement for a warrant which include exigent circumstances and special needs).

\(^12\) See Travy Maclin, The Good and Bad News About Consent Searches in the Supreme Court, McGeorge L. Rev. 27, 31 (2008) (“[C]onsent searches are popular because they allow police
agents, in particular, need to use consent to bypass the warrant requirement to find and deport undocumented immigrants.\(^{13}\) City officials across the United States accuse ICE of engaging in various unlawfully tactics that bypass Fourth Amendment protections to enter a non-citizen’s home.\(^{14}\) 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 would like to enter a person’s home.\(^{15}\)

\(^{13}\) See infra note 143 and accompanying text (describing the limitations of ICE warrants).

\(^{14}\) See infra notes 172-173 (describing city officials across the United States who have spoken out in opposition to ICE’s ruses).

\(^{15}\) See generally, 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 and Larry McShane, ICE Agents Pose as NYPD to Arrest Long-time New Yorker after 6 a.m. Manhattan Door Knock, Say Outraged City Officials, Daily News (Oct. 10, 2020),

https://www.nydailynews.com/new-york/ny-nypd-ice-immigration-raid-detainee-20201011-pln5koqtnjdqj3u4omku3imyi-story.html (“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),

https://patch.com/california/los-angeles/ice-sued-alleged-warrentless-searches-impersonating-officers (“The plaintiffs allege in federal court that ICE officers also ‘routinely trespass on
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 protection 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 the 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 primarily focus on ICE intrusions into the homes of suspected non-citizens.\footnote{See Sarah Wise and George Petras, The Process of Deportation, \textit{USA Today} (June 25, 2018), \url{https://www.usatoday.com/pages/interactives/graphics/deportation-explainer/} (explaining that a suspect can be arrested by local or federal police before contacting ICE to place the suspect in custody).}

Part I begins by describing the Supreme Court’s and various Circuits’ Fourth Amendment jurisprudence concerning the Consent Doctrine and its application to non-citizens.\footnote{\textit{Infra} Part I.A–C.} Part I further discusses Tenth Amendment values concerning anti-commandeering and political accountability principles.\footnote{\textit{Infra} Part I.D.} Part II discusses ICE’s establishment, training practices, and various reports of ICE’s tactics to obtain consent.\footnote{\textit{Infra} Part II.A–B.} Part III argues that ICE ruses are impermissible

\[\text{\textsuperscript{\ldots}}\]
misrepresentations incapable of supporting voluntary consent. 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.

I. Legal Background

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 cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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. 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.

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20 Infra Part III. A-B.
21 Infra Part III.C.
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 Founder’s drafted the Amendment as a response to fears of a large government with powers similar to that of British rule).
24 See id. at 520 (stating that law enforcement must obtain a warrant from an “neutral and detached magistrate” in advance of conducted a search or seizure). Probable cause must be
Thus, began the public’s expectation of freedom from “unreasonable government intrusion.”

Accordingly, a search and seizure of a home without a warrant is presumptively unreasonable. In *Katz v. United States*, 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.

Nevertheless, there are numerous exceptions to the warrant requirement which may excuse the government from obtaining a warrant before conducting a search or seizure. Exigent circumstance is an exception to the warrant requirement when an emergency or dangerous situation is at hand that would justify a warrantless entry. Examples of emergency situations 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, 898 (1984).

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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.”)


28 *Id.* at 358.

29 See infra note 31 (describing exceptions to the warrant requirement).

30 *Id.* at 583.
exist wherein there is imminent destruction of evidence, searches conducted in the name of public safety, or searches conducted at the border.\textsuperscript{31} The Supreme Court has determined that the police are granted higher deference when the needs of law enforcement outweigh the presumption of unreasonableness when proceeding warrantless.\textsuperscript{32}

Consent provides yet another exception to the rule that warrantless searches are presumptively unreasonable.\textsuperscript{33} Professor Susan A. Bandes argues that there is a consensus that a large portion of searches are conducted pursuant to consent.\textsuperscript{34} Professor Bandes goes on to state 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

\begin{itemize}
\item \textsuperscript{31} \textit{See generally}, Kentucky v. King, 563 U.S. 452 (2011) (holding that preventing the imminent destruction of evidence may justify a warrantless search); Brigham City, Utah 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).
\item \textsuperscript{32} \textit{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, 393–394 (1978)).
\item \textsuperscript{33} \textit{See supra} note 26 and accompanying text.
\item \textsuperscript{34} \textit{See} Susan A. Bandes, \textit{Police Accountability and the Problem of Regulating Consent Searches}, 2018 \textit{U. Ill. L. Rev.} 1759, 1760 (2018) (estimating that around 90% or more of searches are consent searches).
\end{itemize}
hand that would permit police to proceed before securing a warrant.\textsuperscript{35} Law enforcement has occasionally used “consent-to-search forms” to try and establish written proof of consent and avoid any challenges down the line.\textsuperscript{36} The Arkansas Supreme Court stated that using a consent form would “undoubtedly be the better practice for law enforcement to follow.”\textsuperscript{37} Regardless, the use of a consent to search forms will not singlehandedly eliminate all challenges to coerced consent or covert force employed by police.\textsuperscript{38}

B. Supreme Court Jurisprudence on the Consent Doctrine

The Supreme Court has crafted two frameworks for consent: voluntary consent and informed consent.\textsuperscript{39} With informed consent, the subject must be reminded of their right to refuse

\begin{footnotesize}
\textsuperscript{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.’”).

\textsuperscript{36} Rocco Parascandola, ‘Consent to Search’ Forms, Now Available in Seven Languages, Allow Police to Bypass Warrant Process, \textit{Daily News (Oct. 1, 2011)}


\textsuperscript{38} Id.

\textsuperscript{39} \textit{Infra} Part I.B.1.
\end{footnotesize}
and with voluntary consent, no such warning is necessary.\textsuperscript{40} In both situations, overly coercive conditions can invalidate the given consent.\textsuperscript{41}

1. Voluntary Consent and Informed Consent

The cornerstone case of the Voluntary Consent Doctrine is Schneckloth v. Bustamonte.\textsuperscript{42} 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.\textsuperscript{43} In Schneckloth, police pulled over Robert Bustamonte along with five other men in his vehicle at 2:40 in the morning.\textsuperscript{44} Once pulled over, the police had the men step out of the car and two additional policemen arrived.\textsuperscript{45} When police asked to search the car, one of the passengers stated “Sure, go ahead.”\textsuperscript{46} 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.\textsuperscript{47} The Court further determined that the onus is on

\textsuperscript{40} \textit{Infra} note 52 and accompanying text.

\textsuperscript{41} \textit{Infra} Part I.B.2.

\textsuperscript{42} 412 U.S. 218 (1973).

\textsuperscript{43} \textit{Id.} at 227.

\textsuperscript{44} \textit{Id.} at 220.

\textsuperscript{45} \textit{Id.}

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} \textit{Id.} at 249.
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.”

The majority considered whether to extend *Miranda v. Arizona*’s 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. 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.” Thus, the Court required a multitude of warnings to be given to a subject before police may conduct a custodial interrogation.

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48 Id. at 248–49. 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*, 446 U.S. 544, 559 (1980) (describing that when police does inform the subject that they are free to withhold consent, the “probability that [police’s] conduct reasonably appeared . . . coercive” is “substantially lessened.”).


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.
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.\(^5^3\) In defense of requiring only voluntary consent, the Schneckloth Court addressed whether the Fourth Amendment’s voluntary consent exception would become a tool of solely “the sophisticated, the knowledgeable, and the privileged.”\(^5^4\) The Court argued that their definition of voluntariness would take into account factors such as: age, intelligence, schooling, and lack of effective warning.\(^5^5\) The Court stated that the voluntariness of any statement would be carefully scrutinized to determine whether it was in fact voluntarily given.\(^5^6\) Further, the approach looked to the particularly vulnerable subjective state of the consenting person to coercive treatment.\(^5^7\) 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.\(^5^8\)


\(^{54}\) 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 U.S. v. Calderon-Fuentes, 788 Fed. Appx. 630, 643 (11th Cir. 2019) (unpublished) (stating that consent is involuntary if the subject is “particularly vulnerable—mentally or physically—to police coercion”). Id.

\(^{58}\) Id.
The three dissents present several reasons why informed consent should be required.\textsuperscript{59} 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.\textsuperscript{60}

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.\textsuperscript{61} 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.\textsuperscript{62}

\textsuperscript{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 (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).

\textsuperscript{60} Id. at 284 (Marshall, J., dissenting).

\textsuperscript{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.”).

\textsuperscript{62} Schneckloth, 412 U.S. at 288.
2. **Coercive Circumstances**

The Supreme Court has addressed tactics that are so coercive as to invalidate consent. *Bumper v. North Carolina*\(^\text{63}\) 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.\(^\text{64}\) In *Bumper*, the Court considered the validity of consent obtained when a police officer falsely claims to have a warrant.\(^\text{65}\) The Court held that by claiming to have a warrant, the officer wrongly “announces in effect that the occupant has no right to resist the search.”\(^\text{66}\) 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.”\(^\text{67}\)

In *Florida v. Royer*,\(^\text{68}\) the Court addressed whether consent to seizure may be given and then invalidated by conduct deemed to be “more intrusive than necessary.”\(^\text{69}\) In *Royer*, police

\(^{63}\) 391 U.S. 543 (1968).

\(^{64}\) Id. at 460.

\(^{65}\) Id. at 548.

\(^{66}\) Id. at 550.

\(^{67}\) Id. at 459–60. *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).

\(^{69}\) Id. at 504.
engaged in profiling when they approached Royer to ask for his airline ticket.\textsuperscript{70} 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.\textsuperscript{71} In the room, the police conducted a search of Royer’s luggage upon receiving his verbal consent.\textsuperscript{72} Here, the Court reasoned that Royer did not feel he was free to leave or refuse the police and, thus, his consent was invalidated by unlawful confinement prior to the search of his luggage.\textsuperscript{73} 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.\textsuperscript{74}

C. Federal Circuits Jurisprudence on the Consent Doctrine

The aforementioned Supreme Court decisions have stipulated that both voluntary consent and informed consent must be free from coercion and the various federal circuit courts have provided guidance to decipher what acts or omissions by law enforcement rise to the level of unconstitutionality.\textsuperscript{75} Law enforcement can engage in undercover operations and refrain from

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

\textsuperscript{71} Id. at 494.

\textsuperscript{72} Id.

\textsuperscript{73} Id. at 507–08.

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

\textsuperscript{75} Supra Part I.A.
revealing the scope of the investigation at hand, but whether consent to a search can be based on a ruse is dependent the type of ruse and further complicated depending on the level of reliance induced causing the subject to give consent.\textsuperscript{76}

1. \textbf{Permissive Deception and Impermissible Misrepresentation}

In \textit{United States v. Bosse},\textsuperscript{77} the court distinguished between permissible deception and impermissible misrepresentation.\textsuperscript{78} Specifically, in this case, an Alcohol, Tobacco, and Firearms (ATF) agent accompanied a lawful inspection conducted by a California Department of Justice agent.\textsuperscript{79} The agent failed to identify himself as an ATF agent and more importantly, the agent did not reveal his purpose in accompanying the inspection conducted by the California Department of Justice.\textsuperscript{80} The court determined that the agent’s “ruse entry” can be justified by consent when the government agent misrepresented the true nature of the investigation.\textsuperscript{81} Thus, a permissible deception involves concealing one’s identity as a government agent while impermissible

\textsuperscript{76} \textit{Infra} note 82.

\textsuperscript{77} 898 F.2d 113 (9th Cir. 1990).

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} \textit{Id.} at 114.

\textsuperscript{80} \textit{Id.}

\textsuperscript{81} \textit{Id.} at 115.
misrepresentation involves “a known government agent [concealing] his purpose for seeking entry.”

Government officials also may not use deceptive acts to engage in a search or seizure where there is no underlying legal authority. In United States v. Ramirez, the FBI agents wore jackets marked “Police” and an agent called Ramirez’s phone, claiming to be investigating a fictional burglary, but received no answer. The FBI revealed their true identity to Ramirez’s mother and asked her to call Ramirez home and present the burglary ruse. Upon Ramirez’s arrival home, the FBI agents frisked Ramirez and acquired his confession. The court held that such deceit violated the Fourth Amendment because the FBI agents’ ruse unlawfully invoked

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82 Id. at 116. See United States v. Alverez-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 United States v. Bosse, 898 F.2d 113, 115 (9th Cir. 1990)).

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

84 976 F.3d 946 (9th Cir. 2020).

85 Id. at 952.

86 Id. at 950.

87 Id.
Ramirez’s trust in the government and the fake burglary induced Ramirez to return home.\textsuperscript{88} 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.\textsuperscript{89}

\textit{Ortiz Becerra v. Garland}\textsuperscript{90} is a case involving similar facts to Ramirez but with an opposite holding.\textsuperscript{91} The Ortiz Becerra court held that ICE did not engage in an impermissible ruse when ICE agents claimed to be police and claimed to be in search of another man.\textsuperscript{92} 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 Ortiz Becerra’s daughter welcomed the agents inside.\textsuperscript{93} 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.\textsuperscript{94} The court dismissed Ortiz Becerra’s claims on several grounds and ultimately concluded that ICE did not engage in an impermissible

\textsuperscript{88} 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)).

\textsuperscript{89} Supra note 83.

\textsuperscript{90} 851 Fed. App’x. 739 (9th Cir. 2021).

\textsuperscript{91} Id.

\textsuperscript{92} Id. at 743.

\textsuperscript{93} Id.

\textsuperscript{94} Id.
misrepresentation.95 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.”96 In holding that no identity misrepresentation 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.”97 Further, the court stated that, in any event, the ICE agents had badges that said “ICE” on them.98 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.99

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,100 the court held that the consent

95 Id.
96 Id. at 742.
97 See id. at 743 (presenting a New Oxford American Dictionary definition of police as “an organization engaged in the enforcement of official regulations in a specified domain” such as “transit police”).
98 See id. (“And in any event, the officers were wearing visible ICE badges, which would have identified them as immigration police specifically.”).
99 Id.
100 550 F.2d 297 (5th Cir. 1977).
given by the suspect was obtained by impermissible misrepresentation when an IRS agent failed to inform the suspect of the agent’s intent to conduct a criminal investigation.\textsuperscript{101} 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.\textsuperscript{102} The court states that the IRS agent’s act was that of a “sneaky deliberate deception . . . and a flagrant disregard for appellant's rights.”\textsuperscript{103} The court went on to state that the omission of information was misleading and the IRS success in concealing the underlying was outside the expectation that the government would act in good faith.\textsuperscript{104}

In contrast, \textit{United States v. Briley}\textsuperscript{105} held there was no intentional misrepresentation when police stated their purpose, without more, as pertaining to an “important matter,” rather

\begin{itemize}
\item \textsuperscript{101} \textit{Id.}, at 299.
\item \textsuperscript{102} \textit{Id.}, at 298.
\item \textsuperscript{103} See \textit{id.}, at 299 (discussing an IRS agent’s misrepresentation of an audit of criminal nature and presented as one of civil nature). See also \textit{SEC v. ESM Government Securities, 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).
\item \textsuperscript{104} See \textit{Tweel}, 550 F.2d at 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.”).
\item \textsuperscript{105} 726 F.2d 1301 (8th Cir. 1984).
\end{itemize}
than their true purpose of making a warrantless arrest.\textsuperscript{106} In \textit{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.\textsuperscript{107} The court stated:

\begin{quote}
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. There has been no showing that [the third-party] lacked the maturity, sophistication, or intelligence to give an effective consent . . nor is there indication that [the third-party] was unaware of her right to withhold consent.\textsuperscript{108}
\end{quote}

Thus, the court determined that police had not intentionally or falsely stated their purpose.\textsuperscript{109} 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.\textsuperscript{110} Ultimately, the court held that the third party’s consent was voluntary and uncoerced under the totality of the circumstances approach as announced in \textit{Schneckloth v. Bustamonte}.\textsuperscript{111}

\textsuperscript{106} See \textit{id.} at 1305 (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).

\textsuperscript{107} \textit{Id.} at 1303.

\textsuperscript{108} \textit{Id.} at 1305 (citations omitted).

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} \textit{Id.} See supra Part I.A (discussing Schneckloth v. Bustamonte, 412 U.S. 218 (1973) and the various factors to be weighed when determining voluntariness).
To determine whether consent was voluntary, courts may decide to evaluate the government actor’s intent or the subject of the potentially coercive activity. In United States v. Spivey,112 the court found that the subjective motive of the officers is not relevant to the question of whether consent was uncoerced.113 The perspective of the subject is the sole determining factor in a finding of voluntariness.114 As a result, the Spivey court went on to hold 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.115 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.116

112 861 F.3d 1207 (11th Cir. 2017).

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

114 Spivey, 861 F.3d at 1215.

115 See id. at 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”). Id.

116 See id. at 1215 (discussing that the subjective purpose of officer’s ruse was minor and consent was voluntary).
D. Tenth Amendment Values

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. The United States District Court for the Northern District of California enjoined 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.

The Tenth Amendment is only one sentence but carries with it ideals of constraint, anti-commandeering, and the hazardous tension between the federal government and state governments. In specific, anti-commandeering is the principle that enjoins the federal government from compelling a state government to enact and enforce a federal provision under the guise of being state action. As an example, in Printz v. United States, the Court

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119 U.S. Const. amend. X (“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.”).
invalidated a statute that required state and local law enforcement to conduct background checks on prospective handgun purchasers.\textsuperscript{122} The Court found that the statute brought about a distortion in the political accountability of the state and local government.\textsuperscript{123} The Court stated that the rule against commandeering served as a constitutional safeguard of liberty and further promoted political accountability.\textsuperscript{124} Thus, the Constitution contemplated that State’s government’s role would be to “represent and remain accountable to its own citizens.”\textsuperscript{125} Expanding upon the principal, in \textit{Murphy v. National Collegiate Athletic Association},\textsuperscript{126} the Court stated:

\begin{quote}
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.\textsuperscript{127}
\end{quote}

Political accountability informs the anti-commandeering doctrine as the Court was concerned with the public’s knowledge of whether the federal or state government is at play in

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\textsuperscript{122} Id. at 902.
\textsuperscript{123} See \textit{id.} at 920 (discussing the importance and design of the federal system as one that establishes “two orders of government” with distinct obligations, relationships, and rights owed to the people).
\textsuperscript{124} Id. at 921.
\textsuperscript{125} Id. at 920.
\textsuperscript{126} 138 S.Ct. 1461 (2018).
\textsuperscript{127} Id. at 1477.
\end{flushleft}
any given act.\textsuperscript{128} Despite the fact that the handgun statute in \textit{Printz} and the enjoined Trump Executive Order are both affirmative federal acts, the underlying ideals of political accountability and the need for a clear divide between the federal and state government actors are the lesson taught by the Tenth Amendment’s jurisprudence. Such ideals must be applied to federal government actions as carried out by the practices of ICE.

\textbf{II. Immigration Background}

\textbf{A. ICE’s Establishment and Training}

Following the September 11, 2001 attack, Congress passed the Homeland Security Act of 2002\textsuperscript{129} and established the Department of Homeland Security.\textsuperscript{130} Subsequently, the Department of Homeland Security absorbed various existing immigration-related agencies and created the Bureau of Immigration and Customs Enforcement, later known as United States Immigration and

\textsuperscript{128} See \textit{New York}, 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.”).

\textsuperscript{129} Homeland Security Act of 2002, H.R. 5005, 107th Cong.

Customs Enforcement, or “ICE.”\textsuperscript{131} ICE has two primary divisions: Enforcement and Removal Operations (ERO) and Homeland Security Investigations (HSI).\textsuperscript{132} ERO states its mission as “protect[ing] the homeland through the arrests and removal of noncitizens who undermine the safety of our communities and integrity of our immigration laws.”\textsuperscript{133} ERO employed approximately 5,300 ERO officers and conducted 103,603 administrative arrests in 2020.\textsuperscript{134} The Training Division, a subdivision of the ERO, undertakes all the training needs of the ERO through basic, advanced, and specialized trainings.\textsuperscript{135}

\textsuperscript{131} History of ICE, supra note 130.

\textsuperscript{132} Id.


\textsuperscript{135} Enforcement and Removal Operations, supra note 133.
As discussed in Part I.A, one of the fundamental principles of the Fourth Amendment is that “no warrant shall issue, but upon probable cause, supported by oath or affirmation.” The police are directed to request a warrant from a magistrate and, in doing so, acquire a judicial search or arrest warrant. While ICE agents can apply for a judicial search warrant in line with Fourth Amendment requirements, ICE agents also have the option to obtain their own self-issued administrative warrant, (hereinafter “ICE warrants”). The major hurdle that ICE officers face is that ICE warrants do not confer the same authority as a judicial warrant. ICE warrants are not issued by a judge or magistrate as called for in Katz, but instead are issued by

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136 U.S. Const. amend. IV. See supra note 26 and accompanying text (providing case law holding warrantless searches as presumptively unreasonable, notwithstanding exceptions).


138 See supra note 24 and accompanying text (describing the requirement of an affidavit signaling probable to grant a judicial warrant).

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

140 See Lopez-Lopez v. County of Allegan, 321 F. Supp. 3d 794 (W.D. Mich. 2018) (citing Abel v. United States, 362 U.S. 217, 233 (1960)) (“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.”).

141 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).
The Attorney General. The Fugitive Operation Handbook reads in part: “[b]ecause neither a Warrant for Arrest of Alien (1-200) nor an administrative Warrant of Removal (1-205) 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.”

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

142 See 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.”).


144 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”).

145 See supra note 31 (discussing examples of exigent circumstances). See also 8 U.S.C. § 1226(a) (stating that ICE agents shall “take into custody” a non-citizen who is inadmissible or deportable for certain crimes without authority enter a non-citizen’s home and conduct a search). See generally, ICE Warrants and Local Authority, Immigrant Legal Resource Center,
(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.\(^{146}\)

Through a lawsuit and subsequent Freedom of Information Act (FOIA) request, the Immigrant Defense Project made internal ICE training documents and memos publicly available.\(^{147}\) ICE’s tactics and techniques are revealed within these obtained documents.\(^{148}\) 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.\(^{149}\) The Handbook describes several elements of Fourth Amendment jurisprudence and describes


\(^{146}\) 8 C.F.R. § 287.8.

\(^{147}\) \text{ICE Ruses, Immigrant Defense Project.} \text{https://www.immigrantdefenseproject.org/ice-ruses} \text{(last visited Oct. 26, 2021).}

\(^{148}\) \text{Infra} note 149.

\(^{149}\) The handbook was obtained and published by independent media outlet, Unicorn Riot, and validity was confirmed by ICE spokesperson, Matthew Bourke. \text{See Eoin Higgins, Confidential ICE Handbook Lays Out Paths for Investigators to Avoid Constitutional Challenges, The Intercept} (Feb. 23, 2018), \text{https://theintercept.com/2018/02/23/ice-search-seizure-handbook-manual-secret/} (“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.”).
how to conduct a consensual encounter between an agent and a subject. The Handbook encourages agents to be courteous, explain the purpose of the encounter, identify as an agent, and request cooperation from the subject. The Handbook further discusses the difference between a criminal search warrant and an administrative warrant. Finally, the Handbook presents how to conduct a search without a warrant by describing exceptions to the warrant requirement.

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.” When obtaining consent to search, ICE

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151 Id.

152 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”).

153 Id. at 36–37. See Higgins, Confidential ICE Handbook, supra note 148, (discussing that the 2012 version of the Handbook has not been made publicly available and that “internal training material are law-enforcement sensitive, not publicly available”).

agents are further instructed to be wary of coercive conditions such as the “number of officers at the door; weapons displayed; tone of voice; language that is demanding/commanding.”

The Fugitive Operation Handbook and a Memorandum on Use of Ruses During Arrest Operations, as written by ICE’s Acting Director in 2005, defines a ruse as a “tactic designed to control the time and location of a law enforcement encounter.” The Fugitive Operation Handbook states that the intent in carrying out ruses is to improve safety for the agent and reduce the opportunity for the target to flee. The Handbook further states that a ruse involves impersonating “a federal, state, local, or private sector employee” and the cover employer should grant permission to ICE agents.

B. Reports and Complaints Against ICE

The Department of Homeland Security (DHS) last estimated that 11.4 million undocumented immigrants were living in the United States on January 1, 2018. DHS categorizes undocumented immigrants as those who entered the United States without inspection

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155 ICE Ruses, supra note 147.


157 Id.

158 Id.

or overstayed temporary approval.\textsuperscript{160} Since ICE is mandated to find and deport undocumented peoples, the use of various tactics is prevalent.\textsuperscript{161} Further, research has shown that undocumented immigrants are hesitant to assert their rights or call 911 out of distrust for law enforcement and their connection to ICE’s operations.\textsuperscript{162} As an example, a study found 70 percent of

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\textsuperscript{160} \textit{Id.}
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\textsuperscript{161} See supra note 15 (discussing ICE ruses pertaining to police impersonations).
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\textsuperscript{162} See US: Immigrants ‘Afraid to Call 911’ States Should Reject Corrosive ‘Secure Communities’ Program, \textit{Human Rights Watch} (May 14, 2014),
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\text{https://www.hrw.org/news/2014/05/14/us-immigrants-afraid-call-911} (discussing that blurred lines between local law enforcement and ICE has brought about a fear in the undocumented population); Karen Hacker, \textit{The Impact of Immigration and Customs Enforcement on Immigrant Health: Perceptions of Immigrants in Everett, Massachusetts, USA}, 73 \textit{Social Science & Medicine} 4, \text{https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3159749} (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); Vanessa Rancaño, ‘Know Your Rights’: Immigrants Prepare for Increased Enforcement, \textit{KQED} (Feb. 27, 2017) \text{https://www.kqed.org/news/11332189/know-your-rights-immigrants-prepare-for-increased-enforcement} (discussing the need for educational programming to teach non-citizen’s about their constitutional rights so they know what to do if confronted by immigration officials).
undocumented immigrants stated they were less likely to contact police if they were a victim of a crime out of fear that officers will inquire into their immigration status.\textsuperscript{163}

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.\textsuperscript{164} There have been instances where ICE posed as local police, detectives, and probation officers, all while presenting false subjects for investigation or false circumstances for their presence.\textsuperscript{165} 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 paperwork.\textsuperscript{166} In another instance, ICE agents visited Martinez’s home and when Maria, Martinez’s wife, opened the door,

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\textsuperscript{163} Nik Theodore, \textit{Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement} i, \textit{Policy Link} (May 2013),

\url{https://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF}.

\textsuperscript{164} See supra note 1 and accompanying text.

\textsuperscript{165} See supra note 15 and accompanying text (detailing stories of non-citizens who experienced ICE’s ruses).

\end{flushleft}
ICE agents told her to fear not because they were police from her local precinct. 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. Much to Maria’s surprise, her husband called her from ICE custody hours later.

As ICE agents continue to impersonate local police, city officials across the nation have called upon ICE to end the practice. 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.” 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.

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168 Id.

169 Id.

170 Supra note 171.

171 See Moynihan and 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).

In Los Angeles, City Attorney Mike Feuer addressed a letter to ICE in which he claimed that ICE’s impersonation of police undermined public confidence in the LAPD.\footnote{173 Frank Stoltze, \textit{LA City Attorney Asks ICE Agents to Stop Saying They Are Police}, \textit{KPCC} (Feb. 23, 2017), \url{https://archive.kpcc.org/news/2017/02/23/69324/la-city-attorney-asks-ice-agents-to-stop-saying-th} (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).}

\section{Analysis}

This Part applies the aforementioned Supreme Court and Federal Circuit jurisprudence in relation to the practices of ICE. First, this Part argues that ICE ruses fit the category of impermissible misrepresentation in violation of non-citizen’s Fourth Amendment rights. Second, this Part argues that ICE ruses are fundamentally coercive based three factors of the totality of the circumstances approach. Finally, this Part presents the subsequent issue of distorted political accountability in violation of the Tenth Amendment values.

\subsection{ICE Ruses are Impermissible Misrepresentation}

ICE ruses are impermissible misrepresentations because the ruses present false circumstances or subjects to be investigated.\footnote{174 Infra note 176 and accompanying text.} Whether ICE may lawfully impersonate police or other law enforcement is a weaker argument under the Fourth Amendment based on the Ninth state legislature passed a law declaring that ICE are not recognized as California peace officers but further, discussing that the bill is likely more symbolic than enforceable).
Circuit’s conflicting holdings in Ramirez and later, Ortiz Becerra. 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. This degree of misrepresentation unlawfully incited the subject’s trust in local police. However, 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. 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. 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.

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

176 See Ramirez, 976 F.3d at 957 (“Deception is unlawful when the government makes its identity as law enforcement known to the target of the ruse and exploits the 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.”).

177 Id.

178 Ortiz Becerra, 851 Fed. App’x. at 743.

179 Id.

180 See infra Part III.C (discussing how impersonation of police undermines Tenth Amendment values).
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.\(^{181}\) 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.\(^{182}\) In the various cases above, the subject relied on the 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.\(^{183}\) While misrepresenting the purpose for seeking entry, the subject’s consent is induced based on false pretenses and thus, improperly obtained.\(^{184}\) The use of a fake burglary in Ramirez and the failure to disclose the criminal nature of the investigation in Tweel precluded law enforcement from showing voluntary consent.\(^{185}\) Likewise, Kidd’s experience of being called home because ICE was pretending to investigate a dangerous criminal is the same situation that Ramirez court held to be unlawful because it invoked the


\(^{182}\) Supra note 15.

\(^{183}\) Supra notes 166-167.

\(^{184}\) Supra note 15.

\(^{185}\) See United States v. Ramirez, 976 F.3d 946 (9th Cir. 2020); United States v. Tweel, 550 F.2d 297 (5th Cir. 1977).
subject’s trust in law enforcement to induce cooperation and consent. 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. 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. 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.” ICE agents that employ a mix of circumstantial and identity ruses obtain entry through coercive tactics that must be limited to create a fairer environment for non-citizens. Although the courts have held that a ruse based on the identity of law enforcement is a permissive deception, this Comment argues that an identity ruse is not much different than an impermissible misrepresentation when the goal is the same: to obtain consent to search from a non-citizen based on reliance in another

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186 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).

187 See supra note 167 (discussing ICE’s impersonation of NYPD to arrest Martinez).

188 Ramirez, 976 F.3d at 950; Tweel, 550 F.2d at 299.

189 United States v. Bosse, 898 F.2d 113, 115 (9th Cir. 1990).
government official or their authority.\textsuperscript{190} When ICE agents employ ruses—whether it be pertaining to their identity, purpose, or both—it stems from the same intent to 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 they are not a risk of deportation.\textsuperscript{191} 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 it was ICE agents all along.\textsuperscript{192}

The Spivey court held that an officer misrepresenting their identity was a minor deception immaterial to consent.\textsuperscript{193} 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.\textsuperscript{194} ICE being aware of this fact poses as police to induce reliance and obtain consent by misrepresenting the purpose or basis of their investigation. Otherwise, the non-citizen is much more likely to

\begin{thebibliography}{99}
\bibitem{Ramirez} Ramirez, 976 F.3d at 956-57. Kopetman, supra note 1 (describing two cases in which ICE officials presented themselves as probation officers).
\bibitem{Bosse} Bosse, 898 F.2d at 115.
\bibitem{Supra} Supra note 15.
\bibitem{Spivey} 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.”).
\bibitem{Id} Id. See supra note 162 and accompanying text (discussing non-citizens’ fear of deportation and law enforcement efforts to deport).
\end{thebibliography}
refuse the ICE agents entry if the agent stated they were ICE. It is important to recall that the
Fourth Amendment is intended to allow people to seek refuge within their own home and non-
citizens, too, have an equal right to choose whether to open the door to local law enforcement or
ICE agent. As such, there must be a presumption that when ICE agents impersonate police,
they are engaged in an impermissible misrepresentation because it induces 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.” ICE agents are fully capable of obtaining a judicial warrant but rather, ICE
willingly equips itself with a weaker ICE warrant and the need for consent to search. 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. Schneckloth calls for a “totality of the circumstances” approach that takes into
account age, intelligence, lack of warning, and coercive conditions. Using this approach, three

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

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


198 See *supra* note 35 (discussing the consent to search doctrine as a “loophole”).

199 *Id.* at 227.

200 *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.”).
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.

The combination of the non-citizen’s lack of constitutional knowledge, lack of warning, and use of impermissible misrepresentation fail show voluntariness under the totality of circumstances. While non-citizens are made up by people in various education and intelligence levels, this population sits in a unique position as new arrivals in the country who lack awareness of what their Fourth Amendment rights entail. As non-citizens with little to no education in American civics attempt to avoid giving consent to a search by a manipulative authority, they are the highest risk: being arrested and deported. 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, ICE agents are attempting to capitalize on the ignorance of non-citizens.

In all of the previously described cases and reports, ICE never warned the subject of their rights to refuse consent. “[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

201 See Rancaño, supra note 162(discussing the need for educational programming to teach non-citizen’s about their constitutional rights).

202 Id.


204 Supra notes 15 and 166-167.
must weigh directly into the measure of the totality of circumstances.\textsuperscript{205} 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 request for consent.\textsuperscript{206} However, as will be discussed below, the coercive circumstances brought about by ICE ruses call for explicit warning for voluntariness under the totality for the circumstances.\textsuperscript{207}

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.\textsuperscript{208} The Spivey court stated that the government is required to provide “clear and positive testimony that the consents were voluntary, equivocal, 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.\textsuperscript{209} These acts do not constitute just minor deceptions but rather are orchestrated to unfairly create a condition where the non-citizen are told that local police needs their cooperation in investigating a matter or person separate from ICE’s goals.\textsuperscript{210} As a result, there is coercion through reliance on local police and duress through the falsity of the ruse itself.\textsuperscript{211}

\textsuperscript{205} Schneckloth, 412 U.S. at 248.

\textsuperscript{206} Id. at 246.

\textsuperscript{207} Id. at 227.

\textsuperscript{208} Supra Part III.A.

\textsuperscript{209} United States v. Spivey, 861 F.3d 1207, 1217 (11th Cir. 2017).

\textsuperscript{210} Supra notes 15 and 167 and accompanying text.

\textsuperscript{211} Supra note 15.
C. **ICE Ruses Undermine the Trust in Local and State Police**

The “Standards for enforcement activities” mandates that ICE agents identify as an “immigration officer”,\(^{212}\) however, ICE agents have regularly impersonated police or other law enforcement to engender trust by non-citizens.\(^{213}\) 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 not a “deliberate misrepresentation,” this holding is in violation of Tenth Amendment principles.\(^ {214}\) There are two factors that undermine the assertion that ICE agents are equivalent to police. First, they are able to use an administrative arrest warrant that local police officers do not have access to.\(^ {215}\) Second, ICE’s own regulations recommend that they identify

\(^{212}\) See 8 C.F.R. § 287.8 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.

\(^ {213}\) *Supra* note 15.

\(^ {214}\) *Ortiz Becerra v. Garland*, 851 Fed. App’x. 739, 743 (9th Cir. 2021). *Contra*, Stoltze, *supra* note 171 (reporting that LA City Attorney claimed LAPD to mean police and ICE claiming to be police as misleading).

\(^ {215}\) *Supra* note 143 (discussing ICE warrants).
themselves as immigration officers rather than police.\textsuperscript{216} By contrast, local police authorities are intended to be trusted by non-citizens as officials whose primary goal is not deportation.\textsuperscript{217}

ICE is an arm of the federal government and, as ICE engages in impersonating local police, political distortion is the subsequent outcome.\textsuperscript{218} Through \textit{Printz}, the Court expressed a concern for blurred lines between the federal and state governments.\textsuperscript{219} ICE impersonation of police are considered a permissive deception\textsuperscript{220} but the clear political accountability called for in

\textsuperscript{216} \textit{See generally}, 8 C.F.R. § 287.8.

\textsuperscript{217} \textit{See supra} note 162 (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. \textit{See} Victims of Criminal Activity: U Nonimmigrant Status, \textit{U.S. Citizenship and Immigration Services}, https://www.uscis.gov/humanitarian/victims-of-criminal-activity-u-nonimmigrant-status. Likewise, the T-Visa is a temporary visa gear toward victims of trafficking in persons for an initial period of 4 years as they comply with requests for assistance from law enforcement to investigate and prosecute the perpetrators. \textit{See} Victims of Human Trafficking: T Nonimmigrant Status, \textit{U.S. Citizenship and Immigration Services}, https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-human-trafficking-t-nonimmigrant-status.

\textsuperscript{218} \textit{See supra} Part I.E (discussing anti-commandeering principles).


\textsuperscript{220} \textit{Supra} Part III.A.
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).\textsuperscript{221} Courts must enjoining 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 Fourth Amendment jurisprudence invalidates ruses based on misrepresentation of circumstances, this Comment has argued 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 abolished,\textsuperscript{222} 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. These recommendations

\textsuperscript{221} Supra note 15.

will be further expanded upon below but ultimately, fair treatment of non-citizen’s rights is necessary.

While ICE agents have not been barred from imitating local law enforcement through the various Circuit’s case law, it is important to emphasize that ICE agents are called to identify as “immigration officers” when it is “practical and safe to do so.” 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.” 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 the suspect that refusal to a search request is permitted. 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. 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

223 8 C.F.R. § 287.8.
226 Id., at 285 (Marshall, J. dissenting).
that he did not know that there was some other course he might have pursued.”227 While it would 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.228

A change in ICE’s warrant process 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.229

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.”230 ICE has been permitted to take advantage of uninformed non-citizens and undermine

227 Id.

228 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 (“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.”).


230 Davis v. United States, 328 U.S. 582, 592 (1946) (Frankfurter, J., dissenting).
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 has advanced 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, our nation’s immigrant population’s rights will be faced with disregarded “heedlessly at first, then stealthily, and brazenly in the end.”

231 Id.