No. _____

In The
Supreme Court of the United States

SALVADOR MONDACA-VEGA,

Petitioner,

v.

LORETTA E. LYNCH, ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case the petitioner was placed into deportation proceedings notwithstanding his assertion that he was born in the United States and even though the federal government had repeatedly determined over the last thirty years that he is a U.S. citizen. The questions presented focus on the burden of proof assigned to the government to overcome prior agency determinations that the petitioner is a U.S. citizen and what standard of review should be applied by the court of appeals to the district court's citizenship determination.

The questions presented are:

Whether the "clear, unequivocal, and convincing" burden of proof the government bears in challenging prior citizenship determinations is more demanding than the "clear and convincing" civil burden of proof.

Whether the court of appeals maintains independent review over a citizenship determination made by the district court, as opposed to limiting all review to clear error under Rule 52(a).

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the Petitioner Reynaldo Mondaca-Carlon, also known as Salvador Mondaca-Vega, and Respondent Loretta E. Lynch, Attorney General. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Reynaldo Mondaca-Carlon, called Salvador Mondaca-Vega by Respondent ("Mr. Mondaca"), respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the en banc court of appeals is reported at 808 F.3d 415 and reprinted at Petition for Writ of Certiorari Appendix ("App.") 1-66. The panel decision is reported at 718 F.3d 1075 and reprinted at App. 67-120. The decision of the district court is unreported and reprinted at App. 121-144. The decision of the Board of Immigration Appeals is unreported and reprinted at App. 145. The decision of the Immigration Judge is unreported and reprinted at App. 146-170.

JURISDICTION

The judgment of the en banc court for the Ninth Circuit Court of Appeals was entered on December 15, 2015. This Court has jurisdiction over this timely filed petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Citizenship Clause of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

U.S. Const. amend. XIV, § 1, cl. 1.

8 U.S.C. § 1252(b)(5)(B) (formerly 8 U.S.C. § 1105a(a)(5)), concerning requirements for review of orders of removal, provides:

> Transfer if issue of fact
>
> If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.

Rule 52(a)(6) of the Federal Rules of Civil Procedure provides:

> *Setting Aside the Findings.* Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due

regard to the trial court's opportunity to judge the witnesses' credibility.

STATEMENT OF THE CASE

Petitioner asserts that he is Reynaldo Mondaca-Carlon, a citizen of the United States, born on July 17, 1931, in Imperial, California, to Marin Mondaca and Antonia Carlon. App. 5, 69, 113. Soon thereafter his parents took him to Mexico, where he was raised. App. 5, 113. The government claims that he is Salvador Mondaca-Vega, born in Mexico. App. 5.

Petitioner returned to the United States on a regular basis throughout the 1950s and 1960s, working as a migrant farmworker. App. 113-14. He was apprehended by immigration authorities and removed on multiple occasions. App. 5-7. The earliest entry on record is from July 1951, when he was arrested by the Sheriff's Office in Auburn, California, and transferred to federal immigration officials' custody. App. 5. He subsequently accepted removal to Mexico two months later under the name Salvador Mondaca-Vega. *Id.* He testified that he gave an alias because the others who were detained with him explained that it would be easier to say he was Mexican and be quickly removed than it would be to wait for any U.S. citizenship claim to be investigated while detained. App. 27, 134.

Petitioner successfully applied for a Social Security number in 1953. App. 6, 64. It is undisputed that

Mr. Mondaca has always used the same Social Security number. App. 114, 125. Mr. Mondaca's immigration file also includes certified copies of the genuine California birth certificate for "Renoldo [sic] Mondaca," born in Imperial, California. App. 5, 150.

Around 1971 Mr. Mondaca permanently moved to the United States with his wife and children. App. 160. In 1977, the INS approved visa applications and certificates of citizenship he filed for his wife and Mexico-born children, based on his own U.S. citizenship. App. 7, 128. In September 1980, Mr. Mondaca was arrested by the Border Patrol in Arizona. App. 129. He was charged and convicted in federal district court for transporting undocumented persons across the border. App. 64, 129. This criminal investigation, which necessarily focused on the identity and immigration status of the persons involved, also determined that Mr. Mondaca is a U.S. citizen. App. 64. The State Department issued him a United States passport in April 1998, and issued a replacement passport in September 2005, after the original was lost. App. 7-8.

In early 1973, the Border Patrol launched an investigation into Petitioner's identity and obtained a copy of a Mexican birth certificate for Salvador Mondaca-Vega, born June 3, 1931, in El Mahone, Sinaloa, Mexico, from American consular officials in Mazatlan. App. 115, 127. There is no evidence that Mr. Mondaca ever possessed the Mexican birth certificate or even knew of its existence. After reviewing the evidence, the Immigration and Naturalization Service

("INS") did not pursue any further allegations of a false claim to U.S. citizenship. *See* App. 29, 127.

However, in 1994, after a conviction for second-degree assault, immigration authorities issued Petitioner an Order to Show Cause in deportation proceedings alleging that he illegally entered the United States by falsely claiming the identity of Reynaldo Mondaca-Carlon, a U.S. citizen born in California. App. 8, 121. After an evidentiary hearing at which Mr. Mondaca, his wife, and daughter testified, the Immigration Judge ("IJ") found by "clear, convincing and unequivocal" evidence that Mr. Mondaca was not a U.S. citizen and issued an oral decision ordering deportation on November 17, 1998. *See generally* App. 146-70. On February 27, 2003, a one-person panel of the Board of Immigration Appeals ("BIA") summarily affirmed the IJ's order without an opinion. App. 145. Mr. Mondaca's wife passed away after the BIA issued the final order. App. 89.

Mr. Mondaca then filed a petition for review to the Ninth Circuit Court of Appeals, seeking judicial review of the agency's final order. App. 122. The court of appeals had jurisdiction to review the final order of deportation under 8 U.S.C. § 1252(b).[1] App. 8. On

[1] Because this case was initiated before April 1, 1997, and because the BIA decision was issued after October 30, 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") transitional jurisdictional rules apply. *See* IIRIRA, Pub. L. No. 104-208, § 309(a), (c)(1), 110 Stat. 3009-625 (transitional jurisdictional rules apply to deportation proceedings

(Continued on following page)

review, the Ninth Circuit found Petitioner's claim of U.S. citizenship presented genuine issues of material fact and transferred the proceedings to the Eastern District of Washington for a de novo determination of citizenship pursuant to 8 U.S.C. § 1105a(a)(5) (now 8 U.S.C. § 1252(b)(5)(B)) as amended by section 306 of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 306(a), (b), 110 Stat. 3009-546, 607-612 (1996). *Id.*

The Immigration and Nationality Act provides that on judicial review of a final removal order, where the petitioner "claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented," the proceeding shall then be transferred to district court "for a new hearing on the nationality claim and a decision on that claim." 8 U.S.C. § 1252(b)(5)(B).

After a one-day bench trial, the district court issued its findings and conclusions on July 14, 2011, declaring it "highly probable" that Petitioner is not Reynaldo Mondaca-Carlon, the U.S. citizen, but rather Salvador Mondaca-Vega, the Mexican citizen.

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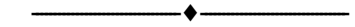
pending on April 1, 1997); *id.* § 309(c)(4), 110 Stat. 3009-626 (transitional rules apply to cases in which final order of deportation is entered after October 30, 1996). Those "transitional" jurisdictional rules were subsequently modified by the REAL ID Act of 2005, which clarified that the permanent jurisdictional rules should be applied to the transitional cases. REAL ID Act of 2005, Pub. L. No. 109-13, § 106(d), 119 Stat. 231, 311 (2005).

App. 122, 144. The Ninth Circuit then issued an Order to Show Cause. App. 73. On April 25, 2013, after briefing and arguments by the parties, a divided three-judge panel held that there was no clear error in the district court's ultimate conclusion, and entered an order denying the petition for review. App. 9, 67-92.

Petitioner then filed a petition for rehearing en banc. A majority of the non-recused active judges for the Ninth Circuit voted to rehear the case. App. 9. After further briefing and arguments, the en banc court of appeals denied the petition for review on December 15, 2015. App. 1-66. The en banc court, divided 7-4, held that in reviewing challenges to U.S. citizenship there is no difference between the "clear and convincing" and the "clear, unequivocal and convincing" burdens of proof. App. 2, 11-17. Further, the divided court held 6-5 that the court of appeals does not apply independent review to a citizenship determination made by the district court after transfer under 8 U.S.C. § 1252(b)(5)(B), but rather reviews the citizenship determination for "clear error" under Rule 52(a)(6) of the Federal Rules of Civil Procedure. App. 2-3, 17-26.



REASONS FOR GRANTING THE PETITION

The Ninth Circuit's deeply divided opinion diverges from the standards established by this Court and creates conflicts among the circuits with respect

to two distinct legal questions, both of which go to the heart of the courts of appeals' constitutional and statutory obligations to protect the rights of citizenship under the Fourteenth Amendment. Both focus on critical safeguards that this Court established over seventy years ago to ensure that the government does not unlawfully strip individuals of their U.S. citizenship: a heightened burden of proof, and independent review of the citizenship determination made by a lower court.

A. This Court's Review Is Warranted To Resolve The Conflict As To The Burden Of Proof Required To Safeguard U.S. Citizenship Under The Fourteenth Amendment.

The first safeguard to the Citizenship Clause of the Fourteenth Amendment at issue in this case is the burden of proof placed on the government when seeking to deport an individual who not only claims to be a U.S. citizen, but whom the government has repeatedly determined to be a U.S. citizen for over thirty years. The burden of proof "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979). With respect to potentially stripping an individual of their citizenship, this Court has repeatedly held that the government must present evidence that is "clear, unequivocal, and convincing" and does not "leave[ ] the issue in doubt." *Schneiderman v. United States*, 320 U.S. 118, 125 (1943) (internal quotation

marks and citations omitted). This Court has further clarified, "[i]t is better that many . . . immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country." *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920). However, the majority opinion below determined that the "clear, unequivocal, and convincing evidence" standard is no more demanding than the "clear and convincing" standard and allowed Mr. Mondaca's citizenship to be stripped away based on competing plausible facts. App. 29-30.

1. The holding from the court below stands in conflict with case law from this Court that repeatedly reaffirms the applicable burden of proof where the Executive seeks to strip an individual of their U.S. citizenship. In 1943, this Court first clarified that where the government seeks to strip an individual of their citizenship in denaturalization proceedings, "the evidence must be 'clear, unequivocal, and convincing' – 'it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.'" *Schneiderman*, 320 U.S. at 125. Indeed, the government must present evidence so compelling that it does "not leave the issue in doubt." *Klapprott v. United States*, 335 U.S. 601, 612 (1949).

In an uninterrupted line of cases dating from the 1940s, this Court has instructed that when citizenship is at stake, the appropriate evidentiary standard requires the adjudicator to determine whether the Executive presented 1) clear, unequivocal, and convincing evidence, 2) that *does not* leave the issue

in doubt. *See Baumgartner v. United States*, 322 U.S. 665, 671 (1944) (emphasizing "the importance of 'clear, unequivocal, and convincing' proof") (citations omitted); *Knauer v. United States*, 328 U.S. 654, 657-58 (1946) ("We reexamine the facts to determine whether the United States has carried its burden of proving by 'clear, unequivocal, and convincing' evidence, which does not leave 'the issue in doubt' "); *Nowak v. United States*, 356 U.S. 660, 663 (1958) ("Where citizenship is at stake the Government carries the heavy burden of proving its case by 'clear, unequivocal, and convincing' evidence which does not leave 'the issue in doubt.' "); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) ("[T]he evidence must indeed be 'clear, unequivocal, and convincing' and not leave 'the issue in doubt.' "); *Costello v. United States*, 365 U.S. 265, 269 (1961) (same); *Fedorenko v. United States*, 449 U.S. 490, 505 (1981) ("The evidence justifying revocation of citizenship must be 'clear, unequivocal, and convincing' and not leave 'the issue in doubt.' "); *Kungys v. United States*, 485 U.S. 759, 781 (1988) ("[F]actual matters necessary to support denaturalization[ ] must be proved by 'clear, unequivocal, and convincing' evidence which does not leave 'the issue in doubt.' ").[2]

2. The majority opinion of the court below relied on this Court's opinion in *California ex rel. Cooper v.*

[2] This same burden of proof has also been applied in deportation cases. *See Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 285-86 (1966).

Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 93 (1981), and its discussion stating that "[t]hree standards of proof are generally recognized," *id.*, to conclude that it is "implausible . . . that 'clear, unequivocal, and convincing' signifies a fourth burden of proof – something between clear and convincing and proof beyond reasonable doubt." App. 14-15.[3] The court below then ruled that there is *only* one, *uniform* intermediate burden, and that any variations in the way this intermediate burden has been articulated by this Court do not impact or modify the substance of the standard. App. 16-17.

In rejecting Petitioner's argument that the word "unequivocal" necessarily increases the burden beyond simply "clear and convincing," the majority opinion below asserted "[t]he Supreme Court has repeatedly used the phrases 'clear, unequivocal, and convincing' and 'clear and convincing' interchangeably." App. 12. However, the court below was unable to point to a *single* case where this Court has applied the less demanding "clear and convincing" standard in a challenge to citizenship since first establishing

[3] In *Cooper*, this Court further explained, "[t]he precise verbal formulation of this standard varies, and phrases such as 'clear and convincing,' 'clear, cogent, and convincing,' and 'clear, unequivocal, and convincing' have all been used to require a plaintiff to prove his case to a higher probability than is required by the preponderance-of-the-evidence standard." 454 U.S. at 93 n.6.

the appropriate standard in *Schneiderman* in 1943.[4] Indeed, Petitioner's counsel has found *no* case from this Court applying the "clear and convincing" evidence standard as the appropriate burden of proof in citizenship determinations.

Even more significant, the majority opinion failed to acknowledge that this Court has repeatedly required "clear, unequivocal and convincing" evidence that *does not leave the issue in doubt*. If "clear, unequivocal, and convincing" and "clear and convincing" really are interchangeable, one would expect to see cases where this Court has also stated that a party has the burden to present such "clear and convincing" evidence that "does not leave the issue in doubt." However, Petitioner's counsel have found *no* case applying the "clear and convincing" standard that also requires evidence that does not leave the issue in doubt.[5] Uninterrupted and repeatedly affirmed over seven decades, this Court has articulated a heightened

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[4] Instead, the majority points to a footnote from *Pullman-Standard v. Swint*, 456 U.S. 273, 286 n.16 (1982), a case that does not address the burden of proof, but instead the standard of review. App. 12-13.

[5] The cases that apply "clear and convincing" are devoid of statements asserting that the evidence must not leave the issue in doubt. *See*, *e.g.*, *Kansas v. Nebraska*, 574 U.S. ___, 135 S. Ct. 1042, 1071-72 (2015); *Kucana v. Holder*, 558 U.S. 233, 251-52 (2010); *Demore v. Kim*, 538 U.S. 510, 549-52 (2003); *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 63-64 (1993); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 515-16 (1990); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-56 (1986); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984).

burden of proof in citizenship cases that does not leave the issue in doubt, and the majority's opinion below cannot be reconciled with that precedent.

3. The majority opinion below is also in direct tension with this Court's analysis in *Addington v. Texas*, 441 U.S. 418 (1979). In *Addington*, this Court examined what standard of evidence was constitutionally required to impose indefinite civil commitment on an individual. This Court was reviewing the Texas Supreme Court's determination that a trial court need only employ a "preponderance of the evidence" standard in making this determination.[6]

This Court first determined that "the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." *Id.* at 427. Next, this Court determined that due process did not require application of the most demanding standard – evidence beyond a reasonable doubt. *Id.* at 429-31. In discussing why this was so, this Court explained that "the heavy standard applied in the criminal cases manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go

[6] The Texas Supreme Court had overturned the state court of civil appeals' decision, which had in turn reversed the trial court's original instructions applying a "clear, unequivocal, and convincing evidence" standard in favor of the criminal standard "beyond a reasonable doubt." *Id.* at 421-22.

free. The full force of that idea does not apply to civil commitment." *Id.* at 428 (citation omitted).[7] This Court explained that unlike an erroneous conviction, ongoing professional oversight, treatment concerns, and involvement of family and friends would generally provide continuous opportunities to appropriately address an erroneous civil commitment. *Id*. at 428-29.

This Court then ruled that the "clear, unequivocal and convincing" standard *also* demanded too much: "Similarly, we conclude that use of the term 'unequivocal' is not constitutionally required, although the states are free to use that standard." *Id.* at 432. This Court made this pronouncement after surveying the different standards applied, noting that some states require "clear and convincing" evidence, while others require "clear, cogent and convincing" evidence, and others "clear, unequivocal and convincing" evidence. *Id.* at 431-32.

In deciphering "clear, unequivocal and convincing" evidence this Court turned to deportation and denaturalization cases applying that standard:

> In *Woodby v. INS*, 385 U.S. 276 (1966), dealing with deportation, and *Schneiderman v. United States*, 320 U.S. 118, 125, dealing

[7] In contrast, this Court's precedent shows that the "full force of that idea" *does* apply in the citizenship context: "it is better that many . . . immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country." *Kwock Jan Fat*, 253 U.S. at 464.

> with denaturalization, the Court held that "clear, unequivocal, and convincing" evidence was the appropriate standard of proof. *The term "unequivocal," taken by itself, means proof that admits of no doubt, a burden approximating, if not exceeding, that used in criminal cases.*

Id. at 432 (emphasis added) (footnote omitted). This Court explained why the burden of proof was appropriately higher in the deportation and denaturalization context than in the civil commitment context: "The issues in *Schneiderman* and *Woodby* were basically factual, and therefore susceptible of objective proof and the consequences to the individual were unusually drastic – loss of citizenship and expulsion from the United States." *Id.* Thus, *Addington* expressly distinguished deportation and denaturalization proceedings from civil commitment proceedings that required only "clear and convincing" evidence to satisfy due process.

This Court concluded by noting that the trial court in the civil commitment proceedings originally employed the more stringent standard of "clear, unequivocal and convincing" evidence. *Id.* at 433. "However, determination of the precise burden equal to or greater than the 'clear and convincing' standard which we hold is required to meet due process guarantees is a matter of state law which we leave to the Texas Supreme Court." *Id*. (footnote omitted). Thus, this Court again made readily apparent that "clear, unequivocal and convincing" does not equate to the

"clear and convincing" standard constitutionally required in civil commitment proceedings, otherwise there would have been no need to leave it to the State Supreme Court to determine if it wanted to adopt that higher standard. The majority opinion below cannot be reconciled with *Addington*.

4. The majority's opinion below also creates a direct conflict with another circuit – the only other circuit to have directly addressed the question of whether "clear and convincing" is the equivalent of "clear, unequivocal, and convincing." *See Ward v. Holder*, 733 F.3d 601 (6th Cir. 2013). Contrary to the majority opinion below, the Sixth Circuit recognized that Supreme Court precedent compels the conclusion that "the omission of 'unequivocal' makes a difference. The 'clear, unequivocal, and convincing standard' is a more demanding degree of proof than the 'clear and convincing' standard." *Ward*, 733 F.3d at 605. Like Judge Smith's dissenting opinion below, App. 33-41, the Sixth Circuit relied heavily on this Court's decision in *Addington*, to reach this conclusion: "The distinction between, on the one hand – clear, unequivocal, and convincing evidence – and, on the other – clear and unequivocal evidence – may seem inconsequential. . . . But the Supreme Court has said otherwise." *Ward*, 733 F.3d at 605.

5. The question presented not only demonstrates a clear conflict among the courts, but also addresses a matter of grave significance. The court below asserted, "It is not necessary to create, out of whole cloth, a nebulous fourth burden to recognize

that an alienage determination implicates important rights." App. 17. But as demonstrated above, the more rigorous burden of proof is nothing new. Equally important, the burden of proof is the primary safeguard for citizenship claims, especially in cases like this one, where the federal government seeks to strip away the citizenship of a natural-born citizen, previously recognized by the government as a citizen over the course of decades. As such, the en banc majority's holding significantly undermines a fundamental protection of birthright citizenship under the Fourteenth Amendment. The error committed by the court below is of enormous significance.

This burden of proof, moreover, applies to citizenship challenges in both deportation proceedings and in denaturalization proceedings. Consequently, a substantial number of citizenship cases will be directly impacted by the Ninth Circuit's new rule. But even if it were just one case each year, the issue merits this Court's consideration in light of the profound importance of threats to citizenship, as "we deal with 'judgments lying close to opinion regarding the whole nature of our government and the duties and immunities of citizenship.'" *Chaunt*, 364 U.S. at 353 (citation omitted). The court below demonstrably undercuts a fundamental safeguard first established by this Court over seventy years ago to protect persons from being unlawfully deprived of their rights, entitlement, and immunities as U.S. citizens. Such protection is especially necessary in times of political upheaval – as the historical context surrounding the adoption of this

standard shows. *See also infra* Section B.2. It is thus essential for this Court to assert its steadying hand.

The court below has created a fundamental divide between how the burden is applied within the Ninth Circuit, and how this Court has instructed the burden of proof to be applied – as recognized by the Sixth Circuit – in an area of law that, perhaps above all other areas, requires national uniformity. This Court's intervention is required to ensure that an essential component of this democracy – its citizenship – is not left unprotected based upon the variances of interpretations in the lower courts.

B. This Court Should Resolve The Conflict Among The Circuits With Respect To The Applicable Standard Of Review Of Citizenship Determinations.

The Supreme Court implemented the second safeguard to U.S. citizenship the year after it first established the heightened burden of proof in *Schneiderman*. Applying the same exacting standard of proof in another denaturalization case, this Court further ruled that the reviewing court would re-examine the findings of fact by the lower courts and make an *independent* determination as to whether the evidence satisfied the requisite high burden of proof. *See Baumgartner v. United States*, 322 U.S. 665, 671 (1944). This Court explained two reasons for applying independent review of the lower court findings. First, because citizenship is at stake:

"Particularly is this so where a decision here for review cannot escape broadly social judgments – judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship." *Id.* Second, but closely related to the first, this Court concluded that the necessary emphasis on the onerous burden of proof the government bears in a denaturalization suit "would be lost" if the determination by the lower courts "whether that exacting standard of proof had been satisfied on the whole record were to be deemed a 'fact' of the same order as all other 'facts', not open to review here." *Id*.

While Federal Rule of Civil Procedure 52(a)(6) calls for a very deferential standard of review of factual findings, this Court has not altered its approach in cases reviewing citizenship claims. However, in overturning its own precedent that followed this Court's approach,[8] the Ninth Circuit majority below distinguished denaturalization proceedings

[8] The majority below overruled *Lim v. Mitchell*, 431 F.2d 197 (9th Cir. 1970), an action for a judgment declaring the plaintiff to be a U.S. citizen. In her dissenting opinion, Judge Murguia points out that "[a]ccording to the majority, the court 'need only conclude that *Lim* has been overruled, leaving the Supreme Court to decide whether it has also implicitly repudiated its own decisions.' But that is a distinction without a difference. *Lim* merely adopted *Baumgartner* and its progeny's appellate standard of review. Therefore, the two cases rise and fall together. Until the Supreme Court holds otherwise, *Baumgartner* and its progeny remain good law." App. 59 (citations omitted).

from deportation proceedings to justify its decision to no longer apply independent review to citizenship determinations made in deportation proceedings. App. 22. The majority further suggested that this Court has "implicitly repudiated" its prior precedent even with respect to denaturalization cases. App. 24 n.9.

1. This Court has consistently applied independent review, as first announced in *Baumgartner*, where the government seeks to strip an individual of their United States citizenship. *See*, *e.g.*, *Knauer*, 328 U.S. at 657-58 ("We reexamine the facts to determine whether the United States has carried its burden of proving by 'clear, unequivocal, and convincing' evidence, which does not leave 'the issue in doubt,' that the citizen who is sought to be restored to the status of an alien obtained his naturalization certificate illegally."); *Nowak v. United States*, 356 U.S. 660, 663 (1958) (scrutinizing the record "with the utmost care"); *Chaunt*, 364 U.S. at 353 ("The issue in these cases is so important to the liberty of the citizen that the weight normally given concurrent findings of two lower courts does not preclude reconsideration here."); *Costello*, 365 U.S. at 269-70 (same); *Fedorenko*, 449 U.S. at 506 ("in reviewing denaturalization cases, we have carefully examined the record ourselves."). *Cf. Pullman-Standard v. Swint*, 456 U.S. 273, 286 n.16 (1982) ("*Baumgartner*'s discussion of 'ultimate facts' referred not to pure findings of fact – as we find discriminatory intent to be in this context – but to findings that 'clearly impl[y] the application of standards of law.' ").

This Court has reiterated that independent review is an essential safeguard to U.S. citizenship. In *Chaunt*, this Court reaffirmed that the court's responsibility to provide a searching review of the facts is based on the right at issue, U.S. citizenship under the Fourteenth Amendment:

> The issue in these cases is so important to the liberty of the citizen that the weight normally given concurrent findings of two lower courts does not preclude reconsideration here, for we deal with "judgments lying close to opinion regarding the whole nature of our government and the duties and immunities of citizenship." *Baumgartner v. United States*, supra, 322 U.S. 671, 64 S. Ct. 1243, 1244.

Chaunt, 364 U.S. at 353. As this Court has repeatedly stated, "To deport one who so claims to be a citizen obviously deprives him of liberty," and "[i]t may result also in loss of both property and life, or of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

2. In opting to diverge from this Court's precedent, the majority below pointed out that all the cases from this Court arose in the context of denaturalization proceedings: "The Supreme Court, however, has never extended independent review to alienage determinations." App. 21.[9] In making this distinction

[9] Thus, the majority opinion below asserts that native-born citizens are entitled to less protection than naturalized citizens,

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the majority below disregarded the reasons provided by this Court for independent review – both of which are equally applicable here: 1) to safeguard the precious rights of citizenship that involve social "judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship," *Baumgartner*, 322 U.S. at 671; and 2) to ensure proper application of this demanding standard of proof in the civil context. *See id.* at 675. To the contrary, the court below asserts, "the value of citizenship and the hardship of deportation are not the only, or even the primary, factors that motivated independent review in the denaturalization cases. Nor could they be." App. 24. This conclusion is irreconcilable with *Baumgartner* and its progeny, which tied independent review directly to the unique and precious nature of citizenship, and the need to uphold the demanding burden of proof in the civil context.

Instead, the majority below described this Court's reasoning as based on concerns about shifting political tides and free speech, ultimately concluding that "[s]ubsequent denaturalization cases underscored that independent review was motivated by concern

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as challenges to their citizenship are not entitled to independent review as in denaturalization cases. However, in confronting challenges by naturalized citizens asserting that they have been unlawfully denied the rights and immunities of native-born citizens, this Court has clarified, "the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive" *Schneider v. Rusk*, 377 U.S. 163, 165 (1964).

about the risk of political persecution *uniquely* present in the denaturalization context." App. 19 (emphasis added). The majority ignores the many denaturalization proceedings that do not touch upon political opinion or political persecution, but rather are based on failure to reveal criminal history or fraud on underlying applications for immigration benefits. Indeed, the Supreme Court applied the independent standard of review in *Costello*, where the government sought to revoke citizenship based on the petitioner's failure to disclose his prior career as a bootlegger. *See Costello*, 365 U.S. at 267. Moreover, even if these cases were just focused on protecting vulnerable or unpopular individuals from oppression, persons who have passed through the criminal justice system – such as Mr. Mondaca – are also often the targets of unwarranted enforcement actions and disenfranchisement. Indeed, as this Court has recognized, "Citizenship is not a license that expires upon misbehavior." *Trop v. Dulles*, 356 U.S. 86, 92 (1958).

The majority also fails to acknowledge that deportation proceedings are often at the very eye of the storm for issues involving both political persecution and free speech. *See*, *e.g.*, *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (challenging selective immigration enforcement based on political associations); *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (challenging closed removal proceedings in "special interest" cases); *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (same); *Skeffington v. Katzeff*, 277 F. 129

(1st Cir. 1922) (challenging orders of deportation entered for Communist Party membership or affiliation); *see also* U.S. Commission on Civil Rights, *The Tarnished Golden Door: Civil Rights Issues in Immigration* at 11, U.S. Gov't Printing Office (1980) (noting that "many of those apprehended" in the 1950s "were denied a hearing to assert their constitutional rights and to present evidence that would have prevented their deportation," and "[m]ore than 1 million persons of Mexican descent were expelled from this country in 1954 at the height of 'Operation Wetback.'"); Cohen, Harlan G., *The (Un)favorable Judgment of History: Deportation Hearings, the Palmer Raids, and the Meaning of History*, 78 N.Y.U. L. Rev. 1431, 1472 (2003) ("The history of deportation hearings and immigration policy is . . . written largely in times of crisis and fear."). History amply demonstrates that just as in denaturalization proceedings, there is great risk of political persecution in deportation proceedings.

3. To further support its refusal to apply the independent standard of review articulated in *Baumgartner* and its progeny, the majority below questioned whether that standard remains good law in light of this Court's discussion of Rule 52(a) in *Pullman-Standard*, 456 U.S. at 285-87; *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985); and *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, ___ U.S. ___, 135 S. Ct. 831, 836-39 (2015). App. 22-23. Each of these rejected an argument asserting an exception to Rule 52(a)'s clear error standard. Both *Pullman-Standard*

and *Anderson* concerned review of findings that Congress had specified as factual. *See Pullman-Standard*, 456 U.S. at 289 (noting that "under § 703(h) discriminatory intent is a finding of fact"); *Anderson*, 470 U.S. at 573 (finding of intentional discrimination is a finding of fact). In *Teva Pharm. USA, Inc.*, the Court determined that subsidiary factfinding is subject to clear error review under Rule 52(a), while the ultimate question of claim construction is treated as a matter of law. *Teva Pharm.*, 135 S. Ct. at 838.

However, none of these cases touched on the areas of law that this Court has previously declared required independent review: citizenship status or cases presenting First Amendment concerns. *See*, *e.g.*, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505-08 (1984). To the contrary, in *Pullman-Standard* this Court explicitly acknowledged *Baumgartner*'s exception to the "clear error" standard of review Rule 52(a):

> Whatever *Baumgartner* may have meant by its discussion of "ultimate facts," it surely did not mean that whenever the result in a case turns on a factual finding, an appellate court need not remain within the constraints of Rule 52(a). *Baumgartner's* discussion of "ultimate facts" referred not to pure findings of fact – as we find discriminatory intent to be in this context – but to findings that "clearly impl[y] the application of standards of law."

Pullman-Standard, 456 U.S. at 286 n.16. Thus, this Court clearly acknowledged the distinct standard applicable in *Baumgartner* and one of the fundamental underpinnings for this unique standard – to ensure the correct application of the standards of law in this sensitive area. *Id*.

4. The Ninth Circuit's holding below creates a further divide among the circuits with respect to the controlling standard of review, broadening the gulf among the circuits as to the continuing vitality of *Baumgartner* and its progeny. Similar to the approach advocated by Judge Murguia, along with four other judges, in dissent below, App. 50-52, the First Circuit explicitly followed *Baumgartner* and *Schneiderman* to determine it maintained independent review of a district court's findings in denaturalization proceedings. *United States v. Zajanckauskas*, 441 F.3d 32, 37-38 & n.5 (1st Cir. 2006) (holding that precedent from this Court is "still valid" and has "not been overruled in any way").

Without discussing *Baumgartner*, the Sixth, Seventh, and Eleventh Circuits have held that appellate review of a district court's factual findings in a denaturalization action is conducted under the clearly erroneous standard of Rule 52(a). *See United States v. Kairys*, 782 F.2d 1374, 1379 (7th Cir. 1986); *United States v. Hajda*, 135 F.3d 439, 444 (7th Cir. 1998); *United States v. Firishchak*, 468 F.3d 1015, 1023 (7th Cir. 2006); *United States v. Koziy*, 728 F.2d 1314, 1318-1319 (11th Cir. 1984); *United States v. Demjanjuk*, 680 F.2d 32, 33 (6th Cir. 1982) (per curiam). This

Court's intervention would resolve the conflict between the circuits with respect to the continued vitality of the standard of review first established in *Baumgartner* in order to protect U.S. citizenship under the Fourteenth Amendment.

5. The lower court's divided en banc opinion does more than simply create conflict with this Court and deepen the divide among the circuits: it directly undermines a critical safeguard established by this Court over seventy years ago to protect against unwarranted efforts to strip individuals of their citizenship. The majority below determined that "the only legal interests at stake in this case are the petitioner's." App. 24 n.10. However, this Court has placed a much broader value on citizenship determinations, which "deal with 'judgments lying close to opinion regarding the whole nature of our government and the duties and immunities of citizenship.'" *Chaunt*, 364 U.S. at 353 (citation omitted). This Court's intervention is now required to "safeguard the integrity of this 'priceless treasure.'" *Fedorenko*, 449 U.S. at 507 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 791 (1950) (Black, J., dissenting)).

C. This Case Squarely Frames The Questions Presented.

This case presents an excellent vehicle to address the appropriate standards established by this Court to protect U.S. citizenship under the Fourteenth Amendment. The burden of proof and the standard of

review were critical to the lower court's holding, leading first to a divided panel decision, and then to a deeply divided en banc opinion. Only by determining that both these safeguards were inapplicable did a 6-5 majority conclude that 84-year-old Mr. Mondaca should be deported from his home – separated from the life he has established here and the family that he successfully petitioned to bring to this country nearly forty years ago.[10]

The government has never disputed that the California birth certificate Mr. Mondaca presented is genuine. App. 5. Similarly, the government has never presented any evidence that anyone other than Petitioner has ever claimed to be Reynaldo Mondaca Carlon. App. 119 (Pregerson, dissenting). Mr. Mondaca does not dispute that he has been arrested and removed from this country by immigration authorities on multiple occasions. App. 5-7. He does not dispute that he claimed to be Salvador Mondaca, a Mexican national, after he was first arrested in 1951 and held in custody for two months before accepting removal under that name. App. 5, 26-27.

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[10] Indeed, the majority marshaled six votes only after Judge Smith decided to "reluctantly concur in the judgment to deny the petition." App. 2-3, 32. Strangely, he so concurred after he filed a dissenting opinion as to the majority's "clear and convincing" burden of proof, but then concluded "that using the majority's 'clear and convincing' burden of proof, I cannot grant the petition for review." App. 32.

Yet when Mr. Mondaca decided to move to the United States with his family, the government approved every application and certification he filed for his family members, each one requiring that he demonstrate his United States citizenship. App. 7-8. This occurred *after* the agency had already identified his prior removals under an alias, obtained a copy of the Mexican birth certificate for Salvador Mondaca, and placed a memorandum in his immigration file based on their 1973 investigation regarding suspicion of him making a false claim to U.S. citizenship. App. 127. He was later charged as a U.S. citizen in federal court. App. 64, 129. And even after deportation proceedings commenced in 1994, the Department of State issued Mr. Mondaca a U.S. passport in April 1998, and a replacement passport in September 2005 after the original was lost. App. 7-8, 64, 131-132.

Despite this conflicting evidence, the district court found that it was "highly probable" that Petitioner is not Reynaldo Mondaca-Carlon, the U.S. citizen, but instead Salvador Mondaca-Vega, the Mexican citizen. App. 144. The majority opinion from the en banc court of appeals acknowledged that Petitioner presented substantial factual evidence to the contrary and even acknowledged that the district judge made several factual errors, but labeled them as "minor errors," and with respect to one error asserted "it is hardly conceivable that absent this mistake, the district court would have reached a different conclusion, given the ample other reasons to doubt the petitioner's credibility." App. 28-29. The

dissenting opinion, however, highlights several additional important factual errors made by the district judge, and additional factual findings based on pure speculation and misguided cultural expectations. App. 62-63.

The majority opinion ultimately shoved aside the evidence supporting Petitioner's claim and the errors made by the district court, concluding that

> petitioner's position is simply that the evidence could plausibly be read as supporting his claim that he was born in this country. But the district judge found to the contrary, and the clear error standard "does not vest[ ] us with power to reweigh the evidence presented at trial in an attempt to assess which items should and which should not have been accorded credibility."

App. 29-30.

It is precisely because the district court failed to apply the more demanding burden of proof that it found to the contrary. After all, even if Petitioner and the government had presented plausible alternatives on the issue of Petitioner's citizenship, that would have required that the district court uphold Petitioner's claim to U.S. citizenship under the applicable burden of proof. Moreover, if the district court was required in the first instance to find not that it was just "highly probable" that Petitioner was a Mexican citizen, but rather, that the evidence *does not leave that issue in doubt*, then it is clear that the Ninth

Circuit failed to correct the district court's error. The court below *compounded* the error by abdicating its obligation to independently review Petitioner's citizenship claim, in order to ensure that the district court applied the heighted burden of proof. This is precisely why this Court first implemented an independent review in citizenship cases – to ensure that the unusually demanding standard of proof was faithfully applied to protect the precious right of citizenship. *See Baumgartner*, 322 U.S. at 671.

The interests at stake here are of utmost importance. This case not only squarely presents the legal questions involved – what the proper burden of proof and standard of review are in cases where the government seeks to strip an individual of their U.S. citizenship – it also crystalizes the critical significance of these issues, as the life of an 84-year-old U.S. citizen and his family hang in the balance. For the last forty years, Petitioner has raised his family here in the United States, with the government repeatedly confirming his citizenship status. Now, he faces the specter of losing his family, his home, his Social Security, his Medicare, and his Medicaid. This Court should intervene to clarify that the safeguards it first implemented over seventy years ago in *Schneiderman* and *Baumgartner* must continue to be applied by the courts whenever the government seeks to strip away U.S. citizenship, whether in denaturalization or deportation proceedings.

CONCLUSION

For these reasons the petition for certiorari should be granted.

Respectfully submitted,

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