



## **PRACTICE ADVISORY<sup>1</sup>: Rights and Obligations of Noncitizens During ICE Car Stops**

April 29, 2020

Since 2013, Immigrant Defense Project (IDP) has been monitoring Immigration and Customs Enforcement (ICE) raid and community arrest tactics in the New York City area. Over the past few years, we have received an increasing number of reports of ICE stopping and arresting people in their cars.<sup>2</sup> We have also been alerted to a potential increase in car stops given ICE's increased use of Automated License Plate Readers (ALPRs) for surveillance.<sup>3</sup>

This advisory provides an overview of the rights of noncitizens during a car stop<sup>4</sup> and the Fourth Amendment principles underlying those rights. Practitioners may utilize this advisory to (1) advise their clients about their rights and obligations during potential car stops by immigration enforcement, and (2) identify the relevant issues in considering a motion to suppress or terminate removal proceedings based on the illegality of a car stop.

The sections that follow contain discussions of statutes, regulations, and case law that apply to car stops by immigration enforcement officers. The observations and cases cited herein are examples only and focus on precedent that is binding in New York and the Second Circuit. This advisory is not based on an exhaustive search of relevant case law in all jurisdictions.

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<sup>1</sup> Practice advisories do not replace independent legal advice provided by an attorney or representative familiar with a client's case. This advisory was prepared by the Immigrant Defense Project, relying in part on research by Jessica Rofé, Gabriela Siegel, and Jon Greenspan of the Immigrant Rights Clinic at NYU School of Law.

<sup>2</sup> To see reports of ICE car stops and raids generally, visit IDP's ICEWatch Raids Map at <https://raidsmap.immdefense.org> and ICE raids trends reports at <https://www.immigrantdefenseproject.org/icewatch>. To find car stops in ICEWatch, search "car" in the menu.

<sup>3</sup> See Vasudha Talla, ACLU, *Documents Reveal ICE Using Driver Location Data From Local Police for Deportations* (Mar. 13, 2019), <https://bit.ly/2xfkC27>.

<sup>4</sup> As used in the advisory, "car stops" do not include stationary checkpoints at which all vehicle traffic is stopped. Checkpoint stops, which are typically conducted by Border Patrol near land borders, are "subject to less stringent constitutional safeguards." *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976).

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## Key Takeaways

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- Under the Fourth Amendment, cars are less protected spaces than homes. ICE is still required to conform to constitutional and statutory limitations when it stops or pulls over a car.
- A judicial warrant is not required for car stops. Reasonable suspicion of a federal crime or an immigration violation is sufficient for ICE to stop a car.
- Reasonable suspicion *cannot* be based solely on an individual’s perceived race or ethnicity.
- A person’s rights might differ based on whether they are the driver or the passenger.
- If a car stop is justified by reasonable suspicion, ICE is also permitted to request the driver’s ID.
- ICE cannot take fingerprints during a car stop without individualized suspicion of an immigration violation.
- ICE may order all occupants to remain inside or step out of the vehicle for officer safety reasons.
- In order to arrest and detain an individual, an ICE officer must have an administrative warrant or probable cause of an immigration violation.
- Reasonable suspicion to *stop* a car does not automatically confer authority to *search* the car. Generally, a search warrant or the driver’s consent is required to search inside the vehicle and its compartments.
- Always advise your clients to exercise the right to remain silent, especially with respect to their name and place of birth.
- Whenever possible, allege and preserve constitutional, statutory, and regulatory arguments on behalf of your clients.

## A. When can ICE initiate a car stop?

Under the Fourth Amendment, cars are less protected spaces against searches and seizures than homes. While an ICE officer may not enter a home without a judicial warrant, exigent circumstances, or consent, ICE officers are only required to have “reasonable suspicion” (RS) of an immigration violation to initiate a car stop. *See Navarette v. California*, 572 U.S. 393, 396-97 (2014). Section 287 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1357, authorizes ICE officers to interrogate and arrest noncitizens for suspected immigration violations. Under implementing regulations, ICE officers can briefly detain individuals for questioning (i.e., conduct *Terry* stops) if the officer has a “reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is [] illegally in the United States.” 8 C.F.R. § 287.8(b). In other words, in order to initiate a car stop, an ICE officer must have a particularized basis to suspect a federal crime or an immigration violation. *See Terry v. Ohio*, 392 U.S. 1, 22 (1968) (officer cannot act on a mere “inarticulate hunch[]”). As further noted below, such RS cannot be based solely on the perceived race or ethnicity of an individual.

As a general principle, whether RS exists depends on the “totality of circumstances . . . to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing.” *United States v. Arvizu*, 534 U.S. 266, 273 (2002). The standard for determining whether a particular stop was justified by reasonable suspicion is an objective one, not dependent on the intentions or motivations of the particular detaining officer. *Illinois v. Wardlow*, 582 U.S. 119, 123 (2000); *see also, e.g., United States v. Singletary*, 798 F.3d 55, 59 (2d Cir. 2015) (examining “the totality of the circumstances through the eyes of a reasonable and cautious police officer on the scene”).

In the context of immigration enforcement, the Supreme Court has explained that “[e]xcept at the border and its functional equivalents, officers on roving patrol may stop vehicles **only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion** that the vehicles contain [noncitizens] who may be illegally in the country.” *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). Officers may “draw on their own experience and specialized training” in making this judgment, *id.*, looking to factors<sup>5</sup> including:

- Proximity to an international border;
- Usual patterns of traffic;
- An officer’s previous experience with “alien traffic”;
- An officer’s knowledge of “[r]ecent illegal border crossings in the area”;
- The driver’s erratic driving or obvious attempts to evade officers;
- Aspects of the vehicle itself, e.g., large compartments for transporting “concealed” individuals, extraordinary number of passengers, persons trying to hide; and
- Trained officers’ recognition of persons who live in Mexico, e.g., mode of dress, haircut.

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<sup>5</sup> Because *Brignoni-Ponce* involved car stops by Border Patrol officers in the “border area,” it is not clear whether all of these factors apply to ICE enforcement outside the border region.

*Brignoni-Ponce*, 422 U.S. at 884-85; see also *Contreras v. United States*, 672 F.2d 307, 308 (2d Cir. 1982) (holding that RS of immigration violations can also be based on anonymous tips that are partially corroborated).

Importantly, *Brignoni-Ponce* expressly held that the “apparent Mexican ancestry” of the occupants in the car, without more, does not amount to RS justifying a car stop. *Id.* at 885-87. In other words, perceived ethnicity or nationality can be a factor in establishing RS, but not the *only* factor. For example, in a subsequent case, the Second Circuit found that Border Patrol was justified in conducting a brief interrogation where a defendant escorted two women with “heavy [foreign] accents” at a bus station two miles away from the border in Buffalo, NY. *United States v. Salter*, 521 F.2d 1326, 1328 (2d Cir. 1975).

ICE may also have RS to stop a car based on prior knowledge of the owner of the vehicle. The Supreme Court has recently held that it is rational for an officer to infer that the driver of a vehicle is the registered owner. *Kansas v. Glover*, No. 18-556, slip op. at 9 (Apr. 6, 2020). Therefore, if ICE uses an ALPR to discover that a particular car is registered to someone who is potentially undocumented, the officer may use that information to initiate a stop—even if the car’s owner is not actually in the vehicle. However, *Glover* includes the caveat that “the presence of additional facts might dispel reasonable suspicion,” for instance if the officer observes the driver’s age and gender to differ from that of the registered owner. Slip op. at 9.

The INA authorizes ICE to make warrantless stops and arrests only for violations of immigration law and federal criminal law. 8 U.S.C. § 1357(a)(2)-(5). Its federal statutory authority does not extend to enforcing state traffic laws. *Cf. Brignoni-Ponce*, 422 U.S. at 883 n.8 (“Border Patrol agents have no part in enforcing laws that regulate highway use.”). However, a few courts have found that federal law enforcement officers are authorized by New York state law<sup>6</sup> to make car stops for traffic violations. *Evans v. Solomon*, 681 F. Supp. 2d 233, 241-44 (E.D.N.Y. 2010) (U.S. Parks police); *U.S. v. Samuels*, No. 04-cr-649, 2004 WL 2823079 (S.D.N.Y. Dec. 7, 2004) (DEA). Because of ICE’s limited enforcement purview, these cases should **not** apply to ICE officers, and their application should be challenged if ICE makes a pretextual traffic stop.

Finally, DHS regulations authorize ICE officers to issue administrative arrest warrants for immigration violations, 8 C.F.R. 287.5(e)(2), and to execute those warrants, *id.* 287.5(3)(3). Thus the regulations may be read to authorize officers to initiate a car stop if ICE has an administrative warrant for someone in the vehicle.<sup>7</sup> DHS regulations also permit ICE officers in vehicles equipped with emergency lights and a siren to engage in “vehicular pursuit” if a driver suspected of an immigration violation does not stop. 8 C.F.R. § 287.8(e). The most recently available ICE

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<sup>6</sup> ICE officers are considered “peace officers” under state law. N.Y. Crim. Pro. L. § 2.15(3). Peace officers are authorized to “arrest a person for an offense committed or believed by him to have been committed within the geographical area of such peace officer’s employment . . . when such person has in fact committed such offense in his presence.” *Id.* § 140.25(3).

<sup>7</sup> If a client is arrested during a car stop based on an administrative warrant, practitioners should consider preserving the argument that because administrative warrants may be issued on less than probable cause, they do not provide valid Fourth Amendment grounds to initiate a car stop. *But see Abel v. United States*, 362 U.S. 217, 230 (1960) (“Statutes authorizing administrative arrest to achieve detention pending deportation proceedings have the sanction of time.”).

training materials directly contradict this, however, and state that “Vehicle Pursuits of persons not complying with your direction to stop are not authorized.”<sup>8</sup> Nevertheless, a driver’s failure to pull over when signaled may be considered an element of RS, and drivers should avoid any actions that could escalate risks to their safety.

**Practice Tip:** Clients should understand that ICE could identify and stop them while driving if their vehicle is registered with a state Department of Motor Vehicles and ICE reasonably suspects that they have violated an immigration law. For example, a client who has been ordered removed by an immigration judge or CBP officer can be pulled over by ICE and arrested if ICE encounters the client driving their car. Advocates should advise clients to pull over to the side of the road, even if they do not know which law enforcement agency is stopping them. ICE might interpret a person’s failure to stop as an attempt to flee and rely on that as another reason to suspect the client has violated immigration laws. Furthermore, while ICE is trained to not pursue cars that fail to pull over, officers have been known to physically block a car by pulling out in front of it on the road. Clients should always assess the safety of their situation.

Importantly, clients should know that ICE cannot pull them over based only on their perceived race or ethnicity. If a client suspects that they were pulled over for this reason, they should remember how ICE agents acted and what they said during the stop and provide this information to the advocate to assess the possibility of filing a motion to suppress in removal proceedings.

For clients in all situations, advise them to remain silent when stopped by ICE and to not answer any questions about their place of birth or immigration history. Any such information that they give to ICE officers could be used against them in removal proceedings.

## **B. What rights does a driver have after being pulled over?**

### **1. Providing identification**

Once ICE pulls over a vehicle, the stop is considered a Fourth Amendment seizure and must be justified by RS. *United States v. Arvizu*, 534 U.S. 266, 277 (2002). ICE officers typically begin car stops by asking the occupants for identification. Under binding case law, no additional RS is required to ask for identification, as “questions concerning a suspect’s identity are a routine and accepted part of many *Terry* stops.” *Hiibel v. Sixth Judicial Dist. Ct. of Nev., Humboldt Cty*, 542

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<sup>8</sup> Office of the Principal Legal Advisor, 4th Amendment Training [Refresher for ERO FUG OPS] (Aug. 2017), at 51, available at <https://mijente.net/wp-content/uploads/2019/07/ICE-4th-Amendment-Training.pdf>.

U.S. 177, 186 (2004); *see also Salter*, 521 F.2d at 1329 (if a brief investigatory stop is lawful, it is also lawful for immigration agent to demand identification); *cf. I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984) (explaining that no seizure occurs where an officer conducts an “interrogation relating to one’s identity or a request for identification”).

Furthermore, under New York state law, drivers are required to produce a driver’s license and vehicle registration to law enforcement officers conducting a stop. As a “peace officer, acting pursuant to his special duties,” an ICE officer may request that the driver of a vehicle produce identification. N.Y. Veh. & Traf. L. § 401(4); *see supra* n.2. Thus, if ICE has RS that an occupant of the vehicle is undocumented or otherwise in violation of immigration law, the driver likely cannot refuse to show identification.

## 2. Orders to step outside the vehicle

Officers conducting a car stop may order the driver to step out of the vehicle as a precautionary measure. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). As discussed below, passengers may also be ordered to exit even without RS. *Maryland v. Wilson*, 519 U.S. 408 (1997). The use of force to remove occupants from the vehicle is somewhat constrained by regulation: ICE officers “shall always use the **minimum non-deadly force necessary** to accomplish the officer’s mission and shall escalate to a higher level of non-deadly force only when such higher level of force is warranted by the actions, apparent intentions, and apparent capabilities of the suspect, prisoner, or assailant.” 8 C.F.R. § 287.8(a)(1)(iii). However, ICE will likely justify the use of force based on an individual’s criminal history and perceived dangerousness; as such, forcible removals from a vehicle may be difficult to challenge.

## 3. Questions about citizenship and removability

If there is RS of the driver, the ICE officer may ask questions about citizenship and removability. 8 U.S.C. § 1357(a)(1); *see also Rajah v. Mukasey*, 544 F.3d 427, 441 (2d Cir. 2008) (“The Fourth Amendment does provide protection against random or gratuitous questioning related to an individual’s immigration status. For example, government agents may not stop a person for questioning regarding his citizenship status without a reasonable suspicion of alienage.”). The information provided to the officer during this encounter can then be used as a basis for a subsequent arrest. 8 C.F.R. § 287.8(b)(3).

However, if this questioning dispels any suspicion, the officer may not prolong a car stop for additional questioning. Only if there is independent reasonable suspicion of another occupant’s alienage can the officer continue to detain the vehicle. *Rodriguez v. United States*, 575 U.S. 348, 357 (2015) (extending a car stop after its original purpose is completed requires additional reasonable suspicion). For instance, if someone in the car states that they are not a U.S. citizen or provides identification issued by a foreign government (e.g. passport or consular ID), this information can provide the basis for further questioning and prolonging the stop. *See infra* Part C.3 (considerations for passengers asked about their identity or citizenship). Reasonable suspicion does not override any of the occupants’ Fifth Amendment right to remain silent and decline to answer such questions about immigration status.

#### 4. Arrest

If ICE has an administrative warrant for the driver and confirms their identity, officers are permitted under regulation to take the driver into custody. 8 C.F.R. § 287.8(c)(2). The INA also authorizes an ICE officer to make a **warrantless** arrest if there is (1) “reason to believe that the [noncitizen] so arrested is in the United States in violation of” immigration law; and (2) the person “is likely to escape before a warrant can be obtained for his arrest.” 8 U.S.C. §1357(a)(2). “Reason to believe” is the equivalent of “probable cause” in the criminal context—a higher threshold than RS, and one that requires greater certainty. In the Second Circuit, an officer has probable cause to arrest an individual for a violation of immigration laws where, after a proper stop, any of the following occurs:

- The individual admits alienage, but fails to produce any documentation or details to confirm valid immigration status;
- The individual produces identification that appears to be fabricated and fails to produce any evidence of their right to remain in the United States;
- The individual admits to entering the United States unlawfully; or
- The individual possesses an expired visa, and is unable to produce any other evidence demonstrating the validity of the visa.<sup>9</sup>

As for the likelihood of escape, the Second Circuit has held that if the driver’s “deportability is clear and undisputed,” this may be a “sufficient basis . . . to believe that escape is likely.” *Contreras v. United States*, 672 F.2d 307, 309 (2d Cir. 1982). However, courts in other circuits have required independent evidence that a suspect is likely to escape—i.e., more than probable cause of removability.<sup>10</sup>

Finally, if ICE initiates the car stop because an officer mistakenly believes a particular individual is in the vehicle (i.e., has an administrative warrant or probable cause but stops the wrong vehicle), any arrests resulting from the stop can be challenged unless the ICE officer’s mistake was “reasonable.” See *Hill v. California*, 401 U.S. 797, 804 (1971) (holding that a defendant who was mistakenly arrested may not suppress evidence as long as there was probable cause for the actual suspect and the mistake was “reasonable”); see also *Kansas v. Glover*, slip op. at 9 (reasonable to infer that a car’s registered owner is the current driver). Cf. *Hernandez v. United States*, 939 F.3d 191, 201-03 (2d Cir. 2019) (the fact that arrestee’s name was similar to the name on a removal order did not establish probable cause, and a “reasonable inquiry would have revealed that Hernandez was a U.S. citizen who could not have been subject to an immigration detainer”).

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<sup>9</sup> See Immigrant Legal Resource Center, *Motion to Suppress Supplement, Developments in Circuit Cases*, 10-11 (Dec. 2017) (collecting cases), <https://bit.ly/34MHHFq>.

<sup>10</sup> See, e.g., *United States v. Harrison*, 168 F.3d 483 (4th Cir. 1999); *United States v. Cantu*, 519 F.2d 494, 497 (7th Cir. 1975); see also *United States v. Pacheco-Alvarez*, 227 F. Supp. 3d 863, 872, 890 (S.D. Ohio 2016) (holding that the defendant did not pose an escape risk, even though fingerprint evidence and his admissions confirmed he was in the country unlawfully, when he was arrested during a traffic stop “a few miles from his home” on the way to his “stable job as a painter,” “lacked any known criminal history, . . . answered the officers’ questions without incident,” and “lived with his fiancé” and her children). Advocates should therefore preserve the argument that *Contreras* applied an incorrect standard.

**Practice Tip:** Advocates should advise clients that a driver is required by New York law to show a driver’s license and registration when stopped by any law enforcement officer, including ICE. Clients should also know that ICE can order a driver and all passengers to get out of the car and may arrest the occupants if the officer has probable cause that the client violated an immigration law. However, clients can also ask the officers about why they are being stopped or ordered to step outside the car. Questions such as “Why are you stopping me?” or “Do you have a warrant?” may deter the officer from continuing the interrogation or arrest and end the encounter.

Finally, it is important for clients to know that, while ICE training materials instruct officers not to use force to remove a driver from the car, officers have been known to escalate car stops by drawing weapons or breaking car windows. Clients should assess the safety of the situation when deciding whether to follow ICE’s orders or to ask questions before complying. In any situation, a client still has the right to remain silent and to refuse to answer questions about their identity (while still complying with a request for identification), their place of birth, or their immigration history. Advocates should inform clients that any such information that they give to ICE officers will be used as the basis for further interrogation and will be used against them in removal proceedings.

## C. Considerations for passengers

### 1. Fourth Amendment protections for passengers

During a car stop, all passengers are seized within the meaning of the Fourth Amendment and are thus entitled to its protections and challenges arising from those protections. *Brendlin v. California*, 551 U.S. 249, 257 (2007) (“A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver . . . and the police activity that normally amounts to intrusion on ‘privacy and personal security’ does not normally . . . distinguish between passenger and driver.”). The Supreme Court recognizes that passengers would generally not “feel free to leave, or to terminate the personal encounter any other way, without advance permission.” *Id.* at 258.

### 2. Orders to step outside or stay inside the vehicle

However, as long as the car stop itself is justified by RS for anyone in the vehicle, a temporary detention of the passengers does not violate the Fourth Amendment. Even if the ICE officer has no individualized suspicion, i.e., even if a passenger is not targeted or under suspicion by ICE, the officer is still permitted to instruct the passenger to exit or remain in the vehicle for safety reasons. *Maryland v. Wilson*, 519 U.S. 408 (1997). In this respect, the passenger in a vehicle



during a car stop is in a different position from an individual who is stopped by ICE while walking on the street. However, if asked to step outside or stay inside the vehicle, the passenger may still inquire whether they are free to leave.

### 3. Answering questions about citizenship and removability

ICE sometimes questions all the occupants of a vehicle during a stop, even those for whom there is no individualized suspicion. The Supreme Court has held that “interrogation relating to one’s identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure.” *I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984). Once a vehicle is lawfully stopped, that is, the officer may question the passengers without needing particularized RS or any additional Fourth Amendment justification. However, passengers questioned in this manner have a Fifth Amendment right to remain silent during such questioning and thus have no obligation to respond or to produce identification.

Without RS, ICE cannot extend a car stop or detain a passenger solely because the passenger is refusing to show ID. “[I]f the person refuses to answer and the police take additional steps . . . to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure.” *I.N.S. v. Delgado*, 466 U.S. at 216-17. Further, under New York law, police may not arrest or detain a passenger simply for refusing to identify themselves.<sup>11</sup> *People v. Howard*, 50 N.Y.2d 583, 590-92 (1980). In other words, ICE may not extend a car stop or detain a passenger solely because the passenger is refusing to show ID. However, the refusal to produce identification may contribute to an officer’s reasonable suspicion. In addition, once a passenger admits alienage, an ICE officer is permitted to demand immigration documents. *See* 8 U.S.C. § 1304(e) (making it a misdemeanor for an adult noncitizen not to carry documentation).

**Practice Tip:** It is important for clients to understand that ICE may stop and ask them questions if they are riding in a car and anyone in the car is suspected of violating an immigration law. ICE can also order them to get out of the vehicle or to stay in the vehicle. However, clients should know that they are not legally required to state their name, show identification, or answer any questions about their identity, place of birth, or immigration history. If interrogated, passengers should ask whether they are free to leave. If the ICE officer indicates that they are not, passengers should remain silent and refuse to answer questions. Advocates should inform clients that any information that they give to ICE officers will be used to extend the car stop and potentially used against them in removal proceedings.

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<sup>11</sup> An exception to this is if the driver does not have a license or ID. Then, some New York courts have held that an officer is justified in demanding passengers’ identification. *People v. Jones*, 8 A.D.3d 897, 898 (App. Div. 2004).

#### D. Fingerprinting during a car stop

ICE sometimes uses mobile devices to fingerprint the occupants of a vehicle before deciding whether to make an arrest. Although the Fourth Amendment does apply to fingerprint collection, probable cause or judicial authorization is not needed for fingerprinting during a brief detention (e.g., car stops). The Supreme Court has explained:

Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment. It is arguable, however, that, because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment **even though there is no probable cause in the traditional sense . . . .** Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions.

*Davis v. Mississippi*, 394 U.S. 721, 727 (1969).

If an arrest or seizure itself is lawful, so too is fingerprinting the seized individual. *See United States v. Kelly*, 55 F.2d 67, 70 (2d Cir. 1932) (fingerprinting incident to lawful arrest infringes no constitutional right). The Court has routinely recognized fingerprinting as an administrative step “incident to arrest,” not as a separate search or seizure requiring additional justification. *See, e.g., Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 58 (1991) (describing fingerprinting as one of the “administrative steps incident to arrest”). Therefore, if an ICE officer has RS for an occupant of a vehicle during a car stop, the officer is most likely not violating the Fourth Amendment by fingerprinting them. However, by the same principle, **ICE probably does not have authority to fingerprint anyone in the car for whom it has no particularized suspicion.**<sup>12</sup>

**Practice Tip:** Clients should know that ICE officers can take a person’s fingerprints if the officers have reasonable suspicion that the person violated an immigration law. The officers may also take their fingerprints if ICE decides to arrest them.

<sup>12</sup> A related issue is whether improperly obtained fingerprint evidence can be suppressed in removal proceedings. This question turns on whether fingerprint information is considered “identity” information, which may not be suppressed, or evidence of alienage, which is suppressible. *See Pretzantzin v. Holder*, 736 F.3d 641, 651 (2013) (noting this distinction but declining to “decide where identity ends and alienage begins”); *see also Lopez-Mendoza*, 468 U.S. at 1039 (“The ‘body’ or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred.”). One consideration is whether the unlawful fingerprint scan “links” to information that is already in the federal government’s possession, or if it leads to new evidence from other non-federal sources, like state police databases. In the latter scenario, the case for suppression is stronger. *Cf. Pretzantzin*, 736 F.3d at 652 (“linkage rationale . . . does not apply with equal force” where “alienage-related evidence was in the possession of a municipal transit police department rather than immigration officials”).

Advocates can advise clients to ask the officers to justify taking their fingerprints by asking: “Why am I being fingerprinted?” This is especially important where the client suspects that the ICE officer does not know the client’s identity or is asking for the client’s fingerprints based on their perceived ethnicity or appearance. The client can also refuse to give consent to such fingerprinting by saying: “I don’t consent to being fingerprinted.” Advocates should advise the client to repeat this statement, even if ICE forces them to give their fingerprints.

### E. When can ICE search a car?

ICE officers conducting car stops have limited authority to search the vehicle without a search warrant or the driver’s consent. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). An officer must have probable cause that “contraband” or evidence of an offense will be found before conducting a search of a vehicle’s compartments, including containers and objects belonging to the occupants. *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999). However, if there is “a reasonable belief that the suspect poses a danger,” the officer may search the passenger compartment, limited to areas where weapons may be found (e.g., the glove compartment). *Michigan v. Long*, 463 U.S. 1032, 1049 (1983).

If the ICE officer arrests any of the car’s occupants, a “search incident to arrest” may include parts of the vehicle, but only if either (1) the officer has a reasonable belief that evidence relevant to the arrest will be found in the vehicle, or (2) the arrestee is unrestrained and within reaching distance of the passenger compartment. *Arizona v. Gant*, 556 U.S. 332, 351 (2009).

Finally, the Supreme Court has held that law enforcement may conduct a thorough “inventory search” of an arrestee’s vehicle after the vehicle is taken into custody, provided that the search is done according to a written policy. *Colorado v. Bertine*, 479 U.S. 367 (1987). However, ICE Enforcement and Removal Operations (ERO) does not have such a policy, and agency training materials prohibit ICE officers from conducting vehicle inventory searches.<sup>13</sup>

**Practice Tip:** It is important for clients to understand that ICE may pat them down above their clothes for “officer safety,” but cannot search anyone’s pockets or inside the car (including the glove compartment or trunk) without a search warrant or the owner’s consent. Advocates should advise their clients to say: “I do not consent to a search,” or “I don’t want you to search my car.”

<sup>13</sup> Office of the Principal Legal Advisor, 4th Amendment Training [Refresher for ERO FUG OPS], at 61.

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Contact [litigation@immdefense.org](mailto:litigation@immdefense.org) with any questions about this advisory and for technical assistance on legal challenges arising from car stops. IDP also keeps track of ICE tactics to better equip individuals to exercise their constitutional rights and to highlight the harms associated with the agency's mass deportation mandate. To report a car stop, contact [kyr@immdefense.org](mailto:kyr@immdefense.org).