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Brief for the Florence Immigrant and Refugee Rights Project and Thomas & Mack Legal Clinic as Amici Curiae Supporting Petitioners, Mondaca-Vega v. Lynch

Hillary G. Walsh

No. 15-1153

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

BRIEF OF *AMICI CURIAE* FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT AND THOMAS & MACK LEGAL CLINIC, UNIVERSITY OF NEVADA, LAS VEGAS, WILLIAM S. BOYD SCHOOL OF LAW, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae proffer this brief to highlight to the Court the extreme importance of the uniform and clear application of (1) the government's evidentiary burden of proof when it challenges a prior citizenship determination, and (2) the standard of review a court of appeals maintains over a district court's citizenship determination. These questions are tied directly to the precious right of citizenship, and this Court's resolution of the circuit split on these issues will affect countless U.S. citizens, noncitizens, and their families.

Amicus Florence Immigrant and Refugee Rights Project ("FIRRP") is a nonprofit legal service organization providing free legal services to men, women, and unaccompanied children in immigration custody in Arizona, where about 10 percent of the country's immigrant detainees are housed. FIRRP has represented numerous U.S. citizens who have been errantly placed in removal proceedings and detained. FIRRP has also represented and is aware of numerous U.S. citizens who the government has errantly deported.

Amicus Thomas & Mack Legal Clinic at the University of Nevada, Las Vegas, William S. Boyd School of Law, is an organization that provides pro bono representation for indigent and vulnerable individuals. The immigration clinic within the

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[1] Counsel of record provided both parties with timely notice of *amici*'s intent to file this brief. The parties' written consent is on file with the Court Clerk. The parties' counsel did not author the brief in whole or in part, and no person or entity outside the organizations and attorney listed on this brief made a monetary contribution to its preparation or submission.

Thomas & Mack Legal clinic advocates for non-citizens and immigrant communities through a variety of methods, including direct legal representation to individuals pursuing relief from deportation. The clients of both *amici* will be significantly affected by this case.

Furthermore, counsel of record is currently litigating a contested U.S. citizenship case in the Ninth Circuit that requires the application of the standard of proof and appellate review rules established in *Mondaca-Vega v. Lynch*, 808 F.3d 415 (9th Cir. 2015), the decision underlying the Petition for a Writ of Certiorari. Thus, while *amici* and counsel of record have no interest in this particular case, they do have a direct interest in the legal questions raised in this matter.

SUMMARY OF ARGUMENT

Citizenship in this country is our most basic right. It is the key that unlocks all the rights contained in the Constitution; citizenship is the right to have rights. It is also critical to the self-governance of our Republic. The questions presented in this case ask the Court to clarify the legal standards at play when the government seeks to take away its prior, repeated, albeit nonjudicial, acknowledgement of this precious right. First, what evidentiary burden must the government meet when it challenges its prior acknowledgement of U.S. citizenship? Is "clear and convincing" evidence necessary, or does the fact that a "priceless possession" hangs in the balance require the government to meet a higher burden, that of "clear, unequivocal, and convincing" evidence?

The decision below directly conflicts with the decisions of the Sixth Circuit and Board of Immigra-

tion Appeals ("BIA") on this issue, with the lower court holding that both standard formulations equate to the intermediate degree of proof found in civil law, and the Sixth Circuit and BIA holding that adding "unequivocal" creates a higher standard, one that dispels all doubt.

The "clear, unequivocal, and convincing" formulation is the evidentiary standard immigration courts must apply every day. Where on the spectrum of proof this standard lies is therefore crucial to the uniform and just application of our immigration laws. For example, this is the standard for establishing an immigration court's jurisdiction—immigration courts do not have jurisdiction over U.S. citizens—and therefore as a threshold matter in every removal proceeding, the government must establish that the individual it seeks to remove is an "alien" over whom the court has jurisdiction by "clear, unequivocal, and convincing" evidence. But immigration courts routinely assert jurisdiction over U.S. citizens in error by finding the government met its burden of proving alienage. Immigration courts also commonly order these U.S. citizens removed by finding the government met its burden to prove inadmissibility by "clear, unequivocal, and convincing" evidence. Thus, even before the circuit split created by the decision below, immigration judges were unsure of how exacting a standard "clear, unequivocal, and convincing" is, and now that there is a clear disruption of national uniformity on this issue, the errant deportation of U.S. citizens will only persist and increase in frequency.

The second question presented asks whether a court of appeals may review a district courts citizenship finding de novo, or is the court of appeals lim-

ited to clear error? Given the disturbing number of U.S. citizens detained and deported errantly based on judicial findings that they are "aliens" by "clear, unequivocal, and convincing" evidence, the resolution of what standard of review the appellate court should apply is critical, not only because de novo review would provide an additional safeguard against errant removal of U.S. citizens, but also because of the importance of the uniform and just application of the law regarding U.S. citizenship.

The Court should grant the writ to resolve whether "clear, unequivocal, and convincing" is the same as "clear and convincing" proof, and to clarify what standard of review the court of appeals is to apply when reviewing a district court's citizenship determination. Not only are these issues affecting our most precious right, but by granting the writ, this Court will reduce the widespread harm errantly deported U.S. citizens and their families endure when their U.S. citizenship is not adequately safeguarded.

THE COURT SHOULD GRANT THE WRIT.

The questions presented implicate (A) the "precious right" of U.S. citizenship guaranteed by the Fourteenth Amendment and (B) the "severe consequences" citizens endure when the government strips them of their previously recognized citizenship. *Costello v. United States*, 365 U.S. 265, 269 (1961) ("American citizenship is a precious right. Severe consequences may attend its loss . . . ."). What evidentiary burden must the government meet when challenging a prior citizenship determination? And what standard of review does the court of appeals apply when reviewing a de novo district court citizenship determination?

This Court has repeatedly recognized that these are issues of incredible importance, for the proper administration of the law affecting citizenship impacts "the whole nature of our Government . . . ." *See, e.g.*, *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (internal quotation marks and citation omitted); *Baumgartner v. United States*, 322 U.S. 665, 666 (1944) ("We brought the case here because it raises important issues in the proper administration of the law affecting naturalized citizens."); *Schneiderman v. United States*, 320 U.S. 118, 120 (1943) (same).

The Court has repeatedly addressed related issues to ensure that the appropriate safeguards are uniformly applied to protect U.S. citizens from being detained and deported in error, and this Court should do so again here by granting certiorari.

A. U.S. citizenship is a fundamental right that goes to the heart of our democracy, and therefore it is critical that the Court clarify what constitutionally required judicial safeguards exist to ensure our government does not deport U.S. citizens.

"Precious." *Costello*, 365 U.S. at 269.

Worth an "intangible value," *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 189 (1989), that "would be difficult to exaggerate . . . ." *Schneiderman*, 320 U.S. at 122.

"The highest hope of civilized man." *Id.*

Americans' "most basic right." *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

This is how this Court has described only one right conferred by the Constitution—U.S. citizenship—and rightfully so: citizenship is a critical component of our Republic, for it is U.S. citizens alone who give the government power. *Foley v. Connelie*, 435 U.S. 291, 296, 297 (1978) (observing "a democratic society is ruled by its people" and "the right to govern is reserved to citizens"); Decl. of Independence ("Governments are instituted among Men, deriving their just powers from the consent of the governed."); Times Editorial Board, *Why U.S. Citizenship Matters*, L.A. Times (Oct. 19, 2014), http://tinyurl.com/gqs6wuj (opining that citizenship is important not just because of the certainty, stability, and a sense of empowerment that come with the rights it confers, but also because it requires citizens to invest in our government through civic duties, such as voting, jury duty, and service in public office, all of which are necessary to a self-governing commonwealth).

A key aspect of self-governance is that the government cannot lightly take away the precious right of citizenship—whether through denaturalization, expatriation, or the deportation proceedings instituted against a person who claims U.S. citizenship. *Schneiderman*, 320 U.S. at 125 (finding citizenship "rights once conferred should not be lightly revoked" through denaturalization); *Woodby v. INS*, 385 U.S. 276, 286 (1966) (adopting the denaturalization standard of proof established in *Schneiderman* in all deportation cases because the "immediate hardship of deportation is often greater than that inflicted by denaturalization, which does not, immediately at least, result in expulsion from our shores").

This Court has consistently recognized the importance of this right (1) by consistently granting certiorari in cases implicating citizenship, (2) by repeatedly holding that the government must prove its case with "clear, unequivocal, and convincing evidence" which does not leave "the issue in doubt" when citizenship is at stake, and (3) by permitting de novo appellate review of citizenship determinations. *See, e.g.*, *United States v. Minker*, 350 U.S. 179, 197 (1956) (concurring opinion) ("When we deal with citizenship we tread on sensitive ground"); *Chaunt*, 364 U.S. at 353 (internal quotation marks omitted) (citing *Schneiderman*, 320 U.S. at 125, 158, and *Baumgartner*, 322 U.S. at 670); *Woodby*, 385 U.S. at 286 (holding that "no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true"); *Baumgartner*, 322 U.S. at 671 ("Suffice it to say that emphasis on the importance of 'clear, unequivocal, and convincing' proof" in denaturalization cases "would be lost if the ascertainment 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") (citation omitted).

Indeed, this Court has found that citizenship is a right as important as life itself, a point emphasized by this Court's holding that the government's standard of proof when citizenship is at stake is "substantially identical with that required in criminal cases—proof beyond a reasonable doubt." *Klapprott v. United States*, 335 U.S. 601, 611-12 (1949) (citation omitted); *see also Fedorenko v. United States*, 449 U.S. 490, 505-506 (1981) (citation omit-

ted) ("Any less exacting standard would be inconsistent with the importance of the right that is at stake"); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) ("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").

The heightened burden of proof and de novo appellate review of citizenship determinations safeguard all Americans, including those the government has expressly recognized as citizens, from being subjected to "a fate of ever-increasing fear and distress," never knowing "when and for what cause his existence in his native land may be terminated," and "[h]e may be subject to banishment, a fate universally decried by civilized people." *See, e.g.*, *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (finding the Eight Amendment prohibits the use of denationalization as punishment).

Given the extreme importance of citizenship to our Republic, the Court should grant certiorari to clarify what safeguards exist to protect one's citizenship from errant termination and subsequent banishment.

B. The circuit split created by the decision below disrupts the uniform meaning of "clear, unequivocal, and convincing" evidence, a legal standard that not only arises in numerous contexts every day, but also affects countless U.S. citizens, noncitizens, and their families.

The "clear, unequivocal, and convincing" evidentiary standard is at play in numerous contexts countless times every day across the country, including in the denaturalization context, as referenced above, in addition to (1) the immigration removal context (2) the contested U.S. citizenship context, and (3) federal legislation; it therefore (4) impacts countless U.S. citizens and their families.

For these reasons, it is imperative that the Court resolve what this standard means and what level of review circuit courts afford lower courts' finding of whether that standard is met. Is "clear, unequivocal, and convincing" the same as "clear and convincing" as the Ninth Circuit found in *Mondaca-Vega*, 808 F.3d at 415? Or does "the omission of 'unequivocal' make[] a difference," as the Sixth Circuit and Board of Immigration Appeals have held? *See Ward v. Holder*, 733 F.3d 601, 605 (2013); *Matter of Patel*, 19 I&N Dec. 774, 783 (1988) ("[T]he clear and convincing standard imposes a lower burden than the clear, unequivocal, and convincing standard . . . because it does not require that the evidence be unequivocal or of such a quality as to dispel all doubt") (citations omitted). Put slightly differently: Is "[t]he 'clear, unequivocal, and convincing standard' . . . a more demanding degree of proof than the 'clear and convincing' standard"? *Ward*, 733 F.3d at 605. The Court's answer to this question is

critical to the uniform and just application of our laws implicating U.S. citizenship.

1. "Clear, Unequivocal, and Convincing" Evidence in the Immigration Removal Context.

Immigration judges have jurisdiction over noncitizens or "aliens" only, and therefore, at the outset of every removal proceeding, the government must establish the individual's "alienage" by "clear, unequivocal, and convincing" evidence. *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923) ("[A]lienage is a jurisdictional fact; . . . an order of deportation must be predicated upon a finding of that fact."), *overruled on other grounds by INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *Ramon-Sepulveda v. INS*, 743 F.2d 1307, 1308 n. 2 (9th Cir. 1984) (holding that the government must prove alienage by "clear, convincing, and unequivocal evidence").

In fiscal year 2015 alone, immigration judges found the government met this "exacting" standard in over 124,500 cases. *See, e.g.*, Dep't of Homeland Sec., *DHS Releases End of Fiscal Year 2015 Statistics* [hereinafter "DHS Press Release"] (Dec. 22, 2015), http://tinyurl.com/prkj8dd (reporting that in fiscal year 2015, the Department of Homeland Security ("DHS") removed 462,463 individuals from the U.S.); *see also* John F. Simanski, *Immigration Enforcement Actions: 2013*, Dep't of Homeland Sec. Annual Rep't, 1-2, (Sept. 2014), http://tinyurl.com/gwc4de2 (reporting that in fiscal year 2013, the most recent fiscal year itemizing DHS removals, approximately 73 percent (337,598) of all removals were through expedited and reinstated orders of removal—through which noncitizens are removed

"without a hearing before an immigration judge"—and therefore the remaining 27 percent of individuals removed (about 124,865) appeared before an immigration judge before being removed).

Despite the frequency with which immigration judges must apply this evidentiary standard, immigration judges are apparently unsure of its meaning, a conclusion supported by the fact that immigration judges routinely find jurisdiction over U.S. citizens, but then go on to order them removed. *See Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law of the H. Comm. on the Judiciary*, 110th Cong. (2008) [hereinafter "*Rep't*"], *available at* http://tinyurl.com/jjmsrfr (2008 testimony of *amicus*, Att'y Kara Hartzler).

For example, in 2008, *amicus* FIRRP's then legal director, Attorney Kara Hartzler, testified before Congress that "the numbers I personally am seeing border on routine deportation and detention of U.S. citizens." *Id.* This problem has persisted. Recent empirical research shows that DHS improperly detains approximately 2,500 U.S. citizens every year, and immigration judges errantly order the removal of some of those individuals. *See* Jacqueline Stevens, *Detaining and Deporting U.S. Citizens as Aliens*, 18 Va. J. Soc. Pol'y & L. 613 n.17, 618, 630 (2011) (observing that the actual number of U.S. citizens deported is unknowable due largely to DHS's policy "not to maintain records of U.S. citizens [it] has detained or deported," and reporting that based on her groundbreaking empirical research, "[Immigration and Customs Enforcement ("ICE"), an agency within DHS,] has incarcerated over 20,000 U.S.

citizens, and deported thousands more" from 2003 to 2011); *see also* William Finnegan, *The Deportation Machine* [hereinafter "Finnegan"], The New Yorker (April 29, 2013), http:// tinyurl.com/ncpkyea (citing Northwestern political science professor Jacqueline Stevens and reporting that about one percent of the "tens of thousands" of immigration detainees are U.S. citizens).

This data shows that immigration judges are not holding the government to the exacting "clear, unequivocal, and convincing" standard for establishing alienage; the lack of uniformity among the circuits the decision below created regarding the meaning of this standard will only increase the likelihood of the errant deportation of citizens. Given that "U.S. citizens are [already] being detained and deported from the United States not monthly or weekly, but on a daily basis," the Court should immediately clarify the standard immigration judges use to establish their jurisdiction in all removal hearings in this country. *See Rep't*, *available at* http://tinyurl.com/jjmsrfr (2008 testimony of *amicus*, Att'y Kara Harzler).

2. "Clear, Unequivocal, and Convincing" Evidence in the Context of Contested U.S. Citizenship Cases.

When an individual like Petitioner appeals his removal order to a circuit court by claiming U.S. citizenship, the court of appeals must determine whether there are genuine issues of material fact regarding the citizenship claim. 8 U.S.C. § 1252(b)(5)(B). If there are, the court must transfer the citizenship issue to a district court for a de novo hearing on this issue. *Id.*

In the Ninth Circuit, the federal court jurisdiction with the largest number of individuals in removal proceedings, the "clear, unequivocal, and convincing" evidentiary standard comes into play twice in these de novo district court alienage hearings. *See* DHS Press Release, n.1 (Dec. 22, 2015), http://tinyurl.com/prkj8dd. First, if the government offers proof of the individual's foreign birth, a rebuttable presumption of alienage arises, which the individual may rebut with substantial credible evidence of citizenship, thereby shifting the burden back to the government to ultimately prove alienage by "clear, unequivocal, and convincing" evidence. *Ayala-Villanueva v. Holder*, 572 F.3d 736, 737 n.3 (9th Cir. 2009). Second, as in removal proceedings, the government "bears the ultimate burden of establishing all facts supporting deportability by clear, unequivocal, and convincing evidence." *Chau v. INS*, 247 F.3d 1026, 1029 n.5 (9th Cir. 2001).

The Second and Third Circuits are the only other circuit courts with decisions addressing the evidentiary standard in de novo district court hearings on alienage; both circuits also require "clear, unequivocal, and convincing" evidence of alienage. *McConney v. INS*, 429 F.2d 626, 628 (2d Cir. 1970); *see also United States. v. Ghaloub*, 385 F.2d 567, 570 (2d Cir. 1966) (placing initial burden of proving citizenship on individual, and shifting burden to the government if individual shows a prior governmental determination establishing his citizenship and requiring government to prove expatriation or the prior citizenship determination was in error by "clear, unequivocal, and convincing evidence"); *Johnson v. Attorney Gen. of U.S.*, 235 F. App'x 24, 40 (3d Cir. 2007) (placing initial burden of proof on

individual, then shifting the burden to the government rebut presumption of citizenship with "clear, unequivocal, and convincing" evidence) (citing *Delmore v. Brownell*, 236 F.2d 598, 600 (3d Cir.1956)).

Given that some circuit courts, like the lower court here, do not permit de novo review of the findings reached by the district court in alienage determinations, including whether the government satisfied its burden to provide "clear, unequivocal, and convincing" evidence of alienage, it is critical that the Court clarify and create uniformity regarding the meaning of this standard, which directly affects one's precious right of citizenship. Indeed, the appeal of at least one district court's alienage determination is currently pending before the Ninth Circuit. *See Boateng v. Lynch*, No. 11-72044 (9th Cir.).

3. "Clear, Unequivocal, and Convincing" Evidence in Federal Legislation.

The "question of what degree of proof is required" in a proceeding "is the kind of question which has traditionally been left to the judiciary to resolve . . . ." *Woodby*, 385 U.S. at 284. However, Congress often amends statutes in response to this Court's construction of a statute, including its holdings regarding the appropriate degree of proof. *See Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 313 (1994) ("Congress, of course, has the power to amend a statute that it believes we have misconstrued."); *Ward*, 733 F.3d at 604.

For example, in *Woodby*, this Court held for the first time that the government must establish deportability with "clear, unequivocal, and convincing" evidence. 385 U.S. at 277. In 1996, however,

Congress amended the Immigration and Nationality Act ("INA") to reflect that "in cases of deportable aliens" (as opposed to "inadmissible" aliens), the government's evidentiary burden is "clear and convincing," not *Woodby*'s "clear, unequivocal, and convincing." Yet, in the same section of the INA, Congress incorporated a different evidentiary degree of proof by requiring "clear, unequivocal, and convincing" evidence in absentia cases. 8 U.S.C. § 1229a(b)(5)(A).

Under the cardinal rules of statutory construction, courts must "give effect to each word in a statute," *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004), and "avoid a reading which renders some words altogether redundant," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995). But the lower court's decision equates the two standards. This forces courts within the lower court's jurisdiction to violate these cardinal rules of statutory construction by rendering Congress' use of "unequivocal" meaningless or redundant. Thus, regardless of whether this Court originally intended to create two different evidentiary standards in *Schneiderman*, Congress has created two evidentiary formulations. This Court's clarification is therefore needed by (1) courts that must apply this standard on a daily basis, (2) the agency in its interpretation of two separate standards enunciated by Congress, and (3) Congress, so it may accurately legislate its intent and amend the INA as necessary.

4. The Circuit Split Created By the Lower Court's Decision Regarding the Meaning of "Clear, Unequivocal, and Convincing" Evidence Affects Countless U.S. Citizens and Their Families.

The fact that immigration judges are not only erroneously asserting jurisdiction over U.S. citizens by finding "clear, unequivocal, and convincing" evidence of their "alienage," but also ordering them deported shows that even before the circuit split created by the decision below, immigration judges are grappling with how "exacting" this degree of proof is. *See Rept.*, *available at* http://tinyurl.com/jjmsrfr (2008 testimony of *amicus*, Att'y Kara Hartzler) ("U.S. citizens are being detained and deported from the United States not monthly or weekly, but on a daily basis."). Given that immigration courts will now begin holding the government to different evidentiary burdens based on the same standard formulation, the occurrence of errant U.S. citizens' deportation will only increase.

The following are scenarios and real-life stories that, in *amicus*'s experience, are representative of the catastrophic effect the confusion over the meaning of the "clear, unequivocal, and convincing" standard has on all U.S. citizens and their family members. The Court should not only clarify the government's evidentiary burden, but it should also create national uniformity regarding the court of appeals' standard of review of a district court's alienage determinations.

a. The "Clear, Unequivocal, and Convincing" Standard Impacts All Children Born Abroad to Married U.S. Citizen Parents.

As previously addressed, in removal proceedings and in de novo district court alienage hearings, the government can create a presumption of alienage by providing evidence of the individual's foreign birth, such as a foreign birth certificate or passport. The burden then shifts to the individual claiming U.S. citizenship who must rebut this presumption of alienage with substantial credible evidence of U.S. citizenship. If the individual provides sufficient evidence, the burden shifts back to the government to provide "clear, unequivocal, and convincing" evidence of alienage.

Thousands of children are born abroad every year, for example to married U.S. citizens serving as missionaries and to U.S. military service menbers stationed overseas with their families. These foreign-born children are U.S. citizens at birth. 8 U.S.C. § 1401(c). They are issued a U.S. passport, but they are not formally adjudicated as U.S. citizens. These children are in a position similar to Petitioner in this regard.

Consequently, these foreign-born U.S. citizens face a higher risk of errant deportation than U.S. citizens born in the U.S. because, if wrongly placed in removal proceedings, these children would be required to rebut a presumption of alienage. Given that "7 percent of U.S. citizens do not have ready access to proof of their citizenship such as a U.S. Passport, naturalization papers, or a birth certificate"—a figure that increases to 12 percent among U.S. citizens who make less than $25,000 per year—it is extremely likely that children born abroad to

U.S. citizen parents could be errantly deported since they have even less documentary proof of U.S. citizenship by virtue of having no U.S. birth certificate and no naturalization paperwork. *See Rep't*, *available at* http://tinyurl.com/jjmsrfr (testimony of Rachel E. Rosenblookm, Human Rights Fellow, Center for Human Rights and Int'l Justice at Boston College).

The Court should create uniformity regarding the government's evidentiary burden when proving alienage.

b. Thomas Warziniack's story illustrates how critical the uniform and just application of the "clear, unequivocal, and convincing" evidentiary standard is to prevent the errant detention of U.S. citizens.

Amicus FIRRP regularly represents U.S. citizens errantly detained after being placed in removal proceedings. One such client was Thomas Warziniack, a Minnesota-born, Georgia-raised U.S. citizen with a mental illness and heroin addiction who was errantly detained as an unlawfully present noncitizen. After law enforcement arrested him on a minor drug charge in Colorado, he told them that he had been shot seven times, stabbed twice, and bombed four times as a Russian army colonel in Afghanistan before he swam to America from a Russian submarine. Despite having evidence of his U.S. citizenship in their records, these law enforcement officers notified immigration authorities of Mr. Warziniack's unlawful presence. Removal proceedings were then instituted and he was trasferred to a detention facility in Florence, Arizona.

Because Mr. Warziniak was detained, "he did not have access to his birth certificate; nor did he

have any family or friends who could obtain a copy. *Rep't*, *available at* http://tinyurl.com/jjmsrfr (testimony of *amicus*, Att'y Kara Hartzler). "He had heard it cost $30 to order a copy of his birth certificate, so he was working in the prison kitchen for a dollar a day until he had the money to order one. So far, he had $8 and he hoped to earn the remaining $22 before his next court date in several weeks." *Id.*

Mr. Warziniak was eventually able to obtain a copy of his birth certificate and prove his citizenship, thereby preventing his deportation, but "[e]ven now, the prison records inaccurately show his current location as 'the Soviet Union.'" Marisa Taylor, *Immigration Officials Detaining, Deporting American Citizens*, McClatchyDC (Jan. 28, 2008), http://tinyurl.com/gsbxntz.

In *amicus's* experience, stories like Mr. Warziniak's are not rare. For example, in 2008, *amicus* had an average of "40 to 50 cases per month in which individuals with potentially valid claims to U.S. citizenship [we]re being detained and deported." *Rep't*, *available at* http:// tinyurl.com/jjmsrfr (2008 testimony of *amicus*, Att'y Kara Hartzler). While somewhat less common now than in 2008, *amicus* continues to see individuals with potentially valid claims to U.S. citizenship being placed in removal proceedings, detained, and deported on a regular basis. These citizens often belong to racial and ethnic minorities, or are mentally ill, homeless, indigent, or without the family or monetary means to obtain the necessary documents to prove their citizenship. It is therefore crucial that immigration courts not only uniformly apply the "clear, unequivocal, and convincing" evidentiary burden when determining alienage—the threshold to establishing jurisdiction—but

also understand precisely where on the spectrum of proof this standard lies. By granting certiorari in this case, the Court can accomplish both of these important goals.

c. Mark Lyttle's story illustrates that clarification and uniform application of the "clear, unequivocal, and convincing" standard is necessary to prevent the errant deportation of U.S. citizens.

Unlike Mr. Warziniak, who was able to obtain evidence of his U.S. citizenship prior to being removed, Mark Lyttle, a North Carolina-born U.S. citizen, was not. *See* Finnegan, The New Yorker (April 29, 2013), http:// tinyurl.com/ncpkyea. Like Mr. Warziniak and many other U.S. citizens errantly placed in removal proceedings, Mr. Lyttle has cognitive problems. *Id.* "He can read, but writes with difficulty." *Id.* He was in mental institutions, jails, and group homes for much of his adolescence and young adulthood. *Id.*

When he was incarcerated for misdemeanor assault, the clerk completing Mr. Lyttle's intake form mistakenly listed "Mexico" as his place of birth and "Alien" as his citizenship status. *Id.* However, Mr. Lyttle speaks no Spanish and has no familial ties to Mexico. Stevens, *Detaining and Deporting U.S. Citizens as Aliens*, 18 Va. J. Soc. Pol'y & L. at 674. During numerous ICE interviews, Mr. Lyttle repeatedly claimed he was born in the U.S, yet was still placed in removal proceedings. Finnegan, The New Yorker (April 29, 2013), http:// tinyurl.com/ncpkyea.

Although he told the immigration judge twice that he was a U.S. citizen, the judge still ordered him deported. *Id.* "He later told an interviewer, 'I was

going to appeal until I found out that it would be six months to two years before I'd have a chance, and, even if I did that, they still wouldn't believe me.'" *Id.* He found the detention center so intolerable that he had already attempted suicide once. *Id.*

After he was ordered removed, ICE flew Mr. Lyttle in handcuffs and shackles to Hidalgo, Texas where he was left with "only the green prison outfit he had on when ICE picked him up six weeks earlier in North Carolina" and a deportation order for "Jose Thomas." Stevens, *Detaining and Deporting U.S. Citizens as Aliens*, 18 Va. J. Soc. Pol'y & L. at 674. He was then instructed to walk across a bridge to Reynosa, Mexico. *Id.* Meanwhile, Mr. Lyttle's family searched for their missing son, "contacting the jails and hospitals they knew, and even checking the obituaries." Finnegan, The New Yorker (April 29, 2013), http://tinyurl.com/ ncpkyea.

When Mr. Lyttle tried to reenter the U.S., border patrol officers threatened him with prison time. Stevens, *Detaining and Deporting U.S. Citizens as Aliens*, 18 Va. J. Soc. Pol'y & L. at 675. He spent the next "four and a half months in shelters, immigration camps, and a jail in Mexico, Honduras, Nicaragua, El Salvador, and Guatemala." *Id.*

Mr. Lyttle attempted to reenter the U.S. two more times. *Id.* He was refused reentry the first time, and the second time resulted in an Expedited Removal Order based on falsely misrepresenting himself as a U.S. citizen. *Id.* He eventually obtained a U.S. passport through the help of a consular office and was allowed to reenter the U.S., but his records still do not correctly identify him as a U.S. citizen. *Id.* at 676. For example, he was later "detained in the Atlanta airport en route to see his brother, a soldier

based in Kentucky," and was nearly deported to Mexico again based on a third Expedited Removal Order. *Id.* This was prevented at the eleventh hour, however, when an ICE agent realized the error. *Id.*

The lower court's decision disrupts uniformity of the already murky degree of proof that is supposed to prevent immigration courts from asserting jurisdiction over U.S. citizens and thereby ensuring that U.S. citizens are never removed from their country. The Court should grant certiorari to restore and clarify this important evidentiary standard to ensure more cases like Mr. Lyttle's do not occur.

d. Peter Guzman's story illustrates the severe, long-term suffering errantly deported U.S. citizens and their families endure.

Peter Guzman is a U.S. citizen who was born in Los Angeles, California. *Rept.* (testimony of James J. Brosnahan, Att'y for Mr. Guzman). Like Mr. Warziniak and Mr. Lyttle, Mr. Guzman is a person of limited mental capacity," and at the age of 30, he had "about a second grade reading ability." *Id.* In 2007, he was incarcerated in county jail for 40 days on a trespassing charge, during which immigration officials "interviewed him and asked if he was a citizen," even though both ICE and the sheriff's office had records of Mr. Guzman's U.S. citizenship. *Id.* ("They had [evidence of Mr. Guzman's citizenship] in their computers, but they didn't look, evidently, so they say . . . ."); Paloma Esquivel, *Suit Filed Over Man's Deportation Ordeal* [hereinafter "Esquivel"], L.A. Times (Feb. 28, 2008), http://tinyurl.com/pgkx38l.

During these interviews, Mr. Guzman repeatedly stated that he was a U.S. citizen. *Rep't*, *available at* http://tinyurl.com/jjmsrfr (testimony of Mr.

Brosnahan). He also "complained of hearing voices while in custody, and was prescribed anti-psychotic medication." *See* Esquivel, L.A. Times (Feb. 28, 2008), http://tinyurl.com/pgkx38l (reporting the allegations set forth in Mr. Guzman's lawsuit).

However, Mr. Guzman eventually agreed to the interviewing agent's repeated suggestion that he was actually born in Mexico, like his parents were, and was therefore not a citizen. *Rep't*, *available at* http://tinyurl.com/jjmsrfr (testimony of Mr. Brosnahan) ("And [the interviewing agent] said, But your parents were born in Mexico, you can't be a citizen, and sent him back to a holding cell and then brought him back again.").

ICE then "put him on a bus with $3, [and] [t]hey took him to Tijuana." *Id.* And "[f]or three months, he tried to get back into his country . . . ." *Id.* For three months, "[h]e had to eat out of garbage cans. He had to wash himself in the Tijuana River." *Id.* He was able to call his mother once, but before he could tell her exactly where in Tijuana he was, the line was cut. Jacqueline Stevens, *Thin ICE*, The Nation (June 5, 2008), http://tinyurl.com/j6ncbtp.

His mother went to Tijuana to find him; she wandered the streets, left fliers with his photo at the morgue, hospitals, churches, and shelters. Esquivel, L.A. Times (Feb. 28, 2008), http://tinyurl.com/pgkx38l (reporting the allegations in Mr. Guzman's lawsuit). "When her money ran out after three days, she slept in the closet-sized backroom of a banana warehouse, where she was allowed to stay in exchange for cooking for the warehouse workers, according to the suit." *Id.*

Mr. Guzman was finally permitted to return; however, he is now "terrified of strangers and has been unable to return to work," and the problems he had before have worsened. *Id.* He no longer speaks, and his mother must accompany him when he goes out in public. *Id.*

By clarifying the degree of proof required to prove alienage, the Court will immediately curb the daily occurrence of wrongful deportations of U.S. citizens and prevent additional stories of needlesssuffering like that of Mr. Guzman and his family. Clarification will also restore the just and uniform application of immigration laws, thereby preventing stories of suffering like Mr. Guzman's from increasing in frequency. Finally, these issues directly implicate the precious right of U.S. citizenship, and therefore are eminently deserving of this Court's consideration.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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