U.S. Department of Justice
Executive Office for Immigration Review

http://eoir-vll/lib_index.html
Published since 2007

Immigration Law Advisor

March 2015 **A Legal Publication of the Executive Office for Immigration Review** *Vol. 9 No. 3*

In this issue...

Deciphering the *Lopez-Mendoza* "Identity Statement" Rule: A Rule of Personal Jurisdiction or a Bar to Suppressing Evidence of Identity?

by Hannah C. Cartwright

In *INS v. Lopez-Mendoza*, the paradigmatic case delineating the role of the exclusionary rule in immigration proceedings, the Supreme Court stated, "[T]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." 468 U.S. 1032, 1039 (1984). In the 30 years that have followed, this "identity statement" rule has "bedeviled" courts seeking to adjudicate suppression of identity-related evidence, resulting in dueling interpretations that have split the courts of appeals. *United States v. Oscar-Torres*, 507 F.3d 224, 228 (4th Cir. 2007).

This article briefly discusses the two predominant interpretations of the *Lopez-Mendoza* "identity statement" rule, both of which arose in the context of criminal charges for illegal reentry under 8 U.S.C. § 1326. The first views the statement as a bar to the suppression of identity-related evidence, while the second posits that the Supreme Court was simply reiterating a long-standing rule of personal jurisdiction. The article then considers the Second Circuit's recent case, *Pretzantzin v. Holder*, 736 F.3d 641 (2d Cir. 2013), which interprets the "identity statement" rule in the immigration context and identifies the questions the rule raises for immigration courts.

Lopez-Mendoza and the "Identity Statement" Rule

In *Lopez-Mendoza*, the Supreme Court addressed challenges from two respondents who were charged with deportability after unlawful arrests. 468 U.S. at 1034. Lopez-Mendoza did not seek to suppress any evidence but instead moved to terminate deportation proceedings solely on the grounds of his unlawful arrest. *Id.* at 1040. The Supreme Court summarily rejected the claim, reciting the "identity statement" rule and upholding the

Board's conclusion that "[t]he mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding." *Id.* 1039–40 (quoting the Board's unpublished decision) (internal quotation marks omitted).

In contrast, the second respondent, Sandoval-Sanchez, specifically sought to suppress the admissions he had made during the arrest from being used as evidence of his alienage. *Id.* at 1037, 1040. The Supreme Court's determination whether his admissions could be suppressed is likely a familiar one—that the exclusionary rule does not apply in civil deportation hearings unless there are "egregious" or "widespread" violations. *Id*. at 1050. The question of what constitutes an "egregious violation" of the Fourth Amendment has been the subject of dispute among the circuit courts, but it will not be discussed here. *See* Kate Mahoney, *What To Do When the Constable Blunders? Egregious Violations of the Fourth Amendment in Removal Proceedings*, Immigration Law Advisor, Vol. 6, No. 8 (Sept. 2012); *see also* Sara A. Stanley and Daniel L. Swanwick, *Suppression: Respondents Look for a Shield and Sword in Immigration Proceedings*, Immigration Law Advisor, Vol. 2, No. 6 (June 2008). Instead, the focus of this article is on the Supreme Court's summary dismissal of the claim made by Lopez-Mendoza and the litigation it has generated.

What Constitutes Identity-Related Evidence?

As a threshold issue, we must identify what constitutes identity-related evidence. The *Lopez-Mendoza* "identity statement" rule specifies a narrow type of evidence, that of the "'body' or identity of a defendant or respondent." 468 U.S. at 1039. Lopez-Mendoza gave his name and admitted that he was from Mexico in response to questioning by the Immigration and Naturalization Service ("INS") investigator, which resulted in his arrest. *Id*. at 1035.

These facts suggest two specific categories of identity-related evidence. The first category of evidence relates to a person's fundamental identity, including name, birthdate, and birthplace. The second category relates to other types of evidence, including statements, admissions, and Government documents. Some courts have also engaged in inquiries about whether other evidence, including photographs, fingerprints, and documentation from foreign countries, constitute identity-related evidence. These questions require courts to determine what evidence is *independent* of one's identity and what evidence is "so inherently intertwined with one's identity that it necessarily is tantamount to identity itself." *United States v. Hernandez-Mandujano*, 721 F.3d 345, 355 (5th Cir. 2013). In other words, courts are faced with drawing a line "where identity ends and alienage begins." *Pretzantzin v. Holder*, 736 F.3d at 651.

Practical and Policy Conundrums

Identity-related evidence creates a practical conundrum for immigration courts. *Id.* at 650. Courts recognize that establishing the identity of a respondent is "an essential component" of an immigration investigation. *United States v. Garcia-Beltran*, 389 F.3d 864, 868 (9th Cir. 2004). Basic identity-related evidence regarding birthplace and birthdate is necessary to establish an alien's unlawful immigration status and to sustain a charge of removability. Thus, granting a motion to suppress requires courts to recognize the legal fiction of suppressing the evidence relating to the identity of an individual because the alien is physically present before the court. This aspect of suppression cases is distinct from criminal cases, where the courts are often suppressing tangible evidence relating to the violation or crime.

Underlying this practical conundrum is the policy tension that plagues suppression questions generally in immigration proceedings. On the one hand, "[i]f a defendant's identity may be suppressed, the moment the court lets him go, he is immediately committing the continuing violation of being present in the United States after having been deported." *United States v. Del Toro Gudino*, 376 F.3d 997, 1001–02 (9th Cir. 2004); *see also United States v. Farias-Gonzalez*, 556 F.3d 1181, 1188 n.8 (11th Cir. 2009); *United States v. Navarro-Diaz*, 420 F.3d 581, 587 (6th Cir. 2005). On the other hand, *Lopez-Mendoza* also reinforced the need for the exclusionary rule to deter unlawful conduct by immigration officers. This policy interest is further reinforced by the Supreme Court's acknowledgment that it might change its conclusions regarding the exclusionary rule if violations by immigration officers become widespread. 468 U.S. at 1041, 1050; *cf. United States v. Guevara-Martinez*, 262 F.3d 751, 755 (8th Cir. 2001) (explaining that the exclusionary rule is applied where evidence has been obtained "by exploitation" of the constitutional violation (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)) (internal quotation marks omitted)). To that

end, the Tenth Circuit has asserted that, in this context, the purpose of the exclusionary rule is to "deter—compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *United States v. Olivares-Rangel*, 458 F.3d 1104, 1113 (10th Cir. 2006) (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)) (internal quotation mark omitted).

"Identity Statement" Rule as a Bar to Suppression

The first interpretations of the "identity statement" rule arose in criminal cases in which defendants moved to suppress evidence of their identities after being charged with illegal reentry into the United States in violation of 8 U.S.C. § 1326.

In *United States v. Guzman-Bruno*, 27 F.3d 420, 421 (9th Cir. 1994), an early case in the Ninth Circuit, Guzman-Bruno admitted his name and birthplace during a seizure of his person and then admitted prior deportations after being taken into administrative custody. When he invoked the exclusionary rule, the trial court found that the seizure violated his Fourth Amendment rights and that all of his statements, with the exception of his initial admission of his name, were fruits of the illegal arrest. *Id*. However, the court then found that neither the evidence of his preexisting criminal convictions nor evidence of his prior deportation were suppressible based on the independent source doctrine. *Id.* The Ninth Circuit affirmed all of these determinations, holding that "[a]n illegal arrest would not serve to suppress [Guzman-Bruno's] identity, since '"there is no sanction to be applied when an illegal arrest only leads to discovery of the man's identity and that merely leads to the official file or other independent evidence."'" *Id.* at 422 (quoting *United States v. Orozco-Rico*, 589 F.2d 433, 435 (9th Cir. 1978) (quoting *Hoonsilapa v. INS*, 575 F.2d 735, 738 (9th Cir. 1978))).

The Ninth Circuit's analysis that the *Lopez-Mendoza* "identity statement" rule barred identity-related evidence from suppression proved long-lasting, although other circuits offered additional supporting rationales. For example, the Fifth Circuit relied on *Lopez-Mendoza* and *Guzman-Bruno* but framed its interpretation of the "identity statement" rule as barring suppression in the context of privacy expectations under the Fourth Amendment. *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999) (citing *United States v. Pineda-Chinchilla*, 712 F.2d 942, 944 (5th Cir. 1983) (holding that the defendant had no legitimate expectation of privacy in his INS file and no standing to challenge its introduction into evidence)); *see also United States v. Bowley*, 435 F.3d 426, 431 (3d Cir. 2006) (noting that an alien has no "possessory or proprietary interest in his or her immigration file or the documentary evidence contained in that file"). Other circuit courts focused on the language and context of the "identity statement" rule. For example, the Third Circuit found the Supreme Court's use of "never" to be a "sweeping word," which signified the broad application of the bar to suppression of identity evidence. *United States v. Bowley*, 435 F.3d at 430. In contrast, the Eleventh Circuit engaged in a balancing test before finding a bar to suppression. *See United States v. Farias-Gonzalez*, 556 F.3d at 1186–89 (applying the test from *Hudson v. Michigan*, 547 U.S. 586 (2006)).

The First, Third, Fifth, and Sixth Circuits have since joined the Ninth Circuit in relying on *Lopez-Mendoza* to conclude that identity-related evidence is barred from suppression. *See United States v. Hernandez-Mandujano*, 721 F.3d at 351 (*reaffirming United States v. Roque-Villanueva*, 175 F.3d 345); *United States v. Bowley*, 435 F.3d at 430–31; *United States v. Navarro-Diaz,* 420 F.3d 581; *Navarro-Chalan v. Ashcroft*, 359 F.3d 19 (1st Cir. 2004); *United States v. Guzman-Bruno*, 27 F.3d 420. In contrast, the Eleventh Circuit determined that *Lopez-Mendoza* was not controlling because the Supreme Court was "not addressing an evidentiary challenge in a criminal prosecution when it pronounced that identity was never suppressible." *United States v. Farias-Gonzalez*, 556 F.3d at 1186. Regardless, the court ultimately decided that the identity-related evidence presented by the Government could not be suppressed. *Id*. at 1186–89.

"Identity Statement" Rule as a Rule of Jurisdiction

Four circuits—the Second, Fourth, Eighth, and Tenth—came to the opposite conclusion, finding that the *Lopez-Mendoza* "identity statement" rule merely reiterates a long-standing rule regarding personal jurisdiction and does not preclude suppression of all identity-related evidence. *See, e.g.*, *United States v. Oscar-Torres*, 507 F.3d 224, 230–32 (4th Cir. 2007) (requiring suppression of a defendant's fingerprint evidence and immigration records after a warrantless arrest and charge under 8 U.S.C. § 1326 if they were obtained for an "investigative purpose");

United States v. Olivares-Rangel, 458 F.3d at 1113–17 (upholding a district court's exclusion of a defendant's statements, but remanding to determine if his fingerprints and the contents of his immigration file were suppressible because they were obtained by "exploitation" of the arrest after he was illegally stopped and charged under 8 U.S.C. § 1326).

The Eighth Circuit first advanced this argument in *United States v. Guevara-Martinez*, when it affirmed the suppression of a defendant's fingerprint evidence. 262 F.3d 751. There, the defendant was identified as a passenger in a traffic stop and was placed under arrest. *Id.* at 752. He initially refused to give his name, telling a local police officer that he did not have identification. Officers suspected that he did not have lawful immigration status and reported him to the INS. Additionally, the officers fingerprinted the defendant, which revealed his true identity, INS file, and previous deportation. Based on this information, he was charged with illegal reentry pursuant to 8 U.S.C. § 1326. *Id.* At trial, the court granted his motion to suppress and suppressed all the evidence obtained in connection with the traffic stop, particularly his fingerprints, identity statements, and prior deportation. *Id.* The Eighth Circuit affirmed the trial court's decision, agreeing that the Supreme Court's "reference to the suppression of identity" in *Lopez-Mendoza* was "tied only to a jurisdictional issue, not to an evidentiary issue." *Id*. at 753–54, 757.

The Eighth Circuit's rationale was based on its determination that all of the authority the Supreme Court cited to support its holding in *Lopez-Mendoza* focused on the "jurisdiction over the person, not evidence of the defendant's identity illegally obtained." *Id*. at 754 (quoting *United States v. Mendoza-Carillo*, 107 F. Supp. 2d 1098, 1106 (D.S.D. 2000) (citing *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *Frisbie v. Collins*, 342 U.S. 519 (1952))). Additionally, the court noted that the Supreme Court did not distinguish between identity-related evidence and other types of evidence when discussing Sandoval-Sanchez's evidentiary challenge, but instead referred to it as a "general rule in a criminal proceeding," suggesting that Sandoval-Sanchez likely sought to suppress identity-related evidence. *United States v. Guevara-Martinez*, 262 F.3d at 754 (quoting *INS v. Lopez-Mendoza*, 468 U.S. at 1040) (internal quotation marks omitted). Ultimately, the Eighth Circuit held that "if the Supreme Court meant to exempt identity-related evidence in a criminal proceeding from the 'general rule,' we believe the Court would have said so while discussing the evidentiary challenge, not the jurisdictional challenge." *Id.*

"Identity Statement" Rule in Removal Proceedings

As previously mentioned, after *Lopez-Mendoza*, these cases largely arose in the context of criminal trials for defendants charged under 8 U.S.C. § 1326. However, in 2013, the Second Circuit addressed this issue in the context of removal proceedings in *Pretzantzin v. Holder*, 736 F.3d 641, which arose out of an early morning Immigration and Customs Enforcement ("ICE") home investigation. ICE officers entered a home without a warrant or consent and demanded immigration "papers" from the residents. *Id.* at 644. The officers then arrested the petitioners and served them with notices to appear, in which ICE charged them with removability under section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i), as natives and citizens of Guatemala who entered the United States without inspection. *Id*. During their hearing before the Immigration Judge, the petitioners requested suppression of all statements and evidence obtained as a consequence of the Fourth Amendment violation. The Department of Homeland Security ("DHS") argued that the birth certificates they had obtained from Guatemala using the petitioners' names constituted an independent source of alienage. *Id*.

The Immigration Judge found an egregious violation of the petitioners' Fourth and Fifth Amendment rights under the Constitution and granted their motions to suppress. *Id.* at 645. The DHS appealed, arguing that identity-related evidence is never suppressible, and the Board reversed, relying on *Lopez-Mendoza*. *Id.* The Board did not address whether there was an egregious constitutional violation, instead concluding that the DHS had independently obtained the birth certificates after determining the petitioners' identities. *Id*. The Second Circuit reversed on two grounds.

First, pursuant to the Second Circuit's contextual reading of *Lopez-Mendoza*, the Supreme Court was *not* announcing a new evidentiary rule regarding suppression. *Pretzantzin*, 736 F.3d at 647–48. The court found that such a rule would have made the cost-benefit analysis that the Supreme Court undertook in Sandoval-Sanchez' claim impracticable "without first determining whether the statements he sought to suppress were identity-related evidence." *Id.* at 648.

continued on page 12

CIRCUIT COURT DECISIONS FOR FEBRUARY 2015

by John Guendelsberger

The United States courts of appeals issued 112 decisions in February 2015 in cases appealed from the Board. The courts affirmed the Board in 103 cases and reversed or remanded in 9, for an overall reversal rate of 8.0%, compared to last month's 18.9%. There were no reversals from the First, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits.

The chart below shows the results from each circuit for February 2015 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	2	2	0	0.0
Second	10	9	1	10.0
Third	10	9	1	10.0
Fourth	8	8	0	0.0
Fifth	5	5	0	0.0
Sixth	2	2	0	0.0
Seventh	2	1	1	50.0
Eighth	2	2	0	0.0
Ninth	64	59	5	7.8
Tenth	5	4	1	20.0
Eleventh	2	2	0	0.0
All	112	103	9	8.0

The 112 decisions included 50 direct appeals from denials of asylum, withholding of removal, or protection under the Convention Against Torture; 35 direct appeals from denials of other forms of relief from removal or from findings of removal; and 27 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	50	46	4	8.0
Other Relief	35	31	4	11.4
Motions	27	26	1	3.7

The four reversals or remands in asylum cases involved corroboration (two cases), nexus, and protection under the Convention Against Torture. The four reversals or remands in the "other relief" category addressed the application of the categorical approach to aggravated felony grounds (two cases), a crime involving moral turpitude, and a section 212(h) waiver. The motions case involved Immigration Judge and Board jurisdiction over U visa determinations.

The chart below shows the combined numbers for January and February 2015 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Second	24	18	6	25.0
Seventh	5	4	1	20.0
Ninth	127	108	19	15.0
Tenth	7	6	1	14.3
Eleventh	7	6	1	14.3
Fourth	17	15	2	11.8
Sixth	11	10	1	9.1
Third	16	15	1	6.3
First	3	3	0	0.0
Eighth	7	7	0	0.0
Fifth	10	10	0	0.0
All	234	202	32	13.7

Last year's reversal rate at this point (January and February 2014) was 13.1%, with 389 total decisions and 51 reversals.

The numbers by type of case on appeal for the first 2 months of 2015 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	123	102	21	17.1
Other Relief	61	53	8	13.1
Motions	50	47	3	6.0

John Guendelsberger is a Member of the Board of Immigration Appeals.

RECENT COURT OPINIONS

Second Circuit:

Prabhudial v. Holder, No. 14-4574, 2015 WL 1061798 (2d Cir. Mar. 12, 2015): The court dismissed a petition for review of a Board decision affirming an Immigration Judge's order of removal. The petitioner admitted that he was convicted of fifth degree criminal sale of a controlled substance under section 220.31 of the New York Penal Law but argued that his conviction could potentially be vacated if a case pending before the New York Court of Appeals was decided favorably. The Immigration Judge found that the petitioner's conviction was for an aggravated felony and sustained the charges of removability. In his appeal to the Board, the petitioner raised the new argument that the Immigration Judge's use of the modified categorical approach was contrary to the Supreme Court's decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013). The Board determined that the petitioner waived that argument because he had not raised it before the Immigration Judge. The Second Circuit joined the First, Fifth, Eighth, and Tenth Circuits in holding that the Board may apply the doctrine of waiver to refuse to consider an argument that was not raised before an Immigration Judge. The court noted that 8 C.F.R. § 1003.1(d)(1) states that the Board "shall function as an appellate body" and described the waiver doctrine as "a basic rule of appellate review, judicial or administrative." The court therefore dismissed the petition for lack of jurisdiction.

Florez v. Holder, 779 F.3d 207 (2d Cir. 2015): The court denied a petition for review of a Board decision affirming the Immigration Judge's finding of removability. The Immigration Judge determined that the petitioner's two convictions for endangering the welfare of a child in violation of section 260.10(1) of the New York Penal Law were for crimes of child abuse within the meaning of section 237(a)(2)(E) of the Act. The court noted that because of its previous determination that section 260.10(1) is divisible, its review was limited to the first prong of the statute, which criminalizes "action that is 'likely to be injurious' to a child, whether or not harm ensues." The court then accorded deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010), where the Board held that its definition of a crime of child abuse was sufficiently broad to include offenses that do not require proof of injury to the child. In support of its finding, the court noted that at the time Congress made "child abuse" a ground for removal, at least nine States had child abuse statutes that did not require injury as an element. The court further found the Board's definition to be sufficiently limited by its requirement of a particularly high risk of harm to the child. Finally, the court acknowledged that its decision is in direct conflict with the Tenth Circuit's decision in *Ibarra v. Holder*, 736 F.3d 903 (10th Cir. 2013).

Flores v. Holder, 779 F.3d 159 (2d Cir. 2015): The court granted in part a petition for review challenging an Immigration Judge's denial of the petitioner's motion to continue removal proceedings, denial of relief, and order of removal. The petitioner entered the United States without inspection and later married a United States citizen. In 2009, he was convicted of two counts of first-degree sexual abuse under section 130.65 of New York Penal Law and was subsequently placed in removal proceedings. After several continuances, he conceded removability and sought an additional continuance to pursue adjustment of status in conjunction with a waiver of inadmissibility under section 212(h) of the Act. The Immigration Judge denied the petitioner's request for a continuance and, finding that his convictions were for aggravated felonies, denied his applications for relief. The court held that the agency abused its discretion by denying the petitioner's motion to continue without first considering the factors articulated in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), and remanded for consideration under the correct standard. The court further found that the denial of a section 212(h) waiver was an abuse of discretion, clarifying that an aggravated felony conviction would not render the petitioner statutorily ineligible for a waiver because he was not admitted to the United States as a lawful permanent resident. In addition, the court vacated the Immigration Judge's aggravated felony determination, which was based on the conclusion that the underlying conduct of the petitioner's convictions satisfied the generic definition of sexual abuse of a minor. The court instructed the Immigration Judge to determine whether the minimum conduct required to violate the State statute would fall within the generic definition of "sexual abuse." Finally, the court upheld the Immigration Judge's determination that the petitioner's convictions under section 130.65 were for particularly serious crimes that rendered him ineligible for asylum and withholding of removal.

Seventh Circuit:

Bouras v. Holder, No. 14-2179, 2015 WL 912947 (7th Cir. Mar. 5, 2015) (as amended Mar. 13, 2015): The court denied a petition for review challenging an Immigration Judge's denial of a motion for continuance. The petitioner was granted status as a conditional permanent resident based on his marriage to a United States citizen. However, his marriage ended by divorce before the conditions were removed. The USCIS denied the petitioner's request for a discretionary good faith marriage waiver and the petitioner renewed his request before the Immigration Judge. At the removal hearing, the petitioner informed the Immigration Judge that his ex-wife would be unavailable to testify and moved for a continuance to allow her to appear. The Immigration Judge denied the motion. The court found that the denial was not an abuse of discretion, noting that the petitioner did not challenge the Immigration Judge's conclusion that the petitioner did not meet his burden of proving that he married his ex-wife in good faith. Further, the court found that the Immigration Judge's basis for denying the motion was consistent with the regulation's "good cause" requirement. Finally, the court found that the petitioner did not meet his burden of establishing that his ex-wife's testimony would have been "significantly favorable to him" or that he had made good-faith efforts to procure her appearance. The three-judge panel decision contains a dissent from Judge Posner.

Keirkhavash v. Holder, 779 F.3d 440 (7th Cir. 2015): The court denied a petition for review of an Immigration Judge's denial of the petitioner's applications for asylum, withholding of removal, and protection under the Convention Against Torture. The Immigration Judge denied the petitioner's initial application on the basis that the petitioner provided support for a terrorist organization. Following appeal, the Board remanded for the Immigration Judge to consider the petitioner's eligibility for protection under the Convention Against Torture. On remand, the petitioner admitted that her first claim was a lie fabricated by her former counsel. She further claimed that both she and her father had testified consistently with the first application because her former lawyer had told them to do so. The Immigration Judge denied the petitioner's application based on an adverse credibility finding. The court found that substantial evidence supported the Immigration Judge's decision. The court noted that the new claim was based entirely on the testimony of two people who had put "self-interest ahead of the legal obligation to tell the truth" and had "no entitlement to be believed" upon changing stories. The court acknowledged that the Immigration Judge had the choice to believe the new story but did not exceed his authority when he chose not to do so.

Eighth Circuit:

Mogeni v. Holder, No. 13-3597, 2015 WL 1003982 (8th Cir. Mar. 9, 2015): The court denied a petition for review challenging the Board's affirmance of an Immigration Judge's denial of a motion for continuance and order of removal. The DHS denied a visa petition (Form I-130) filed by the petitioner's wife, finding that he had entered into a sham marriage to obtain an immigration benefit. The petitioner soon divorced and married another United States citizen, who also filed a visa petition on his behalf. The DHS denied the second petition and the petitioner appealed. The petitioner's daughter from a previous marriage in Kenya then filed a third visa petition on his behalf. The petitioner was placed into removal proceedings, where he successfully requested 12 continuances over the course of 5 years to allow the DHS to adjudicate the pending visa petitions. The Immigration Judge denied the request for another continuance, citing the diminished likelihood that either visa petition would be approved in light of the petitioner's prior sham marriage determination. The court found that the Board did not abuse its discretion when it affirmed the Immigration Judge's decision, observing that the likelihood of a petitioner's success is an important consideration in determining whether to continue proceedings under *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009). The court further noted that the petitioner did not appeal the sham marriage determination, making it likely that the pending visa petitions would be denied under section 204(c) of the Act. Finally, the court emphasized that the Immigration Judge has "discretion to avoid unduly protracted proceedings."

Ninth Circuit:

Khudaverdyan v. Holder, 778 F.3d 1101 (9th Cir. 2015): The court granted in part a petition for review of the Board's decision affirming an Immigration Judge's denial of asylum. The Immigration Judge determined that the petitioner had not established a nexus between the harm he suffered and a protected ground because the harm stemmed from a "purely personal" dispute with the chief of police. The Immigration Judge also concluded that the petitioner's meeting with a reporter for an opposition newspaper could not be viewed as whistleblowing because the incident that the two discussed did not constitute

government corruption. The court addressed its two relevant lines of precedent regarding political opinion as a protected ground. In the first line of cases, the court held that retaliation against whistleblowers can constitute persecution on account of a political opinion. The second line of cases emphasized that eligibility for asylum can be based on an imputed political opinion. The court applied these two lines of cases to hold that an applicant for asylum or withholding of removal may show persecution on account of a protected ground if he establishes that the persecutor thought that the applicant was trying to expose corruption and harmed him as a result, even if the applicant actually had no such intent. In other words, "one form of imputed political opinion is perceived whistleblowing." The court agreed with the Board's conclusion that the petitioner was not an actual whistleblower. However, the court found both direct and indirect evidence in the record that the military police perceived the petitioner to be a whistleblower and harmed him as a result. The court therefore remanded for the Board to determine whether one central reason for the petitioner's harm was that the military police believed he was involved in whistleblowing. The court also directed the Board to determine whether the harm suffered by the petitioner rose to the level of persecution and whether he had established a well-founded fear of future persecution. The three-judge panel's decision included concurring and dissenting opinions.

Martinez-Hernandez v. Holder, 778 F.3d 1086 (9th Cir. 2015): The court denied a petition for review of the Board's denial of the petitioner's motion to reopen. The petitioner entered the United States in 1984 when he was a year old. In 2001, he pled guilty to felony battery with severe bodily injury, with an enhancement for use of a deadly weapon or instrument on a police officer. A visa petition filed by his mother was approved in 2004, but the petitioner was no longer a minor and did not apply for adjustment of status within 1 year, as permitted by the Child Status Protection Act of 2002 ("CSPA"). In 2007, he was placed in removal proceedings. His attorney did not apply for cancellation of removal after the Immigration Judge informed him that the petitioner was likely ineligible because of his felony conviction. The petitioner therefore applied only for adjustment of status. That application was denied as untimely because it was not filed within 1 year of obtaining a visa, as required by the CSPA. After his appeal was dismissed, the petitioner moved the Board to reopen, claiming that his prior counsel provided ineffective assistance by failing to file a cancellation of removal application or challenge the Immigration Judge as to his eligibility. The court observed that a motion based on ineffective assistance requires a threshold showing of prejudice. This requires at a minimum, a showing "that the asserted ground for relief is at least plausible." The court found that the Board correctly determined that the plausibility threshold was not met where the motion made no argument, references to evidence, or other claim suggesting what "exceptional and extremely unusual hardship" his qualifying relatives might face. The court thus concluded that the Board did not abuse its discretion in denying the motion to reopen.

Tenth Circuit:

Rodas-Orellana v. Holder, Nos. 14-9516, 14-9448, 2015 WL 859566 (10th Cir. Mar. 2, 2015): The court denied a petition for review of the Board's decision affirming an Immigration Judge's denial of asylum and withholding of removal and the Board's subsequent denial of the petitioner's motion to reconsider. The petitioner based his asylum claim on his fear of the MS-13 gang in his native El Salvador. MS-13 had targeted the petitioner for resisting its recruitment efforts. He also expressed fear that if he returned to El Salvador, MS-13 would target him because he had lived in the United States and would be perceived to be wealthy. First, the Board determined that "persons who have been subjected to recruitment efforts by criminal gangs, but who have refused to join" is not a particular social group because it fails the particularity and social visibility tests. It also found that people who have an "imputed or perceived American nationality" or "people who appear to be of American nationality or perceived to be wealthy" did not qualify as particular social groups. Additionally, the Board found that the petitioner had not established that membership in either proposed group formed "one central reason" for the gang's actions. The Board later denied the petitioner's motion to reconsider its decision in light of its subsequently issued decisions in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), and *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014). The appeals from both denials were consolidated by the court, which upheld the Board's determination that the petitioner's proposed social groups lacked the requisite social distinction. The court noted that the petitioner may have been targeted for resisting recruitment, but it found that this constituted "generalized gang violence" rather than evidence of membership in a distinct social group. The court also found that the petitioner had

not established a nexus to a protected ground because his testimony suggested that the gang's motive was the petitioner's refusal to join or pay MS-13, not punishment for his membership in a particular social group.

Medina-Rosales v. Holder, 778 F.3d 1140 (10th Cir. 2015): The court granted a petition for review of the Board's affirmance of an Immigration Judge's denial of relief from removal. The Immigration Judge determined that the petitioner was ineligible for a waiver pursuant to section 212(h) of the Act because he was convicted of an aggravated felony after adjusting his status to that of a lawful permanent resident ("LPR"). The Tenth Circuit joined eight other circuits (the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh) in finding that an alien is only disqualified from applying for a section 212(h) waiver if he was convicted of an aggravated felony following inspection and admission to the United States as an LPR at a port of entry. The court did not accord *Chevron* deference to the Board's precedent decision in *Matter of E.W. Rodriguez*, 25 I&N Dec. 784 (BIA 2012). Instead, based on what it found to be clear and unambiguous statutory language, the court concluded that section 212(h) barred only those who obtained LPR status before or when they entered the United States from seeking a waiver. No such bar applied to those who obtained LPR status through adjustment of status. The court acknowledged that there was no obvious reason for distinguishing between people who obtained LPR status before or at the time of entry and those who obtained such status through adjustment of status after their entry into the United States. However, in light of the plain meaning of the statutory language, the court found no basis to expand the scope of the provision. Instead, it concluded that if Congress intended the prohibition to extend to people who obtain LPR status through adjustment of status, it must amend the language of section 212(h) of the Act.

BIA PRECEDENT DECISIONS

In *Matter of Vides Casanova*, 26 I&N Dec. 494 (BIA 2015), the Board determined that the former Salvadoran Director of the National Guard and Minister of Defense was removable pursuant to section 237(a)(4)(D) of the Act as an alien described in section 212(a)(3)(E)(iii) because, through his "command responsibility," he assisted or participated in acts of torture and extrajudicial killings.

The respondent served as El Salvador's Director of the National Guard and Minister of Defense during a period of civil war between the Salvadoran Government and opposition forces known as the Frente Farabundo Martí para la Liberación Nacional ("FMLN"). During this period, government "death squads" engaged in mass killings and torture of civilians suspected of supporting the opposition, and human rights abuses were rampant. Following credible testimony by torture survivors and expert witnesses, the Immigration Judge concluded that the respondent assisted or otherwise participated in the torture of two surviving witnesses and in acts of torture "generally." Additionally, the Immigration Judge found that the respondent assisted or otherwise participated in extrajudicial killings by failing to investigate or cooperate in the investigations of the killings, or to hold the perpetrators accountable.

On appeal, the Board rejected the respondent's contention that he is not removable because the DHS did not establish that he knew of and "took personal action to promote or facilitate" the described acts. Relying on *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011), and the legislative history of section 212(a)(3)(E)(iii) discussed therein, the Board pointed out that the statute does not require an alien to have taken personal action. Instead, the respondent's knowledge that his subordinates committed unlawful acts and his subsequent failure to investigate them in a genuine effort to punish the perpetrators were sufficient to render him removable.

The Board was also unpersuaded by the respondent's argument that he had no control over "rogue units" of National Guardsmen and soldiers who were committing torture and extrajudicial killings. Noting that even if the respondent lacked the requisite command responsibility for section 237(a)(4)(D) of the Act to apply, the respondent had control over his subordinates—he personally led a small officer corps and had ultimate responsibility for the National Guard's intelligence unit, which could have investigated misconduct. Additionally, as the Minister of Defense, the respondent was the head of the Armed Forces, the director of the security forces, and a member of the president's cabinet. He had authority to punish any member of the Armed Forces who disobeyed his orders. The Board therefore determined that the respondent was proximate enough to the human rights abuses to be accountable for them, pointing out that he led the National Guard and the military when numerous

high profile human rights violations occurred without taking any action to remedy or deter his subordinates' misconduct; that he affirmatively and knowingly shielded subordinates from the consequences of their acts; and that he was aware of pervasive abuses occurring throughout his command but failed to hold perpetrators accountable, and even protected them at times.

The Board further agreed with the Immigration Judge that the respondent was removable because he assisted or otherwise participated in the torture of the two testifying witnesses. Additionally, the Board affirmed the Immigration Judge's finding that the respondent assisted or otherwise participated in the extrajudicial killing of four American churchwomen because he knew that National Guardsmen under his command had confessed to the killings but failed to competently investigate them, impeded the United States' investigative efforts, and delayed bringing the perpetrators to justice. It similarly agreed that the respondent was removable for assisting or otherwise participating in the extrajudicial killings of a Salvadoran man and two American citizens at a Sheraton Hotel based on his failure to remove from active duty or investigate the officers under his command whom he knew were responsible for the killings.

The respondent argued that the Immigration Judge lacked jurisdiction to determine his removability pursuant to the "political question abstention doctrine." However, the Board determined that the nonjusticiability of a political question is a function of the Executive Branch's retention of authority over political questions without a redetermination of those questions by the Judicial Branch. In removal proceedings, the prosecutory and adjudicative roles assumed by the DHS and the Department of Justice both fall within the Executive Branch, with no Judicial Branch encroachment. The Board also rejected the respondent's argument that equitable estoppel should be applied to prevent his "manifestly unjust" removal because he was led to believe that his conduct was consistent with the United States' "official policy." Noting that the respondent had provided no authority for his contention that the Immigration Judge or the Board could apply equitable estoppel in determining whether he is removable, the Board explained that only the DHS can consider the respondent's circumstances in determining whether to file removal charges.

The Board agreed with the Immigration Judge that the respondent was removable under section 237(a)(4)(D) of the Act and ineligible for cancellation of removal pursuant to section 240A(c)(4) of the Act. The appeal was dismissed.

In *Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015), the Board held that where an Immigration Judge finds that an applicant for asylum or withholding of removal has not provided reasonably available corroborating evidence, the Immigration Judge should first consider the applicant's explanation for the absence of such evidence and, if a continuance is requested, determine whether good cause exists to continue the proceedings for the applicant to obtain the evidence. Additionally, the Board determined that section 208(b)(1)(B)(ii) of the Act does not impose a requirement that the Immigration Judge identify the specific evidence necessary to meet the applicant's burden of proof and provide an automatic continuance for the purpose of obtaining evidence.

The applicant applied for withholding of removal and protection under the Convention Against Torture, and the Immigration Judge denied the applications after finding that the applicant lacked credibility. Alternatively the Immigration Judge found that, even if the applicant were credible, the applicant's testimony was insufficient to satisfy his burden of proof and he did not provide adequate corroborating evidence to establish eligibility for the relief sought.

On appeal, the applicant argued that section 208(b)(1)(B)(ii) of the Act requires an Immigration Judge to inform an applicant for asylum or withholding of removal during a merits hearing what specific corroborating evidence is required to meet the burden of proof, and to grant a continuance so the applicant can obtain the evidence. The Board reasoned that section 208(b)(1)(B)(ii) is ambiguous as to what steps must be taken when an applicant has not provided the corroborating evidence required by the Immigration Judge. Proceeding to a review of the statute as a whole and the legislative history, the Board observed that Congress enacted section 208(b)(1)(B)(ii) intending to codify the corroborating evidence standards outlined in *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997). In that case, the Board held that irrespective of an applicant's credibility, he has the burden to corroborate the material elements of his claim where the evidence is reasonably obtainable, without advanced notice from the Immigration Judge.

The Board pointed out that an applicant is alerted to the possibility that corroborating evidence may be required, or its unavailability explained, in sections 208(b)(1)(B)(ii) and 241(b)(3)(C) of the Act; 8 C.F.R. §§ 1208.13(a) and 1208.16(b); and the Application for Asylum and Withholding of Removal (Form I-589). Additionally, it observed that the *Matter of S-M-J-* framework did not require identification at the merits hearing of the specific corroborating evidence that would be considered persuasive for the applicant to meet his burden of proof. Nor did it require the Immigration Judge to grant an automatic continuance for the applicant to present that evidence at a future hearing. The Board opined that Congress enacted section 208(b)(1)(B) of the Act so that Immigration Judges could follow commonsense standards in evaluating asylum claims without undue restrictions, but it did not intend to create additional procedural requirements for the submission and assessment of corroborating evidence.

Noting that requiring advance notice of the need for specific corroborating evidence and granting an automatic continuance would contravene the normal Immigration Court hearing procedures, the Board explained that where an Immigration Judge determines at a merits hearing that specific corroborating evidence should have been submitted, the applicant should be provided the opportunity to explain why the evidence could not reasonably be obtained. The Immigration Judge is obliged to ensure that the explanation is included in the record along with a statement of whether the explanation is sufficient. If the applicant requests a continuance to obtain additional corroborating evidence, the Immigration Judge should decide whether good cause has been shown to warrant a continuance. As an example, the Board explained that a continuance would be appropriate if an applicant was unaware of a unique piece of evidence that is essential to satisfying the burden of proof.

Additionally, the Board instructed that an Immigration Judge must not place undue weight on the absence of a particular piece of corroborating evidence while disregarding other corroborating evidence in the record. In determining whether an applicant has met his burden of proof, an Immigration Judge should weigh all of the evidence and consider the totality of the circumstances.

Rejecting the applicant's argument that the Immigration Judge was required to automatically continue his hearing so he could obtain corroborating evidence in accordance with *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011), the Board pointed out that the Ninth Circuit case is not binding because this case arose in the Fifth Circuit. The Board noted however that its approach is consistent with that adopted by the Second Circuit in *Liu v. Holder*, 575 F.3d 193, 198 (2d Cir. 2009), and the Seventh Circuit in *Rapheal v. Mukasey*, 533 F.3d 521, 530 (7th Cir. 2008).

Concluding that the applicant had not provided sufficient corroborating evidence of key elements of his case, the Board determined that he had not met his burden of proof to establish eligibility for relief. The Board agreed with the Immigration Judge that the applicant had not demonstrated that the evidence could not reasonably have been obtained in advance of his merits hearing and held that the applicant had not shown good cause to warrant a continuance. Affirming the Immigration Judge's determination that the applicant also had not demonstrated eligibility for protection under the Convention Against Torture, the Board dismissed the appeal.

In *Matter of Cerda Reyes*, 26 I&N Dec. 528 (BIA 2015), the Board held that the rules for applying for a bond redetermination at 8 C.F.R. § 1003.19(c) relate to venue and are mandatory, but not jurisdictional. Reviewing the plain language of the regulation, the Board observed that it refers to "[a]pplications for the *exercise* of authority[,]" suggesting that it provides a means for an Immigration Court to exercise its preexisting authority to review the case, but does not grant the court its authority. Significantly, 8 C.F.R. § 1003.19(c) refers to 8 C.F.R. part 1236 (2014), which delineates an Immigration Judge's authority pursuant to section 236 of the Act to hear bond cases—authority that derives from the Act itself via delegation by the Attorney General.

Noting that 8 C.F.R. § 1003.19(c) additionally permits bond applications to be filed with the Office of the Chief Immigration Judge, which is authorized to designate the Immigration Court to hear the case, the Board reasoned that the presumption of jurisdiction by any designated court means that the regulation is not jurisdictional.

Second, the court found it persuasive that the Supreme Court cited cases discussing the "long-standing *Ker-Frisbie* doctrine," which asserts that an "illegal arrest does not divest the trial court of jurisdiction over the defendant or otherwise preclude trial." *Id.* (citing *Frisbie v. Collins*, 342 U.S. at 522, and *Ker v. Illinois*, 119 U.S. 436, 438–40 (1886)). The Second Circuit found that the Supreme Court's reliance on the *Ker-Frisbie* line of authority left "no doubt that the Court was referencing the long-standing jurisdictional rule that an unlawful arrest has no bearing on the validity of a subsequent proceeding." *Id.* The Supreme Court's recent case, *Maryland v. King*, 133 S. Ct. 1958 (2013), further confirmed this jurisdictional interpretation, because the Court's concept of "identity" there was incompatible with an interpretation of *Lopez-Mendoza* as a broad bar to suppression. *Pretzantzin*, 736 F.3d at 649–50.

Interestingly, the Second Circuit did not distinguish between civil and criminal proceedings, citing freely to the previously discussed case law from other circuit courts that arose from criminal charges for illegal reentry under 8 C.F.R. § 1326. However, other circuit courts have relied more heavily on the distinction between the civil and criminal contexts and the role that distinction played in *Lopez-Mendoza*. *See, e.g.*, *United States v. Oscar-Torres*, 507 F.3d at 230 (finding that *Lopez-Mendoza* bars the application of the exclusionary rule in *civil* proceedings, but that suppression of identity-related evidence is not prohibited in *criminal* proceedings); *Navarro-Chalan v. Ashcroft*, 359 F.3d at 22 (refusing to suppress the petitioner's pre-arrest admission of alienage because his arrest was a "prelude to a civil immigration proceeding, and not to a criminal proceeding"); *see also United States v. Farias-Gonzalez*, 556 F.3d 1181. Nonetheless, this cross-pollination of case law across criminal/immigration lines since *Lopez-Mendoza* suggests that courts will continue to examine cases from both contexts in interpreting the "identity statement" rule.

Policy Rationales Underlying the Circuit Split

The Second Circuit's decision in *Pretzantzin*, which followed the Fourth, Eighth, and Tenth Circuits, cemented the split between the four circuit courts that interpret the identity statement rule in *Lopez-Mendoza* as a rule of jurisdiction and the six courts that interpret it as a bar to suppression of identity evidence. The divergent interpretations are based on differing policy rationales. The Tenth Circuit found that "a broader reading of *Lopez-Mendoza* would give the police carte blanche powers to engage in any manner of unconstitutional conduct so long as their purpose was limited to establishing a defendant's identity." *United States v. Olivares-Rangel*, 458 F.3d at 1111. Conversely, the Ninth Circuit has continually asserted that the "practical force" of a bar to suppression of identity related evidence "is particularly great in this context" because when an immigrant is released, he is committing a continuing violation of the immigration laws. *United States v. Del Toro Gudino*, 376 F.3d at 1001. These rationales suggest that the circuit split is likely to deepen and persist, especially with the additional questions that the "identity statement" rule has introduced.

Additional Questions

This line of case law has raised more questions: (1) whether the egregiousness of a violation circumvents the bar on suppression of identity-related evidence; (2) if suppression is available, what constitutes an independent source of identity or alienage; and (3) which types of identity-related evidence are treated differently in this analysis.

The Question of Egregiousness

A number of circuit courts have addressed whether the presence of an *egregious* violation permits the suppression of identity-related evidence. The Ninth Circuit reasoned in *United States v. Del Toro Gudino* that the "identity statement" rule in *Lopez-Mendoza* still prohibited suppression of identity evidence even if egregious violations were present. 376 F.3d at 1000–01. The Ninth Circuit examined the factual circumstances in precedents cited in *Lopez-Mendoza* and found all of them to be of an "egregious" nature, concluding that when the Supreme Court "unequivocally" stated that "the body or identity of a defendant is 'never' suppressible, it meant 'never.'" *Id.* at 1001 (citing *Frisbie v. Collins*, 342 U.S. at 522, and *Ker v. Illinois*, 119 U.S. at 438, 444).

Other courts of appeals have been more reticent on this point. *See, e.g.*, *United States v. Navarro-Diaz*, 420 F.3d at 587 (declining to suppress the admission of an applicant's name and birthplace, but qualifying its holding by noting that no egregious constitutional

violation was present). For example, the Third Circuit addressed a Fourth Amendment violation that was *not* egregious, stating that "absent the kind of egregious circumstances referred to in *Lopez-Mendoza*, we hold that the Fourth Amendment does not provide a basis for an alien to suppress his/her immigration file, or information in that file." *United States v. Bowley*, 435 F.3d at 431. This language suggests that even though the Third Circuit interpreted the "identity statement" rule as barring the suppression of identity evidence, it recognized that an *egregious* constitutional violation may be an exception to that rule. *Id*.

However, the Third Circuit's analysis complicates the adjudication of suppression issues in removal proceedings. If a respondent establishes an *egregious* violation and thus meets his threshold burden for suppression, then identity-related evidence will also be suppressed unless the DHS has an independent source of such evidence. *INS v. Lopez-Mendoza*, 468 U.S. at 1050; *see also Oliva-Ramos v. Att'y Gen. of U.S.*, 694 F.3d 259, 276 (3d Cir. 2012); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 234–37 (2d Cir. 2006). Thus, in those circuits that recognize an egregiousness exception, the "identity statement" rule as a bar to suppression is effectively eliminated.

Independent Source of Identity or Alienage

The practical reality is that respondents often confront not only identity evidence in the form of their own admissions of identity and alienage resulting from a constitutional violation, but also evidence that the DHS obtained from an allegedly "independent source." *Lopez-Mendoza* recognized that in removal proceedings, it "will sometimes be possible using evidence gathered *independently of, or sufficiently attenuated from*, the original arrest" for the DHS to meet its burden of proving a respondent's identity and alienage. 468 U.S. at 1043 (emphasis added) (citing *Matter of Sandoval*, 17 I&N Dec. 70, 79 (BIA 1979)). Therefore, in cases where a respondent has had prior contact with immigration enforcement, the individual has a previous deportation or removal order, or the DHS has contacted a respondent's country of origin to obtain evidence of identity or alienage, the focus of the inquiry is whether such evidence constitutes an "independent source."

However, the *Lopez-Mendoza* "identity statement" rule is still relevant in this inquiry. In determining whether the DHS gathered evidence *independently* of the violation, a court must first determine *how* the DHS obtained that evidence, which often implicates questions regarding what evidence was used to link the respondent with documents evidencing his or her alienage. *See, e.g.*, *Pretzantzin v. Holder*, 736 F.3d at 651–52 (rejecting the DHS's argument that it procured the petitioner's birth certificate from Guatemala using only his name, which is not suppressible, and therefore finding that there was no independent source of his alienage).

In the alternative, the DHS may argue that evidence of a prior immigration contact is sufficiently *attenuated* from the violation "as to dissipate the taint" and render it admissible. *Segura v. United States*, 468 U.S. 796, 805 (1984) (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)) (internal quotation mark omitted). For example, a respondent with prior contacts with immigration enforcement will face an uphill battle arguing that the contents of his alien file should be suppressed, even if an ICE agent accessed the file using admissions of name, birthdate, and birthplace that the respondent provided during the allegedly unconstitutional incident. Nonetheless, adjudicators should focus on the temporal proximity of the arrest and the moment that the evidence was obtained, the presence of intervening circumstances, and "particularly, the purpose and flagrancy of the official misconduct" as factors in adjudicating attenuation. *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975).

Treatment of Different Types of Identity-Related Evidence

As the independent source exception forecasts, the *type* of evidence at issue is still relevant. Even those circuit courts that have interpreted the "identity statement" rule as a rule of jurisdiction have not consistently identified the specific forms of identity evidence that are "necessary to identify the individual for jurisdictional purposes, and [are] thus not suppressible on a purely practical level." *Pretzantzin v. Holder*, 736 F.3d at 650. In *Pretzantzin*, for example, the court only examined whether the DHS exclusively used the name of the petitioner to obtain the other evidence at issue, and so the Second Circuit's entire independent source analysis flowed from that specific form of identity-related evidence. *Id.*

However, other forms of evidence, particularly fingerprints, raise different questions. Even the Ninth Circuit, which has been largely consistent in following its initial interpretation that *Lopez-Mendoza* bars suppression of identity-related evidence, has acknowledged that fingerprints pose a difficult question. *United States v. Garcia-Beltran*, 389 F.3d at 867–68. While holding that "fingerprints taken solely for *identification* purposes . . . can be admitted, because evidence of 'identity' is never suppressible under *Lopez-Mendoza*," the court "left open the possibility . . . that fingerprints taken for an 'investigatory' purpose should be suppressed." *Id.* at 867. This, of course, in part builds on the wealth of Supreme Court precedent in which the exclusionary rule was applied to suppress fingerprint evidence obtained in connection with unlawful arrests. *See, e.g.*, *Hayes v. Florida*, 470 U.S. 811, 815 (1985); *Davis v. Mississippi*, 394 U.S. 721, 727 (1969). Therefore, inquiries into whether officers obtained a respondent's fingerprints for investigatory purposes or as a result of a routine booking are still alive and well.

Consequences of Suppression of Identity-Related Evidence

Lurking in the background of all of these legal questions is the practical question whether suppressing such evidence is necessary or appropriate, given that identity-related evidence "is not unique evidence that, once suppressed, cannot be obtained by other means." *United States v. Farias-Gonzales*, 556 F.3d 1181, 1189 (11th Cir. 2009). The fact that the DHS *can* collect new, admissible evidence of that individual's identity and simply re-charge him with removability is a significant practical reality facing applicants and immigration courts. *Id.* Some courts therefore view the suppression of identity-evidence to have "minimal deterrence benefit" because the DHS can so quickly obtain additional identity evidence and re-serve the individual with a notice to appear. *Id.* (arguing that civil suits are available to foreign nationals whose rights are violated and provide an adequate deterrent against constitutional violations).

Conclusion

The challenge of interpreting the *Lopez-Mendoza* "identity statement" rule in the context of these tangled evidentiary and policy questions explains why the case law on these questions is both sparse and complex. While additional courts of appeals will likely weigh in, ultimately the Supreme Court will need to clarify *Lopez-Mendoza* to provide adequate guidance concerning the scope of the exclusionary rule in removal proceedings.

Hannah C. Cartwright is an Attorney Advisor at the Philadelphia Immigration Court.