# OPERATION PAPER CHASE, ICE STING OPERATIONS, AND THE CASE AGAINST THE UNIVERSITY OF FARMINGTON: ARGUING THE ENTRAPMENT, ESTOPPEL, AND OUTRAGEOUS GOVERNMENT CONDUCT DEFENSES IN IMMIGRATION COURT AND BEYOND

JOSEPH TAHBAZ*

"The Declaration of Independence, the writings of the fathers, the Revolution, the Constitution, and the Union, all were inspired to overthrow and prevent like governmental despotism. They are yet living, vital, and potential forces to those ends, to safeguard all domiciled in the country, alien as well as citizen."

*Ex parte Jackson*, 263 F. 110, 113 (D. Mont. 1920).

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* Joseph Tahbaz, J.D. Candidate, 2020, Harvard Law School, B.A. History, 2015, Dartmouth College. I would like to thank the many inspiring immigration lawyers in my life who made this Note possible, including Professor Deborah Anker, Kevin A. Gregg, and, most importantly, my parents Laura Menchero and Hedy Tahbaz. 

## I. INTRODUCTION

Between 2017 and 2019, the Homeland Security Investigations (HSI) division of Immigration and Customs Enforcement (ICE) conducted a sting operation through a fake school, the University of Farmington. This sting, codenamed "Operation Paper Chase," duped at least 600 foreign students into visa fraud.[1] The University of Farmington was certified by the Student and Exchange Visitor Program (SEVP) and endorsed by the Accrediting Commission of Career Schools and Colleges.[2] The school had its own Facebook page, events calendar,[3] and a voicemail box to the "Office of Admissions."[4] In an email to a prospective student, the university's president described the school as an "accredited institution authorized . . . by the U.S. Department of Homeland Security."[5] Recruiters for the University of Farmington lured foreign students who paid thousands of dollars in fees and tuition.[6] Eager to learn about class offerings, some students even visited the university's office in Farmington Hills, Michigan, but struggled to reach school representatives.[7] The university reassured students that eventually

1. *See* Indictment at 4, *United States v. Kakireddy*, No. 2:19-cr-20026-GAD-EAS (E.D. Mich. Jan. 15, 2019); *see also* Robert Snell, *Feds used fake Michigan university in immigration sting*, DETROIT NEWS (Jan. 30, 2019), https://www.detroitnews.com/story/news/local/oakland-county/2019/01/30/federal-agents-used-fake-michigan-university-to-find-undocumented-immigrants/2722791002/.

2. Bill Chappell, *Homeland Security Created A Fake University In Michigan As Part Of Immigration Sting*, NPR (Jan. 31, 2019), https://www.npr.org/2019/01/31/690260797/homeland-security-created-a-fake-university-in-michigan-as-part-of-immigration-s; DEP'T OF HOMELAND SEC., SEVP Certified Schools 259 (Sept. 19, 2018), https://studyinthestates.dhs.gov/assets/certified-school-list-09-19-18.pdf.

3. Snell, *supra* note 1.

4. Sarah Mervosh, *ICE Ran a Fake University in Michigan to Catch Immigration Fraud*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/2019/01/31/us/farmington-university-arrests-ice.html.

5. Niraj Warikoo, *Emails show how fake university in metro Detroit lured students*, DETROIT FREE PRESS (Feb. 11, 2019), https://www.freep.com/story/news/2019/02/11/emails-reveal-how-university-lured-students-fake-farmington-university/2744103002/.

6. *See* Mervosh, *supra* note 4.

7. *See* Kim Russell, *Students detained after feds use fake university for immigration sting*, WXYZ DETROIT (Jan. 31, 2019), https://www.wxyz.com/news/students-detained-after-feds-use-fake-university-for-immigration-sting.

classes would be held.[8] In truth, it was a sham: there were no classes, no classrooms, and no teachers. The University of Farmington was nothing but an office space in a suburban business park with an elaborately orchestrated online presence. On January 15, 2019, the U.S. Attorney's Office for the Eastern District of Michigan indicted six recruiters for the University of Farmington with conspiracy to commit visa fraud and harboring aliens for profit.[9] Within weeks over 100 students were placed into removal proceedings.[10] Days after local news reported the story, the university's Facebook page posted a meme of the amphibious *Star Wars* alien Admiral Ackbar shouting, "It's a trap."[11]

## II. SUMMARY OF THE ARGUMENT

This article presents four defenses that advocates can raise against ICE sting operations: (1) outrageous government conduct (OGC), (2) entrapment, (3) entrapment by estoppel, and (4) equitable estoppel. I argue that the OGC, entrapment, and entrapment by estoppel defenses can be raised in immigration court through a motion to terminate removal proceedings on due process grounds. The OGC, entrapment, and entrapment by estoppel defenses operate in immigration court to the extent that they show removal proceedings must be terminated because the government's evidence was obtained in violation of the Due Process Clause of the Fifth Amendment. Once the respondent has established a due process violation, the immigration court or the Board of Immigration Appeals (BIA) may estop the government from pursuing removal proceedings. Although immigration courts are said to lack the authority to estop the government, I argue that immigration courts have the power to estop the government from pursuing unlawful conduct such as removing an individual in violation of due process. Finally, even if an immigration court refuses to estop the government, a federal court can estop the removal notwithstanding the jurisdictional bar under 8 U.S.C. § 1252(g) of the Immigration and Nationality Act (INA).

## III. HISTORY OF ICE STING OPERATIONS

ICE has a long history of undercover operations and deceitful enforcement tactics. As early as 1908, the Immigration Commission schemed to induce Woo Wai of San Francisco to smuggle Chinese nationals across the U.S.-Mexico border.[12] The Ninth Circuit reversed Mr. Wai's smuggling conviction because the immigration officers encouraged the offense and punishing those induced to commit a crime is unsound policy.[13] Over a century later,

8. *See* Warikoo, *supra* note 5.
9. *See* Indictment, *supra* note 1.
10. *See* Mervosh, *supra* note 4.
11. Snell, *supra* note 1.
12. Woo Wai v. United States, 223 F. 412, 413 (9th Cir. 1915).
13. *Id*. at 413, 415.

*Woo Wai v. United States* remains the only successful entrapment defense in immigration law in federal court.

The legacy Immigration and Naturalization Service (INS) engineered a host of sting operations targeting corruption, human smuggling, and humanitarian efforts. In 1983, the San Francisco INS office operated a sting in which agents posed as employers offering jobs to Mexicans who could be smuggled into the United States.[14] Much like in Operation Paper Chase, the noncitizens were deported while the intermediaries—smugglers—were criminally charged.[15] Shortly after the district court dismissed the indictment against the smugglers on due process grounds, the Attorney General issued guidelines for sensitive undercover INS operations requiring written approval from the INS Commissioner or Associate Commissioner for Enforcement.[16] The Ninth Circuit subsequently reversed the district court's dismissal for lack of standing.[17] In "Operation Sojourner" in 1984, INS informants posed as church volunteers to infiltrate the Sanctuary Movement in a sting that culminated in eighteen convictions against a nun, three priests, and four immigration activists.[18] In 1990, the INS Chief Legalization Officer in the Salinas, California office accepted over $1,000,000 in bribes for Temporary Work Authorization Cards.[19] Between 1998 and 2001, INS ran another anti-corruption sting in Chicago called "Operation Durango" that caught approximately 250–300 noncitizens giving bribes for green cards.[20]

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14. United States v. Valdovinos-Valdovinos, 588 F. Supp. 551, 553 (N.D. Cal.), *rev'd on other grounds*, 743 F.2d 1436 (9th Cir. 1984) (reversing the dismissal of the criminal indictment for outrageous government conduct on the ground that the criminal defendant lacked standing to bring a due process claim suffered by a third party).

15. *Id*. at 552–53.

16. *See* Office of the Attorney Gen., Dep't of Justice, *Attorney General's Guidelines on INS Undercover Operations* (Mar. 5, 1984), https://www.justice.gov/archives/jm/criminal-resource-manual-1901-guidelines-ins-undercover-operations; *see also INS Guidelines for Undercover Operations Uncovered*, 64 INTERPRETER RELEASES 572 (1987); *see also* Pieniazek v. Gonzales, 449 F.3d 792, 794 (7th Cir. 2006) (holding that the Attorney General's guidelines on INS undercover operations continued to govern after the INS was reorganized under the Department of Homeland Security (DHS)). *But see* Krasilych v. Holder, 583 F.3d 962, 966 (7th Cir. 2009) (holding that the guidelines are not legally binding because they are internal rules, not regulations adopted after notice and comment).

17. *See* United States v. Valdovinos-Valdovinos, 743 F.2d 1436, 1437 (9th Cir. 1984) (reversing the dismissal of the criminal indictment for outrageous government conduct on the ground that the criminal defendant lacked standing to bring a due process claim suffered by a third party).

18. United States v. Aguilar, 883 F.2d 662, 705 (9th Cir. 1989) (finding no due process violation in the government's use of undercover informers to infiltrate the Sanctuary Movement because the investigation was conducted in good faith and the informers adhered to the scope of the defendant's invitation to participate in the organization); *see also* Kristina M. Campbell, *Operation Sojourner: The Government Infiltration of the Sanctuary Movement in the 1980s and Its Legacy on the Modern Central American Refugee Crisis*, 13 U. ST. THOMAS L.J. 474, 479–80, 482 (2017); *see also* Bill Curry, *8 of 11 Activists Guilty in Alien Sanctuary Case: Defiant Group Says 6-Month Trial Hasn't Ended Movement to Help Central American Refugees*, L.A. TIMES (May 2, 1986), http://articles.latimes.com/1986-05-02/news/mn-3211_1_illegal-aliens.

19. United States v. Ahluwalia, 807 F. Supp. 1490, 1492–93 (N.D. Cal. 1992), *aff'd*, 30 F.3d 1143 (9th Cir. 1994) (finding the government's bribery sting did not rise to the level of outrageous government conduct).

20. Pawlowska v. Holder, 623 F.3d 1138, 1139–40 (7th Cir. 2010) (denying a continuance to pursue adjustment of status based on an approved visa petition filed by her brother because the immigration judge stated he would ultimately deny the request for adjustment of status in his discretion because she paid a

Other sting operations have deceptively targeted violators of U.S. immigration law or, worse, induced the immigration violation itself. In 1993, the District Director of the San Diego INS office mailed 600 letters falsely offering the possibility of employment authorization to undocumented immigrants with outstanding deportation orders.[21] The outcry in response led to the issuance of a new directive limiting INS's use of misrepresentations in undercover operations.[22] Nonetheless, immigration officials continued engineering deceptive stings. In 2006, undercover agents in Danbury, Connecticut posed as employers for manual labor projects to elicit admissions of alienage from Latino workers.[23] In 2010, ICE agents invited taxi drivers to a local parking authority for a supposed refund only to be questioned about their immigration status after submitting identifying information.[24] Between 2014 and 2016, HSI operated the fictitious University of Northern New Jersey in a sting that, much like Operation Paper Chase, ensnared hundreds of international students in visa fraud.[25] From *Woo Wai* to today, there is a large body of case law on ICE sting operations that advocates can draw on when arguing the OGC, entrapment, and estoppel defenses.

## IV. OUTRAGEOUS GOVERNMENT CONDUCT (OGC)

### A. *Overview of the OGC Defense*

The Supreme Court first recognized the OGC defense in *United States v. Russell*.[26] There, undercover agents supplied the defendant with an essential

bribe to immigration officials); *Krasilych*, 583 F.3d at 964, 967 (7th Cir. 2009) (holding that violations of the Attorney General's guidelines on INS undercover operations were not grounds for exclusion of evidence because Operation Durango was not an egregious violation of the Fourth Amendment); Skorusa v. Gonzales, 482 F.3d 939, 941–43 (7th Cir. 2007) (affirming the immigration judge's denial of a continuance to obtain videotapes of interviews in Operation Durango because the testimony of the respondent and the immigration official were consistent, and the immigration judge and the BIA reasonably interpreted the regulations to only require production of evidence in DHS's possession); Pieniazek v. Gonzales, 449 F.3d 792, 793–94 (7th Cir. 2006) (remanding for the BIA to reconsider the petitioner's motion to suppress evidence obtained in violation of the Attorney General's guidelines on INS undercover operations).

21. Lenni B. Benson, *By Hook or by Cook: Exploring the Legality of an INS Sting Operation*, 31 SAN DIEGO L. REV. 813, 813–14 (1994).

22. *INS Issues New Standards for Sting Operations*, 70 INTERPRETER RELEASES 1209 (Sept. 13, 1993). In December 1993, INS Commissioner Doris Meissner added a new prohibition against "any INS-directed activity intended to induce, through misrepresentation . . . specifically targeted law violators of the Immigration and Nationality Act to present themselves to an INS facility or office for administrative proceedings or to receive some seemingly valid INS benefit, for the purpose of apprehending them." Benson, *supra* note 21, at 818.

23. Maldonado v. Holder, 763 F.3d 155, 158 (2d Cir. 2014) (holding that the sting operation was not an egregious Fourth Amendment violation that could suppress evidence of incriminating statements).

24. Lawal v. McDonald, 546 Fed. Appx. 107, 109 (3d Cir. 2014) (holding that inviting the taxi drivers under a ruse to question their immigration status did not violate the Fourth Amendment).

25. Jie Fang v. Dir. U.S. Immigration & Customs Enf't, 935 F.3d 172, 176–77 (3d Cir. 2019) (holding that ICE's termination of student visas was a final order subject to judicial review under the Administrative Procedure Act).

26. United States v. Russell, 411 U.S. 423, 431–32 (1973).

but difficult-to-obtain ingredient used in the production of methamphetamine.[27] Although the majority ruled in the government's favor, the Court noted that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."[28] To win, the claimant must show the government's conduct offended "fundamental fairness" and shocked "the universal sense of justice."[29] Although the Supreme Court has yet to find a case where government misconduct rose to the level of outrageousness,[30] numerous state courts, district courts, and circuit courts have dismissed indictments for OGC.[31]

Courts have adopted a range of standards and factors in evaluating whether government conduct is sufficiently outrageous to violate fundamental fairness. The Ninth Circuit has held that outrageous conduct requires the government's involvement be *malum in se*, or that the government engineer and direct the criminal enterprise from start to finish.[32] Thus, the OGC defense applies when the "police completely fabricate the crime solely to secure the defendant's conviction."[33] In the Tenth Circuit, a successful OGC defense requires either excessive government involvement in the creation of the crime or significant governmental coercion to induce the crime.[34] New York state courts look to four factors: (1) whether the police manufactured a crime that otherwise would not likely have occurred; (2) whether the police engaged in criminal or improper conduct repugnant to a sense of justice; (3) whether the defendant's reluctance to commit the crime is overcome by appeals to humanitarian instincts such as sympathy or past friendship, by temptation of exorbitant gain, or by persistent solicitation in the face of unwillingness; and (4) whether the record reveals simply a desire to obtain a conviction, with no reading that the police motive is to prevent further crime or protect the populace.[35]

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27. *Id*. at 424–26.
28. *Id*. at 431–32.
29. *Id*. at 432.
30. Eve Zelinger, *The Outrageous Government Conduct Defense: An Interpretive Argument for Its Application by SCOTUS*, 46 HASTINGS CONST. L.Q. 1, 153, 155 (2019); *see Russell*, 411 U.S. at 431–32 (rejecting the OGC defense); Hampton v. United States, 425 U.S. 484, 490–91 (1976) (same).
31. *See, e.g*., United States v. Twigg, 588 F.2d 373, 380–81 (3d Cir. 1978) (granting the OGC defense where the government involvement was vital to the criminal enterprise because the informant supplied the money, chemicals, and expertise for operation of a meth lab); People v. Isaacson, 44 N.Y.2d 511, 522–23, 525 (1978) (granting the OGC defense where the informant lured an out-of-state resident to New York to purchase cocaine); United States v. Gardner, 658 F. Supp. 1573, 1577–78 (W.D. Pa. 1987) (granting the OGC defense where the government's sole motive for overcoming the defendant's obvious reluctance was to secure a conviction).
32. *Ahluwalia*, 807 F. Supp. at 1496 (citing United States v. Williams, 791 F.2d 1383, 1386 (9th Cir. 1986)).
33. *Id*. (internal quotation marks omitted) (quoting United States v. Winslow, 962 F.2d 845 (9th Cir. 1992)).
34. United States v. Pedraza, 27 F.3d 1515, 1521 (10th Cir. 1994).
35. *Isaacson*, 44 N.Y.2d at 521.

The OGC defense differs from entrapment in several key respects. First, in an OGC defense, the inquiry is focused on the government's misconduct. Even if the defendant was predisposed to commit the crime, the indictment must be dismissed if the government's conduct violates due process.[36] Therefore, whether the students were predisposed to engage in visa fraud has no bearing on their OGC claim. Second, whereas entrapment is an affirmative defense determined at trial, the OGC defense is typically raised as a pretrial motion to dismiss the indictment.[37] As such, the OGC defense is a question of law that the judge will decide.[38] Third, since OGC is not an affirmative defense, it does not result in a finding of not guilty. Rather, it bars the prosecution from trying the defendant.[39] Finally, unlike entrapment, OGC is not a recognized defense in the Sixth[40] and Seventh[41] Circuits. Sixth Circuit case law is of special importance because the University of Farmington and likely many of those it duped are located in this Circuit. Victims of Operation Paper Chase must transfer venue outside of the Sixth Circuit in order to raise the OGC defense or else rely on the entrapment, entrapment by estoppel, and estoppel defenses.

### B. *Arguing the OGC Defense in Immigration Court*

Although the OGC defense cannot directly operate in immigration court as a criminal defense because removal proceedings are civil in nature,[42] it is applicable insofar as outrageous government conduct shows that the removal proceedings violate due process. Individuals in removal proceedings are protected by the Fifth Amendment's Due Process Clause.[43] Under *In re Toro*, immigration courts have the power to exclude evidence obtained through means that violate the Due Process Clause of the Fifth Amendment.[44] The immigrant has the initial burden of establishing a prima facie case through

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36. *Hampton*, 425 U.S. at 497 (Brennan, J., dissenting) (agreeing that "Russell does not foreclose imposition of a bar to conviction based upon our supervisory power or even due process principles where the conduct of law enforcement authorities is sufficiently offensive, even though the individuals entitled to invoke such a defense might be 'predisposed.'"); *Valdovinos-Valdovinos*, 588 F. Supp. at 555 ("[I]ndicia of a defendant's predisposition are irrelevant to the issue of outrageous government conduct.").

37. Zelinger, *supra* note 30, at 155.

38. *Id*. at 160; *Valdovinos-Valdovinos*, 588 F. Supp. at 555.

39. Zelinger, *supra* note 30, at 160.

40. United States v. Tucker, 28 F.3d 1420, 1424 (6th Cir. 1994) ("In our view, therefore, there is no authority in this circuit which *holds* that the government's conduct in inducing the commission of a crime, if 'outrageous' enough, can bar prosecution of an otherwise predisposed defendant under the Due Process Clause of the Fifth Amendment.").

41. United States v. Gustin, 642 F.3d 573, 575 (7th Cir. 2011) (stating that the OGC defense is "not one this circuit recognizes").

42. I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing.").

43. Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

44. *In re* Toro, 17 I. & N. Dec. 340, 343 (B.I.A. 1980); *see also In re* Garcia, 17 I. & N. Dec. 319, 321 (B.I.A. 1980).

specific and detailed statements alleging illegality based on personal knowledge,[45] which may then be rebutted by the government.[46] If the Department of Homeland Security (DHS) cannot sustain the charges of removability once the evidence is suppressed, then the immigration judge may terminate proceedings.[47] In numerous unpublished decisions, the BIA has terminated removal proceedings where evidence was acquired unconstitutionally.[48] Additionally, an immigration court may terminate proceedings where DHS has disregarded the "entire procedural framework, designed to insure [sic] the fair processing" of a removal proceeding.[49] Thus, under binding BIA precedent, an immigration court can terminate the removal proceeding of a victim of Operation Paper Chase if they can show the government's evidence was obtained through a sting operation that violated the Due Process guaranteed by the Fifth Amendment.[50]

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45. *In re* Burgos, 15 I. & N. Dec. 278, 279 (B.I.A. 1975); *see also In re* Wong, 13 I. & N. Dec. 820, 822 (B.I.A. 1971).

46. *In re* Barcenas, 19 I. & N. Dec. 609, 611 (B.I.A. 1988).

47. *In re* J-A-B- & I-J-V-A-, 27 I. & N. Dec. 168, 169 (B.I.A. 2017) ("It is well settled that an Immigration Judge may only 'terminate proceedings when the DHS cannot sustain the charges [of removability] or in other specific circumstances consistent with the law and applicable regulations.'" (citing *In re* Sanchez-Herbert, 26 I. & N. Dec. 43, 45 (B.I.A. 2012))); *see also In re* S-O-G- & F-D-B-, 27 I. & N. Dec. 462, 468 (A.G. 2018) ("Immigration judges also possess the authority to terminate removal proceedings where the charges of removability against a respondent have not been sustained." (citing 8 C.F.R. § 1240.12(c))).

48. *See, e.g.*, *In re* J-M-P-, No. AXXX XXX 298, 2015 WL 1605505, at *1 (B.I.A. Mar. 9, 2015), *on remand sub nom.* Pretzantzin v. Holder, 736 F.3d 641, 646 (2d Cir. 2013) (affirming the immigration judge's finding of an egregious Fourth Amendment violation where ICE officers apprehended the petitioner in a nighttime warrantless raid and terminating removal proceedings without prejudice); *In re* D-A-L-T-, No. AXXX XXX 294, 2014 WL 1120165, at *1–2 (B.I.A. Jan. 28, 2014) (affirming the immigration judge's decision granting a motion to suppress evidence and terminate removal proceedings where National Security Agency officers detained the respondent for four hours due to a traffic violation and the stop seemed to be based solely on race); *In re* M-A-I-C-, No. AXXX XXX 400, 2013 WL 5872076, at *5 (B.I.A. Sept. 16, 2013) (affirming the immigration judge's decision granting a motion to suppress evidence and terminate removal proceedings where ICE officers entered the respondent's home via a window in an early morning raid without a search warrant); *In re* J-C-G-M-, No. AXXX XXX 291 (B.I.A. June 14, 2011) (affirming the immigration judge's decision granting a motion to suppress and terminate removal proceedings where in a warrantless early morning raid ICE officers broke down the respondent's bedroom door, seized their I.D., and subjected them to custodial interrogation).

49. *In re* Garcia-Flores, 17 I. & N. Dec. 325, 329 (B.I.A. 1980).

50. Operation Paper Chase might also be considered an egregious Fourth Amendment violation warranting suppression of evidence in immigration court. *See Lopez-Mendoza*, 468 U.S. at 1050–51 (holding that the exclusionary rule may apply in immigration proceedings if there are "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained"). *But see* Hoffa v. United States, 385 U.S. 293, 300–03 (1966) (upholding the admission of incriminating statements made to a government informant because the defendant assumed the risk of betrayal when confiding his wrongdoing to an invitee); *Krasilych*, 583 F.3d at 967 ("What the Fourth Amendment, which prohibits unreasonable searches and seizures, has to do with Krasilych's involvement in Operation Durango escapes us, and he has not even come close to identifying an 'egregious violation' of any other liberty."). There is some support for a reasonable expectation of privacy in one's dealings with their university. *See* 20 U.S.C. § 1232g(b)(1) (2012) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of . . . personally identifiable information . . . of students without . . . written consent . . . ."); Downs v. Holder, 758 F.3d 994, 998 (8th Cir. 2014) (holding that a violation of the Family Educational Rights and Privacy Act (FERPA) plus an egregious Fourth Amendment violation could trigger the exclusionary rule in removal proceedings where the government used the respondent's community college application); Laura Khatcheressian, *FERPA and the Immigration and Naturalization Service: A Guide for University Counsel on Federal Rules for*

Ninth Circuit precedent supports the OGC defense in ICE sting operations. In *United States v. Valdovinos-Valdovinos*, the District Court for the Northern District of California held that an undercover INS operation constituted outrageous government conduct in violation of due process.[51] There, INS agents disseminated an undercover telephone number, accepted calls from Mexican citizens, and advised them it was permissible to enter the United States without proper documentation.[52] The court held that the sting transgressed fundamental fairness and shocked the universal sense of justice because the government generated the crimes for the sake of pressing charges.[53] "This is not the infiltration of crime," the court wrote, but "its creation."[54] Thus, the district court dismissed the indictment charging the defendant with transporting illegal aliens.[55]

On appeal, the Ninth Circuit reversed the district court's dismissal because the defendant—a smuggler—lacked standing to raise a due process violation since he had no direct contact with the government's undercover hotline. Although the defendant could not raise a third party's due process claim, the Ninth Circuit acknowledged that "[a]ny due process violations in the instant controversy involved the Fifth Amendment rights of the two illegal aliens encouraged to illegally enter the country."[56] Significantly, the Ninth Circuit expressly left open the possibility that the operation of the undercover hotline encouraging noncitizens to immigrate unlawfully constitutes outrageous conduct.[57] Thus, pointing to *Valdovinos-Valdovinos*, victims of government-orchestrated stings such as Operation Paper Chase can argue in immigration court that these stings transgress notions of fundamental fairness and thereby violate the Fifth Amendment.

The government's conduct in Operation Paper Chase meets or exceeds the level of misconduct in numerous cases where courts have granted the OGC defense. In *United States v. Twigg*, for example, the Third Circuit found the government's conduct outrageous because the government played a vital role in the commission of the crime: undercover agents supplied the money, facilities, chemicals, and knowledge for the operation of a methamphetamine lab.[58] If the government's vital role in *Twigg* manufactured the crime,

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Collecting, Maintaining and Releasing Information About Foreign Students, 29 J.C. & U.L. 457, 477 (2003) (discussing the interaction between FERPA and the INA); *see also* Carpenter v. United States, 138 S. Ct. 2206, 2213–14, 2217 (2018) (narrowing the third party doctrine to find a reasonable expectation of privacy in the cell-site location information (CSLI) shared with a wireless carrier because of the need to check against arbitrary power and "too permeating police surveillance").

51. *Valdovinos-Valdovinos*, 588 F. Supp. at 556–57.
52. *Id*. at 556.
53. *Id*.
54. *Id*.
55. *Id*. at 558.
56. *Valdovinos-Valdovinos*, 743 F.2d at 1437–38.
57. *Id*. at 1438 ("Because we find that Valdovinos lacked standing to challenge the alleged outrageous conduct of the government, we need not at this time decide whether the operation of the cold line constituted outrageous conduct.").
58. *Twigg*, 588 F.2d at 380–81.

Operation Paper Chase goes even further. Unlike in *Twigg* where the defendants could have created the drugs in another lab, in Operation Paper Chase there might not have been an alternative faux university through which the students could obtain fraudulent visas. Thus, Operation Paper Chase is outrageous government conduct because the government's role was indispensable to the commission of the crime.

Additionally, Operation Paper Chase is analogous to successful OGC cases because the students were actively recruited. Courts have granted the OGC defense where the government initiated the criminal venture[59] or where the crime would not have occurred but for the persistence of undercover government agents.[60] In *United States v. Batres-Santolino*, for example, the court found outrageous government conduct where the undercover agent persisted until the defendant executed the drug deal.[61] In Operation Paper Chase, six individuals recruited over 600 foreign students to enroll at the University of Farmington.[62] Such a high volume of recruitment almost certainly required aggressive tactics that can support a finding of outrageous government conduct. Even though the recruiters were not government officials, the recruiters' conduct may still constitute outrageous government conduct because—unlike entrapment—the OGC defense can extend to those indirectly induced by a government agent.[63]

Finally, the creation of a fake university is outrageous government conduct because it presents an irresistibly unique opportunity. Dangling a "unique opportunity" before an otherwise law-abiding person is a key factor in determining whether inducement tactics violate due process.[64] Students enrolled at the University of Farmington were in an unusual situation: they had F-1 visas from a new, ostensibly SEVP-certified university that had not yet begun classes, but they were reassured that classes would start soon.[65] As a result, the students had a unique opportunity to remain lawfully present in the United States without attending class. Thus, Operation Paper Chase's unique method of inducement also supports a finding of outrageous government conduct.

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59. *Id.* (differentiating *Twigg* from prior cases because the government initiated contact with the defendant and "deceptively implanted the criminal design in [the defendant's] mind").

60. *Isaacson*, 44 N.Y.2d at 511 (finding outrageous government conduct where "[i]nitially, defendant refused to arrange a sale of drugs, but after seven persistent phone calls, defendant finally agreed to supply the informant with two ounces of cocaine").

61. United States v. Batres-Santolino, 521 F. Supp. 744, 751–52 (N.D. Cal. 1981).

62. Indictment, *supra* note 1.

63. *Twigg*, 588 F.2d at 382 ("We are reluctant to establish a Per se rule barring the use of this defense to anyone who was not directly induced by a government agent.").

64. *See* United States v. Savage, 701 F.2d 867, 869–70 (11th Cir. 1983) ("The government in no sense created the crimes because it merely presented the appellants with an opportunity that was in no way unique . . . . [I]t is useful to contrast this case with *United States v. Batres-Santolino*, 521 F. Supp. 744 (N.D.Cal.1981). . . . [where] the government created the crimes for which the defendants were convicted because the government presented the defendants with a unique opportunity that otherwise would not have arisen.").

65. Warikoo, *supra* note 5.

Operation Paper Chase is distinguishable from anti-corruption immigration stings in which defendants have lost the OGC defense. In *United States v. Ahluwalia*, the District Court for the Northern District of California evaluated twenty-two factors to reject an OGC defense in a bribery sting involving immigration officials.[66] Three factors are crucial. First, unlike *Ahluwalia* in which the defendants initiated the criminal activity by bribing immigration officials, in Operation Paper Chase the students were actively recruited to enroll at a fraudulent university.[67] Second, unlike *Ahluwalia*, here the government's active participation was essential to the commission of the offense because the students could not have enrolled in the fake university unless the government had created and SEVP-certified it. In contrast, in a bribery scheme the government's active participation is not essential to the commission of the crime because offering a bribe is itself a crime.[68] Third, although undercover operations may be tolerable to combat difficult-to-detect crimes such as bribery,[69] DHS can shut down the fraudulent "visa mills" at issue in Operation Paper Chase through conventional law enforcement techniques. An immigration officer simply needs to visit suspicious universities to verify their authenticity. Indeed, the government has previously prosecuted individuals for operating sham universities for foreign students.[70]

In summary, victims of Operation Paper Chase can argue that ICE's sting operation amounted to outrageous government conduct because they were actively recruited and the crime could not have been committed but for ICE's misconduct. In particular, advocates can point to the Ninth Circuit's acknowledgment in *Valdovinos-Valdovinos* that the victims of an INS sting operation could have raised an OGC defense where INS set up a telephone hotline encouraging noncitizens to immigrate unlawfully.[71] In a motion before an immigration court, advocates can argue ICE's outrageous government conduct violated the Fifth Amendment Due Process Clause rights of the victims of Operation Paper Chase, and thus removal proceedings must be terminated.[72]

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66. *Ahluwalia*, 807 F. Supp. at 1496–97; *see also* United States v. Myers, 527 F. Supp. 1206, 1223 (E.D.N.Y. 1981) (listing the twenty-two factors).

67. Indictment, *supra* note 1.

68. *Ahluwalia*, 807 F. Supp. at 1497.

69. *See id*. at 1498.

70. *See e.g*., Press Release, U.S. Immigration & Customs Enf't, Former Bay Area university president sentenced to more than 16 years in prison for visa fraud scheme (Nov. 2, 2014), https://www.ice.gov/news/releases/former-bay-area-university-president-sentenced-more-16-years-prison-visa-fraud-scheme [hereinafter *University President Sentenced*]; Press Release, U.S. Attorney's Office for the Southern District of New York, Press Release, U.S. Attorney's Office for the Southern District of N.Y., Three Senior Executives Of For-Profit Schools Plead Guilty in Manhattan Federal Court To Participating in Student Visa And Financial Aid Fraud Schemes (Apr. 30, 2015), https://www.justice.gov/usao-sdny/pr/three-senior-executives-profit-schools-plead-guilty-manhattan-federal-court [hereinafter *Executives Plead Guilty*].

71. *See* United States v. Valdovinos-Valdovinos, 743 F.2d 1436, 1438 (9th Cir. 1984).

72. *See e.g*., *In re* Toro, 17 I. & N. Dec. 340, 343 (B.I.A. 1980).

## V. ENTRAPMENT

### A. *Overview of the Entrapment Defense*

Victims of Operation Paper Chase may also argue that the government's sting operation was entrapment. Entrapment occurs when the government induces the crime and the defendant lacked the predisposition to engage in the unlawful conduct.[73] Inducement means the government's deception "implanted" the criminal design in the mind of the defendant.[74] Inducing conduct includes "persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship."[75] In federal court, the predisposition inquiry is a subjective, fact-intensive inquiry into the individual's criminal propensity.[76]

### B. *Arguing the Entrapment Defense in Immigration Court*

Although a criminal defense, entrapment can be raised in immigration court insofar as it is a violation of due process to prosecute someone for conduct that is the result of entrapment. The BIA has acknowledged that evidence obtained through improper inducement may violate due process.[77] Courts have held that entrapment tactics violate the fundamental fairness guaranteed by the Fifth Amendment where the government's involvement "generate[s] new crimes . . . merely for the sake of pressing criminal charges against him when, as far as the record reveals, he was lawfully and peacefully minding his own affairs."[78] Given that there are true visa mills which do not require sting operations to detect and prosecute,[79] Operation Paper Chase violates due process because it was created merely to generate new crimes and the victims were law-abiding individuals. Once it is established that the entrapment scheme has violated the Fifth Amendment's Due Process Clause, the immigration court may suppress the unlawfully obtained evidence and terminate removal proceedings if DHS cannot sustain the charges of removability.[80]

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73. Mathews v. United States, 485 U.S. 58, 63 (1988).

74. United States v. Russell, 411 U.S. 423, 436 (1973).

75. United States v. Mendoza-Salgado, 964 F.2d 993, 1004 (10th Cir. 1992) (citations and internal quotation marks omitted).

76. *See* Hampton v. United States, 425 U.S. 484, 496 (1976) (Brennan, J., dissenting) ("The 'subjective' approach to the defense of entrapment followed by the Court today and in Sorrells, Sherman, And Russell- focuses on the conduct and propensities of the particular defendant in each case and, in the absence of a conclusive showing, permits the jury to determine as a question of fact the defendant's 'predisposition' to the crime.").

77. *See In re* Jorge Luis-Rodriguez, 22 I. & N. Dec. 747, 759 n.5 (B.I.A. 1999).

78. United States v. Twigg, 588 F.2d 373, 381 (3d Cir. 1978); *see also* United States v. Pitt, 193 F.3d 751, 759–60 (3d Cir. 1999) ("The defense of outrageous government conduct examines whether a defendant's due process rights have been violated because the government created the crime for the sole purpose of obtaining a conviction."); United States v. Batres-Santolino, 521 F. Supp. 744, 752 (N.D. Cal. 1981) (holding that entrapment tactics violated due process because law enforcement implanted the crime in the mind of an innocent person with no predisposition to commit the alleged offense).

79. *See, e.g.*, *University President Sentenced*, *supra* note 70; *Executives Plead Guilty*, *supra* note 70.

80. *See In re* Toro, 17 I. & N. Dec. 340, 343 (B.I.A. 1980).

One of the earliest cases to recognize the entrapment defense in federal court was an immigrant smuggling case.[81] In *Woo Wai*, an agent of the Immigration Commission suspected that Mr. Wai of San Francisco had smuggled women from China into the United States.[82] An undercover detective travelled with Mr. Wai to San Diego, and proposed he smuggle Chinese individuals across the border. When Mr. Wai said that would be illegal, the immigration inspectors replied, "Oh, well, if we make no arrest, who can make arrest?"[83] Over the course of a year, the detective and the immigration inspectors insisted Mr. Wai smuggle Chinese nationals into the country, until finally he assented.[84] Mr. Wai was convicted of conspiracy to smuggle noncitizens,[85] and the Ninth Circuit reversed his conviction because Mr. Wai had been induced to commit the crime.[86] Although Mr. Wai's entrapment defense concerned a criminal offense—not a civil immigration violation—his case bolsters the entrapment defense in immigration court because it is an example of a successful entrapment defense against immigration officials.

The victims of Operation Paper Chase satisfy the elements of entrapment. First, Operation Paper Chase amply meets the standard for inducement. In *Woo Wai*, the court found inducement because the idea to commit the offense originated in the minds of the immigration officials—not the defendant. Similarly, in Operation Paper Chase the idea of obtaining a student visa was implanted in the minds of the victims because they were actively recruited to enroll at the University of Farmington, a phony university premised on the government's fraudulent representations of SEVP certification.[87] More recently in *Jacobson v. United States*, the Supreme Court found inducement where the defendant ordered child pornography after the government solicited his order through letters decrying censorship.[88] If letters can induce clearly illegal conduct, personally recruiting students to attend an SEVP-certified university surely exceeds the standard for inducement. Additionally, courts have found inducement where the government makes extraordinary promises "that would blind the ordinary person to his legal duties."[89] The unique situation presented by the University of Farmington of obtaining a student visa without attending class is exactly the kind of extraordinary opportunity that would blind even law-abiding individuals.

Victims of Operation Paper Chase can also meet the predisposition element of entrapment, depending on the facts of their particular case. Factors relevant in determining predisposition include: "(1) the character of the

81. United States v. Vanzandt, 14 M.J. 332, 334–35 (C.M.A. 1982).
82. *Woo Wai*, 223 F. at 413.
83. *Id.*
84. *Id.* at 414.
85. *Id.* at 412.
86. *Id.* at 416.
87. Indictment, *supra* note 1; Snell, *supra* note 1.
88. Jacobson v. United States, 503 U.S. 540, 553–54 (1992).
89. United States v. Evans, 924 F.2d 714, 717 (7th Cir. 1991).

defendant; (2) who first suggested the criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant demonstrated reluctance; and (5) the nature of the government's inducement."[90] Whether the defendant reluctantly assented to the offense or enthusiastically participated is especially important.[91] Since the victims of Operation Paper Chase were actively recruited and many were graduate students who had previously held lawful F-1 visas,[92] the students satisfy the predisposition element: they did not propose the criminal activity and were previously law-abiding. Crucially, the predisposition inquiry focuses on the defendant's state of mind at the time of the inducement.[93] Thus, even if the students quickly realized the University of Farmington was a scam after obtaining their visas, the entrapment defense is still available as long as they were not predisposed to violate the immigration laws at the time of inducement.

### C. *Vicarious or Derivative Entrapment*

Courts have generally held that an individual can only be entrapped by a government agent.[94] Consequently, Operation Paper Chase's use of recruiters complicates the entrapment defense. Some circuits—including the Sixth—have held that the entrapment defense does not apply if the intermediary *on their own* induces the defendant, but can be raised if the intermediary was acting at the instruction of a government official.[95] Hence, the entrapment defense is available if the recruiters in Operation Paper Chase were carrying out the instructions of ICE agents.

Even if the recruiters were not acting at the direction of ICE, an alternative from the Seventh Circuit may provide another route to the entrapment defense. In the Seventh Circuit, although there is no private or "vicarious" entrapment, there is a defense of *derivative* entrapment. Derivative entrapment occurs when the private actor is entrapped and serves as a conduit for the government's entrapment scheme.[96] Hence, the students may win a derivative entrapment defense if the recruiters were also entrapped. Given the burdensome standards for inducement and predisposition, however, a derivative entrapment defense may prove challenging.

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90. United States v. Citro, 842 F.2d 1149, 1152 (9th Cir.1988).
91. United States v. Higham, 98 F.3d 285, 291 (7th Cir. 1996).
92. Indictment, *supra* note 1; Snell, *supra* note 1.
93. *Evans*, 924 F.2d at 716 (7th Cir. 1991) ("If he was indeed entrapped, it is irrelevant that the entrapment was so effective as to make him not only a willing but an eager participant."); *see also* United States v. Hildreth, 485 F.3d 1120, 1126 (10th Cir. 2007).
94. *See, e.g.*, United States v. Emmert, 9 F.3d 699, 703 (8th Cir. 1993) ("The entrapment defense does not extend to inducement by a private citizen."); United States v. Goodacre, 793 F.2d 1124, 1125 (9th Cir. 1986) ("[T]here is no defense of private entrapment.").
95. United States v. Layeni, 90 F.3d 514, 520 (D.C. Cir. 1996); *see also* United States v. Poulsen, 655 F.3d 492, 503 (6th Cir. 2011) ("Inducement for the purpose of entrapment may occur through private citizens acting as government agents upon the instructions of the government.").
96. United States v. Hollingsworth, 27 F.3d 1196, 1204 (7th Cir. 1994) (en banc).

## VI. ENTRAPMENT BY ESTOPPEL

### A. *Overview of the Entrapment by Estoppel Defense*

If removal proceedings are not terminated under the entrapment defense, a related defense remains available: entrapment by estoppel. Entrapment by estoppel is derived from the Supreme Court cases *Raley v. Ohio* and *Cox v. Louisiana*, which held that due process prohibits the prosecution of individuals for conduct authorized by the government.[97] Entrapment by estoppel arises when the government affirmatively assures the defendant that their conduct is lawful, the defendant reasonably relies on those assurances, and the government criminally prosecutes the defendant for that conduct.[98] Entrapment by estoppel requires that the government "actively mislead" the defendant by inducing him or her to rely on a government official's affirmative misrepresentation.[99] Such reliance is only reasonable if a person who is "sincerely desirous" of obeying the law would have "accepted the information as true, and would not have been put on notice to make further inquiries."[100]

### B. *Arguing the Entrapment by Estoppel Defense in Immigration Court*

Like the OGC and entrapment defenses, entrapment by estoppel can be raised as a defense in immigration court insofar as it evinces a violation of due process. The entrapment by estoppel defense is based upon the principle of fundamental fairness "embodied in the Due Process Clause of the Constitution."[101] "[C]onvicting a citizen for exercising a privilege which the State had clearly told him was available to him" is to "sanction an indefensible sort of entrapment by the State" that "violate[s] the Due Process Clause."[102] Thus, victims of Operation Paper Chase may raise entrapment by estoppel as a defense in immigration court under *In re Toro*.[103] Additionally, given that federal courts have applied the entrapment by estoppel defense in

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97. Raley v. Ohio, 360 U.S. 423, 425–26 (1959) (holding that it is an indefensible violation of due process to convict an individual for refusing to answer questions from a state commission which had clearly told the individual they have the privilege to remain silent); Cox v. Louisiana, 379 U.S. 559, 570–71 (1965) (holding that the conviction of a protestor for demonstrating "near" a courthouse violated due process because the police had told the protestor they may demonstrate on the sidewalk of the courthouse).

98. United States v. Aquino-Chacon, 109 F.3d 936, 938–39 (4th Cir. 1997); *see also* United States v. W. Indies Transp., Inc., 127 F.3d 299, 313 (3d Cir. 1997) (holding that entrapment by estoppel requires "(1) a government official (2) told the defendant that certain criminal conduct was legal, (3) the defendant actually relied on the government official's statements, (4) and the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statement.").

99. United States v. Trevino-Martinez, 86 F.3d 65, 69 (5th Cir. 1996).

100. United States v. Ramirez-Valencia, 202 F.3d 1106, 1109 (9th Cir. 2000) (citations and internal quotation marks omitted).

101. United States v. Levin, 973 F.2d 463, 468 (6th Cir. 1992).

102. *Raley*, 360 U.S. at 425–26.

103. *In re* Toro, 17 I. & N. Dec. 340, 343 (B.I.A. 1980).

strict liability cases because it "rests upon principles of fairness,"[104] by extension the defense should also apply in civil immigration proceedings that likewise do not have a mens rea component.

Entrapment by estoppel has been argued as a defense to numerous criminal immigration offenses. In *United States v. W. Indies Transp., Inc.*, for example, the Third Circuit considered the entrapment by estoppel defense of a company convicted of visa fraud.[105] In that case, a shipping company instructed foreign workers to apply for the incorrect visa, housed these "crewmen" in a shipping container, and exploited them as dock workers at low wages.[106] Although the company claimed they had fully informed INS of this arrangement, the district court found INS had only extended the visas because they were supposed to start work as crewmen.[107] Thus, the shipping company's entrapment by estoppel defense failed because government officials never approved the conduct as legal.[108] Entrapment by estoppel has also frequently, but unsuccessfully, been brought as a defense in illegal reentry cases.[109]

Operation Paper Chase meets the criteria for entrapment by estoppel. The students reasonably relied on the government's representations that the University of Farmington was lawful because DHS listed the school as SEVP certified.[110] Furthermore, agents posing as university employees assured students of the school's legality.[111] After actively misleading the students, the government placed them into removal proceedings. Since it is a violation of due process to prosecute someone for conduct authorized by the government, the removal proceedings must be terminated under *In re Toro*.[112] Entrapment by estoppel may prove pivotal in Operation Paper Chase because, unlike OGC, entrapment by estoppel is a recognized defense in the Sixth Circuit.[113] Moreover, it is easier to prove than entrapment, which would require either a showing of derivative entrapment or that ICE directed the recruiters.

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104. United States v. Thompson, 25 F.3d 1558, 1563–64 (11th Cir. 1994) (applying the entrapment by estoppel defense to a strict liability firearm offense under 18 U.S.C. § 922); *see also* United States v. Batterjee, 361 F.3d 1210, 1218 (9th Cir. 2004).

105. *W. Indies Transp., Inc.*, 127 F.3d at 312–13.

106. *Id.* at 304.

107. *Id.* at 313.

108. *Id.*

109. *See, e.g.*, *Aquino-Chacon*, 109 F.3d at 937, 939 (finding no entrapment by estoppel because the Form I-294's statement that "any deported person who within five years returns without permission is guilty of a felony" did not affirmatively assure the defendant that reentry without permission was lawful if it occurred more than five years after deportation); *Trevino-Martinez*, 86 F.3d at 70 (finding no entrapment by estoppel because the U.S. consulate could not have not have actively misrepresented that his attempts to reenter were legal if defendant was not candid about his prior deportations); *Ramirez-Valencia*, 202 F.3d at 1109 (finding no entrapment by estoppel because Form I-294 did not affirmatively misrepresent that the defendant could lawfully reenter without permission after five years).

110. DEP'T OF HOMELAND SEC., *supra* note 2; Chappell, *supra* note 2.

111. Warikoo, *supra* note 5.

112. *In re* Toro, 17 I. & N. Dec. 340, 343 (B.I.A. 1980).

113. *See, e.g.*, United States v. Honeycutt, 816 F.3d 362, 374 (6th Cir. 2016), *rev'd on other grounds*, 137 S. Ct. 1626 (2017).

## VII. EQUITABLE ESTOPPEL

### A. *Overview of Equitable Estoppel in Immigration Law*

In addition to terminating removal proceedings on due process grounds, an immigration court may estop the government from pursuing removal proceedings against the students. The Supreme Court has expressly left open the possibility that the government may be estopped from enforcing immigration laws if it engages in affirmative misconduct.[114] The First,[115] Second,[116] Third,[117] Fourth,[118] Fifth,[119] Sixth,[120] Seventh,[121] Eighth,[122] Ninth,[123]

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114. I.N.S. v. Miranda, 459 U.S. 14, 19 (1982); I.N.S. v. Hibi, 414 U.S. 5, 8 (1973); Montana v. Kennedy, 366 U.S. 308, 314–15 (1961).

115. Akbarin v. I.N.S, 669 F.2d 839, 841, 844 (1st Cir. 1982) (vacating and remanding because the petitioner may estop the government where the petitioner alleged that the INS had misinformed his employer that he could hire the petitioner, and weeks later the INS initiated removal proceedings on the basis of a letter from his employer).

116. Corniel-Rodriguez v. I.N.S., 532 F.2d 301, 304 (2d Cir. 1976) (reversing order of deportation where the consular officer failed to advise the petitioner, as required by federal regulation, that she would become inadmissible if she married before entering the United States).

117. Mudric v. Attorney Gen. of U.S., 469 F.3d 94, 99 (3d Cir. 2006) (finding that delay in adjudicating asylum and adjustment of status applications was not affirmative misconduct); *see also* McLeod v. Peterson, 283 F.2d 180, 182 (3d Cir. 1960) (staying the deportation order where the petitioner had agreed to an erroneous order of voluntary departure because of immigration officials' assurances that they would help his wife petition for his legal reentry, but failed to do so before his wife passed away). The court in *McLeod* "held against the Government on what amounts to an estoppel theory without actually mentioning estoppel." *Akbarin*, 669 F.2d at 843.

118. Casa De Maryland v. U.S. Dep't of Homeland Sec., 924 F.3d 684, 706 (4th Cir. 2019) (finding that DACA recipients failed to establish reasonable reliance on government policies regarding information sharing with ICE where the government had warned them that such policies could be modified or rescinded at any time), *petition for cert. filed*, (U.S. May 24, 2019) (No. 18-1469).

119. Fano v. O'Neill, 806 F.2d 1262, 1265–66 (5th Cir. 1987) (finding the petitioner adequately stated a claim for estoppel where he alleged the INS "willfully, wantonly, recklessly, and negligently" delayed his application, suggesting discriminatory treatment); Ponce-Gonzalez v. I.N.S., 775 F.2d 1342, 1346 (5th Cir. 1985) (finding that the failure of the INS to inquire whether the petitioner was eligible for § 241(f) relief did not constitute affirmative misconduct sufficient to estop the government).

120. Elia v. Gonzales, 431 F.3d 268, 274, 276 (6th Cir. 2005) (finding no affirmative misconduct where the government's failure to promptly schedule a deportation hearing allegedly resulted in the denial of § 212(c) relief); Tapia v. Gonzales, 192 Fed. Appx. 436, 439 (6th Cir. 2006) (finding no affirmative misconduct where the petitioner claimed that his advance parole authorization was procured by someone who falsely claimed to be a lawyer and acted in cahoots with a government official).

121. Gutierrez v. Gonzales, 458 F.3d 688, 693 (7th Cir. 2006) (finding that the government's use of information which was voluntarily provided in a deficient application for adjustment of status was not "the type of egregious affirmative misconduct necessary to justify the extraordinary remedy of estoppel").

122. Castillo v. Ridge, 445 F.3d 1057, 1061 (8th Cir. 2006) (denying estoppel claim where emails implied the INS intentionally delayed adjudication of the petitioner's adjustment of status application until the completion of his divorce proceedings because the alleged bad faith did not constitute a false representation and he did not rely on it to his detriment).

123. Salgado-Diaz v. Gonzales, 395 F.3d 1158, 1165 (9th Cir. 2005), *as amended* (Mar. 10, 2005), *opinion amended on reconsideration*, No. 02-74187, 2005 WL 553046 (9th Cir. Mar. 10, 2005) (finding that if the government unlawfully deported the petitioner during pending immigration proceedings, then the government would be estopped from asserting that his subsequent attempt to reenter the US illegally was a basis for ordering him removed); Sun Il Yoo v. I.N.S., 534 F.2d 1325, 1327 (9th Cir. 1976) (estopping the government from denying the petitioner the benefit of pre-certification in seeking adjustment of status where INS's failure to timely process the petitioner's application for a labor-based immigrant visa, even after counsel had corrected the agency's misunderstanding regarding the petitioner's employment history, resulted in the petitioner being ineligible for relief because of subsequent changes in immigration law); Gestuvo v. Dist. Dir. of I.N.S., 337 F. Supp. 1093, 1094 (C.D. Cal. 1971) (estopping the INS from denying the petitioner's eligibility for preference classifications, where the government had initially

Tenth,[124] and Eleventh Circuits[125] have all considered equitable estoppel claims against the government in immigration enforcement. Estoppel requires a "false representation or concealment of material facts to a party ignorant of the facts, with the intention that the other party should rely on it, where the other party actually and detrimentally relies on it."[126] Additionally, an estoppel claim against the government requires "affirmative misconduct."[127] Affirmative misconduct is more than "mere negligence."[128] The government must intentionally or recklessly mislead the claimant,[129] and cause a "serious injustice."[130] As the BIA has explained, "[t]o warrant an estoppel, the fact situation must be a glaring and obvious one in which, to permit the party against whom estoppel is sought to assert as a bar the position that it has induced the claimant to assume would be to countenance a gross miscarriage of justice."[131] Failure to comply with agency regulations may also support a finding of affirmative misconduct.[132] Finally, the petitioner must show that "the public's interest will not suffer undue damage" from estoppel.[133]

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found the petitioner eligible for permanent residence status but changed its determination eighteen months later).

124. Kowalczyk v. I.N.S., 245 F.3d 1143, 1150 (10th Cir. 2001) (finding that the BIA's nine-year delay in deciding an asylum appeal did not constitute affirmative misconduct).

125. Savoury v. Attorney Gen. of U.S., 449 F.3d 1307, 1319 (11th Cir. 2006) (finding no affirmative misconduct where the government attempted to deport the petitioner after adjusting his status to lawful permanent resident even though it was already aware of his removable offense); Tovar-Alvarez v. Attorney Gen. of U.S., 427 F.3d 1350, 1354 (11th Cir. 2005) (finding that the government's delay in processing the noncitizen's petition for naturalization did not constitute affirmative misconduct).

126. Mukherjee v. I.N.S., 793 F.2d 1006, 1008 (9th Cir. 1986); *see also Casa De Maryland*, 924 F.3d at 705 ("To establish equitable estoppel, '[i]t is only necessary to show that the person [sought to be] estopped, by . . . statements or conduct, misled another to his prejudice'" (quoting United States *ex rel*. Noland Co. v. Wood, 99 F.2d 80, 82 (4th Cir. 1938))); *Castillo*, 445 F.3d at 1061 ("To establish a claim for estoppel against the government, the claimant must prove: (1) false representation by the government, (2) that the government intended to induce the claimant to act on that representation, (3) the claimant's lack of knowledge or inability to obtain the true facts, (4) that the claimant relied on the misrepresentation to his detriment, and (5) affirmative misconduct by the government.").

127. *Hibi*, 414 U.S. at 8, 10–11; Tefel v. Reno, 180 F.3d 1286, 1303 (11th Cir. 1999) ("[E]very other circuit has concluded that establishing estoppel by a private party against the government requires a showing of affirmative misconduct."); *In re* Morales, 15 I. & N. Dec. 411, 412 (B.I.A. 1975) ("[I]n INS v. Hibi, 414 U.S. 5 (1973), the Supreme Court indicated that, if applicable at all, estoppel in the area of citizenship could only arise after 'affirmative misconduct' on the part of the government.").

128. *Mukherjee*, 793 F.2d at 1008.

129. *Elia*, 431 F.3d at 276.

130. *Mukherjee*, 793 F.2d at 1008.

131. *In re* Talanoa, 12 I. & N. Dec. 371, 378–79 (B.I.A. 1967).

132. In *Corniel-Rodriguez v. I.N.S.*, for example, the Second Circuit estopped the government where a consular officer failed to warn the visa applicant that she would be inadmissible if she married before applying for admission, as required by federal regulations. 532 F.2d 301, 303 (2d Cir. 1976). As a result, the petitioner was denied entry because she married three days before departing to the United States. *Id*. The court found that noncompliance with a required procedure qualified as "affirmative misconduct" under *Hibi*, and thus reversed the order of deportation. *Id*. at 306–07.

133. *Mukherjee*, 793 F.2d at 1008–09 (quoting Morgan v. Heckler, 779 F.2d 544, 545 (9th Cir.1985)); *see also* Heckler v. Cmty. Health Servs. of Crawford Cnty., 467 U.S. 51, 60–61 (1984) ("[T]he public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.").

### B. *Arguing Equitable Estoppel in Immigration Court*

Although it is commonly said that equitable estoppel is unavailable in immigration court,[134] I argue that immigration courts possess the authority to estop the government. Precedent BIA decisions plainly indicate that immigration courts have the power to equitably estop the government. In *In re Hernandez-Puente*, the BIA held that immigration courts have no authority to estop the government only insofar as they cannot preclude the government from undertaking a *lawful* course of action.[135] Thus, if removing a noncitizen violates due process because of outrageous government conduct or entrapment, then an immigration court can estop the government from removing the noncitizen. In *In re Hernandez-Puente*, the BIA reasoned that it did not have the authority to estop the government from rescinding a grant of adjustment of status because it was within the government's lawful power to do so: the applicant was clearly ineligible for adjustment of status after he had aged out and married.[136] Nonetheless, the BIA stressed that violations of an alien's procedural rights may affect determinations of removability and it may exercise the power to make such determinations as long as the BIA is acting within its appellate jurisdiction.[137] As argued *supra*, Operation Paper Chase violated the students' due process rights because the sting constituted outrageous government conduct and entrapment. Thus, it is unlawful to deport the students and an immigration court or the BIA may estop the government from doing so. Alternatively, if an immigration court or the BIA does not find a due process violation, they can still estop the government if Operation Paper Chase constitutes affirmative misconduct.

The BIA's supposed inability to estop the government is belied by its consideration of numerous estoppel claims. In *In re Truong*, for example, the BIA rejected the petitioner's estoppel claim because it found that the government had not engaged in affirmative misconduct when it placed the respondent in exclusion proceedings after spending four months abroad, although this brief absence could fall under the *Fleuti* doctrine.[138] In *In re Morales*, the BIA considered an estoppel claim where INS mistakenly granted a visa on the basis of the petitioner's wife, who in fact was not a U.S. citizen, but

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134. *See, e.g.*, *Tapia*, 192 Fed. Appx. at 440 ("Equitable relief is unavailable because the IJ's jurisdiction is purely legal and because both it and the BIA 'are without authority to apply the doctrine of equitable estoppel against the [DHS].'" (quoting *In re* Hernandez-Puente, 20 I. & N. Dec. 335, 338 (B.I.A. 1991))); Castaneda-Cortez v. Sabol, No. 3:14-CV-1151, 2014 WL 2940853, at *4 (M.D. Pa. June 30, 2014) ("[E]ven if Petitioner were to appeal to the BIA, neither an Immigration Judge nor the BIA can apply the doctrine of equitable estoppel . . .").

135. *In re* Hernandez-Puente, 20 I. & N. Dec. 335, 338 (B.I.A. 1991) ("[T]he Board itself and the immigration judges are without authority to apply the doctrine of equitable estoppel against the Service *so as to preclude it from undertaking a lawful course of action that it is empowered to pursue* by statute and regulation." (emphasis added)).

136. *Id.* at 336.

137. *Id.* at 339.

138. *In re* Phat Dinh Truong, 22 I. & N. Dec. 1090, 1092–93 (B.I.A. 1999).

rejected the claim due to lack of affirmative misconduct.[139] In another case, the BIA held it could not estop the government absent testimony from INS agents regarding the allegedly unlawful removal.[140] Although, to date, the BIA has not found affirmative misconduct warranting estoppel,[141] dissenting BIA members have argued that estoppel is appropriate in cases evincing entrapment.[142]

Finally, circuit courts have remanded cases to the BIA under the assumption that immigration courts may estop the government. In *Akbarin v. I.N.S.*, for example, the First Circuit held that an immigration judge erroneously excluded evidence of INS's oral authorization of a noncitizen's employment and remanded so the petitioners could present their estoppel claim in immigration court.[143] In *Salgado-Diaz v. Gonzales*, the Ninth Circuit remanded the case to the BIA with instructions that the government be estopped from relying on the petitioner's attempted reentry as a basis for his removability if he is able to establish that the border agents tricked him into signing a voluntary departure form and unlawfully deported him without a hearing.[144] In summary, BIA precedent and circuit court decisions support the position that immigration courts can equitably estop the government from taking an unlawful course of action.

### C. *Overcoming the Jurisdictional Bar in Federal Court*

If immigration courts and the BIA refuse to estop the government from removing the victims of Operation Paper Chase, a federal court may estop the government.[145] Courts of appeals can review constitutional claims or questions of law raised in a petition for review of a final order of removal.[146] To estop the government in federal court, the petitioners must overcome the

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139. *In re* Morales, 15 I. & N. Dec. 411, 413 (B.I.A. 1975).

140. *Salgado-Diaz*, 395 F.3d at 1161.

141. Most recently, in *In re* Vides Casanova, the BIA rejected the estoppel claim of a former Salvadoran military leader who asserted that U.S. officials had led him to believe that the United States supported his country's brutal extrajudicial killings. 26 I. & N. Dec. 494, 495, 514 (B.I.A. 2015). The BIA noted that the respondent failed to cite any case stating immigration courts can estop the government, yet cited *In re* Hernandez-Puente for the proposition that the BIA cannot preclude the government from undertaking *lawful* courses of action. *Id*. Given the dubiousness of the respondent's claim, the BIA's curt analysis, and its approval of *In re* Hernandez-Puente, the BIA's suggestion that it lacks any authority to estop the government should be regarded as mere dicta.

142. *See* Morales, 15 I. & N. Dec. at 412–13, 415 (Jakaboski, J., dissenting) ("The respondent entered . . . as if he had fallen into a *trap* set by the Service. . . . I therefore, would grant the motion to reopen to raise the bar of equitable estoppel." (emphasis added)).

143. *Akbarin*, 669 F.2d at 845.

144. *Salgado-Diaz*, 395 F.3d at 1160, 1168.

145. *See, e.g.*, *Miranda*, 459 U.S. at 19; *Corniel*, 532 F.2d at 306–07; *Gestuvo*, 337 F. Supp. at 1094.

146. 8 U.S.C. § 1252(a)(2)(D) (2018). With limited exceptions, a final order of removal may not be challenged in a habeas petition. *See* 8 U.S.C. §§ 1252(a)(5), (e)(2), (g). However, immigrants in removal proceedings can challenge unlawful detention in a habeas petition. *See, e.g.*, Hamama v. Adducci, 912 F.3d 869, 877 (6th Cir. 2018) (finding that the district court had jurisdiction over detention-based claims, despite its lack of jurisdiction over removal-based claims); *see also* Gerald L. Neuman, *On the Adequacy of Direct Review After the Real ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 136 (2007) (explaining that the REAL ID Act channels judicial review of removal orders into the courts of appeals, while leaving review of detention-related issues in the district courts on habeas).

jurisdictional bars in 8 U.S.C. § 1252. Although § 1252(a)(2)(D) permits review of constitutional claims or questions of law, § 1252(g) strips federal courts of jurisdiction to hear any cause or claim arising from the government's decision to commence proceedings, adjudicate cases, or execute removal orders.[147] If § 1252(a)(2)(D) trumps § 1252(g),[148] then a circuit court can hear a student's claim if the petition for review presents a constitutional claim or question of law. Otherwise, a capacious reading of § 1252(g) could preclude judicial review of their claim.[149]

Regardless of how § 1252(a)(2)(D) interacts with § 1252(g), § 1252(g) would not preclude the federal courts from estopping the government from deporting the victims of Operation Paper Chase for three key reasons. First, § 1252(g) only bars review of claims arising from three discrete decisions: to commence proceedings; adjudicate cases; or execute removal orders.[150] The government's operation of the University of Farmington was not a decision to commence a removal proceeding, adjudicate a case, or execute a removal order. As the Supreme Court explained in *Reno v. Am.-Arab Anti-Discrimination Comm.*, decisions which form part of the deportation process such as surveilling a suspected violator do not fall under § 1252(g).[151] Likewise, the entrapment scheme in Operation Paper Chase falls outside the scope of § 1252(g) because it is merely a form of surveillance.

Second, at least one circuit court has read § 1252(g) narrowly to allow for estoppel claims arising from government misconduct that predates the decision to commence removal proceedings.[152] In *Young Sun Shin v. Mukasey*, a petitioner who had bought a green card from a corrupt INS official asked the

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147. 8 U.S.C. §§ 1252(a)(2)(D), (g) (2018).

148. Circuit courts are split on this question. *Compare* Ali v. Mukasey, 524 F.3d 145, 150 (2d Cir. 2008) (holding that a challenge to DHS's decision to commence removal proceedings is prohibited by § 1252(g) unless it involves a constitutional claim or question of law), *with* Hussain v. Keisler, 505 F.3d 779, 784 (7th Cir. 2007) (holding that "§ 1252(a)(2)(D)'s authorization to review certain constitutional claims or questions of law does not apply to § 1252(g)" because "Section 1252(a)(2)(D) plainly states that other limitations on judicial review in 'this section'—that is, section 1252—still apply"). *See also* Aaron G. Leiderman, *Preserving the Constitution's Most Important Human Right: Judicial Review of Mixed Questions Under the REAL ID Act*, 106 COLUM. L. REV. 1367, 1376 n.51 (2006) (noting that it "is unclear . . . whether even constitutional and legal challenges to such prosecutorial discretion are unreviewable" under § 1252(g) after the enactment of § 1252(a)(2)(D)).

149. *See, e.g.*, De Vera v. Immigration & Customs Enf't, No. 17-62488-CIV, 2018 WL 1441344, at *3 (S.D. Fla. Mar. 21, 2018) ("Put simply, but for the initiation of removal proceedings, the Plaintiffs would likely have never filed this suit. Thus, because the substance of Plaintiffs' Complaint seeks to enforce alleged promises that would affect the Government's decision to commence removal proceedings, this Court is without jurisdiction to entertain it.").

150. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999).

151. *Id.*

152. Young Sun Shin v. Mukasey, 547 F.3d 1019, 1023–24 (9th Cir. 2008); *see also* Wong v. United States, 373 F.3d 952, 965 (9th Cir. 2004) ("[Section] 1252(g) does not bar review of actions that occurred *prior* to any decision to 'commence proceedings'" (emphasis in original)); Kashannejad v. U.S. Citizenship & Immigration Servs., No. C-11-2228 EMC, 2011 WL 4948575, at *9–10 (N.D. Cal. Oct. 18, 2011), *aff'd*, 584 Fed. Appx. 375 (9th Cir. 2014), and *aff'd*, 584 Fed. Appx. 375 (9th Cir. 2014) ("While the instant case raises the prospect of judicial estoppel rather than equitable estoppel, the basic point underlying *Young Sun Shin* is that review of government action taken prior to a decision to commence proceedings is not jurisdictionally barred by § 1252(g). The Court, therefore, may review the merits of Mr. Kashannejad's judicial estoppel argument.").

court to estop the government from removing her because the government had "unclean hands."[153] The court considered the petitioner's estoppel claim notwithstanding § 1252(g) because the claim arose out of misconduct that predated the decision to commence proceedings.[154] Ultimately, the court rejected the estoppel claim because she was not an "innocent dupe," but rather a willing participant in the scheme.[155] Similarly, the victims of Operation Paper Chase present a claim that arises from government misconduct that predates the decision to commence removal proceedings. Thus, under *Young Sun Shin* a circuit court has jurisdiction to estop the government from removing the petitioners notwithstanding the jurisdictional bar in § 1252(g).

Third, § 1252(g) does not state the government cannot be estopped from commencing proceedings, adjudicating cases, or executing removal orders. It only bars jurisdiction over claims arising out of a decision to commence proceedings, adjudicate cases, or execute removal orders. The students' estoppel claim arises out of the government's affirmative misconduct. Whether the government decides to commence removal proceedings is not essential to their claim. Even if the students were never placed into removal proceedings, living without legal status as a result of government misconduct is itself an egregious violation of their rights. Since the students' claims exist independent of the government's decision to commence proceedings, adjudicate cases, or execute removal orders, § 1252(g) does not strip the federal courts of jurisdiction to hear a claim for equitable estoppel. Finally, the outrageous government conduct in Operation Paper Chase may fall under the escape valve recognized in *Am.-Arab Anti-Discrimination Comm.* for rare cases where the "alleged basis of discrimination is so outrageous" that the jurisdictional bar may be overcome.[156] The outrageous government conduct in Operation Paper Chase amply meets this standard.[157]

Sixth Circuit precedent does not foreclose petitioners from presenting an estoppel claim in federal court. In *Hamama v. Adducci*, the Sixth Circuit held that a district court lacked jurisdiction to issue an injunction against the execution of final removal orders in a class action habeas proceeding. Enforcing outstanding removal orders, the court held, falls "squarely" under § 1252(g).[158] Operation Paper Chase is distinguishable because the petitioners in *Hamama*

153. *Young Sun Shin*, 547 F.3d at 1023.
154. *Id.* at 1023–24.
155. *Id.* at 1025.
156. *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 491.
157. *See* Ragbir v. Homan, 923 F.3d 53, 73 (2d Cir. 2019) (finding the government's selective enforcement of a final order of removal due to the petitioner's public advocacy for immigrant rights qualified as outrageous under *Reno v. Am.-Arab Anti-Discrimination Comm.*).
158. Hamama v. Adducci, 912 F.3d 869, 874 (6th Cir. 2018). The Sixth Circuit rejected the district court's argument that an as-applied violation of the Suspension Clause authorized jurisdiction because, first, the relief sought was not protected by the Suspension Clause and, second, the petitioners had an adequate alternative to habeas relief through a motion to reopen followed by a petition for review. *Id.* at 875–76.

did not claim any government misconduct predating the decision to commence removal proceedings. Rather, *Hamama* involved an injunction against the execution of removal orders so that the petitioners could seek other forms of immigration relief such as asylum.[159] Moreover, *Hamama* is inapposite because it concerns a district court's habeas jurisdiction—not a circuit court's power to estop the government in a petition for review. Thus, *Hamama* does not preclude the petitioners from seeking equitable estoppel. In summary, a federal circuit court has jurisdiction to estop the government from removing the victims of Operation Paper Chase notwithstanding § 1252(g) because their claims are rooted in government misconduct distinct from the decision to commence proceedings, adjudicate cases, or execute removal orders.

### D. *Arguing Equitable Estoppel in Federal Court*

Federal courts have equitably estopped the government in numerous immigration cases involving government misconduct. The cases *Salgado-Diaz v. Gonzales* and *Casa De Maryland v. U.S. Dep't of Homeland Sec.* set particularly powerful precedents for estoppel against ICE in sting operations. In *Salgado-Diaz*, a noncitizen with a pending deportation proceeding was questioned by INS agents in San Diego without cause, deceived into signing a voluntary departure form, and deported to Mexico.[160] In short, he was "deport[ed] without a proceeding."[161] Six days later, the petitioner attempted to reenter the United States using a fake passport.[162] The immigration judge declined to hear evidence regarding the circumstances of the petitioner's unlawful arrest in San Diego.[163] The Ninth Circuit rejected INS's argument that the petitioner's attempt to reenter the U.S. unlawfully provided an independent basis for his removal since he was only placed in the position of seeking reentry because of the government's unconstitutional stop and subsequent removal.[164] INS cannot "rely on the post-expulsion events its own misconduct set in motion."[165] Thus, the court held that if the petitioner could show at an evidentiary hearing that INS agents engaged in the alleged misconduct, then the government would be estopped from removing him on the basis of his attempted reentry.[166]

The more recent case *Casa De Maryland* also illustrates the federal judiciary's power to estop the government in immigration cases. In *Casa de Maryland*, the district court estopped DHS from using information provided

159. Hamama v. Adducci, 258 F. Supp. 3d 828, 830 (E.D. Mich. 2017), *aff'd in part*, *vacated in part*, 912 F.3d 869 (6th Cir. 2018).
160. *Salgado-Diaz*, 395 F.3d at 1160.
161. *Id.* at 1167.
162. *Id.* at 1160.
163. *Id.* at 1161–62.
164. *Id.* at 1165.
165. *Id.* at 1166.
166. *Id.* at 1168.

by DACA applicants in immigration enforcement.[167] Since the government "induced these immigrants to share their personal information under the guise of immigration protection," using that same data to track and remove them would potentially be "affirmative misconduct."[168] Thus, the court enjoined DHS from using information provided by DACA recipients for enforcement operations.[169] On appeal, the Fourth Circuit reversed because it found the government had adequately warned DACA applicants that their information could be used in immigration enforcement and its information sharing policies could be rescinded at any time.[170] Since the plaintiffs could not have reasonably believed that information in their DACA applications would never be used for immigration enforcement, the Fourth Circuit found the petitioners failed to establish the reasonable reliance necessary for equitable estoppel.[171] Importantly, however, the Fourth Circuit did not disturb the district court's finding of affirmative misconduct.[172]

Operation Paper Chase meets all the elements of equitable estoppel against the government. First, DHS's creation of the bogus University of Farmington constituted affirmative misconduct because it actively misled hundreds of innocent foreign students, resulting in the serious injustice of their looming mass deportation. The facts of *Salgado-Diaz* and *Casa De Maryland* compel the conclusion that Operation Paper Chase meets or exceeds the standard for affirmative misconduct. If DHS's use of DACA recipients' identifying information in *Casa De Maryland* amounts to affirmative misconduct, then Operation Paper Chase certainly exceeds the standard. Unlike DACA—a program created in good faith to ameliorate the lives of young undocumented people—Operation Paper Chase was made to ensnare foreign students in visa fraud. Although the outrageousness of a due process violation from a single petitioner's entrapment may not necessarily exceed the egregiousness seen in *Salgado-Diaz*, where the government essentially deported the petitioner without a hearing, Operation Paper Chase eclipses that case's affirmative misconduct when multiplied by the hundreds of victims and the premeditative quality of a carefully orchestrated sting.

The government's conduct in Operation Paper Chase is distinguishable from three Supreme Court cases that have found no affirmative misconduct because the government's conduct in those cases involved mere inaction or negligence. In *I.N.S. v. Hibi*, for example, the failure to station a government representative in the Philippines to naturalize WWII veterans was not affirmative misconduct which could estop the government from denying a late

167. Casa De Maryland v. U.S. Dep't of Homeland Sec., 284 F. Supp. 3d 758, 778–79 (D. Md. 2018), *aff'd in part*, *vacated in part*, *rev'd in part*, 924 F.3d 684 (4th Cir. 2019).
168. *Id.*
169. *Id.*
170. *Casa De Maryland*, 924 F.3d at 706.
171. *Id.*
172. *Id.*

citizenship application.[173] In *I.N.S. v. Miranda*, an eighteen-month delay in considering an application for a spousal immigrant visa was not affirmative misconduct justifying estoppel.[174] Finally, in *Montana v. Kennedy*, the Court found no affirmative misconduct where a consular official misstated that the petitioner's mother—a U.S. citizen temporarily abroad in Italy—could not return to the United States while pregnant.[175] Similarly, circuit courts have found no affirmative misconduct where the government failed to inquire as to the availability of relief,[176] used information from an adjustment of status application,[177] or delayed adjudication of an asylum application.[178] In sharp contrast, in Operation Paper Chase the government created a fake university in an elaborate scheme to entrap students in visa fraud. Such active and malicious deceit is the hallmark of affirmative misconduct.

Operation Paper Chase readily satisfies the remaining reasonable reliance, ignorance, and public interest elements of equitable estoppel. Whereas the plaintiffs in *Casa De Maryland* could not establish reasonable reliance because the government had warned DACA applicants that the government's information sharing policy could change at any time, the students in Operation Paper Chase reasonably relied on the government because DHS listed the University of Farmington as a bona fide educational institution with SEVP certification.[179] According to news reports, students were ignorant of the fact that University of Farmington was a sham.[180] Finally, it is in the public's interest that the students are not deported. Operation Paper Chase does not promote the fair enforcement of our immigration laws, deters international students from enrolling at American universities, and degrades the due process rights that belong to citizens and noncitizens alike.

## VIII. CONCLUSION

Although Operation Paper Chase may seem unprecedented, there is a rich body of law on ICE sting operations stretching back to the early twentieth century. By pointing to seminal cases such as *Woo Wai*, *Valdovinos-Valdovinos*, and *Salgado-Diaz*, immigration advocates can revive this largely forgotten body of law and stop the deportation of the innocent students ensnared in Operation Paper Chase. In a motion to terminate, advocates should argue that the immigration court must terminate removal proceedings under *In re Toro* because the OGC, entrapment, and entrapment by estoppel

173. *Hibi*, 414 U.S. at 5, 8, 10–11.
174. *Miranda*, 459 U.S. at 19.
175. *Kennedy*, 366 U.S. at 314–15.
176. *Ponce-Gonzalez*, 775 F.2d at 1346 (finding that the failure of INS to inquire whether the petitioner was eligible for § 241(f) relief was not affirmative misconduct sufficient to estop the government).
177. *Gutierrez*, 458 F.3d at 693 (finding that the government's use of information voluntarily provided in a deficient application for adjustment of status was not affirmative misconduct).
178. *Kowalczyk*, 245 F.3d at 1150 (finding that the BIA's nine-year delay in deciding an asylum appeal did not constitute affirmative misconduct).
179. DEP'T OF HOMELAND SEC., *supra* note 2.
180. Russell, *supra* note 7; Mervosh, *supra* note 4.

defenses evince a flagrant violation of due process. Additionally, advocates should argue that the immigration courts—or, alternatively, an Article III court—must estop DHS from deporting the students caught in Operation Paper Chase because they are the victims of unlawful government misconduct. Even if immigration courts and the BIA are reluctant to grant such relief, the outrageousness of Operation Paper Chase could very well backfire against the government on appeal and set a powerful precedent against government abuse for decades to come.