No. 12-71363

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[redacted],

Petitioner,

v.

ERIC H. HOLDER, JR.,
Attorney General,

Respondent.

PETITION FOR REVIEW OF FINAL ORDER OF THE BOARD OF IMMIGRATION APPEALS
Agency No. [redacted]

BRIEF FOR RESPONDENT

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THE BOARD OF IMMIGRATION APPEALS
Agency No. [redacted]

BRIEF FOR RESPONDENT

STATEMENT OF JURISDICTION

[redacted] ("[redacted]"), seeks review of a final order issued by the Board of Immigration Appeals ("BIA" or "Board") on April 5, 2012, dismissing his appeal of the Immigration Judge's denial of his motion to suppress evidence and order of removal. *See* Certified Administrative Record ("AR"), 1-5. The

Board's jurisdiction to consider [redacted]' administrative appeal arose under 8 C.F.R. § 1003.1(b)(3).

This Court's jurisdiction arises under section 242(a)(1) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252(a)(1), which confers exclusive jurisdiction on the courts of appeals to review final orders of removal. [redacted] timely filed his petition for review on May 1, 2012, within thirty days of the Board's April 5, 2012 order. INA § 242(b)(1), 8 U.S.C. § 1252(b)(1). Venue properly lies in this Court because [redacted]' immigration proceedings were completed within this judicial circuit, specifically in San Francisco, California. AR 319-20; INA § 242(b)(2), 8 U.S.C. § 1252(b)(2).

COUNTER-STATEMENT OF THE ISSUES PRESENTED

1. Whether ICE agents acted in compliance with the Fourth Amendment when they detained [redacted], incident to the execution of a valid search warrant, questioned him about his identity and immigration status while the search ensued, and detained [redacted] in a reasonable manner.

2. Whether the Board and Immigration Judge properly denied [redacted]' request to suppress reliable evidence because of alleged violations of DHS regulations, where ICE agents complied with the applicable regulations and, if any errors occurred, they did not prejudice [redacted]' interests or affect the outcome of the case.

STATEMENT OF THE CASE

[redacted], a native and citizen of Mexico, entered the United States on or about January 1, 2000, without being admitted or paroled into the United States after inspection by an immigration officer. AR 825-26, 847, 1156.

Agents from Immigration and Customs Enforcement ("ICE") of the Department of Homeland Security ("DHS") encountered [redacted] on May 2, 2008, while executing a search warrant at Taqueria El Balazo restaurant ("El Balazo") in Pleasanton, California, to obtain evidence that the owners were knowingly hiring and harboring illegal aliens. AR 825-26 (Form I-213, Record of Deportable / Inadmissible Alien ("Form I-213")). During the search, [redacted] indicated that he was a Mexican citizen who entered the United States without inspection. AR 812, 826. On May 12, 2008, DHS commenced removal proceedings against [redacted] with the filing of a Notice to Appear ("NTA") in Immigration Court, charging [redacted] with being subject to removal under section 212(a)(6)(A)(i) of the INA, 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without having been admitted or paroled by an immigration officer. AR 1156-57.

On October 31, 2008, [redacted] appeared before an Immigration Judge and, through counsel, denied the factual allegations and the ground of removal contained in the NTA. AR 341-342, 831. Subsequently, [redacted] filed a motion to

terminate the removal proceedings and suppress any evidence obtained by ICE during the execution of the warrant on May 2, 2008, and any evidence derived or resulting therefrom, including the Form I-213. AR 1026-1124.

On June 10, 2009, the Immigration Judge issued an order scheduling a hearing for [redacted] to testify in support of his motion. AR 1130-31. [redacted] testified before the Immigration Judge on August 19, 2009 and November 3, 2009. AR 385-448, 491-593. The Immigration Judge issued an order finding that [redacted] established a prima facie case for suppression and, thus, the burden shifted to DHS to demonstrate the manner in which the evidence was obtained. AR 996.

On November 4, 2010, DHS presented testimonial and physical evidence regarding the work-site enforcement operation at El Balazo restaurant on May 2, 2008. AR 694-783. The Immigration Judge issued a decision on January 31, 2011, denying [redacted]' motion to suppress and finding that [redacted] was removable as charged. AR 831-848. [redacted] declined to designate a country of removal and indicated that he did not intend to seek any relief at that time. AR 828. Accordingly, on February 10, 2011, the Immigration Judge issued a decision ordering [redacted] to be removed from the United States to Mexico. AR 293-294.

[redacted], through counsel, appealed the Immigration Judge's denial of his motion to suppress to the Board. AR 20-32, 99-126, 287-291. The Board dismissed [redacted]' appeal on April 5, 2012. AR 1-5.

This petition for review followed.

STATEMENT OF THE FACTS

I. [redacted]' motion to suppress evidence

[redacted] filed a motion to terminate proceedings and suppress any evidence obtained by ICE during the execution of the warrant at the El Balazo restaurant on May 2, 2008, and any evidence derived or resulting therefrom, including the Form I-213. AR 1026-1124. The Form I-213 indicated that when Agent Webster encountered [redacted] at the restaurant, [redacted] admitted that he was a citizen and national of Mexico and that he had entered the United States without inspection on or about January 1, 2000. AR 826. [redacted] argued that the Immigration Judge should suppress this evidence because the government violated the United States Constitution and federal regulations in obtaining it. AR 1026-1049.

In support of the motion, [redacted] submitted a personal declaration giving his account of the events. AR 1052-56. The crux of [redacted]' story was that on the morning of May 2, 2008, immigration agents entered the El Balazo restaurant, handcuffed and detained him, did not ask him any questions or show him a warrant, completed a search of the restaurant about one and one-half hours later,

and then, without having asked him any questions, transported him to ICE's office in San Francisco, where he was detained for several more hours, then interviewed and arrested. *Id.* [1]

II. The Immigration Judge's order scheduling a hearing for [redacted] to testify in support of his motion to suppress

On June 10, 2009, the Immigration Judge issued an order scheduling a hearing for [redacted] to testify in support of his motion to suppress. AR 1130-31. While finding that [redacted]' declaration, "if taken as true," would establish a prima facie case for suppression, the Judge noted that a movant's affidavit alone is not sufficient to establish a prima facie case that evidence was obtained in violation of the Constitution or regulations. AR 1131 (citing *In re Barcenas*, 19 I. & N. Dec. 609, 611-12 (BIA 1988)). "[R]ather the testimony of the movant is required" to set forth a prima facie case, and only then, if the movant meets his burden of proof, will the burden shift to the government to demonstrate that the evidence was obtained lawfully. *Id.*

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[1] The statements in [redacted]' declaration, and his subsequent testimony, are being presented as allegations only, not facts, because the Immigration Judge, after considering the testimony of [redacted] and Agent Carol Webster and the contemporaneous evidence, did not credit [redacted]' assertions to the extent they contradicted Agent Webster's account of the events on May 2, 2008. AR 832-847.

III. [redacted]' testimony in support of his motion to suppress

[redacted] testified before the Immigration Judge on August 19, 2009 and November 3, 2009. AR 385-448, 491-593. Again, the crux of [redacted]' story was that on the morning of May 2, 2008, immigration agents entered the restaurant, handcuffed and detained him, did not ask him any questions and, several hours later, transported him to ICE's office in San Francisco, where he was taken to a room and interviewed. AR 387-417, 498-501, 543-74.

More specifically, [redacted] claimed that the agents did not ask him any questions when they first detained and moved him to the seating area at the front of the restaurant, or when they photographed and searched him about thirty minutes later, or while he was seated at a table in the restaurant for an additional hour. AR 404-408. He asserted that the agents took him to San Francisco without having asked him any question, or telling him what was happening, or saying anything to him. AR 408. At this point in the hearing, the Immigration Judge asked [redacted] whether, during the entire time he was in the restaurant, any agents asked him his name. AR 408-09. [redacted] replied, "No." AR 409. When the Judge asked [redacted] whether the agents asked him what country he was from, [redacted] said that they never asked him about his country of origin. *Id*.

The DHS attorney also cross-examined [redacted] on the subject, asking him whether, while he was seated at the table in the restaurant, anyone asked his name, date of birth, country of birth, or where he lived. AR 569-70. [redacted] said, "No." *Id*. The attorney asked, "Nobody asked you any questions while you were in the restaurant?" AR 571. [redacted] stated, "No, no one." *Id*.

IV. The Immigration Judge's order shifting the burden to DHS to show the manner in which the evidence was obtained

Based on [redacted]' testimony, the Immigration Judge issued an order finding that [redacted] established a prima facie case that DHS obtained the evidence in violation of the Fourth Amendment. AR 995-97. Specifically, the Judge noted that [redacted] "testified that he was never asked any questions by any officer at the restaurant regarding his alienage." AR 996. The Judge concluded that "there was never any probable cause to search him or arrest him and take him to the DHS processing center in San Francisco." *Id*. Accordingly, the Judge found that the burden shifted to DHS to demonstrate the manner in which the evidence was obtained. *Id*.[2]

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[2] The Immigration Judge also found that [redacted] had testified inconsistently about several events on May 2, 2008, but that the inconsistencies were not severe enough to discredit [redacted]' entire testimony. AR 996.

V. DHS' evidence of the manner in which it obtained the information for the Form I-213

DHS submitted to the Immigration Court a copy of the search warrant that authorized ICE agents to search the El Balazo restaurants and several other locations for evidence of the unlawful hiring of undocumented workers. AR 815-22. DHS also submitted a completed "scratch I-213" containing [redacted]' identification and alienage information, including his name, address, date and place of birth, country of citizenship, and method and location of entry into the United States. AR 812-13.[3]

DHS called Agent Carol Webster to testify about the execution of the search warrant at El Balazo restaurant on May 2, 2008, and to explain how ICE obtained the evidence of [redacted]' immigration status. AR 702-783.[4] Agent Webster

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[3] The agents use the "scratch I-213," a blank form, to make handwritten notes while they are in the field. AR 748-749. The information on the scratch I-213 is later entered into the computer system that generates the Form I-213. AR 744-45, 748.

[4] Agent Webster is a group supervisor for ICE and oversees six agents who conduct criminal and administrative investigations. AR 702. She has worked at ICE since its inception in 2003. AR 703. Before that, she worked at Immigration and Naturalization Services ("INS"), beginning in 1988. *Id*. She has executed approximately seventy criminal search warrants during her career with ICE. AR 704. She also has authored search warrants and supervised other individuals who have prepared search warrants. *Id*.

described her involvement during the search and testified that, because she speaks Spanish, she was assigned to assist with interviewing the people on-site at the restaurant. AR 704-732. She testified that shortly after the restaurant was secured, she sat in a booth across the table from [redacted] and interviewed him. AR 710. She spoke to [redacted] in Spanish and asked him questions to obtain the biographic information that is on the "scratch I-213," so she could determine alienage. AR 711-12. As [redacted] answered the questions, Agent Webster wrote down the answers in blue ink on the top part of the scratch I-213. AR 712.[5] It took approximately fifteen or twenty minutes to complete the interview. AR 714-15. After [redacted] answered the questions on the scratch I-213, he was placed under arrest and detained for violating the immigration laws by being unlawfully present in the United States. AR 715, 777.

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[5] Agent Webster authenticated the scratch I-213, and noted that the small box on the right-hand side of the form contained her notation of the location, date and time of completion. AR 711-12, 747-48, 759; *see* AR 812 (reflecting the form was filled out at the "Pleasanton" location on May 2, 2008 at 10:30 am). Agent Webster explained that the handwritten notes in black ink on the bottom-half of the scratch I-213 were not her notes, and were not on the form at the time of her interview with [redacted]. AR 718-20. She indicated that an agent probably wrote the notes when inventorying [redacted]' valuables before transporting him to San Francisco. *Id*.

VI. The Immigration Judge's decision to credit Agent Webster's testimony over [redacted]' testimony

The Immigration Judge assessed the credibility of the witnesses under the provisions of the REAL ID Act of 2005, and concluded that Agent Webster testified credibly and that her testimony should be afforded full evidentiary weight. AR 842-43. The Immigration Judge noted that Agent Webster's testimony that she interviewed [redacted] at the restaurant was corroborated by the contemporaneously created "scratch" I-213. AR 843. Agent Webster identified the form as the one that she had completed by hand on-site, in accordance with agency policy. *Id*. The Judge observed that the handwritten form contained Agent Webster's name, as well as the date, place, and time when it was filled out, and corroborated her account that she interviewed [redacted] on-site at the restaurant. *Id*.

The Judge noted that when [redacted] testified at a previous hearing in support of his motion to suppress, the government identified numerous inconsistencies and ambiguities in his testimony. AR 843-44.[6] Nevertheless, the Court had

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[6] The deficiencies included [redacted]' "inability to recall the details of preparing and signing his declaration; his differing estimates regarding the exact number of employees who were present at the restaurant when ICE agents arrived; his initial refusal to answer questions about his sister's alienage; his inability to recall when an agent took the restaurant keys and locked the door; and his assertion that he was never questioned at the restaurant" and his [redacted]' seeming inability to provide a (continued . . .)

determined at that earlier stage, after [redacted] testified but before the government put forth its case and "absent any countervailing evidence," that the deficiencies in [redacted]' testimony were not sufficient to support an adverse credibility finding. *Id.* The Court previously concluded that [redacted]' basic assertions of the events were plausible enough to make a prima facie case and shift the burden to government to show the manner in which it obtained the [redacted]' identity information in Form I-213. *Id.*

However, after the government had the opportunity to present its evidence, specifically, the search warrant, the scratch I-213, and Agent Webster's testimony, the Immigration Judge no longer credited [redacted]' testimony that no one questioned him at the restaurant. AR 844. The Immigration Judge pointed out that Agent Webster remembered that she interviewed [redacted] shortly after the investigation commenced at the restaurant, and she recalled specific details about the interview, including [redacted]' "attire, the direction he was facing, and his demeanor during the interview." *Id.* The Judge concluded that the existence of the authenticated scratch 1-213, combined with Agent Webster's specific testimony, rendered [redacted]'

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clear time line of the events, such as "when and how the agent placed him in handcuffs, removed the keys, moved [him], and locked the doors[.]" AR 843-44.

assertion that he was never interviewed or questioned at the restaurant not credible. *Id*. This assertion by [redacted] was directly relevant to the admissibility of the information in the I-213. *Id*. The Immigration Judge declined to afford [redacted]' testimony full evidentiary weight, finding that [redacted]' assertion was not credible. *Id*.

VII. The agents' execution of the search warrant on May 2, 2008, and the detention and questioning of [redacted]

For purposes of determining whether the agents' actions complied with the Constitution and regulations, the Immigration Judge evaluated the agents' actions based on Agent Webster's account of events, having found her testimony credible and [redacted]' testimony not credible. AR 844-47. The Judge also seemed to indicate, however, that the Court would consider [redacted]' assertions that were not inconsistent with Agent Webster's testimony. *Id*. Thus, this statement of the events is based primarily on Agent Webster's testimony and, where not inconsistent, includes some of [redacted]' assertions.

On May 1, 2008, ICE held a briefing at its office on Sansome Street to prepare for executing several search warrants the following day in a large case investigating the owner's hiring of undocumented workers at the El Balazo restaurants. AR 705-06, 753. When executing a search warrant, ICE agents typically handcuff and pat down the people who are present at the location of the

search warrant and detain them in a central area, for officer safety and to preserve the evidence from being destroyed or disturbed. AR 708, 751, 756, 780. It is also standard procedure for an assigned team of agents to interview the people on-site as part of the investigation and record their biographic information on the scratch I-213. AR 751, 753-54, 780. If illegal aliens are not present at the site, the agents still follow the same procedures, except the agents fill out a field interview card, rather than scratch I-213, that contains the person's biographic information. AR 780-81.

Agent Webster and four other agents were assigned to be interviewers during the execution of the warrant at the El Balazo restaurant in Pleasanton. AR 704-05, 724-725. Other agents were assigned roles like "sketcher" (the person who sketches the floor plan and labels the areas where items are found), "breacher" (the person who enters the restaurant first), photographer, and the person who logs the evidence. AR 725-726. The agents had an idea of the number of employees who worked at El Balazo because of a preliminary investigation, and they needed to have enough agents to detain the people on-site, search the location, and perform all the jobs that a search warrant entails. AR 780.

On the morning of May 2, 2008, approximately eight workers were inside the restaurant at the location in Pleasanton. AR 392, 498-500, 1053. While the

workers were preparing food in the kitchen area, four ICE agents posing as customers came into the restaurant, ordered food, and sat near the doors. AR 392-93, 397, 1053. Shortly thereafter, approximately eight or ten uniformed agents came through the front door. AR 394, 1053. One agent yelled, "Don't run, we're immigration." AR 1053. A second agent repeated the instructions in Spanish. AR 546-47. Agent Webster was one of the last agents to enter the restaurant. AR 708-709. [7]

The agents had received instructions to go to the kitchen first and secure the area because of the sharp objects, knives, and cooking utensils present there. AR

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[7] [redacted] claimed that one of the agents had his gun drawn upon entering the restaurant. AR 394. Agent Webster could not recall whether any agent had a weapon drawn. AR 781. She indicated, however, that when searching a business or location where customers are present, the agents usually do not draw their weapons. *Id*. At any rate, there was no evidence that any agent pointed a gun at [redacted] or came anywhere near [redacted] with a weapon drawn. [redacted] also claimed in his declaration that the four agents who had posed as customers blocked the doors of the restaurant, and that an agent took the restaurant keys from him and locked the front door. AR 1053. However, when Agent Webster was asked whether agents blocked the doors or locked them, she testified only that a police officer was standing at the front entrance, to keep customers from entering while the agents executed the search warrant. AR 740. Moreover, [redacted]' own testimony was far from consistent in regard to whether any doors were locked. AR 552-54. He first testified that he did not know what the agent did with the restaurant keys, AR 552-53, and then he said that he saw the agent go towards the door but did not see the agent lock the door, AR 554, and then he claimed that he saw the agent lock the door, AR 554.

709. As Agent Webster headed toward the kitchen, she observed other agents detaining the workers who were standing in that area. *Id*. Agents were giving commands such as "[s]earch warrant, police or stop." AR 731. One agent spoke to the workers in English and one spoke to them in Spanish. AR 547-48. The agents were handcuffing the workers and taking them to the dining area. AR 709, 732. The agents handcuffed and detained all the employees during the initial encounter and patted them down to ensure that no one had weapons. AR 738, 742, 777.

The restaurant was very large, and Agent Webster walked toward the back of the kitchen and checked other areas that had not yet been secured. AR 731, 733. She searched the refrigeration area and a locker room but found no individuals present and no hazards there. *Id*. This process took less than one-half hour. AR 732. "It was in the minutes." *Id*. After securing these areas, Agent Webster went to the dining area where the workers were being seated, and she sat in a booth across from [redacted] to interview him. AR 710, 732. Approximately fifteen or twenty minutes had elapsed from the time the agents entered the restaurant to the time that Agent Webster sat down to interview [redacted]. AR 761-762.[8]

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[8] [redacted] claimed that the manager and bartender were not seated with the rest of the employees, but he did not know what happened to them because he was seated

(continued . . .)

Agent Webster suspected that [redacted] might be an illegal alien because the case agent who obtained the warrants had probable cause to believe that the company was hiring undocumented workers, and [redacted] was wearing an apron and apparel with the restaurant name on it. AR 710-711. She spoke to [redacted] in Spanish and asked him questions to obtain the biographic information that is on the "scratch I-213," so she could determine alienage. AR 711-12, 779. As [redacted] answered the questions, Agent Webster wrote down the answers on the scratch I-213. AR 712; *see* AR 812. [redacted] was calm and cooperative. AR 713. He did not indicate that he wanted to leave or not answer the questions. AR 713, 771.

It took approximately fifteen or twenty minutes to complete the questioning. AR 714-715. Agent Webster did not raise her voice or make any threats or promises to [redacted] at any point. AR 715. After [redacted] answered the questions on the scratch I-213, he was placed under arrest and was detained for violating the immigration laws by being unlawfully present in the United States. AR 715, 777. Agent Webster did not search [redacted]' possessions or rely on any information other than his admission to determine his alienage. AR 716.

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at a table in the back section of the restaurant and was facing the wall. AR 415-16, 512-14, 568-69.

After Agent Webster finished interviewing [redacted], she assisted other agents with their interviews. AR 749. While this was happening, other agents inventoried [redacted]' belongings and prepared him for transport. AR 749, 766-767.[9] It took approximately one hour to complete the interviews of all the employees. AR 750. As the interview team interviewed the employees, other agents were engaged in searching the restaurant. AR 750. Agent Webster did not personally search for documents and computers, but the items were found at the site. AR 779. Approximately one and one-half hours to two and one-half hours after the search

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[9] [redacted] claimed in his declaration that after he was handcuffed and seated at the table, two agents came by, helped him stand up, and patted him down. AR 1054. He asserted that one of the agents removed his wallet from his back pocket and, without asking for permission, examined the contents, including his identification. *Id*. Agent Webster recalled that a wallet and other items were lying on the table when she interviewed [redacted], and indicated that the items likely were placed on the table to show that [redacted] had been patted down. AR 766. At the hearing, [redacted] testified that after he was sitting at the table for about thirty minutes, the agents searched him, removed his wallet and counted the money inside, and then gave it back to him and sat him down. AR 404, 407. This testimony is consistent with Agent Webster's testimony to the extent it reflects that his valuables were inventoried after he was placed under arrest. AR 777 (Agent Webster testifying she was certain that no one had extracted money from [redacted]' wallet and counted it before she interviewed him because, if this had happened, the money would have been stacked up and bagged on the table, which it wasn't), AR 766-68 (testifying that because the bottom of the scratch I-213 was blank when she interviewed [redacted], and the form subsequently contained references to cashier checks, she knew that an agent had inventoried [redacted]' valuables after the interview).

commenced, [redacted] was transported to the ICE office in San Francisco. AR 571-72, 591, 1054.

VIII. The Immigration Judge's decision denying [redacted]' motion to suppress

On January 31, 2011, the Immigration Judge issued an order denying [redacted]' motion to suppress and terminate proceedings. AR 831-848. In the order, the Judge provided a detailed account of the testimony by [redacted] and Agent Webster, a description of the evidence, and a statement of the law. AR 832-42.

The Immigration Judge found that the agents' initial detention of [redacted] was authorized under the Supreme Court's decision in *Michigan v. Summers*, 452 U.S. 692, 705 (1981), holding that because of law enforcement interests in officer safety, preventing the destruction of evidence, and ensuring an orderly search during the execution of a search warrant, officers may detain individuals who are present at the location being searched. AR 845. The Judge noted that under *Summers*, "the record need not establish the actual existence of potential threats to persons or evidence to justify such a detention; it is enough that the situation is one where such threats reasonably might exist." *Id.*

The Immigration Judge also found that the agents' decision to place the employees in handcuffs during the initial detention was not unreasonable because there were safety concerns arising from the presence of dangerous objects in the

restaurant, and it was agency policy to restrict the movement of individuals who were present at the site of a warrant search. AR 845. Moreover, the initial detention of [redacted] lasted "less than thirty minutes" before he was interviewed by Agent Webster. *Id*. The Immigration Judge concluded that this was not an unreasonable amount of time and that [redacted]' initial detention was permissible. *Id*.

The Immigration Judge also determined that Agent Webster's questioning of [redacted] about his immigration status was permissible under the Supreme Court's decision in *Muehler v. Mena*, 544 U.S. 93, 101-02 (2005), holding that during the execution of a search warrant, officers may question detainees about their immigration status. AR 845-46. In response to [redacted]' argument on appeal that his detention and questioning was unlawful because the agents did not have reasonable suspicion that he was present in the United States illegally, the Immigration Judge noted that suspicion may arise from the existence of a search warrant based upon probable cause that "criminal activity is afoot on the premises." AR 845-46 (citing *Summers*, 452 U.S. at 703). The Immigration Judge noted that the agents "may well have had reasonable suspicion of [[redacted]'] lack of immigration status based on the fact that he was visibly employed at El Balazo, a site currently under

investigation for illegal employment of undocumented immigrants." AR 846.[10] Ultimately, however, the Judge recognized it was unnecessary to decide that issue because "the detention and questioning were justified under *Muehler*." *Id*.

Next, the Immigration Judge found that when Agent Webster placed [redacted] under arrest, the agent had reasonable suspicion to arrest him.[11] The Judge explained that, although "the information contained in the warrant provided some suspicion that [redacted], an employee at El Balazo, might be present in the United States without documentation," Agent Webster did not place [redacted] under arrest

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[10] The Immigration Judge noted that Agent Webster had testified that [redacted] was wearing an apron and clothing that bore the restaurant's logo. AR 846 n. 7. The Judge concluded that [redacted] detention was distinguishable from the one in *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979), where the Court held that the officers' search of a patron who happened to enter the bar while they were executing a search warrant, was not justified without particularized probable cause. *Id*. Unlike the individual in *Ybarra*, [redacted] was "visibly associated" with the premises that were the subject of the search warrant. *Id*.

[11] The Immigration Judge noted that the INA authorizes immigration officers to arrest an alien without a warrant where they have "reason to believe that the alien so arrested is in the United States in violation of any [immigration] law." AR 846 (quoting INA § 287(a)(2); 8 C.F.R. § 287.8(c)(2)(i)). The regulations require officers to obtain a warrant "except where the agent 'has reason to believe that the person is likely to escape before a warrant can be obtained.'" AR 846 n.8 (quoting 8 C.F.R.§ 287.8(c)(2)(ii)). The Judge concluded that it was reasonable, under the circumstances, for Agent Webster to believe that it was necessary to arrest [redacted] before a warrant could be obtained in order to prevent him from fleeing. AR 846 n.8.

"until she had completed the scratch I-213 and concluded that he was present in the United States in violation of law." AR 846. Agent Webster testified that if [redacted] had declined to answer her questions, "she would not have completed the I-213, and he would not have been transferred to San Francisco." *Id*. The Immigration Judge concluded that [redacted] was not placed under arrest until his answers to the questioning during the execution of the search warrant provided sufficient facts to support Agent Webster's reasonable suspicion that he was present in the United States illegally. *Id*.

Regarding [redacted]' assertion that an agent removed his wallet from his pocket and searched it without his permission, the Immigration Judge noted that Agent Webster testified that she had no awareness of any such search when she interviewed [redacted]. AR 846. The Judge found it unnecessary to decide whether an agent searched [redacted]' wallet as [redacted] claimed, because, even if a search occurred, it did not yield the evidence at issue in the case, that is, the information contained in the I-213 and recorded by Agent Webster during the interview. *Id*. The Immigration Judge found that this evidence—[redacted]' date of birth, place of birth, citizenship, and date and place of entry into the United States—was "obtained independently of any hypothetical unconstitutional search" of [redacted]' wallet and,

thus, even if any such search took place prior to the interview, the I-213 "was not tainted by the earlier violation." *Id*.

Finally, the Immigration Judge rejected [redacted]' assertion that the I-213 was unreliable because it failed to reflect that the circumstances of his detention created a coercive environment that rendered the admission of the 1-213 "fundamentally unfair." AR 847. The Judge found that [redacted] "was not detained for an unreasonable amount of time, physically abused, threatened, or given any promises," and did not resist the questioning. Moreover, Agent Webster's account of the interview and the scratch 1-213 did not suggest that [redacted] was placed in a coercive environment that made his admissions unreliable. *Id*.

Accordingly, the Immigration Judge denied [redacted]' motion to suppress the I-213 and the information contained therein, and denied the motion to terminate the proceedings. AR 847-48. The Immigration Judge found that [redacted] was removable as charged as an alien present in the United States without having been admitted or paroled. AR 847.

[redacted] appealed the Immigration Judge's denial of his motion to suppress and order of removal to the Board. AR 20-32, 99-126, 287-291.

IX. The Board's decision

On April 5, 2012, the Board adopted and affirmed the decision of the Immigration Judge, and dismissed [redacted]' appeal. AR 3-5. The Board concluded that the Immigration Judge's factual findings, including the credibility determination, were not clearly erroneous and that the Judge reasonably believed the government witness's account of events as opposed to [redacted]' statements. AR 3-4.

The Board also concluded that the Immigration Judge properly denied [redacted]' motion to suppress the I-213 and information contained therein. AR 4-5. The Board agreed with the Immigration Judge that, under *Summers* and *Muehler*, the agents were authorized to seize and interview [redacted] while executing a facially valid search warrant at the restaurant, and that the agents "did so without cause to suppress any evidence obtained as a result." AR 4 (also citing *Sanchez v. Canales*, 574 F.3d 1169 (9th Cir. 2009)). The Board noted that the agents executed the search warrant in a reasonable manner and took reasonable measures to secure the restaurant. AR 4 (citing *Dawson v. City of Seattle*, 435 F.3d 1054 (9th Cir. 2006)). The Board also observed that Agent Webster acted reasonably in asking [redacted] for identifying information, given that the warrant authorized a search for evidence of the hiring and harboring of illegal aliens, and [redacted] was dressed in clothes that

identified him as a worker at the restaurant. AR 4. Moreover, the questioning of [redacted] about his immigration status, date of birth, place of birth, citizenship, and date and place of entry into the United States, was authorized under *Muehler* and the INA. *Id*. The Board also noted that immigration officers may briefly detain an individual for questioning if they have a reasonable suspicion that the individual is in the United States illegally. *Id*.

Finally, the Board agreed with the Immigration Judge that [redacted] did not establish that his detention was unreasonably prolonged or created a coercive environment such that the admission of the I-213 would be fundamentally unfair. AR 5. Accordingly, the Board affirmed "the Immigration Judge's decision to deny the motion to suppress, upon concluding that (1) there was no egregious or widespread violation of the Fourth Amendment or due process violation of the Fifth Amendment, (2) the search warrant was properly executed, and (3) the 1-213 which was prepared as a result of the execution of the search warrant was admissible." *Id*.

SUMMARY OF ARGUMENT

[redacted]' detention incident to the execution of a valid search warrant, and the questioning that occurred during that detention, were reasonable under the Fourth Amendment. The Supreme Court has held that officers executing a warrant to

search for evidence may detain the occupants of the premises while the search is conducted. That rule is supported by compelling law enforcement interests: the interest in preventing flight in the event that incriminating evidence is found; the interest in protecting officer safety and preventing the destruction of evidence; and the interest in facilitating the orderly completion of the search. Although such detentions could be invalid in unusual cases involving special circumstances or a prolonged detention, neither the duration nor the manner of the detention here raises any constitutional difficulty. [redacted]' detention lasted only thirty minutes, and the use of handcuffs on the occupants was justified to ensure officer safety and prevent the destruction of evidence, particularly because the location contained knives and other dangerous objects, and there were numerous other occupants on the premises.

Where an officer is detaining an individual incident to the execution of a search warrant, and where the questioning does not prolong the detention, no Fourth Amendment violation occurs. In this case, it is clear that the agent's brief questioning of [redacted] about his alienage did not unduly prolong his detention.

Thus, the questioning and detention were consistent with the Fourth Amendment. [12]

Finally, the agency properly denied [redacted]' request to suppress evidence for the alleged violation of DHS regulations where no violations occurred. Moreover, even assuming the violations occurred, they did not prejudice the interests protected by the regulations or affect the outcome of [redacted]' removal proceeding. Thus, the Court should deny the petition for review.

ARGUMENT

I. Standard and scope of review

Where, as here, the Board adopts the Immigration Judge's decision with a citation to *In re Burbano* and adds its own comments, the Court reviews the decisions of both the Board and Immigration Judge. *Gonzaga-Ortega v. Holder*, 694 F.3d 1069, 1072-73 (9th Cir. 2012). The Court reviews de novo denials of motions to suppress, claims of constitutional violations, and questions of law.

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[12] In his opening brief, [redacted] does not challenge the agency's finding that the search warrant was valid or the finding that the evidence did not establish that the information contained in the I-213 was unreliable or obtained in a manner that was fundamentally unfair and deprived him of Fifth Amendment due process guarantees. Thus, he has abandoned those issues. *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996).

Martinez-Medina v. Holder, 673 F.3d 1029, 1033 (9th Cir. 2011); *Chuyon Yon Hong v. Mukasey*, 518 F.3d 1030, 1034 (9th Cir. 2008). The agency's "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B); *Martinez-Medina*, 673 F.3d at 1033; *see also INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1, 483-84 (1992).

II. Law governing the application of the Fourth Amendment exclusionary rule to removal proceedings

The Supreme Court has held that the exclusionary rule does not apply in civil removal proceedings to suppress evidence obtained in violation of the Fourth Amendment. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984). After announcing its holding, a four-justice plurality of the Court indicated, in dicta, that the exclusionary rule might apply in removal proceedings to evidence obtained through "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *Lopez-Mendoza*, 468 U.S. at 1050-51 (citing *Rochin v. California*, 342 U.S. 165 (1952)); *see Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012,

1019 (9th Cir. 2008) (concurring opinion of Bybee, J.); *Martinez-Medina*, 673 F.3d at 1033 n.2.[13]

This Court, drawing on the dicta in *Lopez-Mendoza*, has held that the exclusionary rule applies in removal proceedings to suppress evidence obtained as a result of an "egregious violation" of the Fourth Amendment. *See Orhorhaghe v. INS*, 38 F.3d 488, 493 (9th Cir. 1994). The Court adopted a two-prong test to assess whether evidence should be suppressed under the exclusionary rule. *Id*. First, the Court determines whether a violation of the Fourth Amendment occurred. *Id*. If it has, then the Court determines whether the violation was egregious. *Orhorhaghe*, 38 F.3d at 493 n.5. To be "egregious," the agent must commit the violation deliberately or by conduct that a reasonable agent should have known was a violation of the Fourth Amendment. *Orhorhaghe*, 38 F.3d at 493.

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[13] The Court also indicated, in dicta, that it might revisit its holding if immigration officers' Fourth Amendment violations were widespread. *Lopez-Mendoza*, 468 U.S. at 1050.

III. The exclusionary rule does not apply here because no violation of the Fourth Amendment occurred

A. [redacted]' detention incident to the execution of a search warrant was valid under the Fourth Amendment

The Fourth Amendment to the Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV. Because the detention of [redacted] was reasonable, it did not violate the Fourth Amendment.

1. Under *Summers* and its progeny, officers may detain the occupants of a building, incident to the execution of a warrant to search the premises for evidence

In *Michigan v. Summers*, police officers encountered Summers leaving a house as they were preparing to execute a warrant to search the house for narcotics. 452 U.S. 692, 693 (1981). The officers brought Summers back into the house and detained him, along with the seven other occupants of the house, while the premises were being searched. *Id*. n.1. The Supreme Court upheld the detention. *Summers*, 452 U.S. at 705. The Court ruled that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id*. The Court reasoned that such detentions are warranted due to law enforcement interests in: (1) "preventing flight in the event that incriminating

evidence is found"; (2) "minimizing the risk of harm to the officers"; and, (3) facilitating "the orderly completion of the search[.]" *Summers*, 452 U.S. at 702-03. The Court recognized that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id*.[14]

In *Muehler v. Mena*, the Supreme Court elaborated on its holding in *Summers*. 544 U.S. 93 (2005). In that case, police officers were investigating a gang-related shooting and obtained a warrant to search a residence where the suspect was believed to live. *Id*. at 95. The warrant authorized a search of the premises for weapons and evidence of gang membership. *Muehler*, 544 U.S. at 95-96. Mena was not the subject of the investigation, but lived in the house. *Id*., *Muehler*, 544 U.S. at 99 n.2; *Mena v. City of Simi Valley*, 332 F.3d 1255, 1263 (9th Cir. 2003). The police officers, along with a SWAT team, executed the warrant

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[14] The Court noted that the initial detention of Summers "constituted a 'seizure' within the meaning of the Fourth Amendment" and that he "was not free to leave the premises while the officers were searching his home." 452 U.S. at 696. Summers was formally arrested only after the officers completed the search. *Id*. The issue in *Summers* involved only the constitutionality of the pre-arrest "seizure," which the Court assumed "was unsupported by probable cause." *Id*. This brief refers to these pre-arrest detentions (incident to the execution of a search warrant), as "*Summers* detentions."

early in the morning. *Muehler*, 544 U.S. at 96. Mena was asleep in her bed when the SWAT team, wearing helmets and black vests, entered her bedroom and "placed her in handcuffs at gunpoint." *Id*. They then took Mena and the three other occupants of the house to the garage, where they "remained in handcuffs" for two to three hours, under guard, while the police searched the premises. *Muehler*, 544 U.S. at 96, 100.[15]

The Supreme Court held that Mena's detention was "plainly permissible" under *Summers* because there was a warrant to search the premises, Mena was present on the premises, and "[a]n officer's authority to detain incident to a search is *categorical*[.]" *Muehler*, 544 U.S. at 98 (emphasis added). The Court also

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[15] Subsequently, Mena brought a § 1983 action against the officers, claiming that she had been detained "for an unreasonable time and in an unreasonable manner" in violation of the Fourth Amendment. *Muehler*, 544 U.S. at 96. The officers filed a motion for summary judgment, which the District Court denied. The Ninth Circuit affirmed the decision and concluded that the detention of Mena was unreasonable because the officers pointed a gun at Mena's face, roughly jerked her off of her bed, marched her barefoot through the rain into a cold garage, and kept her in handcuffs for several hours, even though Mena was not a suspect or the subject of the search warrant, she was unarmed, docile, and did not resist the officers, the SWAT team secured the house in minutes, and the search of Mena's person and room produced no evidence of weapons or gang membership. *Mena*, 332 F.3d at 1263. This Court reasoned that the officers should have released Mena from handcuffs "when it became clear that she posed no immediate threat" and "did not resist[.]" *Id*. The Supreme Court reversed the ruling. *Muehler*, 544 U.S. at 97, 99 n.2, 99-100, 102.

explained that "[i]nherent in *Summers'* authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention." *Muehler*, 544 U.S. at 98-99. The Court held that the detention of Mena for several hours in handcuffs was reasonable and did not violate the Fourth Amendment because the governmental interests in minimizing the risk of harm to the officers and occupants while searching the gang house for weapons outweighed the marginal intrusion caused by the detention. *Muehler*, 544 U.S. at 99-100, 102; *see also Sanchez v. Canales*, 574 F.3d 1169, 1174 (9th Cir. 2009) (explaining that the *Muehler* Court concluded that officers who are executing a warrant to search a premises for contraband, have authority to detain the occupants while the search is being conducted, "regardless of whether or not the occupants appear dangerous.").

In *Dawson v. City of Seattle*, this Court applied the Supreme Court's reasoning in *Summers* and *Muehler* to hold that the detention of occupants and the manner of detention was reasonable during the execution of warrants to search the owner's boarding houses for evidence of rat infestation and violations of the municipal health code. 435 F.3d 1054 (9th Cir. 2006). The inspection of the first building lasted approximately two hours, during which time the building's tenants were detained in a secure room. *Id*. at 1059. The occupants of the second building were detained for approximately forty minutes. *Dawson*, 435 F.3d at 1060. This

Court held that the detention of the tenants while search warrants were being executed, and the manner of the detention, were constitutionally permissible. *Dawson*, 435 F.3d at 1065-70. The Court recognized that officers may detain occupants while executing a warrant to search the premises, so long as the detention is reasonable. *Dawson*, 435 F.3d at 1065. The Court also recognized that such detentions serve "at least three law enforcement interests:" (1) preventing suspects from fleeing; (2) minimizing the risk of harm to the officers and occupants; and (3) expediting the search. *Dawson*, 435 F.3d at 1066. The Court concluded that the interests in safety and conducting an effective search of the boarding houses, including to prevent the risk of tenants fleeing and becoming unavailable for questioning as witnesses or impairing the search, all justified the officers' detention of the tenants. *Dawson*, 435 F.3d at 1066-67. The Court rejected the tenants' argument that *Summers* and *Muehler* apply only to searches for contraband, rather than searches for evidence. *Id*.

2. [redacted]' detention pursuant to *Summers* was valid

[redacted]' initial detention was "plainly permissible" under *Summers* and *Muehler* because there was a valid warrant to search the premises, [redacted] was present on the premises, and agents have categorical authority to detain occupants

incident to the execution of a search warrant. *Muehler*, 544 U.S. at 98; AR 706-11, 815-22, 844-45.

In his opening brief, [redacted] contends that the agents' initial seizure of him violated the Fourth Amendment because the agents did not have reasonable suspicion to detain him. *See* Petitioner's Brief ("Petr's Br"), 24-29. His argument is unavailing because the Supreme Court has made clear that while executing a warrant to search a building for evidence, as in the instant case, officers do not need any suspicion or individual justification to detain the occupants for the duration of the search. *Muehler*, 544 U.S. at 98 ("[a]n officer's authority to detain incident to a search is *categorical*") (emphasis added). Whether the officers have a specific reason to regard an occupant as a suspect or illegally present is irrelevant: the *Summers* rule "does not depend upon such an ad hoc determination, because the officer is not required to evaluate either the quantum of proof justifying the detention or the extent of the intrusion to be imposed by the seizure." *Summers*, 452 U.S. at 705 n.19; *see also Muehler*, 544 U.S. at 99 n.2. (rejecting Ninth Court's reliance upon the fact that the search warrant did not name the occupant as a suspect in finding that the officers should have released the occupant from handcuffs). This Court has interpreted *Muehler*'s endorsement of the officers' categorical authority to detain occupants incident to the execution a search warrant

to mean that as long as the detention is conducted in a reasonable manner, "the duration of a [*Summers*] detention may be coextensive with the period of a search, and require *no further justification*." *Dawson*, 435 F.3d at 1066 (emphasis added).

The cases cited by [redacted] to argue that individualized reasonable suspicion was necessary for his initial seizure to be valid under the Fourth Amendment, are inapposite. *See* Petr's Br, 24-29. Almost all of the cited cases do *not* involve *Summers* detentions (detentions of occupants incident to the execution of a search warrant), and instead deal with the standard for investigatory stops (also known as *Terry* stops), and/or whether the individuals' encounters with officers amounted to seizures. *See* Petr's Br, 24-29 (citing *United States v. Manzo-Jurado*, 457 F.3d 928 (9th Cir. 2006); *Martinez v. Nygaard*, 831 F.2d 822 (9th Cir. 1987); *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985); *Benitez-Mendez v. INS*, 760 F.2d 907 (9th Cir. 1985)).[16] These cases do not hold that the Fourth Amendment requires separate reasonable suspicion to detain an individual who has already been

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[16] The decision in *Ybarra v. Illinois*, 444 U.S. 85 (1980), is distinguishable from the *Summers* decision because, as the *Summers* Court itself noted, "[n]o question concerning the legitimacy of detention was raised" in *Ybarra*. *See Summers*, 452 U.S. at 695 n.4. (stating that *Ybarra* dealt with a "search" rather than "seizure" issue, and had "concluded that the search of Ybarra was invalid"). Thus, *Ybarra* does not assist [redacted]' argument concerning his initial detention.

lawfully detained incident to the execution of a search warrant. In fact, in the one case that involves *Summers* detentions, this Court held that the detention of employees in a waiting room during the execution of a warrant to search the premises "was precisely the conduct the Supreme Court deemed reasonable" in *Summers*. *See Ganwich v. Knapp*, 319 F.3d 1115, 1120-21 (9th Cir. 2003).[17] Thus, [redacted]' claim that his initial detention was invalid because there was no individual reasonable suspicion to detain him is unavailing because this standard is not required for a *Summers* detention. *Muehler*, 544 U.S. at 98; *Dawson*, 435 F.3d at 1066.

3. The manner of [redacted]' *Summers* Detention was reasonable and did not render the detention invalid

In *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994), this Court held that a *Summers* detention may be unreasonable, and thus invalid, "if it is unnecessarily painful, degrading, or prolonged, or if it involves an undue invasion of privacy." In that case, the Court concluded that the manner in which the officers

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[17] *Ganwich* also held that the subsequent coerced interrogation of the detainees was unreasonable and, therefore, violated the Fourth Amendment. 319 F.3d at 1121-22. The constitutionality of questioning detainees during a valid *Summers* detention is a separate issue and will be discussed in more detail later in this brief. *See infra* Part III.B

conducted the *Summers* detention of a man who suffered from advanced multiple sclerosis and who was unable to walk or care for himself, was unreasonable and violated his rights. 31 F.3d at 874-77. The officers handcuffed the man while he was lying semi-clothed in his sickbed, carried him to the living room, placed him on the sofa, where he remained sitting, in handcuffs and exposed from the waist down, for two hours, and did not take him back to his bed within a reasonable time after they had completed the search of his room. *Franklin*, 31 F.3d at 875-77; *see also Tekle v. United States*, 511 F.3d 839, 842-43, 849-50 (9th Cir. 2007) (holding that officers acted unreasonably during execution of search warrant by keeping an 11-year old boy in handcuffs for an additional fifteen or twenty minutes, when the boy was barefoot, unarmed, clad in a tee-shirt and shorts, vastly outnumbered by officers more than 20:1, and was not resisting but was lying face down in the driveway with his arms extended); *Meredith v. Erath*, 342 F.3d 1057, 1063-64 (9th Cir. 2003) (holding that officers acted unreasonably during execution of search warrant by keeping plaintiff in overly tight handcuffs that caused her unnecessary pain for the first 30 minutes of her detention).

Here, the detention of [redacted] bears no resemblance to the rare instances in which this Court has perceived constitutional problems with a *Summers* detention. [redacted] was not a child, bedridden, manifestly ill or injured, and he was fully

dressed at the time of the seizure and for the duration of his detention. Moreover, although [redacted] was handcuffed, he did not complain that his handcuffs were too tight or that he was in pain or acute discomfort. The duration of his *Summers* detention was minimal. It lasted only thirty minutes and did not exceed the period of the search.[18] His privacy was not unduly invaded, and the government's interests in safety and in conducting an orderly search of the premises far outweighed the marginal intrusion of the *Summers* detention. Thus, the detention of [redacted] was reasonable and did not violate [redacted]' constitutional rights.

In his opening brief, [redacted] argues that there was no safety-based rationale to detain him because the agents were conducting a search of a restaurant, not a search for narcotics, weapons, or evidence of gang membership, plus, there was no evidence suggesting any workers were armed or involved in gang activities, and the agents outnumbered the workers two to one. Petr's Br, 37-38.[19] While it is true

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[18] As the Immigration Judge noted, the initial detention lasted "less than thirty minutes" before Agent Webster interviewed [redacted] and, based on his answers, placed him under arrest. AR 845, 846.

[19] Although the overall number of agents exceeded the number of employees, many of the agents were conducting the search and therefore not involved in questioning or watching over the employees. In other words, the number of employees most likely outnumbered the agents who were available to keep the restaurant secure while the premises were being searched.

that the agents were not searching for narcotics, weapons or evidence of gang membership, they still had legitimate safety concerns because the premises contained knives and other sharp objects. Moreover, [redacted] fails to take into account the law enforcement exigencies in executing a search warrant and that the record need not establish the actual existence of threats to persons or evidence to justify a *Summers* detention; "it is enough that the situation is one where such threats reasonably might exist." AR 845; *Summers* , 452 U.S. at 702 (noting that no special danger to the police was suggested by the evidence in the record, but that police still have legitimate law enforcement interests in minimizing the risk of harm or the destruction of evidence); *see also Dawson*, 435 F.3d at 1067 (noting that in executing search warrants at boardinghouses, the officers did not know "exactly how many people were inside" or "the identities of those who were living there" and that "[a]llowing an unknown number of unidentified people to move about unsupervised during an involuntary inspection would dramatically increase the likelihood that an occupant could injure or kill an officer"). The agents' decision to handcuff and detain the employees in the instant case was entirely reasonable. *Muehler*, 544 U.S. at 99-100. The use of handcuffs minimized the risk of harm to officers conducting a search in a location that contained dangerous objects, and simultaneously ensured that the evidence would not be disturbed by

employees. AR 845; *see Muehler*, 544 U.S. at 100 (noting that "the need to detain multiple occupants made the use of handcuffs all the more reasonable"). Agents are not required to take the chance that apparently harmless occupants can safely be left unrestrained. *See Muehler*, 544 U.S. at 95, 97 (reversing Ninth Circuit's ruling that the detention was unreasonable where officers did not release Mena from handcuffs when it became apparent that she posed no immediate threat). [20]

As the Supreme Court noted in *Summers*, "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." 452 U.S. at 702-03. The *Summers* and *Muehler* test, together with the justifications that underlie it, supports routine

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[20] [redacted] also asserts that his detention was not necessary to ensure officer safety or the efficacy of the search because the agents allowed two employees to leave shortly after he was detained. Petr's Br, 36-37. The record does not reflect when exactly these two employees (the manager and bartender), were allowed to leave, let alone indicate that anyone left "shortly after" [redacted] was detained. In fact, it is unclear that the manager ever left the restaurant while [redacted] was there. AR 416-17, 505-07 ([redacted] testifying that the manager was inside the restaurant when he and the workers left for San Francisco and that they gave their keys to the manager as they left), 514 (testifying he did not know when the bartender left). The evidence suggests that the manager and bartender might not have continued to be detained in the same section with the other employees because they were assisting the agents to expedite the search. AR 512-14 ([redacted] testifying that he saw the bartender counting the money and the agents take her keys to the safes). One thing is certain. No one was allowed to wander around the restaurant. AR 741, 756.

measures taken by officers to reduce the risks posed by unknown persons detained during a search: most notably, the risk that occupants will endanger the safety of officers if they are left unrestrained, but also that they may disturb the evidence or impair the expediency of the search. *Dawson*, 435 F.3d at 1066-70. In the final analysis, [redacted]' detention does not remotely present the type of "special circumstances" or "prolonged detention" that might take this case outside the *Summers* rule that a detention incident to the execution of a search warrant is valid. Thus, the detention passes constitutional muster.

Finally, [redacted] argues in his opening brief that the agents' conduct went beyond that authorized by *Summers* and *Muehler* when they removed his wallet from his pocket and searched the contents. Petr's Br, 39-40. He notes that in *Summers*, the officers did not search the detainee until after they had acquired probable cause to arrest him. It is difficult to understand how [redacted] would know whether the alleged search occurred before, or after, Agent Webster acquired cause to arrest him, given that he testified, incredibly, he was never questioned by anyone at the restaurant. Regardless, as the Immigration Judge pointed out, even if the search did occur prior to the interview, it did not yield the evidence at issue. AR 846. Agent Webster obtained the information contained in the I-213 independently of any search of [redacted]' belongings. AR 716, 846. Thus, the I-213

was not tainted by any alleged earlier violation, and exclusion of the evidence was unwarranted. AR 846.

B. The agent's questioning of [redacted] did not render his detention incident to the execution of a search warrant invalid under the Fourth Amendment

1. Questioning does not constitute a discrete "seizure" for Fourth Amendment purposes

In *Muehler*, as noted above, police officers searched a house for evidence of weapons and gang membership. 544 U.S. at 96. Before the search, the officers were aware that the suspect belonged to a gang composed primarily of illegal aliens, and thus they notified INS that they would be executing a search warrant at the house. *Muehler*, 544 U.S. at 96. An immigration officer accompanied the officers executing the warrant. *Id*. During the *Summers* detention of the occupants of the house, officers questioned the occupants about their alienage and immigration status. *Muehler*, 544 U.S. at 96. They asked each occupant's "name, date of birth, place of birth, and immigration status." *Id*. [21] The Ninth Circuit held that the officers' "questioning of Mena about her immigration status constituted an independent Fourth Amendment violation." *Muehler*, 544 U.S. at 97.

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[21] Mena showed papers confirming her status as a permanent resident. *Muehler*, 544 U.S. at 96.

The Supreme Court reversed the ruling and held that the officers had authority to question Mena regarding her immigration status during the search of the premises. *Muehler*, 544 U.S. at 100-01. The Court rejected as "faulty" this Court's apparent assumption that the "officers were required to have independent reasonable suspicion in order to question Mena concerning her immigration status" and that such "questioning constituted a discrete Fourth Amendment event." *Id*. The Court noted that "[e]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage." *Muehler*, 544 U.S. at 101 (citing *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991)). The Court held that because the initial *Summers* detention of Mena was lawful, and her detention was not prolonged by the questioning, "there was no additional seizure within the meaning of the Fourth Amendment." *Muehler*, 544 U.S. at 101. The Court concluded that "the officers did not need reasonable suspicion" or "additional Fourth Amendment justification for inquiring about Mena's immigration status." *Id.*

2. The agent's questioning did not render [redacted]' *Summers* detention invalid

Agent Webster's questioning of [redacted] while officers were executing the search warrant was clearly permissible under *Muehler*. The agent asked [redacted] for

the same type of biographic information that the officers requested in *Muehler* to determine alienage of the occupants. AR 711-12, 812. The questioning of [redacted] lasted only fifteen or twenty minutes, and took place while officers were conducting a search of the premises. AR 714-15, 750. This brief and routine questioning of [redacted] did not call the validity of his *Summers* detention into question. Thus, the questioning, and underlying detention, were consistent with the Fourth Amendment.

In his opening brief, [redacted] accuses the agents of "exploiting" the warrant to develop evidence with which to charge the workers with removability. Petr's Br, 31-34. Yet, the agents did nothing different than the officers executing the search warrant in *Muehler*, and the agent who accompanied them. Here, like in *Muehler*, the agents were aware in advance that illegal aliens might be present on the premises to be searched. And, just like in *Muehler*, the agents questioned the individuals at the site, during their detention incident to the search warrant, to determine their alienage. [redacted] may consider such questioning to be "exploiting" the warrant, but *Muehler* squarely held that it is permissible.[22]

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[22] [redacted]' assertion that the "purpose" of the search was to detain employees, "not find documents," is simply false. Petr's Br, 34. The record clearly shows that the agency was conducting a criminal investigation against the owner of El Balazo

(continued . . .)

Moreover, [redacted]' "exploiting" reference to *Summers* has nothing to do with officers asking occupants for identification or alienage information during a *Summers* detention. Rather, the *Summers* Court, in discussing the minimally intrusive nature of *Summers* detentions, simply observed that officers are not likely to exploit or unduly prolong a *Summers* detention to gain information "because the information the officers seek normally will be obtained through the search and not through the detention." *Summers*, 452 U.S. at 701. This observation holds true in the instant case. The agents did not exploit or unduly prolong [redacted]' detention to gain information about the restaurant owner's criminal hiring practices.

To the extent [redacted] relies on *Ganwich* to suggest otherwise, his reliance is misplaced. First, the *Ganwich* Court did not have the benefit of the *Muehler* decision at the time of its decision, and to the extent Flores interprets the decision

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restaurants and, to that end, obtained a search warrant to retrieve documents, computers, and other evidence of the owner's criminal actions. AR 705-06, 815-22. To accomplish this purpose, agents were assigned roles like logging the evidence and sketching the areas where evidence was found. AR 725. The team found documents and computers at the site. AR 779. The fact that the agency simultaneously prepared for agents to interview the employees that they encountered at the site and, if cause arose, arrest and transport workers found to be illegal aliens, does not make this the "purpose" of the search, nor render [redacted]' detention unconstitutional under the Fourth Amendment. In *Muehler*, the officers also prepared for questioning, as they brought an immigration officer with them.

to preclude the type of questioning that took place in this case, it is no longer good law. Second, the *Ganwich* case is factually distinguishable from the instant case. In *Ganwich*, officers detained employees during the execution of a warrant to search a business that was under investigation for fraudulent consumer practices. 319 F.3d at 1118. The officers told the employees that they would be held until they submitted to individual interviews with investigators in a back room. *Id*. The plaintiffs were detained for periods ranging from almost two hours to five hours, and released only after they submitted to tape-recorded interrogations. *Id*. The Court held that the officers violated the Fourth Amendment by conditioning the employees' release upon their agreeing to submit to the interrogation. *Ganwich*, 319 F.3d at 1121-22.

Clearly, [redacted]' situation bears no resemblance to the circumstances in *Ganwich*. The interviews with the workers took place in a central area of the restaurant and Agent Webster never told [redacted] he would be held until he answered the questions. AR 715. In fact, she testified that had [redacted] refused to answer her questions, the agents would not have had authority to transport [redacted] to San Francisco. AR 715-16, 740, 777.

[redacted] argues that the questioning prolonged his detention beyond the time reasonably required to execute the warrant and, thus, made the *Summers* detention

invalid. Petr's Br, 34-35. More specifically, he argues that if the five agents who were assigned to interview the occupants during the execution of the warrant at Balazo had helped with the search rather than questioning the people at the site, the search would have required less time to complete. His assertion is unavailing. While it may be true that a search would go faster if every agent involved in the execution of a search warrant is assigned a searching role, nothing in Fourth Amendment jurisprudence remotely suggests that a search is unnecessarily or unduly prolonged by having some agents perform reasonable law enforcement tasks, such as detaining the occupants on the premises and asking for identity information, during the execution of the warrant. Moreover, the enforcement agency's decision in this case to assign five agents to conduct interviews during the search of the restaurant ensured, if anything, that the questioning of the numerous employees ran smoothly and was completed within a relatively short time period.[23]

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[23] To the extent [redacted] argues in his opening brief that that the alleged Fourth Amendment violations are widespread, *see* Petr's Br, 42-45, the issue is not properly before the Court because the Immigration Judge did not address the matter in the first instance. AR 831-48; *Gonzales v. Thomas*, 547 U.S. 183 (2006). In fact, [redacted] concedes that because the Immigration Judge "determined that there had been no Fourth Amendment violations in this case at all, she did not have occasion to consider the question[.]" Petr's Br, 44.

IV. Law governing potential suppression of evidence for violations of agency regulations

The applicable regulations give "internal guidance" to agents. 8 C.F.R. § 287.12. These particular regulations "do not, are not intended to, shall not be construed to, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal." 8 C.F.R. § 287.12. DHS has created an expedited internal review process that enables any person to lodge a complaint against an employee for a violation of the standards in § 287.8., and the agency will take appropriate action upon completion of the investigation. 8 C.F.R. § 287.10. Because DHS has a complaint and review process that addresses and deters violations, the suppression of reliable evidence from removal proceedings should be used as a last resort.[24]

This Court has recognized that "in a case of alleged regulatory violations, there is no 'rigid rule . . . under which every violation of an agency regulatory requirement results in . . . the exclusion of evidence from administrative

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[24] While investigations of substantiated complaints likely will deter agents from committing violations of the regulations, it is doubtful that the suppression of reliable evidence from a removal proceeding will have the same, if any, deterrent effect since it would not be reflected in the agent's personnel file and the agent might not even know that evidence was suppressed in a removal proceeding because of his or her violation of a regulation.

proceedings.'" *Chuyon Yon Hong*, 518 F.3d at 1035 (quoting *In re Garcia-Flores*, 17 I. & N. Dec. 325, 327 (BIA 1980)). The Court observed that the Board has adopted a two-prong test for evaluating "the *potential* exclusion of evidence obtained through a violation of agency regulations." *Chuyon Yon Hong*, 518 F.3d at 1035 (emphasis added). The test assesses whether the regulation serves a "purpose of benefit to the alien" and whether "the violation prejudiced interests of the alien which were protected by the regulation." *Chuyon Yon Hong*, 518 F.3d at 1035 (quoting *In re Garcia-Flores*, 17 I. & N. Dec. at 328). The Board's prejudice requirement also assesses whether the action affected the outcome of the removal proceedings. *In re Garcia-Flores*, 17 I. & N. Dec. at 328-29 (adopting test from Ninth Circuit decision that directed the fact-finder to determine whether the violation harmed the protected interests in a way that potentially affected the outcome of the removal proceedings).[25] Ultimately, it should be left to the agency to decide whether a violation of a pre-hearing regulation warrants the extreme action of suppressing evidence at a removal hearing, especially when the alleged

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[25] The Board indicated that in limited situations not applicable here, prejudice may be presumed, *i.e.*, when the Constitution mandates compliance with the regulation or the Supreme Court invalidated the agency action. *In re Garcia-Flores*, 17 I. & N. Dec. at 329.

violations have no impact on the reliability of the evidence or fairness of the removal proceeding itself, as in the instant case. Here, the Board concluded that there was no basis "to suppress any evidence." AR 4. The Court should sustain this conclusion.

V. Suppression is not warranted because the agents complied with the regulations and, even if they did not, no prejudice resulted

A. The agents had reasonable suspicion to detain [redacted] pursuant to 8 C.F.R. § 287.8(b)(2)

Under 8 C.F.R. § 287.8(b)(2), an immigration officer may briefly detain a person for questioning if the officer has a reasonable suspicion, based on specific articulable facts, that the person is an alien present in the United States illegally. The Board agreed with the Immigration Judge's conclusion that the agents had authority to detain and question [redacted]. AR 4. In his opening brief, [redacted] asserts that the evidence of his alienage should be suppressed because the agents did not have reasonable suspicion to detain him. Petr's Br, 46-47. [redacted] is mistaken.

Agent Webster testified that she suspected [redacted] might be an illegal alien because the agent who obtained the search warrants had probable cause to believe that the company was hiring undocumented workers, and [redacted] was wearing an apron and clothing with the restaurant name on it at the time of the search. AR 710-11. The Board acknowledged that Agent Webster's questioning was reasonable because, inter alia, the purpose of the warrant was to search for

evidence regarding the hiring and harboring of undocumented workers, and [redacted] was dressed as a worker at the location being searched. AR 4; *see also* AR 846 (Immigration Judge's decision, noting that the agents could reasonably suspect that [redacted] lacked immigration status because he was "visibly employed" at the site of the search for illegal employment of undocumented workers), 846 n.7 (noting that [redacted] was "visibly associated with the subject of the search warrant" because he was wearing an apron and clothing with the restaurant logo, which made his detention distinguishable from the detention in *Ybarra*). Agent Webster articulated specific facts that supported an inference that [redacted] was an illegal alien. Thus, the agents did not violate § 287.8(b)(2) by detaining [redacted].

[redacted] also asserts in his opening brief that he was prejudiced because, absent the alleged violation, he would not have been detained and questioned. Petr's Br, 47. Again he is mistaken. He still would have been detained because, as already discussed, the agents detained and questioned [redacted] on a separate and permissible basis, consistent with the Fourth Amendment. They detained him incident to the execution of a search warrant and were authorized to do so under *Muehler* without individualized reasonable suspicion. AR 4 (also citing *Summers* and this Court's decisions in *Sanchez* and *Dawson*); *see also* AR 846 (noting that the Immigration Court need not make a reasonable suspicion determination

because the detention and questioning of [redacted] was justified under *Muehler*). Thus, the alleged violation, even if it occurred, does not merit the suppression of evidence because it did not prejudice [redacted]' interests and did not affect the outcome of his removal proceedings.

B. The agents reasonably arrested [redacted] without a warrant pursuant to 8 C.F.R. § 287.8(c)(2)(ii)

Under 8 C.F.R. § 287.8(c)(2)(ii), an agent may arrest an alien without a warrant if there is "reason to believe that the person is likely to escape before a warrant can be obtained." Here, the Immigration Judge found that the circumstances in this case were such that it "was reasonable for Agent Webster to believe that placing [redacted] under arrest was necessary to prevent him from fleeing before a warrant could be obtained." AR 846 n.8.

In his opening brief, [redacted] asserts that the Immigration Judge did not explain the circumstances she was referring to, and that nothing in the record suggested that the agents could not have obtained an arrest warrant for [redacted] and the other employees if they already possessed evidence that the workers were illegal aliens. Petr's Br, 48-49. It is true that the Immigration Judge did not spell out the circumstances; however, the Judge is not required to write an "exegesis on every contention." *Najmabadi v. Holder*, 597 F.3d 983, 990 (9th Cir. 2010). At any rate, the Judge had already described the circumstances under which [redacted]'

arrest took place. AR 844-46. As the Judge noted, the agents were executing a search warrant at a restaurant, had detained the employees incident to execution of the warrant, and were interviewing the employees while the search ensued. AR 844-45. After Agent Webster interviewed [redacted], she determined that he was present in the United States unlawfully. AR 844-45. [redacted] obviously was aware that he had admitted his illegal status to the immigration agent, and Agent Webster obviously was aware that if [redacted] was not placed under arrest, the agents would not have authority to detain him beyond the duration of the search. In this context, and under these circumstances, Agent Webster was justified in arresting [redacted] without a warrant. More importantly, for purposes of judicial review, the record does not compel reversal of the Immigration Judge's conclusion that under the circumstances, it was reasonable for Agent Webster to believe that arresting [redacted] was necessary to prevent him from fleeing before a warrant could be obtained.

[redacted] speculates in his opening brief that the agents could have investigated the workers' identities and obtained arrest warrants before the search "if . . . such evidence existed." Petr's Br, 49. The record contains no evidence suggesting that any such evidence existed or that the agents could have obtained an arrest warrant for [redacted] prior to the search. Agent Webster indicated that the agents had a general idea how many employees would be working on the morning of the search,

see AR 780, but such evidence is easily obtainable by surveillance of the restaurant and does not suggest that the agents could have obtained identity and alienage information on the workers prior to the search. Thus, they cannot be faulted for not having an arrest warrant for [redacted].

Finally, [redacted] asserts in his brief that the alleged violation prejudiced his interest "in being free from an unreasonable warrantless seizure." Petr's Br, 49. His interest was not prejudiced because his warrantless arrest was reasonable: he admitted during the search of the restaurant that he was present illegally in the United States. The fact that his arrest was warrantless did not affect the outcome of the removal proceedings. Thus, the alleged regulatory violation, even if it occurred, does not merit the suppression of evidence.

C. Any error by the agency, or failure by the agents to advise [redacted] of the reason for his arrest at the restaurant pursuant 8 C.F.R. § 287.8(c)(2)(iii), was harmless error

Under 8 C.F.R. § 287.8(c)(2)(iii), an agent who makes an arrest is supposed to inform the arrested party the reason for the arrest "as soon as it is practical and safe to do so[.]" [redacted] contends in the opening brief that during the execution of the search warrant at the restaurant, no one explained to him the reason for his arrest. Petr's Br, 50. The agency never expressly discussed this assertion. Nevertheless, any error is harmless, and remand would be futile, because even

assuming that no one advised [redacted] at the time of his arrest why he had been arrested, it is undisputed that later that same day, May 2, 2008, after [redacted] was transported to the San Francisco office and placed in removal proceedings, he was given a copy of the NTA, apprising him of the reason for his arrest and the ground of removal.[26] AR 1156-57 (NTA's certificate of service, signed by [redacted], reflecting that the notice was personally served on May 2, 2008); *see Kazarian v. U.S. Citizenship and Immigration Services*, 596 F.3d 1115, 1118 (9th Cir. 2010) (recognizing that when an agency errs, the Court may evaluate whether the error was harmless); *Larita-Martinez v. INS*, 220 F.3d 1092, 1095 (9th Cir. 2000) (holding that an error that does not prejudice a petitioner's case is a harmless error). Because it is undisputed that [redacted] received notice of the reason for his arrest, he cannot genuinely claim his interests were prejudiced. Any error relating to this issue is therefore harmless.

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[26] The notice was provided under a parallel regulation, at 8 C.F.R. § 287.3(c), that requires that certain advisals, including the reasons for the arrest, be given to aliens, like [redacted], who are arrested without warrant and placed in proceedings.

CONCLUSION

For the foregoing reasons, the Court should deny this petition for review.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6 of the Rules of this Court, undersigned counsel for Respondent asserts that she is not aware of any cases pending in this Court which involve the Petitioner or are related to the instant case.

s/ Wendy Benner-León
WENDY BENNER-LEÓN
Trial Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached answering brief is:

1. Proportionally spaced using Microsoft Word 2010;

2. Has a typeface of 14 points (font size 14-point, style Times New Roman); and

3. Contains 13,343 words.

s/ Wendy Benner-León
WENDY BENNER-LEÓN
Trial Attorney

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Wendy Benner-León
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