

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
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6
7 August Term, 2012
8

9 (Argued: Thursday, March 14, 2013 Decided: July 31, 2013
10 Amended: September 16, 2013)
11

12 Docket No. 11-2867-ag
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15 JOSE MATIAS PRETZANTZIN, AKA JOSE M. PRETZANTZIN-YAX,
16 PACHECO PRETZANTZIN, AKA SANTOS RAMIRO PRETZANTZIN, PEDRO
17 ESTANISLADO PRETZANTZIN, PEDRO LEONARDO PACHECO LOPEZ, JUAN
18 MIGUEL PRETZANTLIN-YAX, AKA JUAN MIGUEL PRETZANTZIN-YAX,
19

20 *Petitioners,*
21

22 v.
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24 ERIC H. HOLDER, JR., UNITED STATES ATTORNEY GENERAL,
25

26 *Respondent.**
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30 Before:

31 WESLEY, DRONEY, *Circuit Judges*, NATHAN, *District Judge.***
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* The Clerk of Court is directed to amend the official caption to conform to the listing of the parties stated above.

** The Honorable Alison J. Nathan, of the United States District Court for the Southern District of New York, sitting by designation.

1 Petitioners appeal from the December 17, 2010 decision
2 of the Board of Immigration Appeals (the "BIA") reversing
3 the Immigration Judge's prior grant of Petitioners' motion
4 to suppress evidence obtained in egregious violation of
5 Petitioners' Fourth Amendment rights and terminate their
6 removal proceedings. The BIA determined that evidence of
7 Petitioners' identities was not suppressible under the
8 Supreme Court's decision in *INS v. Lopez-Mendoza*, 468 U.S.
9 1032 (1984), and that, in any event, the Government had
10 acquired independent evidence of alienage by obtaining
11 Petitioners' birth certificates. Because we find that
12 *Lopez-Mendoza* confirmed an existing jurisdictional rule,
13 rather than announcing a new evidentiary rule, the BIA erred
14 in concluding that the Government had met its burden of
15 establishing that certain alienage-related evidence had been
16 obtained independent of any constitutional violation. The
17 Government having had the opportunity to show that the
18 alienage-related evidence was obtained from an independent
19 source, and having explicitly chosen not to do so, we **VACATE**
20 and **REMAND** the BIA's decision with instructions to reach
21 only the issue of whether Government agents seized evidence
22 of alienage from Petitioners in the course of committing an
23 egregious Fourth Amendment violation.

24 VACATED AND REMANDED.

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31
32 MATTHEW GEORGE, Trial Attorney, Office of
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36 Director, Office of Immigration Litigation, *on*
37 *the brief*), United States Department of
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39
40 Elaine J. Goldenberg, Matthew E. Price, Jenner &
41 Block LLP, Washington, DC; Omar C. Jadwat,
42 American Civil Liberties Union Foundation,
43 Immigrants' Rights Project, New York, NY, *for*

4 WESLEY, *Circuit Judge*:

5 In the early morning hours of March 5, 2007, Petitioner
6 Pedro Estanislado Pretzantzin ("Estanislado Pretzantzin")
7 awoke to a loud banging; he opened his third-floor bedroom
8 window to see a group of armed, uniformed officers at his
9 apartment building's front door in Jamaica, New York.¹ The
10 officers were from the Department of Homeland Security
11 ("DHS") and worked for Immigrations and Customs Enforcement
12 ("ICE"). Estanislado Pretzantzin shared the apartment with
13 members of his extended family, including Petitioners Jose
14 Matias Pretzantzin, Pacheco Pretzantzin, Pedro Pacheco-Lopez
15 ("Pacheco-Lopez"), and Juan Miguel Pretzantlin-Yax.²
16 Through the open window, the officers informed Estanislado
17 Pretzantzin that they were "the police" and ordered him
18

¹ The factual record in this case is somewhat sparse because the Government declined to make an evidentiary proffer concerning the circumstances of Petitioners' arrests. The following facts are taken from Petitioners' testimony and supporting affidavits, which the agency found credible.

² Santiago Pretzantzin-Yax has since voluntarily left the United States; he is not a petitioner for purposes of this appeal.

1 downstairs to open the door. Estanislado Pretzantzin
2 complied.

3 After confirming that he lived on the third floor, one
4 of the officers led Estanislado Pretzantzin back upstairs
5 and ordered him to allow the other officers inside. At no
6 point during the encounter did the officers explain their
7 presence, present a warrant, or request consent to enter the
8 apartment. Once inside, ICE officers rounded up the
9 remaining Petitioners, who were asleep in their beds,
10 assembled them in the living room, and demanded to see their
11 "papers." It appears that only Pacheco-Lopez – the sole
12 Petitioner who had a passport – was able to comply with the
13 officers' directive. The officers did not ask Estanislado
14 Pretzantzin whether he had legal status in the United States
15 before arresting him.

16 All Petitioners were handcuffed and transported to ICE
17 facilities at 26 Federal Plaza, in New York City, where they
18 were notified for the first time that they were in the
19 custody of immigration officials. ICE officers interviewed
20 Petitioners and told them to sign statements that were not
21 read to them in English (which Petitioners speak minimally
22 if at all); these statements were subsequently memorialized

1 on Form I-213s (Record of Deportable/Inadmissible Alien).
2 Petitioners were released from custody later that afternoon
3 and served with Notices to Appear, charging them with
4 removability under Immigration and Nationality Act ("INA") §
5 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i), as natives and
6 citizens of Guatemala who had entered the United States
7 without inspection.

8 Following consolidation of their proceedings,
9 Petitioners appeared before Immigration Judge George T. Chew
10 (the "IJ") and conceded that they were the individuals named
11 in the Notices to Appear, but denied the charges of
12 removability and moved to suppress the evidence against them
13 and terminate their proceedings. Petitioners argued that
14 they were entitled to the suppression of all statements and
15 evidence obtained as a consequence of the nighttime,
16 warrantless raid of their home under the Fourth and Fifth
17 Amendments. In opposition, the Government argued, *inter*
18 *alia*, that it possessed independent evidence of Petitioners'
19 alienage. Specifically, the Government claimed that it had
20 obtained Petitioners' Guatemalan birth certificates from the
21 United States Embassy in Guatemala using Petitioners' names,
22 and that it also had Petitioner Pacheco-Lopez's criminal

1 history report, arrest record, and fingerprint card from a
2 1994 theft of services conviction for subway-turnstile
3 jumping. The arrest report listed Guatemala as Pacheco-
4 Lopez's birthplace.

5 The Government ostensibly relied on the admission in
6 Petitioners' motion to suppress (indicating that Petitioners
7 were related) and Pacheco-Lopez's arrest records (confirming
8 that he was born in Guatemala) to target the United States
9 Embassy in Guatemala for the birth certificate request. In
10 connection with Petitioners' birth certificates, the
11 Government proffered a Federal Express delivery record label
12 for a package sent from ICE's facilities at 26 Federal Plaza
13 to the United States Embassy in Guatemala, but it did not
14 submit a copy of the actual birth certificate request or any
15 other evidence bearing on the package's contents. Following
16 Petitioners' testimony at a subsequent suppression hearing,³
17 the IJ invited the Government to proffer a warrant,
18 statements from the officers, or any other evidence to
19 justify their intrusion into Petitioners' home. The
20 Government, however, declined to do so and explicitly

³ Pacheco-Lopez and Estanislado Pretzantzin were the only Petitioners to testify at the merits hearing. The IJ found their testimony credible and declined to take additional testimony from the remaining Petitioners, concluding that it would be repetitive.

1 disavowed any reliance on Petitioners' Form I-213s, choosing
2 to rely instead on Petitioners' birth certificates and
3 Pacheco-Lopez's arrest records as the sole evidence of
4 alienage.

5 In June 2008, the IJ granted Petitioners' motion to
6 suppress the Government's evidence of alienage and terminate
7 the proceedings, finding that the nighttime, warrantless
8 entry into their home and resulting arrests constituted an
9 egregious violation of Petitioners' Fourth and Fifth
10 Amendment rights. Having found Petitioners' testimony and
11 supporting affidavits sufficient to establish a *prima facie*
12 case for suppression, the IJ reasoned that the Government's
13 failure to offer any justification for the conduct of its
14 agents resolved the issue in Petitioners' favor. The IJ
15 also rejected the Government's contention that Petitioners'
16 birth certificates and Pacheco-Lopez's arrest records
17 constituted independent evidence of alienage, finding that
18 this evidence could only have been obtained through the use
19 of evidence illegally procured as a result of the raid of
20 Petitioners' home, namely, Pacheco-Lopez's passport and
21 Petitioners' statements.

1 The Government appealed. In a December 17, 2010 order,
2 the BIA vacated the IJ's decision. *In re Jose Matias*
3 *Pretzantizin, et al.*, Nos. A097 535 298/296/297/299/300/301
4 (B.I.A. Dec. 17, 2010). Relying on *INS v. Lopez-Mendoza*,
5 468 U.S. 1032 (1984), for the proposition that identity is
6 never suppressible as the fruit of an unlawful arrest, the
7 BIA found that it need not determine whether Petitioners
8 suffered an egregious violation of their constitutional
9 rights because their birth certificates and Pacheco-Lopez's
10 arrest records were obtained after the Government had
11 determined their identities. The BIA explained that
12 Petitioners' birth certificates were obtained from
13 Guatemalan authorities using Petitioners' insuppressible
14 identities; the BIA offered no similar justification for the
15 independence of Pacheco-Lopez's arrest records. Lastly,
16 although the Government had expressly declined to rely on
17 Petitioners' Form I-213s before the IJ, the BIA found this
18 evidence admissible because Petitioners had not argued that
19 their statements were "untrue or unreliable." *In re*
20 *Pretzantizin*, A097 535 298, at 2.

21 Petitioners were subsequently ordered removed to
22 Guatemala and have timely petitioned for review.

1 In *Lopez-Mendoza*, the Supreme Court held that a Fourth
2 Amendment violation does not, standing alone, justify the
3 suppression of evidence in the course of a civil deportation
4 proceeding, *id.* at 1050; this Court has since interpreted
5 *Lopez-Mendoza* to allow suppression following an *egregious*
6 violation, see *Almeida-Amaral v. Gonzalez*, 461 F.3d 231, 235
7 (2d Cir. 2006). Today, as discussed in a companion case
8 argued in tandem with the case at bar, *Doroteo Sicajau*
9 *Cotzojay v. Holder*, No. 11-4916-ag, – F.3d –, – (2d Cir.
10 2013), we confirm what the BIA and other courts have already
11 recognized: A nighttime, warrantless raid of a person’s
12 home by government officials may, and frequently will,
13 constitute an egregious violation of the Fourth Amendment
14 requiring the application of the exclusionary rule in a
15 civil deportation hearing. See *Matter of Guevara-Mata*, No.
16 A097 535 291 (B.I.A. June 14, 2011);⁵ *Oliva-Ramos v. Att’y*
17 *Gen. of U.S.*, 694 F.3d 259, 279 (3d Cir. 2012).

18 In the instant case, the BIA did not reach the question
19 of whether there was an egregious violation of the Fourth
20 Amendment, but instead predicated its reversal of the IJ’s

⁵ Available at
<http://66.147.244.126/~centrbq3/wp-content/uploads/2012/04/BIA-decision-Guevara-Mata.pdf>.

1 grant of suppression on a finding that Petitioners' birth
2 certificates and Pacheco-Lopez's arrest records were
3 independently obtained through the use of only their names.
4 To reach this result, the BIA relied on *Lopez-Mendoza's*
5 statement that "[t]he 'body' or identity of a defendant or
6 respondent in a criminal or civil proceeding is never itself
7 suppressible as a fruit of an unlawful arrest," 468 U.S. at
8 1039 ("*Lopez-Mendoza's* identity statement"). The task then
9 is to discern the meaning of this statement that "has
10 bedeviled and divided our sister circuits." *United States*
11 *v. Oscar-Torres*, 507 F.3d 224, 228 (4th Cir. 2007).⁶ For
12 the reasons that follow, we join the Fourth, Eighth, and
13 Tenth Circuits in finding that *Lopez-Mendoza* reaffirmed a
14 long-standing rule of personal jurisdiction; it did not
15 create an evidentiary rule insulating specific pieces of
16 identity-related evidence from suppression.

⁶ See *Oscar-Torres*, 507 F.3d at 228 (comparing *United States v. Olivares-Rangel*, 458 F.3d 1104, 1106 (10th Cir. 2006) (interpreting *Lopez-Mendoza* as merely reiterating long-standing jurisdictional rule), and *United States v. Guevara-Martinez*, 262 F.3d 751, 754-55 (8th Cir. 2001) (same), with *United States v. Bowley*, 435 F.3d 426, 430-31 (3d Cir. 2006) (interpreting *Lopez-Mendoza* as barring suppression of evidence of identity), *United States v. Navarro-Diaz*, 420 F.3d 581, 588 (6th Cir. 2005) (same), and *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999) (same)).

1 ***INS v. Lopez-Mendoza***

2 The jurisdictional nature of *Lopez-Mendoza*'s identity
3 statement is evidenced by both the context in which it was
4 made and the authority upon which it relied. In *Lopez-*
5 *Mendoza*, the Supreme Court reviewed challenges in two civil
6 deportation proceedings, each of which were commenced
7 following unlawful arrests. 468 U.S. at 1034. In the first
8 proceeding, respondent Adan Lopez-Mendoza did not seek
9 suppression of any specific piece of evidence and, instead,
10 "objected only to the fact that he had been summoned to a
11 deportation hearing following an unlawful arrest." *Id.* at
12 1040. The Supreme Court easily dispensed with Lopez-
13 Mendoza's challenge to the validity of the proceedings
14 against him because "[t]he mere fact of an illegal arrest
15 has no bearing on a subsequent deportation proceeding." *Id.*
16 (alteration in original and internal quotation marks
17 omitted). It was in this context that the Supreme Court
18 stated that "[t]he 'body' or identity of a defendant or
19 respondent in a criminal or civil proceeding is never itself
20 suppressible as a fruit of an unlawful arrest, even if it is
21 conceded that an unlawful arrest, search, or interrogation
22 occurred." *Id.* at 1039 (citations omitted).

1 In the second proceeding, respondent Elias Sandoval-
2 Sanchez moved to suppress his Form I-213 (Record of
3 Deportable/Inadmissible Alien), which memorialized
4 incriminating post-arrest statements relating to his
5 immigration status and place of birth. *Id.* at 1037-38,
6 1040; *Lopez-Mendoza v. INS*, 705 F.2d 1059, 1062 (9th Cir.
7 1983), *rev'd*, 468 U.S. 1032 (1984). The Court observed that
8 Sandoval-Sanchez had “a more substantial claim” because
9 “[h]e objected not to his compelled presence at a
10 deportation proceeding, but to evidence offered at that
11 proceeding.” 468 U.S. at 1040. Accordingly, the Court
12 considered whether the exclusionary rule should apply to
13 prohibit the Government from using illegally obtained
14 evidence of Sandoval-Sanchez’s alienage against him in
15 deportation proceedings. *Id.* at 1040-41. The Court
16 ultimately found the exclusionary rule inapplicable in
17 Sandoval-Sanchez’s case after weighing the likely social
18 benefits and costs pursuant to the framework established in
19 *United States v. Janis*, 428 U.S. 433 (1976). *Lopez-Mendoza*,
20 468 U.S. at 1050.

21 The Court’s differing treatment of Lopez-Mendoza’s
22 personal jurisdiction challenge and Sandoval-Sanchez’s
23 evidentiary challenge, and the corresponding omission of any

1 identity-related considerations from the evaluation of the
2 latter claim, show that *Lopez-Mendoza's* identity statement
3 merely confirmed the jurisdictional rule that an unlawful
4 arrest has no bearing on the validity of a subsequent
5 proceeding; the Court did not announce a new rule insulating
6 all identity-related evidence from suppression. See *Oscar-*
7 *Torres*, 507 F.3d at 228-29; *United States v.*
8 *Olivares-Rangel*, 458 F.3d 1104, 1111 (10th Cir. 2006);
9 *United States v. Guevara-Martinez*, 262 F.3d 751, 754 (8th
10 Cir. 2001). After all, if *Lopez-Mendoza's* identity
11 statement – applicable to both criminal and civil
12 proceedings, 486 U.S. at 1039-40 – was intended as a rule of
13 evidence, it would have been impracticable for the Court to
14 employ a cost-benefit analysis in deciding whether to apply
15 the exclusionary rule to Sandoval-Sanchez's civil
16 deportation proceedings without first determining whether
17 the statements he sought to suppress were identity-related
18 evidence.

19 The jurisdictional nature of *Lopez-Mendoza's* identity
20 statement is further evidenced by the authorities it
21 employed, which relate to the long-standing *Ker-Frisbie*
22 doctrine – providing that an illegal arrest does not divest
23 the trial court of jurisdiction over the defendant or

1 otherwise preclude trial. See *id.* at 1039-40 (citing, *inter*
2 *alia*, *Frisbie v. Collins*, 342 U.S. 519, 522 (1952) and
3 *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975)); see also
4 *Olivares-Rangel*, 458 F.3d at 1110-11 (recognizing *Lopez-*
5 *Mendoza's* identity statement as an application of the *Ker-*
6 *Frisbie* doctrine); accord *Oscar-Torres*, 507 F.3d at 228-29.
7 In *Ker v. Illinois*, the Supreme Court first considered the
8 effect of an unlawful taking of custody on the validity of a
9 subsequent proceeding; the Court concluded that due process
10 was not violated when a defendant was kidnaped in Peru and
11 forcibly returned to Illinois to stand trial. 119 U.S. 436,
12 438-40 (1886). Due process did not restrict the methods
13 employed to bring the defendant before the court; it
14 governed what happened once he was there. The Court
15 reasoned that due process "is complied with when the party
16 is regularly indicted by the proper grand jury in the state
17 court, has a trial according to the forms and modes
18 prescribed for such trials, and when, in that trial and
19 proceedings, he is deprived of no rights to which he is
20 lawfully entitled." *Id.* at 440.

21 More than sixty years later, in *Frisbie*, the Supreme
22 Court refused to depart from *Ker* when faced with a due
23 process challenge by a defendant who was abducted in

1 Illinois and taken to Michigan for trial, noting that
2 “[t]here is nothing in the Constitution that requires a
3 court to permit a guilty person rightfully convicted to
4 escape justice because he was brought to trial against his
5 will.” 342 U.S. at 522; see also *Gerstein*, 420 U.S. at 119
6 (declining to “retreat from the established rule that
7 illegal arrest or detention does not void a subsequent
8 conviction”). *Lopez-Mendoza’s* reliance on the *Ker-Frisbie*
9 line of authority in support of its identity statement
10 leaves no doubt that the Court was referencing the long-
11 standing jurisdictional rule that an unlawful arrest has no
12 bearing on the validity of a subsequent proceeding rather
13 than announcing a new rule insulating all identity-related
14 evidence from suppression.

15 Contemporary case law confirms our view. A
16 jurisdictional reading of *Lopez-Mendoza’s* identity statement
17 is compelled by the Supreme Court’s recent decision in
18 *Maryland v. King*, 133 S. Ct. 1958 (2013).⁷ In *King*, the

⁷ The Government raised *King* in a Rule 28(j) Letter for the purpose of demonstrating that Petitioners’ birth certificates and Pacheco-Lopez’s arrest records were independently obtained through their insuppressible identities. However, we think that *King’s* treatment of identity-related evidence resolves any doubt that *Lopez-Mendoza’s* mandate is jurisdictional rather than evidentiary.

1 Supreme Court examined the inventory or booking search
2 exception to the Fourth Amendment's warrant requirement and
3 found that a criminal defendant was not subjected to an
4 unreasonable search and seizure when a sample of his DNA was
5 taken, pursuant to the Maryland DNA Collection Act,
6 following a lawful arrest for a serious offense that was
7 supported by probable cause. *Id.* at 1980. In reaching this
8 result, the Court identified the legitimate government
9 interest served by Maryland's DNA Collection Act as "the
10 need for law enforcement officers in a safe and accurate way
11 to process and identify the persons and possessions they
12 must take into custody," *id.* at 1970, and concluded that
13 "[w]hen probable cause exists to remove an individual from
14 the normal channels of society and hold him in legal
15 custody, DNA identification plays a critical role in serving
16 those interests," *id.* at 1971. Importantly, we note that
17 the inventory or booking search exception to the Fourth
18 Amendment's warrant requirement is not implicated on the
19 facts of the case at bar because, unlike in *King*,
20 Petitioners were not subjected to lawful arrests based on
21 probable cause. Indeed, here the IJ explicitly found that
22

1 Petitioners' arrests constituted unlawful seizures under the
2 Fourth Amendment.⁸

3 Still, we find *King's* description of identity-related
4 evidence telling. In finding that "name alone cannot
5 address [the government's] interest in identity," the Court
6 noted that other relevant forms of identification include
7 fingerprints, "name, alias, date and time of previous
8 convictions and the name then used, photograph, Social

⁸ The Government's Brief includes a parenthetical citation to *United States v. Adegbite*, 846 F.2d 834 (2d Cir. 1988), a case the Government referenced during oral argument, for the proposition that "the identity [specifically, the name] of defendants is not suppressible under the exclusionary rule." Resp. Br. at 15 (quoting *Adegbite*, 846 F.2d at 838-39). In *Adegbite*, this Court determined that "the solicitation of information concerning a person's identity and background does not amount to custodial interrogation prohibited by *Miranda*," 846 F.2d at 838 - a statement largely irrelevant to this appeal. Initially, given the Government's inadequate briefing regarding any potential application of the pedigree exception discussed in *Adegbite*, we consider the argument to be waived. See *Tolbert v. Queens Coll.*, 242 F.3d 58, 75-76 (2d Cir. 2001).

Regardless, we would deem the pedigree exception to be inapplicable; it is focused on protecting "basic information needed to facilitate the booking and arraigning of a suspect" from suppression as a result of a *Miranda* violation following a valid arrest. *United States v. Carmona*, 873 F.2d 569, 573 (2d Cir. 1989) (citing *United States v. Gotchis*, 803 F.2d 74, 78-79 (2d Cir. 1986) and *United States ex rel. Hines v. LaVallee*, 521 F.2d 1109, 1112-13 (2d Cir. 1975)). The concerns inherent within the pedigree exception to *Miranda* violations - supplying incriminating but identifying information without being warned of the consequences - do not line up well with the circumstances of Petitioners' constitutional claim that they were seized in their home without consent and without probable cause. There is no reason to consider engrafting an exception to the protections of the Fifth Amendment onto Petitioners' Fourth Amendment claims.

1 Security number, or [DNA] profile." *Id.* at 1972. This
2 broad concept of "identity," when read in conjunction with
3 the Government's proffered interpretation of *Lopez-Mendoza's*
4 identity statement as precluding the suppression of all
5 identity-related evidence, would render the inventory or
6 booking search exception to the Fourth Amendment's warrant
7 requirement superfluous. After all, if DNA is identity-
8 related evidence, and *Lopez-Mendoza* precludes the
9 suppression of all identity-related evidence, then why
10 bother to couch Maryland's DNA Collection Act within the
11 booking exception at all? And if identity-related evidence
12 includes fingerprints, and *Lopez-Mendoza* precludes the
13 suppression of all identity-related evidence, then what are
14 we to make of controlling precedent mandating the
15 suppression of this insuppressible evidence? See, e.g.,
16 *Hayes v. Florida*, 470 U.S. 811, 816-17 (1985) (holding
17 fingerprints properly suppressed when defendant was arrested
18 without probable cause, taken to police station without
19 consent, and detained and fingerprinted for investigatory
20 purposes); *Taylor v. Alabama*, 457 U.S. 687, 692-93 (1982)
21 (concluding that "[t]he initial fingerprints [] were
22 themselves the fruit of petitioner's illegal arrest")

1 (citation omitted)); accord *Davis v. Mississippi*, 394 U.S.
2 721, 727 (1969). Given such peculiar consequences, it is
3 clear that we cannot read *Lopez-Mendoza's* identity statement
4 as establishing a rule of evidence.

5 **Jurisdictional Identity Evidence is Not Suppressible**

6 Although *Lopez-Mendoza's* identity statement merely
7 confirmed a long-standing rule of personal jurisdiction,
8 that does not resolve the matter. *Lopez-Mendoza's*
9 jurisdictional rule has unavoidable, practical evidentiary
10 consequences.⁹ Because an individual cannot escape a
11 tribunal's power over his "body" despite being subject to an
12 illegal seizure en route to the courthouse, he cannot
13 contest that he is, in fact, the individual named in the
14 charging documents initiating proceedings. See *United*
15 *States v. Garcia-Beltran*, 389 F.3d 864, 868 (9th Cir. 2004).
16 Thus, a person's "identity," insofar as necessary to
17 identify the individual subject to judicial proceedings, is
18 not suppressible on a purely practical level.

⁹ The Government argues that one of these consequences is allowing Petitioners to "immunize themselves from the consequences of their continuing violation of law." Resp. Br. at 11. The Supreme Court's recent confirmation that "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States," alleviates any concerns we harbor with respect to this claim. *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012) (citing *Lopez-Mendoza*, 468 U.S. at 1038).

1 The obvious element of identity that falls within this
2 category is one's name. In this case, Petitioners freely
3 concede that they are the individuals charged in the Notices
4 to Appear and they do not argue that their names should be
5 suppressed following an egregious Fourth Amendment
6 violation.¹⁰ A more difficult question is what other
7 identity evidence, if any, is necessary to identify the
8 individual for jurisdictional purposes, and is thus not
9 suppressible on a purely practical level. However, the
10 Court need not reach that question because the Government
11 repeatedly contends that the names alone were sufficient to
12 obtain the additional evidence at issue. Resp. Br. at 7-8,
13 22, 25. There is no need to decide where identity ends and
14 alienage begins. Therefore, we will hold the Government to
15 its position.

¹⁰ The Government argues that even if this Court requires suppression of Petitioners' identity information, Petitioners will be required to admit or deny the allegations and charges in any future Notices to Appear pursuant to 8 C.F.R. § 1240.10(c), and that if they deny the charges, the Government may question them under oath and the agency may draw adverse inferences if Petitioners remain silent. Resp. Br. at 10-11 & 10 n.1. The Government is correct that Section 1240.10(c) provides that an "immigration judge shall require the respondent to plead to the notice to appear," 8 C.F.R. § 1240.10(c), and that "under certain circumstances, an adverse inference may indeed be drawn from a respondent's silence in deportation proceedings," *Matter of Guevara*, 20 I. & N. Dec. 238, 241 (B.I.A. 1990). However, as Petitioners point out, the BIA has also held that "silence alone does not provide sufficient evidence, in the absence of any other evidence of record at all, to establish a prima facie case of alienage." *Id.* at 242.

1 **Independent Evidence**

2 The BIA determined that Petitioners' birth certificates
3 constituted independent evidence of alienage because they
4 were obtained solely through the use of Petitioners'
5 insuppressible identities. In assessing whether evidence
6 was independently obtained, we must determine "whether,
7 granting establishment of the primary illegality, the
8 evidence to which instant objection is made has been come at
9 by exploitation of that illegality or instead by means
10 sufficiently distinguishable to be purged of the primary
11 taint." *Wong Sun*, 371 U.S. at 488 (internal quotation marks
12 omitted). And where, as here, Petitioners have established
13 a *prima facie* case for suppression, the Government must
14 "assume the burden of justifying the manner in which it
15 obtained the evidence." *Matter of Barcenas*, 19 I. & N. Dec.
16 609, 611 (B.I.A. 1988) (internal quotation marks omitted).

17 The Government maintained before the agency and at oral
18 argument that ICE procured Petitioners' birth certificates
19 using only their names. But the arguments of counsel are
20 not evidence, *Matter of Ramirez-Sanchez*, 17 I. & N. Dec.
21 503, 506 (B.I.A. 1980), and the Government failed to make
22 any evidentiary proffer demonstrating the basis for

1 Petitioners' birth certificate request. Moreover, we note
2 that the Government's claim that the request was based on
3 names alone was dubiously supported by only a Federal
4 Express package label, but not by the actual letter ICE sent
5 to the United States Embassy in Guatemala. In addition, the
6 Government's post-argument Rule 28(j) Letter stating that
7 "it was proper for the government to use aspects of
8 [Petitioners'] identity other than simply their names - such
9 as birth date and even place of birth - to obtain their
10 Guatemalan birth certificates," would appear to further
11 undermine the Government's contention. Given that the
12 record before the IJ contained no evidence documenting the
13 basis for Petitioners' birth certificate request, we find
14 that the BIA erred by concluding that the Government had met
15 its burden of establishing that Petitioners' birth
16 certificates constituted independent evidence of alienage.
17 See *Wong Sun*, 371 U.S. at 488; *Barcenas*, 19 I. & N. Dec. at
18 611.

19 The Government argues that it already possessed
20 independent evidence of Pacheco-Lopez's alienage prior to
21 any constitutional violation, in the form of his arrest
22 records that were merely *linked* to him using his name, but
23 the record is equally silent concerning the procurement of

1 those records. The Government relies on *Reyes-Basurto v.*
2 *Holder*, a non-precedential summary order in which we
3 previously affirmed the denial of a motion to suppress
4 evidence on this linkage rationale. See 477 F. App'x 788,
5 789 (2d Cir. 2012). In *Reyes-Basurto*, the petitioner sought
6 to suppress his Border Patrol records and a Form I-140
7 (Petition For Alien Worker) that were necessarily *already* in
8 the possession of immigration officials. See *id.* at 789.
9 In affirming the denial of suppression, we reasoned that
10 Reyes-Basurto's pre-existing immigration records made him "a
11 'suspect' in regards to removability even before his
12 [illegal] arrest." *Id.* at 789 (analogizing to *Crews*, 445
13 U.S. at 476, in which the Court declined to suppress an in-
14 court witness identification because "the robbery
15 investigation had already focused on [Crews], and the police
16 had independent reasonable grounds to suspect his
17 culpability" prior to any Fourth Amendment violation).

18 This rationale does not apply with equal force to
19 Pacheco-Lopez, whose alienage-related evidence was in the
20 possession of a municipal transit police department rather
21 than immigration officials. See *Davis*, 394 U.S. 721; see
22 *also Crews*, 445 U.S. at 476 ("Had it not been for Davis'
23 illegal detention, however, his prints would not have been

1 obtained and he would never have become a suspect."). In
2 any event, given that the Government failed to proffer any
3 evidence demonstrating how Pacheco-Lopez's records were
4 obtained, we are unable to find that this evidence was
5 linked to him through the use of his name alone, and,
6 therefore, we find that the BIA erred in concluding that the
7 Government had met its burden of establishing that this
8 evidence was independent of any constitutional violation.

10 **Conclusion**

11 For the foregoing reasons, the decision of the Board of
12 Immigration Appeals is hereby VACATED and REMANDED. Because
13 the BIA declined to answer the question of whether
14 Petitioners sustained an egregious Fourth Amendment
15 violation, we do not reach this issue. However, we note
16 that fact-finding with respect to the circumstances under
17 which ICE officers entered Petitioners' home and seized
18 Petitioners has been completed. The Government had an
19 opportunity to respond to Petitioners' *prima facie* case for
20 suppression and explicitly chose not to. Likewise, the
21 Government had an opportunity to submit proof showing
22 exactly how it obtained Pacheco-Lopez's arrest records and

1 Petitioners' birth certificates. The Government failed to
2 do so; the evidence proffered is inadequate to support the
3 Government's claim that it relied on Petitioners' names
4 alone in securing their birth certificates from the United
5 States Embassy in Guatemala.

6 Accordingly, we remand this case for the BIA to reach
7 the issue of whether Government agents seized evidence of
8 alienage from Petitioners in the course of committing an
9 egregious Fourth Amendment violation. Should any questions
10 over the nature of the constitutional violation linger, we
11 direct the agency to the opinion issued in a companion case
12 also decided today, in which we were persuaded that the
13 facts as alleged by the alien and similar to those in this
14 case portrayed an egregious Fourth Amendment violation. See
15 *Doroteo Sica jau Cotzokay v. Holder*, No. 11-4916-ag, - F.3d
16 -, - (2d Cir. 2013).