No. 15-1153

# In the Supreme Court of the United States

SALVADOR MONDACA-VEGA, PETITIONER

*v.*

LORETTA E. LYNCH, ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

**BRIEF FOR THE RESPONDENT IN OPPOSITION**


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## QUESTIONS PRESENTED

1. Whether, in proceedings under 8 U.S.C. 1252(b)(5) involving an individual who has been issued a passport and claims to be a United States citizen, the government has met its burden by providing "clear and convincing" evidence that the individual is not a citizen.

2. Whether a district court's findings of fact in citizenship cases are reviewed by an appellate court for clear error under Federal Rule of Civil Procedure 52(a)(6).

## TABLE OF CONTENTS

Page

Opinions below .......... 1
Jurisdiction .......... 1
Statement .......... 1
Argument .......... 7
Conclusion .......... 23

## TABLE OF AUTHORITIES

Cases:

*Addington* v. *Texas*, 441 U.S. 418 (1979) .......... 11, 12, 13
*Anderson* v. *Bessemer City*, 470 U.S. 564 (1985) ... 16, 17, 20
*Baumgartner* v. *United States*:
322 U.S. 665 (1944) .......... 10, 17, 18, 19, 20, 21
138 F.2d 29 (8th Cir. 1943) .......... 17
*California ex rel. Cooper* v. *Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90 (1981) .......... 8, 9, 11
*Chaunt* v. *United States*, 364 U.S. 350 (1960) .......... 19
*Costello* v. *United Stats*, 365 U.S. 265 (1961) .......... 19
*Cruzan* v. *Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) .......... 11
*Fedorenko* v. *United States*, 449 U.S. 490 (1981) .......... 19
*Knauer* v. *United States*, 328 U.S. 654 (1946) .......... 19
*Nowak* v. *United States*, 356 U.S. 660 (1958) .......... 19
*Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982) .......... 10, 16, 19, 20
*Santosky* v. *Kramer*, 455 U.S. 745 (1982) .......... 11
*Schneiderman* v. *United States*, 320 U.S. 118 (1943) .......... 9, 10, 13, 15
*Teva Pharm. USA* v. *Sandoz, Inc.*, 135 S. Ct. 831 (2105) .......... 20, 21

Cases—Continued: Page

*United States* v. *Demjanjuk*, 680 F.2d 32 (6th Cir.), cert. denied, 459 U.S. 1036 (1982) ..... 22

*United States* v. *Firishchak*, 468 F.3d 1015 (7th Cir. 2006) ..... 22

*United States* v. *Koziy*, 728 F.2d 1314 (11th Cir.), cert. denied, 469 U.S. 835 (1984) ..... 22

*United States* v. *Zajanckauskas*, 441 F.3d 32 (1st Cir. 2006) ..... 22

*Ward* v. *Holder*, 733 F.3d 601 (6th Cir. 2013) ..... 13

*Woodby* v. *INS*, 385 U.S. 276 (1966) ..... 10, 13

Statutes and rule:

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Tit. III, § 309(c), 110 Stat. 3009-625 ..... 5

8 U.S.C. 1105a(a)(5) (1994) ..... 5

8 U.S.C. 1252(b)(5)(B) ..... 4, 21, 22, 23

8 U.S.C. 1451(a) ..... 21

8 U.S.C. 1481(a) ..... 10

8 U.S.C. 1481(b) ..... 10

Fed. R. Civ. P. 52(a)(6) ..... *passim*

Miscellaneous:

Charles T. McCormick, *Handbook of the Law of Evidence* (1954) ..... 9

9 John Henry Wigmore, *Evidence in Trials at Common Law* (3d ed. 1940) ..... 9, 11

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## OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1-66) is reported at 808 F.3d 415. The panel decision of the court of appeals (Pet. App. 67-120) is reported at 718 F.3d 1075. The decision of the district court (Pet. App. 121-144), the decision of the Board of Immigration Appeals (Pet. App. 145), and the decision of the immigration judge (Pet. App. 146-170) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on December 15, 2015. The petition for a writ of certiorari was filed on March 14, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a conviction in Washington state court for second degree assault while armed with a deadly weapon, petitioner was placed in deportation proceed-

ings. An immigration judge determined that petitioner is an alien who had been excludable at entry and ordered that petitioner be deported. Pet. App. 146-170. The Board of Immigration Appeals affirmed. *Id.* at 145. Petitioner filed a petition for review with the United States Court of Appeals for the Ninth Circuit, which transferred the case to the United States District Court for the Eastern District of Washington to address petitioner's claim that he is a citizen of the United States. *Id.* at 122. The district court found that petitioner is not a citizen of the United States, *id.* at 121-144, and a panel of the Ninth Circuit denied his petition for review, *id.* at 67-120. Upon en banc review, the court of appeals again denied his petition for review. *Id.* at 1-66.

1. The central dispute in this case is whether petitioner is Salvador Mondaca-Vega, born in June 1931 in Sinaloa, Mexico; or Reynaldo Mondaca Carlon, born in July 1931 in Imperial, California. Pet. App. 3-4 & n.1.

a. "[M]uch of the evidence in this case is a matter of public record and [is] undisputed." Pet. App. 5. Petitioner grew up in El Fuerte, Sinaloa, Mexico, and arrived in the United States at the age of twenty. *Ibid.* In July 1951, petitioner was taken into custody by the Sheriff's Office in Auburn, California; at that time, he identified himself as "Salvador Mondaca." *Ibid.* Petitioner was transferred to the custody of federal immigration officials, where he accepted voluntary departure under the name "Salvador Mondaca-Vega." *Ibid.*

In May 1953, while detained in Washington state jail, petitioner was served with a warrant under the name "Salvador Mondaca-Vega" and was taken into custody by the former Immigration and Naturaliza-

tion Service (INS). Pet. App. 6, 124. Petitioner was deported to Mexico. *Ibid.*

In September 1954, petitioner was again transferred from Washington jail to INS custody. Pet. App. 125. While there, he submitted a sworn statement to INS officials that his name was Salvador Mondaca-Vega and that he was born on "April 16, 1931, at El Puerte, Sin., Mexico." *Id.* at 126. Petitioner was again deported to Mexico. *Id.* at 6. Fingerprints taken at the time of both the May 1953 and September 1954 deportations were later determined to be petitioner's. *Ibid.*

Petitioner has admitted that he accepted voluntary departure to Mexico approximately ten to twenty times under the name Salvador Mondaca-Vega. Pet. App. 126. He was also deported once, in 1966, under the name Jose Valdez-Vega. *Id.* at 7. In 1969, a bench warrant was issued in California for Salvador Mondaca-Vega. *Ibid.* It appears that 1969 was the last time petitioner used the name Salvador Mondaca-Vega. *Id.* at 127.

b. In May 1953, someone using the name Reynaldo C. Mondaca successfully applied for a social security card in Calexico, California. Pet. App. 6, 124-125. Handwriting analysts later determined that the person who had applied for the social security card was likely the same person who, in September 1954, had signed a sworn statement identifying himself as Salvador Mondaca-Vega. *Id.* at 6-7, 113-114, 150-152. Between 1969 and 1994, petitioner was charged with numerous criminal offenses under the names Reynaldo Mondaca Carlon and "variations thereof." *Id.* at 7 n.3.

In April 1998, the Department of State issued petitioner a passport in the name of Reynaldo Mondaca Carlon. Pet. App. 7, 131. A replacement passport was issued in 2005. *Id.* at 8, 132.

2. In January 1994, a Washington state court convicted petitioner of second degree assault while armed with a deadly weapon and sentenced him to 18 months of imprisonment. Pet. App. 121. Immigration officials placed petitioner in deportation proceedings, claiming that petitioner is not a United States citizen and had entered the United States without inspection. *Id.* at 8.

a. Following a multi-day hearing at which petitioner was represented by counsel, an immigration judge determined that petitioner is not a United States citizen. Pet. App. 146-170. Among other things, the immigration judge pointed to petitioner's admission "that he had used the name Salvador Mondaca-Vega * * * many times," *id.* at 165; that petitioner repeatedly had been deported under that name and had "concede[d] alienage," *ibid.*; and that, although he claimed not to know anyone by that name, petitioner "had frequently when using the identity of Salvador Mondaca indicated the correct names of Salvador's parents"—Felix and Josefa, *id.* at 164. The immigration judge concluded that the government had "established by clear, convincing, and unequivocal evidence that [petitioner] is a native and citizen of Mexico" and "not a citizen of the United States." *Id.* at 167.

b. The Board of Immigration Appeals affirmed without opinion. Pet. App. 145.

3. Petitioner filed a petition for review in the Ninth Circuit. The court found "a genuine issue of material fact about the petitioner's nationality," 8 U.S.C.

1252(b)(5)(B),[1] and transferred the case to district court for a hearing on petitioner's nationality claim. Pet. App. 122.

a. Following trial, the district court made de novo findings with respect to petitioner's citizenship. Pet. App. 142. The court first held that the government bore the burden of disproving petitioner's citizenship because it previously had issued him a United States passport and had granted legal status to his wife and children based on his purported United States citizenship. The court then determined that the government had "carried [its] burden" by "present[ing] clear, unequivocal, and convincing evidence th[at] petitioner is not a citizen of the United States." *Id.* at 144.

b. A divided Ninth Circuit panel denied the petition for review. Pet. App. 67-92. The court determined that the district court's findings of fact should be reviewed for clear error under Federal Rule of Civil Procedure 52(a)(6). *Id.* at 73-80. The court also determined that, because petitioner had put forward "substantial credible evidence in support of [his] citizenship claim," *id.* at 81 (citation omitted), the government had the burden to prove by "clear and convincing evidence" that petitioner is not a United States Citizen. *Id.* at 80-85. Based on the evidence

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[1] At the time that deportation proceedings were initiated, that provision was codified at 8 U.S.C. 1105a(a)(5) (1994) (repealed 1996). Because the Board of Immigration Appeals issued its decision in 2003, the present case is governed by the transitional rules for judicial review specified in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Tit. III, § 309(c), 110 Stat. 3009-625. For the sake of clarity, this brief refers to the current provision.

presented, the court concluded that the government had met its burden. *Id.* at 85-92.

Judge Pregerson dissented. Pet. App. 92-120. Notwithstanding Rule 52(a)(6), Judge Pregerson would have applied "independent" appellate review to the evidence, *id.* at 96-112, and would have held that the government had failed to prove its case by "clear, unequivocal, and convincing evidence," *id.* at 112-120.

c. After voting to grant rehearing en banc, the court of appeals again denied the petition for review. Pet. App. 1-30. It first rejected petitioner's argument that the district court had held the government to the wrong burden of proof. According to petitioner, the government had erroneously been allowed to prove petitioner's noncitizenship by evidence that was "clear and convincing," rather than "clear, *unequivocal*, and convincing," which, petitioner claimed, "signifies a higher burden." *Id.* at 12 (internal quotation marks omitted). The court of appeals disagreed, concluding that both phrases merely refer to "the familiar civil intermediate standard." *Id.* at 13. The court rejected petitioner's request to create a "fourth burden of proof" that would be "located in between clear and convincing evidence and proof beyond a reasonable doubt." *Id.* at 15-16.

The court of appeals also rejected petitioner's argument "that, notwithstanding the factual nature of the district court's findings, [appellate] review is independent—i.e., that this Court reviews the trial judge's factual determinations without deference." Pet. App. 17. Instead, the court of appeals held, the "plain terms" of Rule 52(a)(6) require that a district court's findings of fact "'must not be set aside unless clearly erroneous.'" *Id.* at 18. Reviewing the entire record,

the court of appeals found no basis to overturn the district court's determination that petitioner is not a United States citizen. *Id.* at 26-30. The court accordingly denied his petition for review. *Id.* at 30.

Judge N.R. Smith dissented in part, joined in part by three other judges. Pet. App. 30-50. Judge Smith was of the view that "[t]he burden of proof required for clear, unequivocal, and convincing evidence is greater than the burden of proof required for clear and convincing evidence." *Id.* at 33. Judge Smith agreed with the en banc court of appeals, however, that "Federal Rule of Civil Procedure 52(a) mandates the appropriate standard of [appellate] review." *Id.* at 45.

Judge Murguia, joined in full or in part by four other judges, concurred in part and dissented in part. Pet. App. 50-66. Judge Murguia agreed that "questions of fact" should be reviewed on appeal "for clear error" under Rule 52(a)(6). *Id.* at 50. She concluded, however, that the question whether "[p]etitioner's evidence of U.S. citizenship was illegally procured or obtained by fraud" was not a "pure finding of fact," but rather "a finding that clearly implies the application of standards of law," which should instead be reviewed "de novo." *Id.* at 50-51 (brackets and internal quotation marks omitted). Reviewing the record, Judge Murguia also concluded that the government had not met that evidentiary burden. *Id.* at 61-66.

## ARGUMENT

Petitioner renews his contention (Pet. 8-16) that the government must prove he is not a United States citizen by "clear, unequivocal, and convincing evidence," which petitioner maintains is different from the familiar "clear and convincing" intermediate stan-

dard of proof. Petitioner also argues (Pet. 16) that this Court's review is necessary to resolve a conflict between the decision below and the decision of another court of appeals. Petitioner is wrong on both counts. The decision below, which is faithful to this Court's precedents, is correct. And although some disagreement exists on this issue, the division of authority is shallow and of recent origin. It is also far from clear whether the issue would make a practical difference in any case.

Petitioner further argues (Pet. 18-26) that courts of appeals must conduct an "independent" review of the record when making citizenship determinations, rather than apply the "clearly erroneous" standard prescribed in Federal Rule of Civil Procedure 52(a)(6). Petitioner asserts (Pet. 26-27) that a division of authority exists on that issue. But the decision below correctly rejected petitioner's argument, and no conflict worthy of this Court's review exists.

1. a. In litigation, "[t]hree standards of proof are generally recognized, ranging from the 'preponderance of the evidence' standard employed in most civil cases, to the 'clear and convincing' standard reserved to protect particularly important interests in a limited number of civil cases, to the requirement that guilt be proved 'beyond a reasonable doubt' in a criminal prosecution." *California ex rel. Cooper* v. *Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 93 (1981) (per curiam) (footnote omitted). When citizenship is at issue in contexts including immigration, "[t]his Court has, on several occasions, held that the 'clear and convincing' standard or one of its variants is the appropriate standard of proof." *Ibid.* (citing cases). "The precise verbal formulation" of the intermediate standard,

however, has "varie[d], and phrases such as 'clear and convincing,' 'clear, cogent, and convincing,' and 'clear, unequivocal, and convincing' have all been used." *Id.* at 93 n.6 (citing Charles T. McCormick, *Handbook of the Law of Evidence* § 320, at 679 (1954)).

In this case, because petitioner had been issued a passport, the district court held that the government was required to rebut petitioner's evidence of United States citizenship "by presenting clear, unequivocal, and convincing evidence." Pet. App. 142. The court described that burden as being equivalent to the traditional "clear-and-convincing standard." *Id.* at 142-143. The court of appeals agreed, noting that "[t]he Supreme Court has repeatedly used the phrases 'clear, unequivocal, and convincing' and 'clear and convincing' interchangeably." *Id.* at 12. Whatever the precise wording used, the court of appeals noted, this Court's cases have rejected a preponderance standard in favor of the "familiar civil intermediate standard." *Id.* at 13.

In *Schneiderman* v. *United States*, 320 U.S. 118 (1943), for instance, the Court explained that "a certificate of citizenship" could not be set aside "upon a bare preponderance of evidence which leaves the issue in doubt." *Id.* at 125 (internal quotation marks omitted). Instead, such a certificate was "closely analogous to a public grant of land," which can be set aside only where "the evidence [is] 'clear, unequivocal, and convincing.'" *Ibid.* (citation and internal quotation marks omitted). In support of that conclusion, the Court cited the Wigmore treatise, *ibid.*, which explained that "some such phrase as 'clear and convincing proof,' is commonly applied to measure the necessary persuasion" in a variety of civil contexts, 9 John

Henry Wigmore, *Evidence in Trials at Common Law* § 2498, at 329 (3d ed. 1940) (Wigmore). The Court also stated that the government's burden was to provide "evidence of a clear and convincing character." *Schneiderman*, 320 U.S. at 123.

Later denaturalization cases followed a similar pattern. Relying on *Schneiderman*, the Court in *Baumgartner* v. *United States*, 322 U.S. 665 (1944), stated that the government was required to provide "'clear, unequivocal, and convincing' proof" in a denaturalization case. *Id.* at 671 (citation omitted). The Court also stated that "proof to bring about a loss of citizenship must be clear and unequivocal." *Id.* at 670[2]; see *Pullman-Standard* v. *Swint*, 456 U.S. 273, 286 n.16 (1982) (describing *Baumgartner* as resolving "whether or not the findings of the two lower courts satisfied the clear-and-convincing standard of proof necessary to sustain a denaturalization decree"). And in *Woodby* v. *INS*, 385 U.S. 276 (1966), the Court again stated that "[i]n denaturalization cases the Court has required the Government to establish its allegations by clear, unequivocal, and convincing evidence," a burden of proof that "is no stranger to the civil law." *Id.* at 285. In support, the Court cited to the same discussion in the Wigmore treatise of the clear-and-convincing standard that "has traditionally been imposed." *Id.* at 285

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[2] The clear-and-convincing standard of proof imposed upon the government in denaturalization cases is different from the burden of proof in cases involving a loss of nationality under 8 U.S.C. 1481(a). Those cases involve a loss of nationality by the voluntary commission of an expatriating act with the intention of relinquishing United States nationality, and the burden in such cases is "upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence." 8 U.S.C. 1481(b).

n.18 (citing Wigmore § 2498). The Court on several occasions has thus "ma[d]e plain that the phrase 'clear, unequivocal, and convincing' is simply one of the many articulations of the intermediate burden of proof." Pet. App. 14.[3]

In nonetheless arguing that the phrase "clear, unequivocal, and convincing" does not refer to the familiar intermediate standard—but rather to "a fourth burden of proof," Pet. App. 15—petitioner heavily relies (Pet. 13-16) on *Addington* v. *Texas*, 441 U.S. 418 (1979). The question in *Addington* was "what standard of proof is required by the Fourteenth Amendment to the Constitution in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital." *Id.* at 419-420. In answering that question, the Court noted that, "[g]enerally speaking," the law has developed "three standards or levels of proof for different types of cases": (1) a "mere preponderance of the evidence" used in "the typical civil case involving a monetary dispute between private parties"; (2) a standard in criminal cases of proof "beyond a reasonable doubt"; and (3) an "intermediate standard, which usually employs some combination of the words 'clear,'

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[3] Outside the citizenship context, this Court has routinely described *Schneiderman* and other citizenship cases as "mandat[ing] an intermediate standard of proof—'clear and convincing evidence.'" *Cruzan* v. *Director*, *Mo. Dep't of Health*, 497 U.S. 261, 282 (1990) (internal quotation marks omitted); see *ibid.* (citing *Schneiderman*); *Santosky* v. *Kramer*, 455 U.S. 745, 756-757 (1982) (citing *Woodby* and *Schneiderman*); see also *Cooper*, 454 U.S. at 93 (citing *Schneiderman* and *Woodby* as examples of decisions in which the Court "held that the 'clear and convincing' standard or one of its variants is the appropriate standard of proof in a particular civil case").

'cogent,' 'unequivocal' and 'convincing'" for cases that implicate "particularly important individual interests." *Id.* at 423-424. The Court rejected the petitioner's argument "that due process requires use of the criminal law's standard of proof," noting that in a civil commitment proceeding "state power is not exercised in a punitive sense." *Id.* at 427-428; see *id.* at 428 ("[W]e should hesitate to apply [the criminal standard of proof] too broadly or casually in noncriminal cases."). The Court similarly concluded that "the preponderance standard falls short of meeting the demands of due process." *Id.* at 431. Instead, the Court adopted the "middle level of burden of proof," which, the Court held, "strikes a fair balance between the rights of the individual and the legitimate concerns of the state." *Ibid.*

In the course of its discussion, the Court noted that several states had adopted verbal variations of the intermediate standard. *Addington*, 441 U.S. at 431-432 ("20 states, most by statute, employ the standard of 'clear and convincing' evidence; 3 states use 'clear, *cogent*, and convincing' evidence; and 2 states require 'clear, *unequivocal* and convincing' evidence.") (footnotes omitted). The Court then observed that, "[t]he 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 (footnote omitted). The Court also noted that the phrase "clear, unequivocal, and convincing" had been used in past cases addressing deportation and denaturalization. *Ibid.* The Court did not attempt to assess whether that formulation was different from the traditional intermediate standard, however; it instead merely "conclude[d] that use of the term 'unequivocal'

[wa]s not constitutionally required" in the context of a civil commitment proceeding. *Ibid.*

*Addington* does not support petitioner's argument. To the contrary, it reinforces the conclusion that the law typically applies one of "three standards or levels of proof," including the familiar "intermediate standard" in cases that implicate "particularly important individual interests." 441 U.S. at 423-424. In stating that "[t]he term 'unequivocal,' *taken by itself*, means proof that admits of no doubt," *id.* at 432 (emphasis added) (footnote omitted), the Court did not indicate that the term would have that meaning when used in combination with other signifiers of the "middle level of burden of proof," *id.* at 431. And certainly the Court did not suggest that proof in the immigration or citizenship context must "approximat[e], if not exceed[ ], that used in criminal cases," *id.* at 432, a proposition that would have directly contradicted prior precedent. See *Woodby*, 385 U.S. at 285 ("[A] deportation proceeding is not a criminal prosecution."); *Schneiderman*, 320 U.S. at 160 ("A denaturalization suit is not a criminal proceeding."). Petitioner therefore cannot rely on dicta in *Addington* to establish the existence of a fourth, *sui generis* burden of proof in citizenship cases. See Pet. App. 17 ("It is not necessary to create, out of whole cloth, a nebulous fourth burden to recognize that an alienage determination implicates important rights.").

b. Petitioner asserts (Pet. 16) that the decision below "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." In *Ward* v. *Holder*, 733 F.3d 601 (2013), the Sixth Circuit ad-

dressed "the appropriate degree of proof that the government must satisfy in a removal proceeding in which the government has charged a lawful permanent resident with inadmissibility." *Id.* at 602. The petitioner, who had attained the status of lawful permanent resident, left the United States to care for his elderly mother; upon his return three years later, he presented an expired green card, and the government determined that he had abandoned his permanent resident status and was inadmissible. *Id.* at 603. An immigration judge and the Board of Immigration Appeals found that "the charge of removability had been sustained by the requisite *clear and convincing evidence*." *Ibid.* (brackets omitted). The court of appeals vacated and remanded, concluding that the immigration judge had applied the wrong standard. *Ibid.* In the court's view, "'the clear, unequivocal, and convincing standard' is a more demanding degree of proof than the 'clear and convincing' standard." *Id.* at 605. The court also determined that the immigration judge had improperly placed the burden of proof on the petitioner, rather than on the government, which was inappropriate in the context of removal proceedings. *Id.* at 606. The court remanded the case for evaluation of the evidence under the correct burden. *Id.* at 608-609.

Although *Ward* addressed a different question than the one presented here—the standard in a removal proceeding for determining whether the government has proven the inadmissibility of a lawful permanent resident—petitioner is correct that *Ward*'s reasoning is inconsistent with the decision below. For several reasons, however, that inconsistency does not merit this Court's plenary review. As petitioner acknowl-

edges, only two courts of appeals (including the court below) have addressed whether "clear and convincing" is different than "clear, unequivocal, and convincing," and both cases were decided within the last three years. The division of authority is thus shallow and of relatively recent vintage. Moreover, given that both formulations have been used in the citizenship context for more than 70 years, see *Schneiderman*, 320 U.S. at 123, 125, the lack of appellate authority addressing the issue strongly suggests that it rarely, if ever, makes a practical difference. Petitioner himself has identified no case in which evidence found to be clear and convincing was nevertheless found insufficiently clear, *unequivocal*, and convincing.

Indeed, although petitioner insists (Pet. 12) that inclusion of the word "unequivocal" makes a difference because it requires "evidence that *does not leave the issue in doubt*," he omits to mention the origin of that formulation: It is *Schneiderman*'s statement that denaturalization "cannot be done upon *a bare preponderance of evidence which leaves the issue in doubt*." 320 U.S. at 125 (emphasis added) (citation omitted). The Court in *Schneiderman* was thus distinguishing the requisite level of proof from the "bare preponderance" standard used in traditional civil litigation; no distinction was being drawn between "clear and convincing" (on one hand) and "clear, unequivocal, and convincing" (on the other). To the contrary, as noted above, *Schneiderman* itself used both phrases interchangeably. Compare *id.* at 123 ("evidence of a clear and convincing character"), with *id.* at 135 ("clear, unequivocal, and convincing"); see also *id.* at 178 (Stone, C.J., dissenting) (criticizing the Court for "importing" a requirement that naturalization fraud

"must be proved by clear and convincing evidence"). Further review is unwarranted.

2. a. Under Federal Rule of Civil Procedure 52(a)(6), "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous." This Court has explained that Rule 52(a)(6) "does not make exceptions or purport to exclude certain categories of factual findings." *Pullman-Standard*, 456 U.S. at 287. Nor does the rule "divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts." *Ibid.* Rather, whenever the rule applies, it requires appellate deference to district court findings: "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson* v. *Bessemer City*, 470 U.S. 564, 574 (1985).

In this case, the court of appeals correctly applied Rule 52(a)(6) to the district court's factual findings, which it reviewed for clear error. Pet. App. 25. The court of appeals began by noting that "much of the evidence in this case is a matter of public record and [is] undisputed." *Id.* at 5. Among other things, the court pointed to several "facts [that] are beyond dispute," including petitioner's acceptance of voluntary departure "on multiple occasions"; his repeated deportation under the name Salvador Mondaca-Vega; his signed affidavit under that name; and fingerprints taken for Salvador Mondaca-Vega that match petitioner's. *Id.* at 26. The court also reviewed "evidence to the contrary" offered by petitioner, but it noted that such evidence, "[m]uch of [which] turned on credibility," was properly found by the district court to be

"inconsistent and implausible." *Id.* at 27-28. Finally, the court of appeals identified "some minor errors in the district court's factfinding," but found those to be "inconsequential in light of [other] undisputed evidence." *Id.* at 28-29. The court of appeals thus was "not 'left with the definite and firm conviction that a mistake ha[d] been committed'" by the district court, and accordingly it denied the petition for review. *Id.* at 30 (quoting *Anderson*, 470 U.S. at 573).

In challenging that ruling, petitioner argues (Pet. 20-26) that an appellate court must apply "independent review" to a district court's findings whenever citizenship is at stake. For that argument, petitioner relies (Pet. 20-21) on denaturalization cases such as *Baumgartner*, *supra*, in which, he contends, this Court has declined to defer to lower court factual findings. Those cases, however, do not support petitioner's argument.

The question in *Baumgartner* was whether the government could set aside a naturalization decree that had allegedly been obtained by fraud. The government claimed that the petitioner, contrary to the oath he took upon becoming a citizen, "did not truly and fully renounce his allegiance to Germany and that he did not in fact intend to support the Constitution and laws of the United States and to give them true faith and allegiance." 322 U.S. at 666. The trial judge held that the petitioner's allegiance to the United States had not been "unqualified and unconditional," and the court of appeals agreed. *Baumgartner* v. *United States*, 138 F.2d 29, 34-35 (8th Cir. 1943). In considering the level of appellate deference owed to that conclusion, this Court explained:

> The conclusiveness of a "finding of fact" depends on the nature of the materials on which the finding is based. The finding even of a so-called "subsidiary fact" may be a more or less difficult process[,] varying according to the simplicity or subtlety of the type of "fact" in controversy. Finding so-called ultimate "facts" more clearly implies the application of standards of law. And so the "finding of fact" even if made by two courts may go beyond the determination that should not be set aside here. Though labeled "finding of fact," it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of "fact" that precludes consideration by this Court. 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. Deference properly due to the findings of a lower court does not preclude the review here of such judgments.

322 U.S. at 670-671 (citation omitted).

The Court therefore itself reviewed the "broadly social judgments" at stake in *Baumgartner*. 322 U.S. at 671; see *id.* at 671-672 ("The gravamen of the Government's complaint and of the findings and opinions below is that Baumgartner consciously withheld allegiance to the United States and its Constitution and laws."). The Court ultimately disagreed with the lower courts that the petitioner's pro-Hitler views meant that "he had knowing reservations in forswearing his allegiance to the Weimar Republic and em-

bracing allegiance to this country." *Id.* at 677. Subsequent denaturalization cases—which petitioner cites (Pet. 20-21)—have applied a similar level of scrutiny in determining whether naturalized citizens had truthfully professed "attach[ment] to the principles of the Constitution" or had instead "taken a false oath of allegiance." *Knauer* v. *United States*, 328 U.S. 654, 656 (1946); see *Costello* v. *United Stats*, 365 U.S. 265, 270 (1961) (petitioner was accused of not being "a person of good moral character, attached to the principles of the Constitution of the United States") (internal quotation marks omitted); *Chaunt* v. *United States*, 364 U.S. 350, 351 (1960) (petitioner was accused of "lack[ing] the requisite attachment to the Constitution"); *Nowak* v. *United States*, 356 U.S. 660, 663-665 (1958) (similar); see also *Fedorenko* v. *United States*, 449 U.S. 490, 509-514 (1981) (petitioner's past service as an armed guard at a Nazi concentration camp, if disclosed, would have disqualified him for a visa).

*Baumgartner* and its progeny do not help petitioner. Those cases indicate only that certain "broadly social judgments—judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship"—do not constitute "the kind of 'fact'" that requires traditional appellate deference. 322 U.S. at 671. That does not mean, however, that genuine factual findings need not be accorded deference. This Court explained the difference in *Pullman-Standard*, *supra*:

> 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 * * * but to findings that "clearly imply the application of standards of law."

456 U.S. at 287 n.16 (quoting *Baumgartner*, 322 U.S. at 671) (brackets omitted); see *Teva Pharm. USA* v. *Sandoz, Inc.*, 135 S. Ct. 831, 837 (2105) (Rule 52(a)(6) "applies to both subsidiary and ultimate facts.").

This case, by contrast, did not require the district court to make any "broadly social judgments" or to consider "the whole nature of our Government and the duties and immunities of citizenship." *Baumgartner*, 322 U.S. at 671. Instead, "[t]he question for the district court was straightforward: Who is the petitioner?" Pet. App. 21. As the court of appeals explained, the answer to that question involved "no questions of law—nor mixed questions of law and fact." *Ibid.* Rather, it was an "entirely fact-bound" determination. *Id.* at 22. By insisting (Pet. 20) that the court of appeals should have applied "independent review" to the district court's factual determinations, therefore, petitioner has read *Baumgartner* to mean what "it surely did not mean." *Pullman-Standard*, 456 U.S. at 287 n.16; see *Anderson*, 470 U.S. at 574 (deference under Rule 52(a) applies "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts").

Indeed, deference under Rule 52(a)(6) to the district court's factual findings was particularly appropriate in this case given the case's procedural posture. After the Board of Immigration Appeals affirmed the immigration judge's decision, petitioner filed a petition for review in the court of appeals. The court

found "a genuine issue of material fact about the petitioner's nationality," 8 U.S.C. 1252(b)(5)(B), and it accordingly transferred the case to the district court. Pet. App. 122. Section 1252(b)(5)(B) calls upon a district court in that situation to hold "a new hearing" and to render "a decision * * * as if an action had been brought in the district court under section 2201 of title 28"—which is the United States Code provision authorizing district courts to issue declaratory judgments. Upon transfer of the petition for review, therefore, the district court was required to resolve an "issue of fact" in the same manner that it would in a typical declaratory judgment action. Since Rule 52(a)(6) would indisputably apply to a district court's factual determinations in such an action, there is no reason for a different result here. See *Teva Pharm. USA*, 135 S. Ct. at 837 ("[W]hen reviewing the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*.") (internal quotation marks omitted).

b. No division of authority exists on this issue. Petitioner asserts (Pet. 26) the existence of a "divide among the circuits," but the cases he identifies all involved denaturalization proceedings under 8 U.S.C. 1451(a). As explained above, the principles articulated in *Baumgartner* regarding appellate review of "broadly social judgments" in denaturalization proceedings, 322 U.S. at 671, have no application to the "entirely fact-bound" determination at issue here, Pet. App. 22. And district court proceedings under Section 1252(b)(5)(B), unlike naturalization proceedings under Section 1451(a), require the court to resolve "a genuine issue of material fact * * * as if an action [for a

declaratory judgment] had been brought in the district court." 8 U.S.C. 1252(b)(5)(B). See pp. 20-21, *supra*.

But even in the denaturalization context, there is no division of authority worthy of this Court's review. Three circuits have applied a clearly erroneous standard to review a district court's factual findings regarding citizenship. See *United States* v. *Firishchak*, 468 F.3d 1015, 1023 (7th Cir. 2006); *United States* v. *Koziy*, 728 F.2d 1314, 1318-1319 (11th Cir.), cert. denied, 469 U.S. 835 (1984); *United States* v. *Demjanjuk*, 680 F.2d 32, 33 (6th Cir.) (per curiam), cert. denied, 459 U.S. 1036 (1982).[4] The only decision to the contrary cited by petitioner is *United States* v. *Zajanckauskas*, 441 F.3d 32 (1st Cir. 2006), in which the court of appeals stated that, "in denaturalization proceedings," the clear-error standard of Rule 52(a)(6) is "qualified * * * to an extent." *Id.* at 37. Yet even that decision did not apply the "independent review of a district court's findings" that petitioner advocates (Pet. 26). Rather, the court of appeals stated that it would "accord weight to a district court's findings in deference to the wisdom of the general rule of judicial administration based on the opportunity afforded that court to observe witnesses in the flesh and judge their credibility," but that it would "not weight those findings as heavily as [it] would in other cases of a civil nature." *Zajanckauskas*, 441 F.3d at 37-38 (citation omitted). Moreover, because the court ultimately concluded that "the district court committed no error," *id.* at 41, its

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[4] Petitioner's admission (Pet. 26) that those decisions applied deference "[w]ithout discussing *Baumgartner*" belies his claim that a well-considered division of opinion exists in the courts of appeals.

discussion of the standard of review was dicta in any event.

In sum, no other court of appeals has considered whether clear-error review under Rule 52(a)(6) applies to a district court's findings in a Section 1252(b)(5)(B) proceeding. And even in the distinct context of a denaturalization proceeding, no circuit has adopted the "independent review" standard that petitioner advocates.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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