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Taking Shelter Under the Fourth Amendment: The Constitutionality of Policing Methods at State-Sponsored Natural Disaster Shelters

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TAKING SHELTER UNDER THE FOURTH AMENDMENT:
THE CONSTITUTIONALITY OF POLICING METHODS AT
STATE-SPONSORED NATURAL DISASTER SHELTERS

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INTRODUCTION

As of 2014, an estimated 575,000 undocumented immigrants called Houston, Texas home—making Houston the third largest major U.S. metropolitan area in terms of its total unauthorized immigrant population.¹ The Dallas, Fort Worth, and Arlington, Texas metropolitan area ranked right behind Houston, with an estimated 475,000 undocumented immigrants living there in 2014.² Then, against the backdrop of increased enforcement of immigration laws in Texas, came Hurricane Harvey in August 2017.³

Prior to Harvey's arrival, the U.S. Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) released a joint statement assuring residents that “[r]outine non-criminal immigration enforcement operations will not be conducted at evacuation sites, or assistance centers.”⁴ Although this comported with ICE and CBP's practices during other recent hurricanes,⁵ many undocumented immigrants nonetheless feared that heading to a hurricane shelter would put them at a substantial risk for deportation—placing many of them in a life-threatening predicament.⁶

1. Jeffrey S. Passel & D'Vera Cohn, *20 Metro Areas Are Home to Six-in-Ten Unauthorized Immigrants in U.S.*, PEW RES. CTR. (Feb. 9, 2017), <http://www.pewresearch.org/fact-tank/2017/02/09/us-metro-areas-unauthorized-immigrants/> [<https://perma.cc/A4ZM-HS9A>].

2. *Id.*

3. See Simon Romero & Miriam Jordan, *It Was an Uneasy Time for Immigrants in Texas. Then the Rains Came.*, N.Y. TIMES (Aug. 29, 2017), <https://www.nytimes.com/2017/08/29/us/immigration-harvey-border-patrol.html> [<https://perma.cc/KKG3-Q5WS>].

4. Press Release, U.S. Dep't of Homeland Sec., CBP and ICE Statement Regarding Hurricane Harvey (Aug. 25, 2017) [hereinafter Hurricane Harvey Joint Statement], <https://www.dhs.gov/news/2017/08/25/cbp-and-ice-statement-regarding-hurricane-harvey> [<https://perma.cc/4PLY-SQ3V>].

5. See Press Release, U.S. Dep't of Homeland Sec., ICE-CBP Joint Message Regarding Hurricane Isaac (last published Aug. 27, 2015) [hereinafter Hurricane Isaac Joint Statement], <https://www.dhs.gov/publication/ice-cbp-joint-message-regarding-hurricane-isaac> [<https://perma.cc/NP66-6CQV>]; Press Release, U.S. Dep't of Homeland Sec., ICE-CBP Joint Message Regarding Hurricane Matthew (Oct. 6, 2016) [hereinafter Hurricane Matthew Joint Statement], <https://www.dhs.gov/news/2016/10/06/ice-cbp-joint-message-regarding-hurricane-matthew> [<https://perma.cc/Z3Z2-9QQB>].

6. See Lorena O'Neil, *An Undocumented Journey Through Harvey*, ESQUIRE (Aug. 31, 2017), <http://www.esquire.com/news-politics/a57277/undocumented-immigrant-hurricane-harvey/> [<https://perma.cc/SE9D-X535>]. Many attribute this fear to CBP's refusal to close its roadside immigration checkpoints in Texas prior to Hurricane Harvey's arrival. See, e.g.,

Take, for example, the story of Maria, an undocumented immigrant living in Houston during Hurricane Harvey.⁷ The hurricane's floodwaters began to seep into Maria's home faster and faster.⁸ But after restlessly waiting for over three hours for rescuers to reach her and her loved ones, Maria realized that she needed to act.⁹ With her wheelchair-bound friend and three younger children situated in an inflatable kiddie pool, Maria led her family for seventy-five minutes through frigid, chest-deep floodwaters to the local hurricane shelter.¹⁰ Yet the floodwaters did not scare Maria the most.¹¹ Instead, Maria wondered what would happen when she reached the shelter—would they ask her for papers?¹² Despite fearing that the choice to head to the shelter may leave her five American-born children without parents, she continued on.¹³

Less than two weeks later, Florida found itself bracing for Hurricane Irma, “one of the strongest Atlantic hurricanes ever observed.”¹⁴ Just days before Irma's life-threatening impact,¹⁵ Sheriff Grady Judd of the Polk County Sheriff's Office took to Twitter to make this proclamation to Polk County, Florida residents: “If you go to a shelter for #Irma, be advised: sworn [law enforcement officers] will be at every shelter, checking IDs. Sex offenders/predators will not be allowed.”¹⁶ In a follow-up tweet, Sheriff Judd reiterated: “If you go to a shelter for #Irma and you have a warrant, we'll gladly escort you to the safe and secure shelter called the Polk County

Romero & Jordan, *supra* note 3.

7. O'Neil, *supra* note 6.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Elizabeth Djinis, *It's Time to Prepare as Hurricane Irma Threatens Florida*, SARASOTA HERALD-TRIB. (Sept. 5, 2017, 8:56 PM), <http://www.heraldtribune.com/news/20170905/its-time-to-prepare-as-hurricane-irma-threatens-florida> [<https://perma.cc/5DWW-8ATE>].

15. Christine Hauser, *Florida Sheriff Plans to Check for Warrants at Hurricane Shelters*, N.Y. TIMES (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/us/polk-sheriff-hurricane-florida.html> [<https://perma.cc/Q9XG-QQNR>].

16. Polk County Sheriff (@PolkCoSheriff), TWITTER (Sept. 6, 2017, 7:30 AM), <https://twitter.com/PolkCoSheriff/status/905438093527928834> [<https://perma.cc/VH8N-EVNS>].

Jail.”¹⁷ A Polk County Sheriff’s spokeswoman later clarified that officials would not be checking entrants’ immigration status.¹⁸

Sheriff Judd’s tweets sent shockwaves throughout the country,¹⁹ and the policy was even subject to a lawsuit in Florida state court.²⁰ According to court documents, Polk County officers stationed themselves outside of Polk County shelters, stopped every individual seeking entry, and gave each person two options: provide a valid, state-issued ID so that officers could run a warrant check, or provide fingerprints for later analysis.²¹ Plaintiffs sought to have this practice declared unconstitutional, claiming that these “checkpoints” were unreasonable searches and seizures under the Fourth Amendment.²² One Polk County Sheriff’s official characterized the lawsuit as “frivolous and without merit.”²³

The decisions Texas and Florida officials made during Hurricanes Harvey and Irma, respectively, raise two seemingly unprecedented constitutional issues—both of which this Note will address. First, does the Constitution allow states and/or the federal government to establish “checkpoints” to screen entrants to state-sponsored natural disaster shelters for outstanding arrest warrants? The Fourth Amendment protects against “unreasonable searches and seizures,”²⁴ yet the Supreme Court permits suspicionless seizures at

17. Polk County Sheriff (@PolkCoSheriff), TWITTER (Sept. 6, 2017, 7:31 AM), <https://twitter.com/PolkCoSheriff/status/905438240278278144> [<https://perma.cc/ZXN4-RBUZ>].

18. Hauser, *supra* note 15.

19. See, e.g., AJ Willingham, *Sheriff Says Those with Warrants Should Go to Jail; Not a Hurricane Shelter*, CNN (Sept. 7, 2017, 11:47 AM), <http://www.cnn.com/2017/09/06/us/polk-county-sheriff-irma-tweets-trnd/index.html> [<https://perma.cc/9JPK-PRRK>].

20. See Complaint ¶ 1, *Libre by Nexus v. Judd*, No. 2017CA-003170-0000-00 (Fla. Cir. Ct. filed Sept. 10, 2017) [hereinafter *Nexus Complaint*], <https://pro.polkcountyclerk.net/PRO/PublicSearch/PublicSearch> [<https://perma.cc/P4N6-XNKK>] (select “Public Access,” then select “Circuit Civil” under the “Court Types” heading, then enter the case number identified above in the “Uniform Case Number” text box). The plaintiffs voluntarily dismissed the case on March 23, 2018. See Notice of Voluntary Dismissal, *Libre by Nexus*, No. 2017CA-003170-0000-00 (Fla. Cir. Ct. filed Mar. 23, 2018) (for directions to access this material, see *id.*).

21. *Nexus Complaint*, *supra* note 20, ¶¶ 29-32.

22. *Id.* ¶¶ 4, 40-43, 48.

23. Cleve R. Wootson Jr., *Florida Sheriff Sued After Threatening to Scour Hurricane Shelters for Criminals*, WASH. POST (Sept. 11, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/09/11/florida-sheriff-sued-after-threatening-to-scour-hurricane-shelters-for-criminals/> [<https://perma.cc/39V8-QG8D>]. Notably, the official conceded to not having read the lawsuit. *Id.*

24. U.S. CONST. amend. IV.

state-implemented checkpoints if both the “gravity of the public concerns” at stake and the checkpoint’s ability to further that public interest outweigh the checkpoint’s intrusiveness into personal liberties.²⁵ With the number of outstanding arrest warrants in large cities across the country ranging from 70,000 to 1.8 million,²⁶ the legality of general welfare shelter checkpoints likely would substantially influence whether hundreds of thousands decide to seek shelter from a natural disaster.

Second, does the Fourth Amendment allow ICE agents to enter a natural disaster shelter and inquire as to the occupants’ citizenship status? Immigration status enforcement has not yet occurred at natural disaster shelters.²⁷ However, given President Trump’s approach to immigration issues,²⁸ ranging from promises to build a wall on the U.S.-Mexico border²⁹ to the administration’s controversial immigrant family separation policy,³⁰ it is entirely feasible that ICE or CBP would change its policy regarding natural disaster shelters and begin checking entrants’ immigration status during the next natural disaster.³¹ Therefore, it is important to explore the

25. *Brown v. Texas*, 443 U.S. 47, 50-51 (1979).

26. Nick Selby, *The Backlog: Misdemeanor Arrest Warrants in the USA*, MEDIUM (Oct. 6, 2014), <https://medium.com/@nseby/the-backlog-misdemeanor-arrest-warrants-in-the-usa-213145467db2> [<https://perma.cc/M4CG-ZCK7>]. Additionally, there are an estimated 789,000 outstanding arrest warrants in the FBI’s National Crime Information Center database. *Thousands Run Free Despite Warrants*, ABC NEWS (Aug. 7, 2017), <http://abcnews.go.com/GMA/story?id=125876&page=1> [<https://perma.cc/PN3L-99H5>].

27. *See, e.g.*, Hurricane Harvey Joint Statement, *supra* note 4; Hurricane Isaac Joint Statement, *supra* note 5; Hurricane Matthew Joint Statement, *supra* note 5.

28. *See, e.g.*, President Donald J. Trump, State of the Union Address to the Congress of the United States (Jan. 30, 2018) (transcript available at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/>) [<https://perma.cc/YFL4-WBGA>].

29. *Id.*

30. *See* Camila Domonoske & Richard Gonzales, *What We Know: Family Separation and “Zero Tolerance” at the Border*, NPR (June 19, 2018, 2:17 PM), <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border> [<https://perma.cc/MT9D-UJTV>].

31. *Compare* Press Release, U.S. Customs & Border Protection, Border Patrol Checkpoint Operations During Hurricane Harvey (Aug. 25, 2017), <https://www.cbp.gov/newsroom/speeches-and-statements/border-patrol-checkpoint-operations-during-hurricane-harvey> [<https://perma.cc/2XX5-A8SQ>] (“U.S. Border Patrol checkpoints in the path of Hurricane Harvey in Texas will close as state highways close.”), *with* Hurricane Matthew Joint Statement, *supra* note 5 (“[T]here will be no immigration enforcements ... including the use of checkpoints for immigration enforcement.”).

constitutionality of this practice now, before another natural disaster threatens the lives of thousands because they fear deportation.

This Note will address both of these constitutional concerns in the hypothetical implementation of both “warrant checkpoints” and immigration status enforcement at a natural disaster shelter. In this scenario, a state-sponsored natural disaster shelter employs law enforcement officers to perform warrant checks on each entrant prior to admission, turning away those who choose not to participate. Then, while entrants are inside the shelter, ICE agents perform sweeps of the shelter, looking for any entrants that are potentially in the country unlawfully.

The analysis proceeds in three parts. Part I will provide a brief layout of the applicable Fourth Amendment jurisprudence and establish the relevant analytical framework for subsequent Parts. Part II will address “warrant checkpoints” at natural disaster shelters, analyzing first whether a seizure occurs.³² Concluding that a seizure does occur in checking each entrant for a warrant prior to entry,³³ Part II subsequently analyzes the reasonableness of that seizure, and ultimately determines that the goal of the “checkpoint”—which can only be characterized as furthering the State’s interest in general crime prevention—is not sufficient to justify such suspicionless seizures.³⁴ Part III then analyzes the constitutionality of the situation when ICE agents enter a natural disaster shelter and interact with its occupants, asking questions designed only to determine citizenship status. This Part concludes that under the Supreme Court’s jurisprudence, such questioning by ICE agents is likely a consensual encounter that does not amount to a seizure under the Fourth Amendment.³⁵

I. THE FOURTH AMENDMENT’S PROSCRIPTION AGAINST UNREASONABLE SEIZURES

In order to understand how best to analyze the constitutionality of natural disaster shelter checkpoints, as well as immigration

32. *See infra* Part II.A.

33. *See infra* Part II.A.

34. *See infra* Part II.B.

35. *See infra* Part III.C.

status enforcement within natural disaster shelters, one needs to first understand what a “seizure” is under the Fourth Amendment, what a “reasonable” seizure is, and how checkpoints comport with those constitutional safeguards.

A. *What Is a “Seizure”?*

Before attempting to set out which seizures the Fourth Amendment does and does not permit, one must define what exactly constitutes a “seizure” under the Fourth Amendment.³⁶ As the Supreme Court has made clear, “a seizure does not occur simply because a police officer approaches an individual and asks a few questions.”³⁷ It is important, then, to understand where the Court draws the line between a “consensual encounter”³⁸ and a seizure.

A seizure occurs under the Fourth Amendment “when there is a governmental termination of freedom of movement through means intentionally applied.”³⁹ Typically, the “means” is either some application of “physical force,” or some “show of authority” to which a person submits.⁴⁰ Any application of physical force—even when unsuccessful in subduing a person—is sufficient to constitute a seizure.⁴¹ An officer’s *show* of authority, however, is not by itself sufficient to give rise to a seizure.⁴² A person must submit to an officer’s show of authority before such assertion transforms the encounter into a seizure.⁴³ A police officer seizes a person, then, when he “accosts an individual and restrains his freedom to walk away”⁴⁴ but not when the officer approaches an individual who runs away.⁴⁵ In the latter situation, no seizure occurs until officers physically control the fleeing individual.⁴⁶

36. See U.S. CONST. amend. IV.

37. *Florida v. Bostick*, 501 U.S. 429, 434 (1991).

38. *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984) (per curiam).

39. *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989) (emphasis omitted).

40. *California v. Hodari D.*, 499 U.S. 621, 625-26 (1991).

41. *Id.* at 624.

42. *Id.* at 626.

43. *Id.*

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

45. *Hodari D.*, 499 U.S. at 626.

46. *Id.* at 629.

Whether a show of authority is enough to affect a seizure is a fact-intensive inquiry that requires courts to analyze the totality of the circumstances surrounding the alleged seizure.⁴⁷ Courts must determine whether a reasonable person, in those facts and circumstances, would have felt free “to disregard the police and go about his business”⁴⁸ or otherwise ignore the officer’s questioning.⁴⁹ If the totality of the circumstances demonstrates that a reasonable person, measured objectively from the perspective of a law-abiding citizen,⁵⁰ would have felt free to disregard the officer’s questions, then there is no seizure.⁵¹ These situations, often referred to as “consensual encounters,” do not implicate the Fourth Amendment.⁵² Factors that courts consider in this analysis include, but are not limited to, whether (1) the officer made any physical application of force, overwhelming show of force, or other intimidating movements; (2) the officer issued commands or otherwise spoke in an authoritative tone of voice; (3) the officer had a weapon and/or a badge; and (4) the officer blocked any exits.⁵³

B. What Is an “Unreasonable” Seizure?

The text of the Fourth Amendment provides “[t]he right of the people to be secure ... against *unreasonable* searches and seizures.”⁵⁴ It is important to emphasize that the Fourth Amendment requires only that seizures be reasonable;⁵⁵ there is no bright-line rule requiring law enforcement to obtain a warrant before seizing a person.⁵⁶ Thus, the relevant question becomes whether the seizure in question is “reasonable” under the Fourth Amendment.⁵⁷

47. See *United States v. Drayton*, 536 U.S. 194, 201 (2002).

48. *Id.* (quoting *Hodari D.*, 499 U.S. at 628).

49. *Florida v. Bostick*, 501 U.S. 429, 436 (1991).

50. *Id.* at 438.

51. *Id.* at 436-37.

52. See, e.g., *id.* at 434 (quoting *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984) (per curiam)).

53. See, e.g., *Drayton*, 536 U.S. at 204; *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.); see also *United States v. Griffith*, 533 F.3d 979, 983 (8th Cir. 2008) (listing additional factors).

54. U.S. CONST. amend. IV (emphasis added).

55. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

56. *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

57. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 450 (1990).

When the police seize a person who is walking along the street, courts require that the police have reasonable, articulable suspicion that the person was engaging, or was about to engage in, criminal activity.⁵⁸ Law enforcement must form that reasonable, articulable suspicion with objective facts and observations so that a judge may later evaluate the seizure's constitutional validity.⁵⁹ "Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result [that the Supreme] Court has consistently refused to sanction."⁶⁰ Because of these concerns, seizures are ordinarily unreasonable when not supported by any individualized suspicion of criminal wrongdoing.⁶¹

With the general framework for determining whether an encounter with the police rises to the level of an unreasonable seizure under the Fourth Amendment set out, this Note turns next to establish the analytical framework necessary for determining whether a checkpoint is an unconstitutional seizure under the Fourth Amendment.

C. Checkpoints as Constitutional (or Unconstitutional) "Seizures"

The Supreme Court recognizes the "well established" fact "that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment."⁶² This conclusion is inescapable, because in operating a highway checkpoint, the police intentionally station themselves on a public road and stop each car driving on that road, not allowing the traveler to continue until the police say that the person is free to continue.⁶³

The Court, however, treats checkpoints as a "limited" exception to the general rule that a seizure must be supported by some individualized suspicion.⁶⁴ Though a checkpoint allows the police to

58. *See Terry*, 392 U.S. at 20-21.

59. *Id.* at 21-22.

60. *Id.* at 22.

61. *Chandler v. Miller*, 520 U.S. 305, 308 (1997).

62. *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000); *see Sitz*, 496 U.S. at 450; *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976).

63. *See Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989).

64. *Edmond*, 531 U.S. at 41.

stop every motorist traveling on a road indiscriminately, the very fact that the police stop everyone puts a motorist on notice that they, too, will be stopped.⁶⁵ This advance notice results in the motorist being “much less likely to be frightened or annoyed by the intrusion” the checkpoint causes.⁶⁶ Yet this reduced annoyance does not vitiate the Fourth Amendment’s protection against arbitrary invasions of privacy.⁶⁷ In analyzing whether a checkpoint is constitutional, then, “it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion.”⁶⁸

In performing this balancing test, courts must analyze three factors. First, the court must consider “the gravity of the public concerns served by the seizure.”⁶⁹ Next, the court must take into account “the degree to which the seizure advances the public interest.”⁷⁰ Finally, the court must balance the strength of the first two factors against “the severity of the interference with individual liberty.”⁷¹ Weighing the interests is necessary to “assure that an individual’s reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers.”⁷² Under this balancing test, the Supreme Court has upheld DUI⁷³ and border⁷⁴ checkpoints as reasonable seizures, but has struck down narcotics checkpoints on highways⁷⁵ and random spot checks for a motorist’s license and registration as unreasonable seizures.⁷⁶

Specifically concerning the public interest being served, the Supreme Court has never approved a checkpoint “whose primary purpose was to detect evidence of ordinary criminal wrongdoing.”⁷⁷

65. *United States v. Ortiz*, 422 U.S. 891, 894-95 (1975).

66. *Id.* at 895.

67. *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979).

68. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 449-50 (1990) (quoting *Treasury Employees v. Von Raab*, 489 U.S. 656, 665-66 (1989)).

69. *Brown v. Texas*, 443 U.S. 47, 50-51 (1979).

70. *Id.* at 51.

71. *Id.*

72. *Id.*

73. *Sitz*, 496 U.S. at 454-55.

74. *United States v. Martinez-Fuerte*, 428 U.S. 543, 553, 561-62 (1976).

75. *City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000).

76. *Delaware v. Prouse*, 440 U.S. 648, 660-61 (1979).

77. *Edmond*, 531 U.S. at 41.

Instead, “each of the checkpoint programs that [the Court has] approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety.”⁷⁸ In considering whether the public interests that the checkpoint serves satisfy the “exception[,]” courts should “consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue.”⁷⁹ If the primary purpose of the checkpoint appears to be “general crime control,” the Supreme Court is “particularly reluctant” to recognize that checkpoint as valid.⁸⁰

When determining the degree to which the checkpoint serves the purported public interest, courts are cautioned against substituting their judgment of effective alternative measures for the judgment of those “politically accountable officials” responsible for implementing the checkpoint.⁸¹ Though an analysis of the checkpoint’s effectiveness is warranted, courts must recognize that “the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.”⁸²

On the other side of the scale, with regard to the privacy interest at stake, courts are instructed that “[i]n the absence of any basis for suspecting [a person] of misconduct, the balance between the public interest and [one’s] right to personal security and privacy tilts in favor of freedom from police interference.”⁸³ Generally, however, the Court has viewed checkpoints’ interference on individual liberty as “slight.”⁸⁴ Two factors drove the Court to this conclusion.⁸⁵ First, the objective level of intrusion was usually low: the duration of the seizure was short, and the ensuing investigation was not intense.⁸⁶ Second, the checkpoints were subjectively less intrusive in that they

78. *Id.*

79. *Id.* at 42-43.

80. *Id.* at 43.

81. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 453 (1990).

82. *Id.* at 453-54.

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

84. *Sitz*, 496 U.S. at 451-52; *see United States v. Martinez-Fuerte*, 428 U.S. 543, 557-59 (1976).

85. *See Sitz*, 496 U.S. at 451-53; *Martinez-Fuerte*, 428 U.S. at 558-59.

86. *Sitz*, 496 U.S. at 452.

generated no concern or fright in a lawful traveler.⁸⁷ This is because the police did not arbitrarily decide which vehicles would be subject to the checkpoint.⁸⁸ Rather, police established these checkpoints well in advance, notified motorists of their existence, and carried them out according to written guidelines.⁸⁹

This Part accomplished three tasks. First, it established what kinds of interactions with the police constitute a seizure under the Fourth Amendment. Second, it noted the general rule that, without some individualized suspicion of past or ongoing criminal activity, the police cannot seize a person. Lastly, it set out the relevant framework for determining whether checkpoints (which permit suspicionless seizures *en masse*) are reasonable under the Fourth Amendment. With this background established, this Note now turns to the first issues it set out to explore: (1) whether warrant checkpoints at natural disaster shelters are seizures under the Fourth Amendment, and (2) if so, whether those seizures are “reasonable.”

II. THE CONSTITUTIONALITY OF WARRANT CHECKPOINTS AT NATURAL DISASTER SHELTERS

In the first part of this Note’s hypothetical natural disaster shelter scenario, police employ the same sort of checkpoint that the Polk County Sheriff’s Office allegedly employed during Hurricane Irma: police officers are stationed at each entry point to the shelter and stop every individual seeking entry, requiring that entrants either provide identification or fingerprints so that the police can check the entrants for outstanding warrants.⁹⁰

The analysis proceeds in two steps. First, this Note asks whether conducting a checkpoint to determine if one has an outstanding warrant before admitting them to a natural disaster shelter is a “seizure” under the Fourth Amendment. Such checkpoints are in fact seizures, because the police actively and intentionally terminate one’s freedom of movement into the shelter.⁹¹ Second, this Note

87. *Martinez-Fuerte*, 428 U.S. at 558.

88. *See id.* at 559.

89. *Sitz*, 496 U.S. at 453.

90. *See* Nexus Complaint, *supra* note 20, at ¶¶ 29-32.

91. *See infra* Part II.A.

then determines whether natural disaster checkpoints for warrants are “reasonable,” utilizing the *Brown v. Texas* balancing test.⁹² In doing so, this Note will weigh the public interests served by the warrant checkpoints and the effectiveness of those checkpoints to serve those public interests against the significance of the checkpoints’ intrusion upon individual liberty.⁹³ This Note ultimately argues that because the primary purpose behind such checkpoints is to further the State’s interest in uncovering evidence of ordinary criminal wrongdoing, warrant checkpoints at natural disaster shelters fail to pass constitutional muster.⁹⁴

This Note turns now to the question of whether warrant checkpoints are in fact seizures that implicate the Fourth Amendment.

A. *Warrant Checkpoints at Natural Disaster Shelters as Seizures Within the Meaning of the Fourth Amendment*

A state actor’s effort to stop anyone wishing to enter a natural disaster shelter likely constitutes a “seizure” under the Fourth Amendment. It appears difficult for the government to distinguish between stopping an entrant at a natural disaster shelter and stopping a vehicle at a checkpoint.⁹⁵ Similar to stopping a vehicle on a highway, stopping a person from entering a natural disaster shelter and refusing entry unless the person provides an ID or their fingerprints clearly “terminat[es]” a person’s “freedom of movement” into the shelter through intentional means.⁹⁶ In doing so, the government seizes every entrant to the natural disaster shelter, much like it does when operating a DUI checkpoint on a highway.⁹⁷

Moreover, warrant checkpoints at natural disaster shelters, DUI checkpoints, and border checkpoints share another common characteristic: they each restrict one’s freedom of movement in order to

92. 443 U.S. 47, 50-51 (1979).

93. *Id.*

94. *See infra* Part II.B.3.

95. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 545-47 (1976).

96. *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989).

97. *See Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 450 (1990). Notably, in many checkpoint cases, the government conceded that the checkpoint’s operation gave rise to Fourth Amendment seizures. *See id.* (noting that concession was “correct[.]”); *Martinez-Fuerte*, 428 U.S. at 556.

uncover evidence of ongoing criminal activity in a nonconsensual encounter.⁹⁸ In the case of warrant checkpoints at natural disaster shelters, the government actor demands compliance—the entrant must provide identification or fingerprints so that the government may run a warrant check.⁹⁹ Without compliance, the entrant does not gain entrance—just like at a DUI checkpoint, where one may not continue driving without stopping and engaging with the officer so that the officer may determine whether the driver is intoxicated.¹⁰⁰ Given these circumstances, warrant checkpoints at natural disaster shelters are nearly indistinguishable from other checkpoints that the Court has deemed “seizures” within the meaning of the Fourth Amendment.¹⁰¹

The government may argue that there is no seizure here at all because a person has no positive right to enter a shelter. In other words, the government could assert that it has the right to precondition entry into a public place by requiring the individual to meet certain requirements. For example, when entering a courthouse, bailiffs require a person to pass through metal detectors at the front doors to prevent entrants from bringing in weapons, electronics, or other banned items.¹⁰² The Court’s previous checkpoint cases, the argument goes, focus on the public’s right to continue moving about public highways,¹⁰³ whereas here we are concerned only with one’s ability to enter a certain public area.

This argument likely fails because its logical extension compels the conclusion that the Fourth Amendment would not apply to, for instance, Transportation Security Administration (TSA) security

98. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 34-36 (2000) (narcotics checkpoints); *Sitz*, 496 U.S. at 447-48 (DUI checkpoints); *Martinez-Fuerte*, 428 U.S. at 545-47, 552 (checkpoints at the U.S.-Mexico border for detecting illegal alien trafficking).

99. See Nexus Complaint, *supra* note 20, ¶¶ 29-32.

100. *Sitz*, 496 U.S. at 447. One could make a U-turn or otherwise avoid the checkpoint before reaching it, but that factors into how intrusive the checkpoint is, not whether checkpoint stops are seizures. See *id.* at 450, 452-53.

101. See *supra* note 98 and accompanying text.

102. See, e.g., *Courts & Judicial Services: Security Precautions*, ARLINGTON CTY. GOV’T, <https://courts.arlingtonva.us/security/> [<https://perma.cc/WNX9-QNYA>].

103. See *Edmond*, 531 U.S. at 34; *Sitz*, 496 U.S. at 447; *Martinez-Fuerte*, 428 U.S. at 545-46.

screens in airports,¹⁰⁴ or to metal detectors in courthouses.¹⁰⁵ However, courts across the country make clear that security checkpoints as a precondition to boarding an airplane¹⁰⁶ or entering a federal courthouse¹⁰⁷ implicate the Fourth Amendment. Further, the Supreme Court's dicta in past cases give a strong indication that the Court would subject these measures to Fourth Amendment scrutiny (and uphold them as constitutional).¹⁰⁸ Indeed, each federal circuit presented with a challenge to the constitutionality of TSA security checkpoints found that the Fourth Amendment applied.¹⁰⁹

But there is an important distinction, the government will argue, between a TSA security checkpoint and a warrant checkpoint at a natural disaster shelter. Even though the government may acknowledge that TSA body scanners constitute a "search" under the Fourth Amendment,¹¹⁰ it will argue warrant checkpoints at natural disaster shelters are mere "consensual encounters" rather than seizures.¹¹¹ The government will contend that a request for identification alone does not automatically give rise to a seizure.¹¹² Thus, in this situation, a reasonable person would feel free to decline to submit to the warrant check and subsequent fingerprinting (if applicable) because the officers' mere request for identification at the shelter's entrance is not a "show of authority."¹¹³ Rather, the argument goes, by freely providing a driver's license, the potential

104. See generally *Security Screening*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/travel/security-screening> [<https://perma.cc/RC72-4383>].

105. See *supra* note 102 and accompanying text.

106. See, e.g., *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 3-4, 10 (D.C. Cir. 2011); *United States v. Aukai*, 497 F.3d 955, 957-58, 962-63 (9th Cir. 2007) (en banc); *United States v. Hartwell*, 436 F.3d 174, 178-81 (3d Cir. 2006).

107. See, e.g., *Klarfeld v. United States*, 944 F.2d 583, 585-87 (9th Cir. 1991) (per curiam); *Legal Aid Soc'y of Orange Cty. v. Crosson*, 784 F. Supp. 1127, 1128-31 (S.D.N.Y. 1992).

108. See *Edmond*, 531 U.S. at 47-48 ("Our holding also does not affect the validity of ... searches at places like airports and government buildings."); Daniel S. Harawa, *The Post-TSA Airport: A Constitution Free Zone?*, 41 PEPP. L. REV. 1, 34 & n.227 (2013).

109. Harawa, *supra* note 108, at 34 & n.226, 36-37.

110. *Elec. Privacy Info. Ctr.*, 653 F.3d at 10.

111. See, e.g., *United States v. Drayton*, 536 U.S. 194, 200 (2002). Defendants in the Polk County lawsuit made a similar argument. See Motion to Dismiss Plaintiffs' Amended Complaint at 9-13, *Libre by Nexus v. Judd*, No. 2017-CA-003170 (Fla. Cir. Ct. filed Dec. 21, 2017) [hereinafter *Judd Motion to Dismiss*], <https://pro.polkcountyclerk.net/PRO/PublicSearch/PublicSearch> (for directions to access this material, see *supra* note 20).

112. See, e.g., *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 185 (2004).

113. See *id.*; see also *INS v. Delgado*, 466 U.S. 210, 216 (1984).

entrant consents to the performance of the warrant check or fingerprinting.¹¹⁴ “[A]s long as the police do not convey a message that compliance with their requests is required,” no seizure occurs.¹¹⁵

This argument is problematic in two ways. First, it is not accurate to characterize warrant checkpoints at natural disaster shelters as a “request” for one’s identification or fingerprints. In this situation, police are not requesting entrants to engage in conversation as they freely enter the shelter. Instead, police stop each shelter entrant and demand compliance with the warrant check as a prerequisite for entering the shelter—much like the TSA would demand an airline passenger to submit to a full body scan as a prerequisite for boarding their flight,¹¹⁶ or a local police force would demand that a driver submit to questioning before passing through a DUI checkpoint.¹¹⁷ These are not comparable to other “consensual encounters” like in *United States v. Mendenhall*, in which a federal agent merely “asked” a person in an airport terminal if she would show the agents her passenger ticket and identification.¹¹⁸ It seems quite difficult for the government to show how *requiring* that a potential natural disaster shelter entrant comply with the warrant checkpoint is constitutionally distinguishable from *requiring* submission to a full body scan prior to boarding an airplane.¹¹⁹

Second, regarding the warrant check specifically, the vast majority of courts find that without individualized suspicion that a person has an outstanding arrest warrant, detentions to perform a warrant check are not consensual encounters; they are seizures that fall within the scope of the Fourth Amendment.¹²⁰ In *United States v.*

114. *See, e.g.*, *State v. Baez*, 894 So. 2d 115, 115-17 (Fla. 2004) (per curiam) (holding that a defendant consented to warrant check during consensual street encounter with police).

115. *Florida v. Bostick*, 501 U.S. 429, 435 (1991); *see also Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

116. *See Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 3 (D.C. Cir. 2011).

117. *See Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 447 (1990).

118. 446 U.S. 544, 555 (1980) (plurality opinion).

119. *See Elec. Privacy Info. Ctr.*, 653 F.3d at 3, 10.

120. *See, e.g.*, *United States v. Gross*, 662 F.3d 393, 396-97, 399-401 (6th Cir. 2011); *United States v. Lopez*, 443 F.3d 1280, 1285-86 (10th Cir. 2006); *United States v. Green*, 111 F.3d 515, 519-20 (7th Cir. 1997); *United States v. Lockett*, 484 F.2d 89, 90-91 (9th Cir. 1973) (per curiam). *But see State v. Baez*, 894 So. 2d 115, 115-17 (Fla. 2004) (per curiam).

Luckett, the Ninth Circuit held that a warrant check performed on an individual accused of jaywalking was a separate seizure that unreasonably prolonged the initially lawful seizure for jaywalking.¹²¹ The court ruled that the police had the authority to detain the accused only for as long as “necessary to obtain satisfactory identification” and issue the citation for jaywalking.¹²² The warrant check, which also constituted a seizure, could be valid only if police had reasonable suspicion that there may be an outstanding warrant.¹²³ In a similar vein, the Sixth and Seventh Circuits have held that warrant checks performed during the course of an initially invalid seizure constituted further seizures in violation of the Fourth Amendment where police had no reasonable suspicion to believe that the suspect might have had an outstanding arrest warrant.¹²⁴

Further, on two occasions, the Tenth Circuit has held that the retention of one’s identification for longer than needed to verify the person’s identity, without reason to suspect that the person has an outstanding warrant, is an unconstitutional seizure under the Fourth Amendment.¹²⁵ Particularly relevant is *United States v. Lopez*, in which an officer approached two men standing in the street late at night in a high-crime area and asked for their identification.¹²⁶ Based on his interaction with the individuals, the officer had no reasonable suspicion to believe that either was engaged in criminal activity, much less that either man had an active arrest warrant.¹²⁷ The officer nonetheless took Lopez’s identification card, instructed Lopez to stand by, and went to his patrol car to run a warrant check.¹²⁸ The warrant check took about five minutes.¹²⁹ The Tenth Circuit held that at the time of the warrant check, the encounter between Lopez and the officer was no longer consensual because “[u]nder the totality of the circumstances, no reasonable person in Lopez’s position would have felt free to terminate the

121. 484 F.2d at 90-91.

122. *Id.* at 91.

123. *Id.*

124. *Gross*, 662 F.3d at 396-97, 399-401; *Green*, 111 F.3d at 519-20.

125. *Lopez*, 443 F.3d at 1285-86; *United States v. Lambert*, 46 F.3d 1064, 1066, 1068-69 n.3 (10th Cir. 1995).

126. 443 F.3d at 1282.

127. *Id.* at 1282, 1285.

128. *Id.* at 1282.

129. *Id.*

encounter with [the officer].”¹³⁰ The court emphasized that the officer held onto Lopez’s driver’s license “longer than necessary to confirm Lopez’s ident[ity,]” and that taking the license back to his patrol car rendered Lopez “unable to leave.”¹³¹ Thus, the warrant check itself was a seizure under the Fourth Amendment, and without reason to suspect that Lopez had an outstanding arrest warrant, the seizure was an unreasonable one.¹³²

In the case of natural disaster shelters, police stationed at the shelter’s entrances have no reason to suspect that any one person has an outstanding warrant. Despite this lack of individualized suspicion, each person is compelled to submit to a warrant check or fingerprinting if they have no identification—just like a motorist must submit to police questioning at a highway checkpoint.¹³³ The warrant check process requires the person to stand and wait while the officer runs the warrant check in the computer.¹³⁴ Like in *Lopez*, retaining the entrant’s driver’s license during the warrant check beyond the minimal time necessary to confirm the entrant’s identity, and not giving the license back until the warrant check is complete, renders the entrant unable to terminate the encounter.¹³⁵ Though this process may take only minutes, any detention made “*even momentarily*” implicates the Fourth Amendment’s protections.¹³⁶ Thus, warrant checkpoints at natural disaster shelters are seizures within the meaning of the Fourth Amendment.

Establishing that warrant checkpoints are seizures, however, is merely the first step in the constitutional analysis.¹³⁷ To determine whether these seizures are constitutional, the next Part analyzes

130. *Id.* at 1286.

131. *Id.*

132. *Id.*

133. *See supra* notes 95-101 and accompanying text.

134. *See, e.g., Lopez*, 443 F.3d at 1282.

135. *See id.* at 1286. The government could argue that one could revoke “consent” during the warrant check and demand their license back. This, however, does not negate the fact that the *initial retention* of the license constitutes a seizure. *See id.* at 1282, 1285. Indeed, even an airport screening search implicates the Fourth Amendment upon “the *passenger’s election to attempt entry* into the secured area of an airport.” *United States v. Aukai*, 497 F.3d 955, 961 (9th Cir. 2007) (en banc) (emphasis added) (citation omitted).

136. *Florida v. Royer*, 460 U.S. 491, 498 (1983) (plurality opinion) (emphasis added).

137. *See supra* Parts I.A-B.

whether warrant checkpoints at natural disaster shelters are reasonable seizures.

B. The Reasonableness of Warrant Checkpoints at Natural Disaster Shelters

In subjecting warrant checkpoints at natural disaster shelters to the three-pronged *Brown* reasonableness test,¹³⁸ this Note aims to address arguments on both sides and determine which has greater merit. This Part proceeds in three subsections, each dedicated to a separate prong of the *Brown* analysis. Because the analysis demonstrates that a warrant checkpoint appears to primarily serve the government's interest in general crime prevention, warrant checkpoints at natural disaster shelters are unreasonable seizures in violation of the Fourth Amendment.¹³⁹

1. Framing the Public Interest that Warrant Checkpoints Address

First, what is the gravity of the public concern at issue here?¹⁴⁰ A future challenger's characterization of the public interest warrant checkpoints serve will differ greatly from the government's characterization. Any government entity seeking to justify a warrant checkpoint will almost certainly point to the need to ensure the safety of all of the shelter's occupants. The argument will likely be that those with outstanding warrants present a danger to others within the shelter because of their status as at-large criminals. Indeed, one recent study suggested that a "substantial proportion of people" refuse to utilize hurricane shelters because of "a deep mistrust of other people and a fear of criminal victimization."¹⁴¹ Perhaps a warrant checkpoint will be justified on more narrow grounds, as Sheriff Grady Judd attempted to do during Hurricane

138. See *Brown v. Texas*, 443 U.S. 47, 50-51 (1979).

139. See *infra* notes 186-87 and accompanying text.

140. See *Brown*, 443 U.S. at 50.

141. Ashley K. Farmer et al., *Scared of the Shelter from the Storm: Fear of Crime and Hurricane Shelter Decision Making*, 88 SOC. INQUIRY 193, 207-08 (2018).

Irma, tweeting: “We cannot and we will not have innocent children in a shelter with sexual offenders & predators. Period.”¹⁴²

No doubt that such motivations, particularly the motivation to keep sexual predators away from children, are noble; yet noble motivations are not enough to satisfy the Fourth Amendment’s reasonableness standard.¹⁴³ As a challenger will likely (and successfully) argue, such motivations carry little weight in the *Brown* analysis for two reasons.

First, the Court often relies on the presence of empirical data supporting the asserted public interest that a checkpoint addresses.¹⁴⁴ In *Delaware v. Prouse*, the Court—in striking down the practice of discretionary spot checks of drivers for license and registration—frowned upon the lack of empirical data supporting the assertion that the spot checks promote public safety.¹⁴⁵ It specifically pointed out that without some empirical data, “it must be assumed that finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing randomly from the entire universe of drivers,” thereby weakening the public safety argument.¹⁴⁶ In a later case upholding the constitutionality of sobriety checkpoints,¹⁴⁷ the Supreme Court relied on empirical data that emphasized just how serious of a danger drunk driving posed to the public.¹⁴⁸

Little empirical data exists on crime in hurricane shelters. The government could point to the vast number of reported rapes, homicides, and other crimes that allegedly occurred in the Louisiana Superdome during Hurricane Katrina,¹⁴⁹ but many of those reports were unfounded and speculative.¹⁵⁰ Even if this (arguably unreli-

142. Polk County Sheriff (@PolkCoSheriff), TWITTER (Sept. 6, 2017, 8:16 AM), <https://twitter.com/PolkCoSheriff/status/905449649204584448> [<https://perma.cc/GBH2-EB9J>].

143. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 42-43 (2000).

144. See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 658-60 (1979).

145. *Id.* at 658-60, 663.

146. *Id.* at 659.

147. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 447, 454-55 (1990).

148. *Id.* at 451.

149. See, e.g., Scott Gold, *Trapped in the Superdome: Refuge Becomes a Hellhole*, SEATTLE TIMES (Sept. 1, 2005, 9:29 PM), <https://www.seattletimes.com/nation-world/trapped-in-the-superdome-refuge-becomes-a-hellhole/> [<https://perma.cc/FBX5-4PXH>].

150. David Carr, *More Horrible than Truth: News Reports*, N.Y. TIMES (Sept. 19, 2005), <https://www.nytimes.com/2005/09/19/business/media/more-horrible-than-truth-news-reports.html> [<https://perma.cc/98X9-F644>].

able) data from Hurricane Katrina carries some weight, it simply does not carry the same weight as statistics detailing, for example, the rampant societal issue of drunk driving.¹⁵¹ Additionally, unlike the danger of terrorist attacks in air travel, crime within hurricane shelters is not so prevalent and obvious an issue that a court could classify it as an issue “of paramount importance.”¹⁵²

Second, and even more fatal, is that a warrant checkpoint very much appears to be a checkpoint whose primary purpose “is to uncover evidence of ordinary criminal wrongdoing,” a purpose which the Court has expressly admonished.¹⁵³ In *Edmond*, the Court refused to condone the constitutionality of highway checkpoints designed to discover and seize narcotic drugs.¹⁵⁴ Although removing narcotics from highways would indeed benefit the community, “[t]he detection and punishment of almost any criminal offense serves broadly the safety of the community.”¹⁵⁵ The Court refused to approve seizures of motorists for stops justified not by individualized suspicion of narcotics possession, but “only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.”¹⁵⁶ This purpose may be valid, however, in times of true emergency, such as to “thwart an imminent terrorist attack” or to catch a fleeing criminal who will take a particular route.¹⁵⁷

Stopping every entrant to a natural disaster shelter to check for warrants—without any individualized suspicion—closely resembles what the Court in *Edmond* refused to recognize as lawful: a checkpoint to pursue the ends of general crime control.¹⁵⁸ Natural disaster shelters would “no doubt be safer but for the scourge of [fugitives],”¹⁵⁹ but so would any other public place that people can freely enter. In the situation of warrant checkpoints at natural disaster shelters, there is simply no prominent public danger, as

151. See *supra* notes 147-50 and accompanying text.

152. See *United States v. Hartwell*, 436 F.3d 174, 179 (3d Cir. 2006).

153. *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000).

154. *Id.* at 34-35, 41-42.

155. *Id.* at 42-43.

156. *Id.* at 44.

157. *Id.*

158. See *id.* at 42.

159. *Id.* at 43.

evidenced by reliable and extensive empirical data, to justify an exception to the general requirement that the government have some individualized suspicion before intentionally terminating someone's freedom of movement.¹⁶⁰ Thus, because the primary purpose of warrant checkpoints at natural disaster shelters is "indistinguishable from the general interest in crime control," they are presumably unreasonable and therefore unconstitutional.¹⁶¹

2. The Effectiveness of Warrant Checkpoints in Advancing the Asserted Public Interest

The efficacy of warrant checkpoints at natural disaster shelters is unlikely to influence the analysis.¹⁶² Surely, a warrant checkpoint will be "effective" in a place such as Baton Rouge, Louisiana, where there are over 100,000 active arrest warrants for misdemeanors and serious traffic violations¹⁶³ in a city with an estimated population just under 230,000.¹⁶⁴ If a court were to accept the purpose behind warrant checkpoints as valid, then perhaps there is a strong argument that the checkpoint advances state security interests to a great degree, given the high likelihood that someone with a warrant will attempt to enter a natural disaster shelter.¹⁶⁵

But what of a checkpoint that seeks to expose convicted sexual predators and dispel fears that anyone will be exposed to those dangers in the shelter?¹⁶⁶ Given that there is little reliable empirical

160. See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990); cf. *United States v. Hartwell*, 436 F.3d 174, 179 (3d Cir. 2006) (noting the clear danger of terrorist attacks in airline travel).

161. See *Edmond*, 531 U.S. at 48.

162. See *id.* at 34-35, 41-42 (striking down highway checkpoints for narcotics interdiction as unreasonable, despite the checkpoints having a 9 percent "hit rate").

163. City of Baton Rouge, *City Court Warrants*, OPEN DATA BATON ROUGE, <https://data.brla.gov/Public-Safety/City-Court-Warrants/3j5u-jyar> [<https://perma.cc/TMJ8-T574>]. Of course, not every warrant listed applies to a Baton Rouge resident, see *id.*, but the number of felony arrest warrants and outstanding federal arrest warrants are also relevant here, see *supra* note 26.

164. *QuickFacts, Baton Rouge city, Louisiana*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/batonrougecitylouisiana,la/PST045216> [<https://perma.cc/Q8BT-DBSW>] (asserted population estimate made on July 1, 2017).

165. Cf. *Sitz*, 496 U.S. at 454-55 (relying positively on the fact that nearly 1.5 percent of drivers stopped at the sobriety checkpoint were arrested for alcohol impairment).

166. See *supra* note 142 and accompanying text.

data on the amount of rapes that occur in natural disaster shelters,¹⁶⁷ courts will likely subject such a checkpoint to a more exacting effectiveness analysis.¹⁶⁸ Especially in states that require sexual offenders to obtain a special notation on their driver's license that they are a sex offender,¹⁶⁹ a general warrant checkpoint (in order to prevent *sexual predators* from comingling with children inside) would likely fail. Given the much more effective and less-intrusive alternative method of simply looking at each entrant's driver's license in these states, a general check for outstanding arrest warrants—and not sexual offender status—“does not appear sufficiently productive to qualify as a reasonable law enforcement practice under the Fourth Amendment.”¹⁷⁰

3. Balancing the Public Interests that Warrant Checkpoints Advance with Their Intrusion on Privacy

As an initial matter, the Court is clear that a checkpoint which only serves a state's general interest in crime prevention cannot outweigh even a minimal intrusion on privacy.¹⁷¹ However, assuming a court reaches the third prong of the *Brown* test (the severity of the intrusion on individual liberty),¹⁷² the government has a strong argument that the intrusion is slight. The Court looks at the level of intrusion both objectively and subjectively.¹⁷³ Objectively, courts look to the “duration of the seizure and the intensity of the investigation.”¹⁷⁴ Subjectively, courts look at “the generating of concern or even fright on the part of lawful [citizens].”¹⁷⁵ This subjective “fear,” the Court urges, is measured not by the fear of one who may

167. See *supra* notes 149-52 and accompanying text.

168. See *Delaware v. Prouse*, 440 U.S. 648, 658-61 (1979). Though the choice among “reasonable alternatives” in addressing a “serious public danger” remains with the political branches and not the courts, *Sitz*, 496 U.S. at 453-54, the Supreme Court appears only to give that deference when there is empirical evidence to support the asserted public danger, see *id.* at 454-55; *Prouse*, 440 U.S. at 658-61.

169. *E.g.*, ALA. CODE § 15-20A-18(c) (2018); DEL. CODE ANN. tit. 21, § 2718(e) (2016); FLA. STAT. § 322.141(3) (2016); OKLA. STAT. tit. 47, § 6-111(E) (2017).

170. *Prouse*, 440 U.S. at 659-60.

171. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

172. *Brown v. Texas*, 443 U.S. 47, 50-51 (1979).

173. *Sitz*, 496 U.S. at 452; *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976).

174. *Sitz*, 496 U.S. at 452.

175. *Martinez-Fuerte*, 428 U.S. at 558.

be caught by the checkpoint, but by the “fear and surprise engendered in law-abiding [citizens].”¹⁷⁶

First, it is unlikely that a court will find that warrant checkpoints at natural disaster shelters carry a significant level of objective intrusiveness. Presumably, these checkpoints operate fairly quickly, requiring entrants to give only the information needed to run the warrant check. This entire process could quite possibly take less time than it does an officer at a sobriety checkpoint to check a driver’s license and registration.

That some entrants may be pulled aside to provide fingerprints because they do not have state-issued photo identification does not appear to increase the objective level of intrusiveness. The challengers in *Martinez-Fuerte* argued that the fact that border agents referred only a small percentage of drivers at border checkpoints to a secondary inspection area increased the level of objective intrusion, and even raised equal protection concerns.¹⁷⁷ The Court expressly rejected these assertions because border patrol agents made referrals only to conduct a routine and limited inquiry into residence status, which could not be performed with every driver when traffic was heavy.¹⁷⁸

As the government will correctly argue, the *Martinez-Fuerte* logic applies with equal force in the case of fingerprinting at a warrant checkpoint at a natural disaster shelter. Not every entrant is going to have to provide fingerprints—just those who are not able to provide valid identification. This will not increase “the duration of the seizure and the intensity of the investigation,”¹⁷⁹ and perhaps may decrease the seizure’s duration if the entrant does not have to wait for the officer to run the background check. Thus, nothing about a warrant checkpoint’s process at natural disaster shelters raises any objective concerns about intrusiveness.

In looking to subjective intrusiveness, the Supreme Court differentiates between “[r]oving patrols”¹⁸⁰ and traffic checkpoints.¹⁸¹ Historically, the Court has demonstrated concern only with the

176. *Sitz*, 496 U.S. at 452.

177. 428 U.S. at 560.

178. *Id.*

179. *Sitz*, 496 U.S. at 452.

180. *United States v. Ortiz*, 422 U.S. 891, 894-95 (1975).

181. *E.g.*, *Sitz*, 496 U.S. at 452-53.

subjective intrusiveness of roving police patrols, finding that their implementation involves an unjustifiably high amount of surprise and annoyance because the police have essentially unfettered discretion in stopping whomever they please.¹⁸² Traffic checkpoints, however, do not present the same surprise and annoyance concerns because the approaching motorist “can see that other vehicles are being stopped, [and] he can see visible signs of the officers’ authority.”¹⁸³ Additionally, the Court looks positively on the fact that police implement traffic checkpoints pursuant to internal guidelines and that uniformed officers operate the checkpoint.¹⁸⁴

In the case of warrant checkpoints at natural disaster shelters, it seems that, at first glance, the government would have a strong argument that such a checkpoint does not present a high level of subjective intrusiveness.¹⁸⁵ In this hypothetical, every entrant is stopped for a brief period of time, and each has to provide either state-issued identification or fingerprints. Further, every entrant in line sees uniformed police officers stopping entrants at the front of the line. As the argument would go, there is simply no element of fear or surprise presented to “*law abiding* [entrants] by the nature of the [checkpoint].”¹⁸⁶ This argument would seem to apply with strong force when police are simply checking an entrant’s driver’s license for a sexual offender notation. But even in the context of a broader warrant checkpoint, perhaps the government is right. Perhaps, no matter how abhorrent one may consider the idea of making a warrant check a prerequisite for entering a natural disaster shelter, this does not unduly intrude on the ideals that the Fourth Amendment was designed to protect.¹⁸⁷

Certainly, there is an argument that warrant checkpoints at natural disaster shelters do involve an element of surprise and fear, especially if potential entrants are not given sufficient notice of the

182. *Ortiz*, 422 U.S. at 894-95; see *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

183. *Ortiz*, 422 U.S. at 895.

184. See *Sitz*, 496 U.S. at 453.

185. See Judd Motion to Dismiss, *supra* note 111, at 13.

186. *Sitz*, 496 U.S. at 452 (emphasis added).

187. *Cf. Ortiz*, 422 U.S. at 895 (“[T]he central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials.”).

checkpoint's implementation.¹⁸⁸ Traditionally, we associate checkpoints with the border or a local highway on Saturday night, when we can reasonably expect and be on notice that the police might set up a sobriety checkpoint to catch drunk drivers. The idea of warrant checkpoints at natural disaster shelters, however, is seemingly unprecedented.

Yet, consider a city such as Baton Rouge, Louisiana, where the number of outstanding misdemeanor and traffic warrants is nearly half the city's total population.¹⁸⁹ By implementing warrant checkpoints at natural disaster shelters, Baton Rouge potentially deters a significant portion of its population from seeking refuge in a state-sponsored shelter. Instead, it sways that population into making the precarious decision to confront a natural disaster on their own to avoid the possibility of going to jail. Such checkpoints may even deter a law-abiding citizen from going to a state-sponsored shelter, out of the fear that there is an outstanding arrest warrant that the citizen is not aware of. Both of these possibilities, a challenger may argue, could increase the level of intrusiveness of warrant checkpoints to unconstitutional levels.

Ultimately, the level of intrusiveness presented is likely immaterial because the warrant checkpoint's ultimate downfall is its clear and primary purpose as a means to further the state's "general interest in crime control."¹⁹⁰ After all, the Court has made clear that "[i]n the absence of any basis for suspecting [a person] of misconduct, the balance between the public interest and [one's] right to personal security and privacy tilts in favor of freedom."¹⁹¹ "Without drawing the line at [checkpoints] designed primarily to serve the general interest in crime control," the Court cautions, "the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life."¹⁹² Since warrant checkpoints at

188. This would appear to be an issue in Polk County, Florida, where Sheriff Judd's tweets, *supra* notes 16-17 and accompanying text, came just four days before Irma's landfall on the Florida mainland; see Perry Stein et al., *Hurricane Irma Makes Second Landfall in Florida and Will Roar Up the State's Gulf Coast*, WASH. POST: POST NATION (Sept. 10, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/09/10/hurricane-irma-makes-landfall-in-florida-keys-targets-gulf-coast/> [<https://perma.cc/2QGC-H64A>].

189. See *supra* notes 163-64 and accompanying text.

190. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

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

192. *Edmond*, 531 U.S. at 42.

natural disaster shelters do nothing more than further a state's general interest in crime control, courts must deem them unreasonable, and therefore unconstitutional, seizures under the Fourth Amendment.¹⁹³

Yet, what of person-to-person encounters between ICE agents and natural disaster shelter occupants in an effort to determine immigration status? Do the considerations at play there result in a different outcome? The next Part answers these equally important questions.

III. THE CONSTITUTIONALITY OF IMMIGRATION STATUS ENFORCEMENT AT NATURAL DISASTER SHELTERS

Later in the day, after most entrants have made their way inside the shelter, ICE agents¹⁹⁴ decide to enter the shelter and commingle with those seeking refuge inside in an effort to weed out any undocumented immigrants.¹⁹⁵ The agents' methods are simple. If, based on an interaction with an occupant, the agent develops probable cause that the occupant is an undocumented alien, then the agent takes down the necessary information to follow up on potential deportation proceedings.¹⁹⁶ This could include gathering the occupant's fingerprints for later processing, or even detaining the occupant in a separate part of the shelter (assuming that the storm conditions prevent immediate arrest and transportation to an immigration office).

Unlike a warrant checkpoint, it is even less clear in this situation if a seizure occurs before the ICE agent develops probable cause that the person is an undocumented immigrant. Again, if there is

193. *See id.* at 42-44.

194. State officials could potentially perform this same task without presenting a federalism issue. *See Arizona v. United States*, 567 U.S. 387, 411-12 (2012). This Note, however, assumes that ICE is the primary agency performing immigration status enforcement.

195. ICE has the statutory authority to—without a warrant—interrogate any person believed to be an alien regarding their right to be in the United States. 8 U.S.C. § 1357(a)(1) (2012). But since “no Act of Congress can authorize a violation of the Constitution,” courts must determine whether encounters between ICE agents and illegal aliens comport with the Fourth Amendment. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973).

196. *See, e.g., INS v. Delgado*, 466 U.S. 210, 212-13 (1984) (describing an immigration sweep performed at a worksite).

no seizure, then the Fourth Amendment is not implicated.¹⁹⁷ A court, then, must make a choice. Is the initial conversation here between the ICE agent and the (potentially) undocumented immigrant in the shelter a consensual encounter that does not implicate the Fourth Amendment,¹⁹⁸ or is there some sort of unreasonable restraint on liberty present that transforms the encounter into an unconstitutional seizure?¹⁹⁹

Before delving into the analysis, it is important to make clear a working assumption that applies throughout this Part. This Note undertakes its analysis assuming that those illegal aliens subject to warrant checkpoints and immigration status enforcement in natural disaster shelters have Fourth Amendment rights. That the Fourth Amendment protects illegal aliens seemed clear from the Court's decision in *INS v. Lopez-Mendoza*, in which the Court heard (and ruled on) two aliens' arguments that the Fourth Amendment's exclusionary rule applied to immigration deportation proceedings.²⁰⁰ The Court's opinion in *United States v. Verdugo-Urquidez*,²⁰¹ however, has created some debate over whether all illegal aliens in the country have Fourth Amendment rights.²⁰² In *Verdugo-Urquidez*, the Court stated that the Fourth Amendment's reference to "the people" refers only "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."²⁰³ This Note assumes that those illegal aliens heading to natural disaster shelters within the United States satisfy this standard, if it needs to be met at all. Yet, it is worth noting that the *Verdugo-Urquidez*

197. See U.S. CONST. amend. IV; see also, e.g., *Florida v. Bostick*, 501 U.S. 429, 434 (1991).

198. See *Bostick*, 501 U.S. at 434.

199. See *Terry v. Ohio*, 392 U.S. 1, 19 & n.16 (1968). Naturally, this hypothetical inquiry could differ from the precise facts of a future challenge, and those differences may or may not have constitutional significance. This exercise will still be useful nonetheless, for patrolling natural disaster shelters for undocumented immigrants is seemingly unprecedented, and it is important to analyze the practice's legality before the issue arises. See *supra* notes 27-31 and accompanying text.

200. 468 U.S. 1032, 1034-35, 1050 (1984).

201. 494 U.S. 259 (1990).

202. See, e.g., Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 839 (2013).

203. 494 U.S. at 265.

standard may not be satisfied in all circumstances envisioned by this Note.

A. *Setting the Stage: Defining Consensual Encounters*

It is clear that no seizure occurs when an officer simply approaches an individual in a public place and asks a couple of questions.²⁰⁴ Such “consensual” encounters fall outside the Fourth Amendment’s purview as long as a reasonable person would feel at liberty to ignore the officer’s questions and continue about the person’s business.²⁰⁵ Courts determine whether someone feels “free to leave” objectively and “presuppose[] an *innocent* person.”²⁰⁶ Only when the totality of the circumstances of the encounter²⁰⁷ demonstrates that the officer “convey[ed] a message that compliance with their requests [was] required”²⁰⁸ is there a seizure that must then be justified by reasonable suspicion.²⁰⁹

Indeed, in many environments similar to a natural disaster shelter, the Court has found that no seizure occurred when police began an encounter with individuals already within a confined area.²¹⁰ In these situations, people limited their freedom of movement voluntarily, independent of any coercive police conduct.²¹¹ Even when police station themselves at the exits of a worker’s place of employment²¹² or near a bus’s only entrance and exit,²¹³ the Court will not find that a seizure occurred so long as the police do not

204. *E.g.*, *United States v. Drayton*, 536 U.S. 194, 200 (2002); *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *INS v. Delgado*, 466 U.S. 210, 216 (1984).

205. *Bostick*, 501 U.S. at 434.

206. *Id.* at 436-38; *see also* *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988) (“[The reasonableness standard] ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.”).

207. *Delgado*, 466 U.S. at 216-17.

208. *Bostick*, 501 U.S. at 435.

209. *Id.* at 434.

210. *See* *United States v. Drayton*, 536 U.S. 194, 197-98, 204 (2002) (passengers on a Greyhound bus at a scheduled stop); *Delgado*, 466 U.S. at 211-12, 218 (workers at their place of employment); *see also* *Bostick*, 501 U.S. at 431-32, 437-38 (noting that officers approaching a defendant on an airport bus and asking to inspect his ticket and identification left “some doubt [as to] whether a seizure occurred”).

211. *Bostick*, 501 U.S. at 436; *Delgado*, 466 U.S. at 218.

212. *Delgado*, 466 U.S. at 212.

213. *Drayton*, 536 U.S. at 197-98.

prevent someone from exiting.²¹⁴ Of course, other factors—such as whether the police demonstrated force, brandished weapons, made any threats or commands, and spoke with a commanding tone of voice—are relevant.²¹⁵ But in the immigration context, when ICE agents conduct mass sweeps of a place of employment, the Court seems to focus most on whether workers have a “reasonable fear that they would be detained upon leaving.”²¹⁶ That ICE agents station themselves at the exits is constitutionally immaterial so long as they do not take affirmative action to prevent a worker from leaving.²¹⁷

B. Challenging the “Consensual Encounter” Label for Immigration Status Enforcement at Natural Disaster Shelters

A future challenger will argue that immigration enforcement at natural disaster shelters is inherently different. From this perspective, the decision to go to a natural disaster shelter, unlike the decision to get on a Greyhound bus²¹⁸ or even to go to work,²¹⁹ is not a wholly voluntary limitation on one’s freedom of movement. For many people, going to a hurricane shelter is not a choice—it is their only option.²²⁰

Whether it is for a hurricane, for a blizzard, or in the aftermath of an earthquake, state-sponsored shelters provide refuge for those who have nowhere else to go, even if they are in this country illegally. Indeed, nearly seven million people across Florida and Georgia were under either voluntary or mandatory evacuation orders as Hurricane Irma approached.²²¹ Reports indicate that over

214. *See id.* at 204; *Delgado*, 466 U.S. at 218-19.

215. *Drayton*, 536 U.S. at 204.

216. *Delgado*, 466 U.S. at 219.

217. *Id.*

218. *Florida v. Bostick*, 501 U.S. 429, 436 (1991).

219. *Delgado*, 466 U.S. at 218.

220. *See* Dylan Baddour & Avi Selk, *Harvey Drives Tens of Thousands to Texas Shelters, Where All People Can Do Is Wait*, WASH. POST (Aug. 30, 2017), https://www.washingtonpost.com/national/harvey-drives-tens-of-thousands-to-texas-shelters-where-all-people-can-do-is-wait/2017/08/30/b7cc28f0-8db9-11e7-84c0-02cc069f2c37_story.html [https://perma.cc/27SZ-EZWT].

221. Jeremy Berke, *Nearly 7 Million People Told to Evacuate in Florida and Georgia as Hurricane Irma Approaches with 125-MPH Winds*, BUS. INSIDER (Sept. 9, 2017, 12:10 PM), <http://www.businessinsider.com/hurricane-irma-florida-evacuation-orders-2017-9> [https://

75,000 people in the state of Florida sought refuge in a state-sponsored hurricane shelter as Irma approached,²²² and nearly 35,000 in Harvey's path took refuge in state-sponsored shelters,²²³ with many Texans continuing to file into shelters *days after* Harvey made landfall.²²⁴

Undoubtedly, the government recognizes the importance of natural disaster shelters. In recent years, before landfall of several major hurricanes in areas with significant populations of undocumented immigrants, ICE and CBP have felt compelled to issue public statements noting their intent not to enforce the country's immigration laws at evacuation shelters.²²⁵ ICE and CBP recognize, the argument would go, that shelters are not a luxury; they are a life-saving resource for thousands of people.²²⁶ Of course, the humanitarian nature of natural disaster shelters is not enough by itself to render the conduct in question here a "seizure."²²⁷ However, the life-or-death nature of the decision to go to the shelter, a challenger will urge, must play into the totality of the circumstances analysis.²²⁸

In the situation posed here, no one can leave the shelter—in part because they chose to be there, but also in part because a natural disaster renders it necessary for occupants to be at the shelter in the first place. With hundreds, if not thousands, of people stationed in lines of cots and makeshift beds, ICE and CBP agents (presumably armed) begin to walk about the shelter and flash their badges to everyone, asking questions "relating to their citizenship."²²⁹

perma.cc/RR8A-CEY9].

222. *Hurricane Irma: Thousands Stuck in Lines Outside Crowded Florida Shelters*, CBS NEWS (Sept. 9, 2017, 4:41 PM), <https://www.cbsnews.com/news/hurricane-irma-thousands-stuck-in-lines-outside-crowded-florida-shelters/> [<https://perma.cc/C937-V949>].

223. Baddour & Selk, *supra* note 220.

224. *Id.*

225. See Hurricane Harvey Joint Statement, *supra* note 4; Hurricane Isaac Joint Statement, *supra* note 5; Hurricane Matthew Joint Statement, *supra* note 5.

226. *Cf.* Hurricane Harvey Joint Statement, *supra* note 4 (listing promotion of life-saving and life-sustaining activities among the highest priorities); Hurricane Isaac Joint Statement, *supra* note 5 (same); Hurricane Matthew Joint Statement, *supra* note 5 (same).

227. See *Florida v. Bostick*, 501 U.S. 429, 437 (1991).

228. See *id.*

229. *INS v. Delgado*, 466 U.S. 210, 212 (1984).

Perhaps *how* agents pose the questions,²³⁰ or even how many agents are present,²³¹ is constitutionally significant.

Even if a challenger cannot establish that an immigration sweep caused a seizure of the entire shelter, the challenger could allege a Fourth Amendment violation based on the person's particular interaction with an ICE agent.²³² That challenger will surely argue for a reviewing court to follow the reasoning set forth in *United States v. Easley*,²³³ in which a federal district court judge held that race was a relevant factor in analyzing whether a reasonable person would feel free to ignore an officer's questioning.²³⁴

That case involved an interaction between federal agents and the defendant, Easley, a thirty-four-year-old African American woman who was a passenger on a Greyhound bus stopped at a maintenance shop at a bus terminal in Albuquerque, New Mexico.²³⁵ During this stop, federal agents questioned passengers—including Easley—about their itineraries.²³⁶ During the interaction, Easley insisted that a certain suitcase bearing a nametag with the name “Denise Moore” was not Easley's.²³⁷ The name “Denise Moore” appeared on the passenger list with the same reservation number as Easley, and the luggage tag on the bag in question listed the same origin city, destination city, and contact phone number as Easley's luggage tag.²³⁸ After confirming that no “Denise Moore” was on board, the federal agent concluded that the suitcase was abandoned.²³⁹ The agent searched the bag and discovered over 500 grams of methamphetamine.²⁴⁰ Based on the agent's interaction with Easley and the

230. *See id.* at 230 (Brennan, J., dissenting) (taking issue with the fact that ICE agents would “direct pointed questions at the workers,” such as asking a worker to “state where he was born”).

231. *See id.*

232. *See id.* at 219 (majority opinion).

233. 293 F. Supp. 3d 1288 (D.N.M. 2018), *rev'd*, 911 F.3d 1074 (10th Cir. 2018). The Tenth Circuit's rejection of the lower court's rationale certainly diminishes the lower court opinion's persuasive value. However, nothing bars a future litigant from raising this argument and seeking to have the lower court's rationale in *Easley* adopted elsewhere.

234. *Id.* at 1308.

235. *Id.* at 1292.

236. *Id.* at 1293-94.

237. *Id.*

238. *Id.* at 1293.

239. *Id.* at 1294.

240. *Id.* at 1294, 1296.

evidence linking Easley to the bag, the agent believed that Easley owned the suitcase and arrested her.²⁴¹

Easley moved to suppress the evidence found from the search of the suitcase, claiming that her abandonment of the bag was involuntary because a reasonable person in Easley's position would not have felt free to terminate the encounter.²⁴² The court agreed with Easley.²⁴³ In its analysis, the court found that "it is both permissible and necessary to consider race as part of the totality of the circumstances."²⁴⁴ According to Judge Vázquez, "[o]mitting consideration of the ways in which race influences encounters with law enforcement and insisting on a colorblind system of justice perpetuates a system in which constitutional protections are severely weakened for people of color."²⁴⁵ If race were ignored in the reasonable person analysis, then "people who are especially vulnerable to police encounters because of their race are systematically disadvantaged in comparison to people who are not."²⁴⁶ Based on the fact that the agent "repeatedly misrepresented his purpose" in asking questions and searching passengers' bags, and the fact that "a stream of passengers" had already agreed to have their bags searched, the court found that "[i]n the context of an interaction between a white officer and the only black person on the bus" the agent's inquiries had "authoritative and coercive force."²⁴⁷

Analogously, a future challenger to immigration sweeps at natural disaster shelters will argue that these sweeps disproportionately target occupants of color, particularly Hispanics and Latinos.²⁴⁸ Classifying these encounters as consensual, in essence, will justify federal agents' use of race as a pretext to stop a person

241. *Id.* at 1294.

242. *Id.* at 1301.

243. *Id.* at 1300.

244. *Id.* at 1307.

245. *Id.*

246. *Id.* at 1308 (quoting Devon W. Carbado, *(E)rasing the Fourth Amendment*, 100 MICH. L. REV. 946, 1003 (2002)).

247. *Id.* at 1308-09.

248. See Jie Zong et al., *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL'Y INST. (Feb. 8, 2018), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Demographic> [<https://perma.cc/LQ4Y-Q3WD>] (summarizing that 45 percent of immigrants identify as having Hispanic or Latino origins).

without any individualized suspicion at all,²⁴⁹ something that the Court explicitly disapproved in *United States v. Brignoni-Ponce*.²⁵⁰ In such a high-pressure situation, any person—especially a person of color—would feel compelled to surrender to questioning and attempt to convince the ICE agent that the person is not an illegal alien, thereby transforming the encounter into a seizure.²⁵¹

To be sure, this argument is not mere conjecture; some empirical data suggests that a “reasonable person” usually feels compelled to answer police questioning, even outside of the confines of a natural disaster shelter.²⁵² According to one study, “most people do not ... feel free to terminate” encounters with police on a public sidewalk, “the very type of police encounter that the Supreme Court considers the clearest example of a completely consensual conversation.”²⁵³ In that context, only 20 percent of study participants said they would feel free to leave when an officer approaches and says, “I have a few questions to ask you.”²⁵⁴

Within a natural disaster shelter, a challenger will urge that anyone would feel compelled to answer questions posed to him or her by an agent of the federal government.²⁵⁵ That federal agent has come to the one and only place that is keeping that person safe from the impending landfall of the storm, or could be the only place keeping that person out of the elements after a recent earthquake destroyed what was once their home. The hundreds or thousands of people within that shelter can see the agents methodically interviewing everyone and sending those who “fail” the questioning to a separate area, where (unbeknownst to others), that failing individual will be fingerprinted and more information will be gathered so that ICE can apprehend the person later. Indeed, a reasonable person would likely fear that, were the person to decline the agent’s invitation to talk, they too would be sent off to this unknown area

249. See Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1584-86 (2011).

250. 422 U.S. 873, 876, 885-86 (1975).

251. See *Easley*, 293 F. Supp. 3d at 1308-09; Carbado & Harris, *supra* note 249, at 1586.

252. See Janice Nadler & J.D. Trout, *The Language of Consent in Police Encounters*, in THE OXFORD HANDBOOK OF LANGUAGE AND LAW 326, 337-38 (Peter M. Tiersma & Lawrence M. Solan eds., 2012).

253. *Id.* at 337.

254. *Id.*

255. See *id.* at 337-38.

of the shelter.²⁵⁶ It is not as if the person has anywhere to go to avoid this confrontation—due to the weather conditions, the person cannot simply leave the shelter.

In essence, the argument goes, the government agents here are using the basic need of human survival at evacuation shelters and picking out the individuals that simply “do not belong,” absconding the Fourth Amendment under the guise of a “consensual interaction.” The Constitution cannot be blinded to such an “arbitrary and oppressive interference ... with the privacy and personal security of individuals.”²⁵⁷

C. Immigration Status Enforcement Within Natural Disaster Shelters as “Consensual Encounters”

As the government will likely argue with success, there lies one major weakness in a future challenger’s arguments: almost all of the Court’s relevant Fourth Amendment jurisprudence seemingly compels the conclusion that encounters between ICE agents and persons within a natural disaster shelter are consensual encounters. The Court has held that no categorical seizure of all bus passengers occurred when officers boarded a bus and asked individuals questions about their itineraries.²⁵⁸ Nor did a categorical seizure of all factory workers occur when ICE agents swept through a factory and stationed themselves at every exit.²⁵⁹ It seems to stretch reason, then, to say that by entering a natural disaster shelter, ICE agents automatically seize every occupant inside the shelter.

Consider the particular facts of *INS v. Delgado* and *United States v. Drayton*. In *Delgado*, ICE agents entered various factories and performed a sweep of the workforce therein in search of illegal aliens.²⁶⁰ “[S]everal agents” stationed themselves near the factory’s exits, while others fanned out within the factory “to question most,

256. *Cf. id.* at 338 (finding that people are “unaffected” by warnings given to them by police that they have the right to refuse to give consent because “they do not believe them—they feel that they will be searched regardless of whether or not they consent”).

257. *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976) (citations omitted).

258. *United States v. Drayton*, 536 U.S. 194, 197-98, 203 (2002).

259. *INS v. Delgado*, 466 U.S. 210, 211-13, 218 (1984).

260. *See id.* at 211-13. The opinion does not disclose how many ICE agents performed the sweep. *See id.*

but not all, employees at their work stations.”²⁶¹ Agents carried guns, walkie-talkies, and badges, and they asked employees “one to three questions relating to their citizenship.”²⁶²

Even under these circumstances, the Court held that ICE agents did not seize the entire factory.²⁶³ The mass questioning of each employee, the Court found, “should have given [employees] no reason to believe that they would be detained if they gave truthful answers ... or if they simply refused to answer.”²⁶⁴ The Court rejected the argument that the agents stationed at the door prevented employees from leaving, thereby constituting a seizure.²⁶⁵ In the Court’s eyes, the employees already voluntarily restricted their freedom of movement simply by showing up to work, and the agents did nothing to prevent people from moving about the factory or even prevent them from leaving.²⁶⁶ “[T]he mere possibility that [employees] would be questioned if they sought to leave the buildings should not have resulted in any reasonable apprehension by any [employees] that they would be seized or detained in any meaningful way.”²⁶⁷

In *United States v. Drayton*, three officers boarded a Greyhound bus while it was at a scheduled stop and spoke with individual passengers on the bus as part of a drug and weapons interdiction effort.²⁶⁸ One officer “knelt on the driver’s seat and faced the rear of the bus”; one officer went to the back of the bus and remained there; and the other spoke with individual passengers, starting at the rear and methodically working his way up to the front.²⁶⁹ The questioning officer, in order to “avoid blocking the aisle,” either “stood next

261. *Id.* at 212. One may urge that the fact that agents had a warrant to go to two of the factories is an important fact. *See id.* However, this fact may be trivial in analyzing whether the employees were seized, as the Court noted that “neither of the search warrants identified any particular illegal aliens by name,” indicating that agents had no probable cause to believe that a specific employee was an illegal alien. *Id.*

262. *Id.*

263. *Id.* at 218-19.

264. *Id.* at 218.

265. *Id.*

266. *Id.* at 218-19.

267. *Id.* at 219; *see also* *Florida v. Bostick*, 501 U.S. 429, 436 (1991) (articulating that where one’s freedom of movement is restricted through a self-imposed, voluntary condition, the question to ask is not whether the person felt “free to leave,” but “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter”).

268. 536 U.S. 194, 197-98 (2002).

269. *Id.*

to or just behind each [seated] passenger.”²⁷⁰ The interviewing officer testified that anyone “who declined to cooperate with him or who chose to exit the bus ... would have been allowed to do so without argument.”²⁷¹ In the particular encounter challenged, the officer displayed his badge, stated his purpose for being on the bus, and asked the passenger if he had any bags on the bus.²⁷² The officer’s face was about a foot away from the passenger’s during the encounter.²⁷³

The Court again held that the officers’ conduct in questioning bus passengers did not constitute a seizure of the entire bus.²⁷⁴ The Court found that there was no reason for passengers to believe that they were required to answer the questions; indeed, the Court found that “nothing [the officer] said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter.”²⁷⁵ Without the officer making any intimidating movements, brandishing his weapon, talking in a demanding tone of voice, or otherwise blocking the aisle, the Court held that the encounter was consensual.²⁷⁶ The Court even went a step further: “Indeed, because many fellow passengers [were] present to witness officers’ conduct, a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus than in other circumstances.”²⁷⁷

Encounters between ICE agents and people within natural disaster shelters are nearly indistinguishable from those consensual encounters that occur on a bus or in one’s place of employment. Just as when at work, freedom of movement within the shelter is restricted because of the *voluntary* choice to enter the shelter.²⁷⁸ Even assuming that weather conditions prevent a person from leaving the shelter altogether, the Supreme Court is clear that the focus is not on whether the shelter occupant would feel free to leave

270. *Id.* at 198.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 203.

275. *Id.* at 203-04.

276. *Id.* at 204.

277. *Id.*

278. See *INS v. Delgado*, 466 U.S. 210, 218 (1984).

the shelter, but instead on whether the occupant would feel free to decline answering questions or “terminate the encounter.”²⁷⁹ Even within the cramped confines of a Greyhound bus, where an officer looms over a passenger (and with two other officers standing watch), the Court instructs that unless the aisle is blocked, or the officer makes some overwhelming show of force, no reasonable person would feel compelled to answer the officer’s questions.²⁸⁰ Further, questions related to one’s identity or requests for identification alone do not give rise to a “seizure” under the Fourth Amendment.²⁸¹ A future challenger would have difficulty arguing that, generally speaking, there is something more inherently intimidating about approaching an individual within a shelter and asking them a couple of questions relating to their identity as a United States citizen or an illegal alien than doing the same thing on a bus.²⁸²

In addressing an individual occupant’s seizure claim, the government will correctly contend that a court should not consider race as a factor in the totality of the circumstances analysis. The “reasonable person” standard promotes “consistent application from one police encounter to the next, regardless of the particular individual’s response to the actions of the police.”²⁸³ By analyzing what a reasonable person would do from an objective standpoint, police are able to determine *ex ante* whether their conduct may violate the Fourth Amendment.²⁸⁴ While courts cannot tolerate an officer’s decision to investigate a person based solely on their race,²⁸⁵ courts must also ensure that “the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.”²⁸⁶ Subjective considerations, such as race, *are*

279. See *Florida v. Bostick*, 501 U.S. 429, 436 (1991).

280. *Drayton*, 536 U.S. at 197-98, 203-04.

281. *Delgado*, 466 U.S. at 216 (citing *Florida v. Royer*, 460 U.S. 491, 501 (1983) (plurality opinion)).

282. See *United States v. Angulo-Guerrero*, 328 F.3d 449, 450-51 (8th Cir. 2003) (finding no seizure where Immigration and Naturalization Service agents conducting immigration inspection operations questioned an illegal alien on a Greyhound bus while it was at a scheduled stop).

283. *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988).

284. *Id.*; *United States v. Easley*, 911 F.3d 1074, 1082 (10th Cir. 2018).

285. *E.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-86 (1975).

286. *Chesternut*, 486 U.S. at 574; see *Easley*, 911 F.3d at 1082 (finding that because people of color have unique life experiences, “there is no uniform way to apply a reasonable person test that adequately accounts for racial differences consistent with an objective standard for

proper when determining whether police coerced a particular individual into consenting to a search.²⁸⁷ When it comes to determining whether the police seized an individual, courts must continue to measure objectively what a “reasonable person” would do so that the police may know whether their conduct generally comports with an individual’s constitutional rights.²⁸⁸

In sum, any reasonable person—measured from the perspective of a *law-abiding* person²⁸⁹—would feel free to ignore the officer and continue about the person’s business in the shelter. Even if some shelter occupants see agents interviewing other occupants, this conduct should give occupants “no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer.”²⁹⁰ That many people will choose to answer, without being told that they do not have to answer, does nothing to vitiate the fact that the encounter is consensual.²⁹¹ Roaming the halls of a natural disaster shelter to inquire into the occupants’ immigration status, generally,²⁹² is simply not a “seizure” of all of the shelter’s occupants under the Supreme Court’s Fourth Amendment jurisprudence.²⁹³

Fourth Amendment seizures”).

287. *See* *Schneekloth v. Bustamonte*, 412 U.S. 218, 229 (1973); *see also* *Easley*, 911 F.3d at 1081-82.

288. *Chestnut*, 486 U.S. at 574; *see Easley*, 911 F.3d at 1082. As the Tenth Circuit noted in *Easley*, adding subjective considerations such as race into the objective Fourth Amendment seizure analysis could potentially “raise[] serious equal protection concerns if it could result in different treatment for those who are otherwise similarly situated.” *Easley*, 911 F.3d at 1082.

289. *See* *Florida v. Bostick*, 501 U.S. 429, 438 (1991).

290. *INS v. Delgado*, 466 U.S. 210, 218 (1984); *see also* *United States v. Drayton*, 536 U.S. 194, 204 (2002) (“[B]ecause many fellow passengers [were] present to witness officers’ conduct, a reasonable person may feel even more secure in his or her decision not to cooperate with police.”).

291. *See Delgado*, 466 U.S. at 216.

292. Finding that immigration sweeps do not constitute a seizure of the entire shelter does not foreclose the possibility that an ICE agent violated a particular occupant’s Fourth Amendment rights based on the facts and circumstances of that specific encounter. *See id.* at 219.

293. A future challenger should determine whether the state constitution and state common law governing searches and seizures grant protections greater than the Constitution, as state law often provides broader protection. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

CONCLUSION

This Note analyzed the constitutionality of two different hypothetical policing methods at state-sponsored natural disaster shelters: (1) requiring each entrant to submit to a warrant check before entering,²⁹⁴ and (2) conducting immigration status enforcement sweeps within the shelter.²⁹⁵ Despite one's potential intuitions, the Fourth Amendment does not appear to shelter individuals from all police conduct within natural disaster shelters.²⁹⁶ While the Supreme Court's Fourth Amendment jurisprudence counsels the finding that checking each entrant for warrants prior to entry is an unreasonable seizure under the Fourth Amendment,²⁹⁷ that same jurisprudence seemingly mandates the finding that the Fourth Amendment does not limit ICE agents from conducting immigration status sweeps in the shelter.²⁹⁸

In an ideal world, the analysis contained in this Note will never actually be needed. But, given the concerns stated in the Introduction to this Note, it seems more and more likely that these concerns will arise. This Note serves as a guide to future parties to litigation arising out of situations such as those contemplated herein, and raises awareness to the fact that the Fourth Amendment—as construed by the Supreme Court—may not apply to all types of government activity within natural disaster shelters. The reality of the Fourth Amendment's limited umbrella of protections in state-sponsored shelters is potentially a single disaster away.

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294. *See supra* Part II.

295. *See supra* Part III.

296. *Compare supra* Part II *with supra* Part III.C.

297. *See supra* Parts II.A-B.

298. *See supra* Parts III.A, C.

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