C.A. No. 17-56276

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OSCAR OLIVAS,

Petitioner-Appellant,

v.

DAVID SALAZAR et al.,

Respondents-Appellees.

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the United States District Court
For the Southern District of California
D.C. No. 14-cv-01434-WQH-BLM
(Honorable William Q. Hayes)

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INTRODUCTION

For over 40 years, Oscar Olivas lived as a citizen born in the United States. The government consistently confirmed his citizenship. Based on findings he was a citizen, it granted immigrant visas to his mother and his first wife. On several hundred occasions, immigration agents admitted him to the United States as a citizen during his daily commute. Mr. Olivas justifiably relied on the government's assurances, as anyone would.

But in 2010 the government abruptly changed course, questioning his citizenship while processing a visa for his second wife, because his birth certificate was registered a few months after his birth, something it previously found uncontroversial. While interrogating his mother at the U.S. consulate in Juarez, investigators extracted a statement from her that he was born in Mexico, which she later disavowed ("Juarez Statement"). As the district court found, the Juarez Statement is hearsay, not admissible to establish the truth of its contents.

Based on that statement, without a Mexican birth certificate or any other admissible evidence that Mr. Olivas was born in Mexico, the government summarily barred him from re-entering the United States and exiled him to Mexico, where he was living with his wife during the visa application process in reliance on the government's assurances he was a citizen. Despite his repeated pleas, the government provided him with no hearing to challenge his exile, forcing

him to bring this action. Due to the government's intransigence, Mr. Olivas remains stranded in stateless exile, as Mexico does not recognize him as a citizen.

In these circumstances, the district court erred in forcing Mr. Olivas to bear the burden to prove he is a citizen. Under this Court's precedent, Mr. Olivas established a prima facie case of citizenship based on the government's numerous findings that he was a citizen, and the government must bear the burden to disprove his citizenship by clear and convincing evidence. If the government had initiated removal proceedings against him, which it could have done long ago, it would have been required to prove by clear and convincing evidence he was not a citizen. This Court should not reward the government for its delay and negligence by forcing Mr. Olivas to prove facts occurring over 40 years ago. With the burden of proof properly allocated, the government did not prove Mr. Olivas is not a U.S. citizen, because the record contains no admissible evidence of his birth outside the United States. Accordingly, Mr. Olivas is entitled to judgment as a matter of law that he is a U.S. citizen.

The district court was initially correct in finding that it had jurisdiction because Mr. Olivas stated a claim to U.S. citizenship. The court later erred in finding that it lacked jurisdiction under 8 U.S.C. § 1252(g). By its terms, section 1252(g) does not deprive the court of jurisdiction, because it applies only to claims brought by an "alien," and a court has jurisdiction to determine its jurisdiction,

which in this case includes the question whether Mr. Olivas is a U.S. citizen. In addition, narrowly construed as it must be, section 1252(g) only applies to discretionary decisions to commence immigration proceedings, adjudicate such proceedings, or execute removal orders. This case does not arise from any such decision or exercise of discretion. The government made an administrative error, not a discretionary choice, in failing to commence proceedings against Mr. Olivas, consigning him to a Kafkaesque limbo that forced him to commence this action. The district court therefore had jurisdiction, and its judgment must be reversed.

STATEMENT OF JURISDICTION

This district court had jurisdiction pursuant to 28 U.S.C. § 1331 because Mr. Olivas's "rights to judicial review of his citizenship claim and to U.S. citizenship (if he is a citizen) are guaranteed to him by the Constitution." *Rivera v. Ashcroft*, 394 F.3d 1129, 1139 (9th Cir. 2005); *see also Iasu v. Smith*, 511 F.3d 881, 891 (9th Cir. 2007) ("We are still bound by the holding in *Rivera* that 'a non-frivolous claim to U.S. citizenship' gives a person a constitutional right to judicial review.").

It also had jurisdiction pursuant to 28 U.S.C. § 2241 because the government placed Mr. Olivas in constructive custody by exiling him to Mexico. *Flores-Torres v. Mukasey*, 548 F.3d 708, 711 (9th Cir. 2008); *Rivera*, 394 F.3d at 1138-39.

The district court entered final judgment in favor of the government on all claims. I ER 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The

judgment was entered on August 17, 2017, and Mr. Olivas filed timely a notice of appeal on August 18, 2017. II Excerpts of Record ("ER") 101-05; Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF ISSUES PRESENTED

1. When the government previously determined Mr. Olivas is a U.S. citizen and consistently treated him as such for decades but later summarily exiled him without any hearing or process, does it bear the burden to prove by clear and convincing evidence that he is not a citizen?

2. Is Mr. Olivas entitled to judgment as a matter of law because the record contains no admissible evidence that he was born outside the United States?

3. Did 8 U.S.C. § 1252(g), which by its terms only applies to claims brought by an "alien," deprive the district court of jurisdiction to decide whether Mr. Olivas is a U.S. citizen?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Mr. Olivas's Birth and Childhood

Oscar Olivas was born on August 10, 1969. I ER 13, 91 ¶ 1. His California birth certificate – the only birth certificate in the record – indicates he was born on 78th Street in Los Angeles, California. IV ER 643; VII ER 1192. Mr. Olivas's mother and other witnesses testified Mr. Olivas was born in Los Angeles. II ER

252, 299-300; III ER 577-78. When he was a child, relatives told him he was born in a house on 78th Street in Los Angeles. IV ER 602-04.

Mr. Olivas's mother, Delia Perez, was born in Mexico on January 11, 1947, the youngest of six daughters, to Cresencio Olivas and Maria Trinidad Olivas. I ER 11-12; III ER 555-58; VII ER 1199-1205. Ms. Perez was raised in and around Mexicali, Mexico. I ER 11-12; III ER 555-60. Cresencio and Maria Trinidad are now deceased. I ER 11; II ER 292.

In 1963 or 1964 when Ms. Perez was sixteen or seventeen years old, she began entering the United States unlawfully to work as a field hand in California's Imperial Valley. I ER 11; III ER 563-64. After giving her a voluntary departure to Mexico in 1964, the government provided her a valid border crossing card in 1965, which allowed her to enter the United States for 48-hour periods. I ER 11, 92 ¶ B2; VII ER 1196-97. Social Security records confirm Ms. Perez's presence in the United States less than three months after Mr. Olivas's birth, when she applied for a social security number in Los Angeles on November 3, 1969. III ER 586-87; VII ER 1190-91.

In 1963, Mr. Olivas's biological father Raul Encinas – whose identity Mr. Olivas did not know until around 2012 – became a lawful permanent resident in the United States and eventually moved to Los Angeles, California. II ER 272-79. Baptism records for Mr. Encinas's daughter demonstrate he was still in Los

Angeles on February 8, 1969, just a few months after Mr. Olivas was conceived. II ER 276-77; VII ER 1193-94. Mr. Encinas was diagnosed with progressive Alzheimer's disease in 2001. I ER 38; II ER 282.

Ms. Perez began the process of registering Mr. Olivas's birth at the County Recorder's office on January 12, 1970, when she first signed the birth certificate. VII ER 1192. Ms. Perez, who testified that she registered Mr. Olivas's birth so he could be seen by a doctor for immunizations, completed the registration of Mr. Olivas's birth on January 19, 1970, the same day as Mr. Olivas's first immunization with a doctor, according to his immunization records. I ER 91-92 ¶ 4; III ER 590; VII ER 1175-78, 1192. The birth certificate lists Ms. Perez as the attendant to the birth. VII ER 1192.

Mr. Olivas has three U.S. citizen children, a U.S. citizen younger brother, and countless U.S. citizen aunts, uncles, and other family members. I ER 20; III ER 555-58; IV ER 614-15, 629. He was raised in California, where he went to school, attended church, received his first communion, played on the football and wrestling teams, and registered for the selective service, all in the honest belief he was a U.S. citizen. IV ER 602-04, 607-09.

B. Government Determinations of Mr. Olivas's Citizenship and Treatment Consistent with Citizenship

On April 8, 1972, the government granted Mr. Olivas's mother an immigrant visa based on a finding that he is a U.S. citizen. I ER 19, 92 ¶ B3; III ER 337-39, 343-44; IV ER 610, 740; VII ER 1171-74, 1170.

In 1989, he married Cristina Partida, who was not a U.S. citizen, and petitioned for her to obtain an immigrant visa based on his citizenship. I ER 20; IV ER 610-11; VII ER 1145-46. Because immigration laws required the visa to be processed through a U.S. consulate in Mexico, the couple moved to Mexicali, Mexico to await adjudication, and Mr. Olivas commuted across the border to work in Calexico, California. IV ER 610-11. He crossed approximately six times a week, presenting his birth certificate, social security card, and driver's license to border inspectors, and on each occasion he was admitted into the U.S. as a citizen. IV ER 611.

On November 6, 1989, the Immigration and Naturalization Service ("INS") granted Mr. Olivas's petition for Ms. Partida, based on a finding that he was a U.S. citizen. I ER 20, 92 ¶ B8; IV ER 612-13; VII ER 1145-46. Ms. Partida's visa was approved on December 5, 1991. I ER 20, 92 ¶ B9.

The couple moved back to the United States, had children, and eventually returned to Mexicali for the more affordable cost of living. IV ER 614-15. Mr.

Olivas again commuted to the United States for work and also brought his daughter to school in Calexico, entering the country almost daily. IV ER 616, 624. Again, on each occasion, he was admitted into the country as a U.S. citizen after immigration agents inspected his documents. IV ER 616.

On December 2, 1998, Mr. Olivas attempted to bring marijuana into the U.S. through the Calexico port of entry. IV ER 624-27. He was referred to secondary inspection due to his nervous behavior and a concern about the authenticity of his birth certificate. I ER 92 ¶ B10. He was eventually convicted for importation of marijuana. I ER 92-93 ¶ B11. However, the government did not challenge his citizenship or attempt to deport him for what would have been a removable offense if committed by a noncitizen. I ER 21; IV ER 627; *see*, *e.g.*, 8 U.S.C. § 1227(a)(2)(B). Indeed, a condition of his probation required him to remain in the United States. I ER 21; IV ER 627-28. Again, therefore, the government treated him as a citizen.

In 2004, Mr. Olivas married his second wife, Claudia Hernandez. I ER 21; IV ER 628. As before, Mr. Olivas petitioned for his wife, as well as his stepson, to obtain lawful permanent residence based on his U.S. citizenship. I ER 21; IV ER 628. As before, Mr. Olivas and his family, including his then 8-year-old U.S. citizen daughter, moved to Mexicali in fall 2010, to live together while the application was processed. I ER 21; IV ER 628-29. As before, Mr. Olivas

commuted regularly through the Calexico port of entry to work and bring his daughter to school in Calexico, and immigration agents routinely admitted him as a U.S. citizen. I ER 21; IV ER 629, 631, 635-6.

C. Juarez Interviews

On November 5, 2010, government officials interviewed Ms. Hernandez at the U.S. consulate in Juarez, Mexico regarding her visa application, after which they instructed her to return with Ms. Perez on December 17, 2010, confirmed by a written notice provided to Ms. Hernandez the same day. I ER 21; III ER 552; IV ER 632-33, 654; VI ER 1139-40.

Ms. Perez traveled from Salinas, California to Mexicali, Mexico to meet Ms. Hernandez. I ER 21; III ER 541. On December 16, 2010, the two traveled 16-20 hours by bus to Juarez. I ER 21; III ER 541-42. The trip involved multiple checkpoints, and they barely slept. III ER 542-43. They arrived the night before the interview, and Ms. Perez, who was 63 at the time, fell and badly injured her shoulder in their motel, leaving her in considerable pain and unable to sleep. I ER 21-22; III ER 543-46; VII ER 1199-1205.

The next morning, a State Department official questioned Ms. Perez without making any recording. I ER 22, 93 ¶¶ 12-13; IV ER 721. By the time Ms. Perez emerged from the interrogation, she had signed a statement indicating that Mr. Olivas was born in a clinic in Tijuana, Mexico, 133 miles from Mexicali, and that

she had entered the United States when Mr. Olivas was three months old ("Juarez Statement"). I ER 23; II ER 197-98; VI ER 996; VI ER 1137. She later disavowed that statement. II ER 237-38; VI ER 1055-62, 1114-15.

D. Mr. Olivas's Stateless Exile

For months after the Juarez Statement, immigration agents continued to admit Mr. Olivas to the U.S. as a citizen as he commuted to work from Mexicali. IV ER 635-36. On January 11, 2011, Mr. Olivas applied for a passport in Los Angeles, California. I ER 31, 93 ¶ 15. It was denied because he was behind on his child support payments, not because of foreign birth. I ER 31-32, 93 ¶17.

Then, suddenly, on August 22, 2011, when Mr. Olivas presented at the Calexico port of entry as usual, he was referred to secondary because of the Juarez Statement. I ER 32-33; II ER 135-37. He was taken into custody, detained overnight, and questioned. IV ER 637-39. Customs and Border Protection ("CBP") agents called his mother as well. II ER 142-43; IV ER 637-38. Both Mr. Olivas and his mother asserted the Juarez Statement was false and that he was born in Los Angeles. I ER 32; II ER 142-43; IV ER 637-39. CBP agents denied him entry into the United States on the contention he is not a U.S. citizen and exiled him to Mexico to await a hearing. I ER 32-33; II ER 157; IV ER 640-41.

The hearing never came. I ER 32-33; IV ER 641. Once a week for almost two years, Mr. Olivas called the immigration court's hotline to find out when his

hearing would be, but none was ever scheduled. I ER 32-33; IV ER 641. He went to the port of entry several times to request a hearing but stopped after a supervisor threatened to arrest him for attempted illegal entry if he returned again.[1] I ER 33; IV ER 641-42. He also attempted to reach CBP through its website and a letter to its headquarters, but he never received a hearing. IV ER 642. As the government conceded, it made an "administrative error" in failing to initiate any proceedings or provide Mr. Olivas with any hearing or process to challenge his summary exile from the United States. II ER 112, 114-11; VI ER 1048.

On July 24, 2012, Mr. Olivas applied for a certificate of citizenship on form N-600. I ER 33, 93 ¶ 18. The application was denied on the ground that he had not acquired or derived citizenship from his mother, not that he was born outside the United States. I ER 33, 93 ¶ 19. Although the N-600 is ordinarily used by others to seek certification of citizenship for foreign-born children of U.S. citizen parents, Mr. Olivas stated he was born in the United States. II ER 265; VI ER 1116.

[1] Such a threat would have been unlawful because under the "official restraint doctrine," an individual who presents at a port of entry has not made an entry, and therefore cannot be guilty of unlawful entry or re-entry. *See*, *e.g.*, *United States v. Argueta-Rosales*, 819 F.3d 1149, 1160 (9th Cir. 2016) ("We doubt Congress intended to make criminals out of persons who, for any number of innocent reasons, approach immigration officials at the border."). CBP officers are instead required to provide, at minimum, an administrative hearing for individuals making a claim to citizenship at a port of entry. *See* 8 U.S.C. § 1225(b)(2)(A); 8 C.F.R. § 235.3(b)(5)(i).

On January 17, 2013, Mr. Olivas applied for a passport at the U.S. consulate in Tijuana, Mexico, but it was denied based on the Juarez Statement. I ER 33, 93 ¶ 21. Mr. Olivas remains exiled in Mexico because the government has refused to allow him to return to the United States. I ER 92 ¶ 5; IV ER 642. Neither the U.S. nor Mexican governments recognize him as a citizen. IV ER 642-644.

II. PROCEDURAL HISTORY

After the government failed to initiate any proceedings to justify its summary exile of Mr. Olivas for nearly three years, he filed this action on June 12, 2014. Based on the Constitution and Non-Detention Act, he sought a writ of habeas corpus ordering the government to allow him to enter the United States as a citizen, declaratory judgment that he is a U.S. citizen, and an injunction against prohibiting him from entering the United States or detaining him upon entry. VI ER 1063, 1080-83. After denying the government's motions to dismiss, the district court expedited discovery and scheduled an evidentiary hearing. I ER 10; ECF Nos. 23, 72, 88.

Before the hearing, Mr. Olivas argued that the government must bear the burden to prove by clear and convincing evidence he is not a U.S. citizen, because it previously determined he was a citizen and consistently treated him as such. IV ER 666-74; ECF Nos. 99, 102, 105. The district court held otherwise, deciding that Mr. Olivas must bear the burden to prove U.S. citizenship by a preponderance of

evidence. I ER 95, 98. However, the court directed both sides to present all available evidence, regardless of his ruling, and the government agreed to do so. IV ER 669-74.

The government presented no admissible evidence, such as a Mexican birth certificate, showing that Mr. Olivas was born outside the United States, nor does any other admissible evidence establish that fact. The court held the Juarez Statement was inadmissible to establish the truth of its contents and allowed it only for the limited purpose of impeachment. I ER 43. During and after the hearing, Mr. Olivas sought judgment as a matter of law because the record contained no admissible evidence he was born outside the United States. II ER 199-200; ECF No. 152.

After the hearing, the district court issued an order denying habeas relief. I ER 8-47. The court found Mr. Olivas "likely honestly believes he was born in the United States." I ER 36, 45. However, the court again held the government bore no burden of proof. I ER 35. The court found Mr. Olivas did not prove he was born in Los Angeles 46 years earlier. I ER 36, 45. It found witnesses other than Mr. Olivas and his wife not credible because of various inconsistencies as well as impairments such as his birth father's Alzheimer's disease. I ER 36-46. The court made no finding that Mr. Olivas was born in Mexico, stating only that he "has not met his burden to prove that … he is a citizen of the United States by birth." I ER 46.

The district court subsequently determined that 8 U.S.C. § 1252(g) deprived it of jurisdiction over Mr. Olivas's claims and eventually entered final judgment, after which Mr. Olivas timely appealed. I ER 1; II ER 101-105.

SUMMARY OF ARGUMENT

Oscar Olivas grew up in the honest belief he was a U.S. citizen by birth. U.S. Const., amend. XIV, § 1. The government determined he was a citizen by approving visas for his mother and first wife and admitting him into the country hundreds of times based on his citizenship. Mr. Olivas justifiably relied on the government's repeated assurances of his citizenship. Yet more than four decades after his birth, the government suddenly reversed course and summarily exiled him from the United States without any hearing or process, forcing him to commence this action.

In these circumstances, this Court's precedent requires the government to prove by clear and convincing evidence that Mr. Olivas is not a citizen. *Lee Hon Lung v. Dulles*, 261 F.2d 719, 720 (9th Cir. 1958) (cited with approval in *Mondaca-Vega v. Lynch*, 808 F.3d 413, 419 (9th Cir. 2015) (en banc), *cert. denied*, 137 S. Ct. 36 (2016)). In *Lung*, the government admitted the plaintiff to the United States as a citizen but denied his application for a passport 34 years later on the ground he was not a citizen, forcing him to take legal action to determine his

citizenship. 261 F.2d at 720. On those facts, this Court required the government to prove the plaintiff was not a citizen by clear and convincing evidence. *Id.* at 724.

The decision in *Lung* controls this case and requires the government to prove by clear and convincing evidence that Mr. Olivas is not a citizen. Indeed, the record here presents a stronger case than *Lung* for requiring the government to bear the burden of proof. In *Lung*, the government made a single decision the plaintiff was a citizen. Here, the government made hundreds of decisions Mr. Olivas was a citizen, on which he justifiably relied. The district court therefore erred in requiring Mr. Olivas to bear the burden to prove facts occurring over 40 years earlier.

If the government had commenced removal proceedings against Mr. Olivas, as it could have done long ago, it would have been required to prove by clear and convincing evidence in a de novo hearing in district court that he was not a citizen. 8 U.S.C. § 1252(b)(5)(B); *Mondaca-Vega*, 808 F.3d at 419. The government must bear the same burden and standard of proof here. This Court should not reward the government for its delay and negligence by forcing Mr. Olivas to bear the burden of proof.

The district court erred in disregarding the controlling precedent in *Lung*. With the burden properly allocated to the government, Mr. Olivas is entitled to judgment as a matter of law because the record contains no admissible evidence that Mr. Olivas was born outside the United States. The government produced no

foreign birth certificate for Mr. Olivas, though it routinely does so to prove other individuals were born outside the United States and in fact did so for Mr. Olivas's mother. The Juarez Statement, the principal evidence on which it summarily exiled Mr. Olivas, is inadmissible to prove he was born in Mexico, and the district court considered it only for the limited purpose of impeachment. The government cannot sustain its burden of proof merely by impeaching Mr. Olivas's evidence. Without admissible evidence that Mr. Olivas was born outside the United States, the record is insufficient as a matter of law to establish he is not a U.S. citizen. Because the government had a full and fair opportunity to make its case and agreed to do so notwithstanding the district court's ruling on burden of proof, this Court should reverse the judgment and direct entry of judgment in favor of Mr. Olivas.

The district court was initially correct that it had jurisdiction to determine whether Mr. Olivas is a citizen. It later incorrectly relied on 8 U.S.C. § 1252(g) to find it lacked jurisdiction. By its terms, section 1252(g) only applies to claims brought by an "alien." Because Mr. Olivas stated a claim to citizenship, the court had jurisdiction to determine its jurisdiction, which is inseparable from the merits in this case. In addition, narrowly construed as it must be, section 1252(g) only applies to discretionary decisions to commence immigration proceedings, adjudicate cases in such proceedings, or execute removal orders issued in such proceedings. Here, by contrast, the government made no decision and exercised no

discretion in failing to commence proceedings against Mr. Olivas. Instead, it made an administrative error that left Mr. Olivas in limbo, forcing him to file this action. The district court had jurisdiction, and its judgment must be reversed.

STANDARD OF REVIEW

The decision whether to grant a petition for habeas corpus is reviewed de novo. *Flores-Torres*, 548 F.3d at 710; *Singh v. Ilchert*, 63 F.3d 1501, 1506 (9th Cir. 1995). The allocation of the burden of proof is reviewed de novo. *Molski v. Foley Estates Vineyard & Winery, LLC*, 531 F.3d 1043, 1046 (9th Cir. 2008); *Estate of Mitchell v. C.I.R.*, 250 F.3d 696, 701 (9th Cir. 2001). Legal questions, including sufficiency of the evidence, are reviewed de novo. *United States v. Brugnara*, 856 F.3d 1198, 1207 (9th Cir. 2017), *cert. denied*, No. 17-6057, 2017 WL 4181065 (U.S. Oct. 30, 2017); *Price v. U.S. Navy*, 39 F.3d 1011, 1021 (9th Cir. 1994). While interpretation of the hearsay rule is a question of law reviewed de novo, the decision to admit or exclude specific evidence as hearsay is reviewed for abuse of discretion. *Calmat Co. v. U.S. Dep't of Labor*, 364 F.3d 1117, 1122 (9th Cir. 2004). Whether the district court had jurisdiction is reviewed de novo. *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009).

ARGUMENT

I. BECAUSE THE GOVERNMENT PREVIOUSLY DETERMINED MR. OLIVAS IS A U.S. CITIZEN AND CONSISTENTLY TREATED HIM AS SUCH, IT MUST BEAR THE BURDEN TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT HE IS NOT A CITIZEN.

A. The Government Must Bear the Burden to Prove Mr. Olivas Is Not a U.S. Citizen Because It Made Repeated Findings He Was a Citizen, on which He Justifiably Relied for Decades.

Ordinarily, the plaintiff in a civil action bears the burden of proof throughout the case. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57 (2005). But that general rule must yield in this case. Under this Court's precedent, the government's determinations that Mr. Olivas is a U.S. citizen, which he pursued in good faith and on which he justifiably relied, required the government to bear the burden to disprove his citizenship.

In a civil action to determine citizenship, when the evidence shows the government has previously determined the plaintiff is a citizen, the plaintiff has "established a prima facie case" sustaining any initial "burden of proving that he is an American citizen," after which the government must prove by clear and convincing evidence the plaintiff is not a citizen. *Lung*, 261 F.2d at 720. That decision controls this case.

In *Lung*, immigration inspectors at a port of entry, then known as a "board of special inquiry," admitted the plaintiff into the United States in 1923 as a citizen

based on his birth in Hawaii, but in 1957 the State Department denied his application for a passport, claiming he was not a citizen. *Id*. Like Mr. Olivas, Mr. Lung filed an action for a judgment declaring his U.S. citizenship. *Id.* The district court ruled against Mr. Lung because the evidence "was of at least equal weight." *Id.* at 721.

This Court reversed, holding that the government's previous decision to admit Mr. Lung established "a prima facie case" of citizenship that required the government to bear the burden of proof, even though the decision was "informal and summary" and did "not have the standing of a judgment." *Id.* at 720, 724. Because Mr. Lung risked losing "the 'priceless benefits' that derive from the status of citizenship," which he enjoyed for 34 years "in reliance on the board decision," the "practical effect of a decision favorable to the Government in this case is the same as that which results from a decision favorable to the Government in a denaturalization case." *Id.* at 724 (quoting *Schneiderman v. United States*, 320 U.S. 118, 122 (1943)); *cf. Costello v. United States*, 365 U.S. 265, 269 (1961) (recognizing "[s]evere consequences" arising from the loss of citizenship may be "aggravated when the person has enjoyed his citizenship for many years"); *Baumgartner v. United States*, 322 U.S. 665, 675 (1944) ("New relations and new interests flow, once citizenship has been granted. All that should not be undone unless the proof is compelling.").

As a result, this Court required the government to prove by clear and convincing evidence that the plaintiff was not a citizen. *Lung*, 261 F.2d at 724; *see also Delmore v. Brownell*, 236 F.2d 598, 599-600 (3d Cir. 1956) (cited with approval in *Lung*, 261 F.2d at 723) (where immigration official had issued letter stating plaintiff was U.S. citizen, government was "required to disprove its own determination by 'clear, unequivocal, and convincing evidence'"). That rule conforms to the principle that "[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); *cf. Gorbach v. Reno*, 219 F.3d 1087, 1097 (9th Cir. 2000) (noting that because "denaturalization may result in loss of both property and life; or of all that makes life worth living … where there is doubt it must be resolved in the citizen's favor") (citations and quotation marks omitted).

This case is controlled by *Lung* because the government previously determined Mr. Olivas was a citizen on numerous occasions and he developed numerous ties to the United States and family relationships with U.S. citizens, including his own children, in the honest belief he was a citizen. To grant his mother a visa in 1972, it necessarily found he was a U.S. citizen. The immigration laws in place at the time exempted the parents of U.S. citizens from labor certification requirements applicable to all other non-citizens. *See, e.g.*, *Ventura-*

Escamilla v. Immigration & Naturalization Serv., 647 F.2d 28, 29 (9th Cir. 1981). Ms. Perez's visa demonstrates her case fell within this exemption based on a finding that Mr. Olivas was a U.S. citizen. IV ER 740; VII ER 1170.

Similarly, to grant his first wife a visa in 1989, the government necessarily determined Mr. Olivas was a U.S. citizen as a condition of eligibility for the visa. 8 U.S.C. §§ 1151-1154; 8 C.F.R. § 103.2(b) ("An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication."). As the petitioner, Mr. Olivas had to submit "documents which establish the United States citizenship… of the petitioner," such as his birth certificate, which the government did not question. 8 C.F.R. § 204.1(f)(1), (g; *see also* 8 C.F.R. § 204.2(a)(2) (requiring "evidence of United States citizenship").

The INS was required to investigate and verify Mr. Olivas's citizenship to approve the petition. 8 U.S.C. § 1154(b) ("After an investigation of the facts in each case… the Attorney General shall, if he determines that the facts stated in the petition are true and that the alien on behalf of whom the petition is made is an immediate relative [of a U.S. citizen]…, approve the petition."); *Escobar v. Immigration and Naturalization Serv.*, 896 F.2d 564, 566 (D.C. Cir. 1990) ("To grant 'immediate relative' status based on marriage, the INS must first conclude that the facts alleged in the citizen's petition are true."). The INS confirmed as

much on the approved petition itself, noting that it "investigates claimed relationships and verifies the validity of documents." VII ER 1146. Therefore, by approving his first wife's visa, the government again determined that Mr. Olivas is a U.S. citizen.

The visas were approved by an agency "quite capable of ferreting out fraudulent claims" if it had wished to do so. *Kaho v. Ilchert*, 765 F.2d 877, 886 (9th Cir. 1985). The visa approvals were at least as deliberate and considered as an on-the-spot decision by a "special board of inquiry," which was merely a small body of inspectors at a port of entry. *See Lung*, 261 F.2d at 723 n.11. Such a board had "no power to compel witnesses to attend" and was required to reach a "prompt determination" of "a very summary sort" based "upon such evidence as is at hand or is readily accessible." *Pearson v. Williams*, 202 U.S. 281, 284-85 (1906). Indeed, even a letter from an immigration official that was "not a formal adjudication of citizenship status" and did not have "the dignity of a determination by a 'Board of Special Inquiry'" is sufficient to require the government to disprove citizenship. *Delmore*, 236 F.2d at 600. Accordingly, the government's multiple determinations of Mr. Olivas's citizenship are certainly sufficient to do so here.

The government reaffirmed its determinations several hundred times by admitting him as a citizen when he was living in Mexicali and commuting to the United States. I ER 21; IV ER 611, 615-16; 624, 635-36. Each time Mr. Olivas

presented at the port of entry, immigration agents were required to verify he is a U.S. citizen. *See* 8 U.S.C. § 1185(b) n.1; Pub. L. 108-458 (2004), § 7209(c)(2)(A). On each occasion, they did so, further assuring Mr. Olivas the government considered him a citizen.

The government underscored its determinations of Mr. Olivas's citizenship by treating him as a citizen in connection with his criminal case. Despite suspicions about Mr. Olivas's birth certificate when he was arrested, I ER 92 ¶ 10, it did not initiate removal proceedings against him, although he was convicted of a crime that would have rendered a non-citizen removable. 8 U.S.C. §§ 1227(a)(2)(B), (a)(2)(A)(iii); 1101(a)(43)(b). Instead, it reassured him he was a U.S. citizen by imposing a probation term forbidding him to go to Mexico. I ER 21; IV ER 627-28.

On the undisputed facts, the government determined Mr. Olivas was a citizen in approving immigrant visas for his mother and first wife, admitting him to the country hundreds of times as a citizen, and treating him as a citizen after his conviction. If the single decision at a port of entry in *Lung* was sufficient to require the government to disprove citizenship, the government's multiple determinations of Mr. Olivas's citizenship require it to bear the same burden in this case. Indeed, the record here presents a stronger case for requiring the government to bear that burden than in *Lung* itself.

The government may not complain that the processes by which it previously determined Mr. Olivas's citizenship were "too informal and summary to be trustworthy" or that it failed to investigate Mr. Olivas's birth certificate thoroughly enough in the past. *Lung*, 261 F.2d at 724. The government could have challenged Mr. Olivas's citizenship long ago but instead made repeated assurances he was a citizen. Mr. Olivas "acted in reliance" on those assurances, "as he was expected to do," and "[t]he consequences for him are as grave" as if they "had been rendered by a court of law." *Id.* In these circumstances, it is unfair to reward the government for its delay by forcing Mr. Olivas to bear the burden to prove facts occurring over 40 years ago.

The government "prescribed the kind of proceedings" that resulted in prior determinations of his citizenship, and the fact that those processes "may have been informal and summary does not warrant corrective procedures which fail to take account of the human values which have attached. If the Government is to turn the clock back after all these years, it should meet a standard of proof which is not meagre." *Lung*, 261 F.2d at 724. Given that Mexico does not recognize Mr. Olivas as a citizen, the stakes in this case are extraordinary, because a judgment against him would leave him "without the protection of citizenship in any country in the world—as a man without a country." *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967). In such circumstances, it is fundamentally unfair to allow the government to

repudiate its consistent determinations that Mr. Olivas is a U.S. citizen without proving by clear and convincing evidence that he is not.

If the government erred in previously finding Mr. Olivas to be a citizen, "the remedy must lie in taking greater care" in the first instance, not in unjustly requiring him to prove facts occurring four decades ago. *Delmore*, 236 F.2d at 600; *cf. Baumgartner*, 322 U.S. at 675 ("[R]elaxation in the vigor appropriate for scrutinizing" an individual "before admitting him to citizenship is not to be corrected by meagre standards for disproving such allegiance retrospectively."). As a result, the district court erred in not requiring the government to bear the burden of proof.

B. The Government Should Bear the Same Burden and Standard to Prove Mr. Olivas Is Not a Citizen as in Removal Proceedings, Which It Could Have Initiated Long Ago, and the Court Should Not Reward the Government for its Delay and Negligence by Forcing Mr. Olivas to Bear the Burden of Proof.

When the government seeks to expel individuals from the United States or challenge their citizenship, it bears the burden to prove by clear and convincing evidence that they are not U.S. citizens. *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 286 (1966) (removal); *Schneiderman*, 320 U.S. at 123 (denaturalization); *Mitsugi Nishikawa v. Dulles*, 356 U.S. 129, 134-35 (1958) (expatriation). The same burden and standard should apply here, because it is

unfair to allow the government to evade that burden and standard due to its own delay and negligence.

If the government had brought removal proceedings against Mr. Olivas, which it could have done long ago, it would have borne "the ultimate burden of establishing all facts supporting deportability by clear, unequivocal, and convincing evidence." *Mondaca-Vega*, 808 F.3d at 419 (citation and quotation marks omitted). If "the government offers evidence of foreign birth" but the petitioner produces "substantial credible evidence" of U.S. citizenship, "the burden shifts back to the government" to prove non-citizenship "by clear and convincing evidence." *Id.* (citation and quotation marks omitted).

Accordingly, in proceedings to remove Mr. Olivas from the United States, the government would have been required to prove by clear and convincing evidence he is not a U.S. citizen. *See id.* (where petitioner had "valid U.S. passport" and "successfully petitioned for the adjustment of status of his wife and children based on his purported status as a U.S. citizen," government was required to prove non-citizenship by "clear and convincing evidence"). If an immigration court had found him removable, his petition for review would have been transferred to district court "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,"

because the issue of citizenship turns on a "genuine issue of material fact."[2] 8 U.S.C. § 1252(b)(5)(B); *see also Theagene v. Gonzales*, 411 F.3d 1107, 1110 & n.4 (9th Cir. 2005) (noting that "where an order of removal is entered against a petitioner, and '[i]f the petitioner claims to be a national of the United States,' the federal courts shall decide the claim" under "de novo review of this issue, to provide a fail safe against inadvertent or uninformed execution of a final order of removal against a person with a claim to United States nationality") (quoting 8 U.S.C. § 1252(b)(5)). In such a proceeding, the government would have been required to prove lack of U.S. citizenship by clear and convincing evidence. *Mondaca-Vega*, 808 F.3d at 419; *Alexander v. Sessions*, No. CV-16-04514-PHX-DGC, 2017 WL 1326146, at *5 (D. Ariz. Apr. 11, 2017); *cf. Sanchez-Martinez v. Immigration & Naturalization Serv.*, 714 F.2d 72, 74 (9th Cir. 1983) ("The *Woodby* standard is identical to the burden that we impose on the government in declaratory judgment actions [for U.S. citizenship] in which there are special circumstances such as in … *Lee Hon Lung*.").

The same burden and standard must apply here. The government's delay and negligence forced Mr. Olivas to commence this action. To require Mr. Olivas to

[2] This procedure reflects Supreme Court "decisions holding that the Constitution requires that there be some provision for *de novo* judicial determination of claims to American citizenship in deportation proceedings." *Agosto v. Immigration & Naturalization Serv.*, 436 U.S. 748, 753 (1978).

bear the burden of proving his citizenship would unjustly reward the government for its delay and negligence, especially in light of his justifiable reliance on its long history of treating him as a citizen. Given that history, Mr. Olivas "should not be asked to share equally with society the risk of error" when the injury to him resulting from stateless exile "is significantly greater than any possible harm to the state" in requiring it to disprove his citizenship by clear and convincing evidence. *Addington v. Texas*, 441 U.S. 418, 427 (1979).

C. The District Court Incorrectly Relied on Decisions that Do Not Apply to This Case and Erred in Disregarding the Controlling Precedent in *Lung* that Requires the Government to Bear the Burden of Proof.

The district court erred in not requiring the government to bear the burden to prove Mr. Olivas is not a U.S. citizen. It ignored the controlling precedent of *Lung* and relied on decisions that do not apply to this case. The court incorrectly relied on habeas cases challenging criminal convictions, in which the petitioner must "prove his custody is in violation of the Constitution, laws or treaties of the United States." *Snook v. Wood*, 89 F.3d 605, 609 (9th Cir. 1996) (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)). Those cases involve collateral attacks on "judgments of conviction and sentence." *Snook*, 89 F.3d at 609. "When collaterally attacked, the judgment of a court carries with it a presumption of regularity" that the petitioner must overcome "by a preponderance of the evidence." *Johnson*, 304 U.S. at 468-

69. In criminal cases, the petitioner has been convicted in proceedings that presumptively comply with due process. Here, by contrast, the government exiled Mr. Olivas from the United States with *no* process after he justifiably relied on multiple findings that he was a citizen. In these circumstances, the controlling precedent is *Lung*, under which the government must prove by clear and convincing evidence he is not a citizen. 261 F.2d at 724.

The district court mistakenly relied on *Berenyi v. Dist. Dir., Immigration & Naturalization Serv.*, 385 U.S. 630 (1967). In that case, the plaintiff acknowledged he was not a U.S. citizen and "filed a petition for naturalization" without any prior findings by the government that he was a citizen, and the government had "not sought to deport the petitioner."[3] *Id.* at 632, 636 n.11. In those circumstances, "the burden is on the alien applicant to show his eligibility for citizenship." *Id.* at 637. Here, by contrast, the government previously determined Mr. Olivas was a citizen and he justifiably relied on those determinations before the government summarily exiled him. Therefore, this Court's decision in *Lung* requires the government to bear the burden of proof. *Cf. Alexander*, 2017 WL 1326146 at *4 (rejecting argument that *Berenyi* imposed burden on respondent to prove citizenship in de

[3] In stating *Berenyi* was a case brought by "a person outside of the United States," I ER 35, the district court misunderstood the facts. *Berenyi*, 385 U.S. at 632 ("The petitioner, an alien who entered this country from Hungary in 1956, filed a petition for naturalization in the United States District Court for the District of Massachusetts in 1962.").

novo hearing in district court, because "*Berenyi* dealt with a petition for naturalization from an alien with authorized presence who did not face an immediate risk of deportation").

The district court erred in asserting that the government did not make "determinations that [Mr. Olivas] was a citizen" by allowing his mother and first wife "to adjust their immigration status based on [Mr. Olivas's] citizenship." I ER 36. That position conflicts with *Mondaca-Vega*, in which this Court found that where an individual "possessed a valid U.S. passport and successfully petitioned for the adjustment of status of his wife and children based on his purported status as a U.S. citizen," he presented evidence sufficient to require the government to disprove his citizenship by clear and convincing evidence. 808 F.3d at 419. Similarly, the government determined Mr. Olivas's citizenship through approving visas for his mother and first wife based on his status as a U.S. citizen and admitting him to the country numerous times as a citizen. Therefore, the government must the bear the burden to prove he is not a U.S. citizen.

The district court also erred to the extent it held that the government's subsequent denials of a passport or certificate of citizenship to Mr. Olivas relieved it of the burden of proof. I ER 36. The government denied Mr. Olivas a passport in 2011 "based on child support arrears," not his place of birth. I ER 31-32, 93 ¶ 17. In 2012, the government denied Mr. Olivas's "application for a certificate of

citizenship on the ground that he had not established that he derived or acquired U.S. citizenship through his mother," not on the ground that he was not born in the United States. I ER 33, 93 ¶ 19. In 2013, Mr. Olivas's "application for a U.S. passport was denied" based on the Juarez Statement. I ER 33, 93 ¶ 21. Neither of the first two denials concerned Mr. Olivas's place of birth. The third simply recapitulated the summary decision to exile Mr. Olivas based on the Juarez Statement and cannot negate the numerous previous occasions on which the government assured him he was a citizen.

Whether in exiling him from the port of entry or in denying his passport application afterward, the summary rejection of his citizenship without any process cannot justify imposing the burden of proof on Mr. Olivas. Indeed, in *Lung* itself, the plaintiff filed suit because the government denied his "application for a passport on the ground that he was not a national of the United States," but this Court required the government to bear the burden of proof because it had previously admitted him to the country as a native-born "citizen of the United States." 261 F.2d at 720. The same must be true here. Accordingly, the district court erred in requiring Mr. Olivas to bear the burden of proof.

Lung is not distinguishable on the ground it was a "declaratory judgment action." *Id.* at 720. Mr. Olivas sought declaratory and injunctive relief as well a writ of habeas corpus. VI ER 1082-83. A habeas case is a civil action just as much

as a declaratory judgment action. Fed. R. Civ. P. 81(a)(4); *Woodford v. Garceau*, 538 U.S. 202, 208 (2003). The district court expedited discovery and held an evidentiary hearing on Mr. Olivas's request for habeas relief, I ER 34-35; ECF Nos. 23, 88, but it could just as easily have expedited discovery and conducted a trial on his requests for declaratory and injunctive relief. 28 U.S.C. § 1657(a) (allowing court to expedite any civil action involving constitutional rights for "good cause"); Fed. R. Civ. P. 16(a)(1) (pretrial conference for "expediting disposition of the action"); *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002) (Rule 26 allows district court to expedite discovery for "good cause"); Fed. R. Civ. P. 52(a)(1) (discussing "action tried on the facts without a jury"). An evidentiary hearing on a habeas petition is effectively a bench trial. *Jackson v. Crosby*, 375 F.3d 1291, 1292 n.1 (11th Cir. 2004). The writ of habeas corpus is an equitable civil remedy just as much as declaratory or injunctive relief. *Schlup v. Delo*, 513 U.S. 298, 319 (1995); *In re Al-Nashiri*, 835 F.3d 110, 124 n.5 (D.C. Cir. 2016), *cert. denied*, No. 16-8966, 2017 WL 1710409 (U.S. Oct. 16, 2017); *Gray v. Swenson*, 430 F.2d 9, 11 (8th Cir. 1970). Accordingly, *Lung* controls this case regardless of whether the district court elected to decide Mr. Olivas's claims in the context of habeas rather than declaratory or injunctive relief.

II. BECAUSE THE RECORD CONTAINS NO ADMISSIBLE EVIDENCE PROVING MR. OLIVAS WAS BORN OUTSIDE THE UNITED STATES, THE GOVERNMENT DID NOT SUSTAIN ITS BURDEN TO PROVE HE IS NOT A CITIZEN, AND HE IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

A. The Government's Determinations of Mr. Olivas's Citizenship Established a Prima Facie Case He Is a U.S. Citizen, and the Record Contains No Admissible Evidence Proving He Is Not.

The government's determinations of Mr. Olivas's citizenship established a prima facie case he is a U.S. citizen. *Lung*, 261 F.2d at 720. Given that the government "previously determined that [Mr. Olivas] is a citizen of the United States," it had "the duty to go forward with the evidence" proving he is not. *Wong Kam Chong v. United States*, 111 F.2d 707, 710 (9th Cir. 1940). The rules of evidence apply to this action. Fed. R. Evid. 1101. Without admissible evidence that Mr. Olivas was born outside the United States, the government cannot sustain its burden of proof. *Weisgram v. Marley Co.*, 528 U.S. 440, 454 (2000) ("Inadmissible evidence contributes nothing to a legally sufficient evidentiary basis.") (quotation marks omitted). The government did not meet its burden because the record contains no admissible evidence that Mr. Olivas is not a U.S. citizen.

The government submitted no admissible documents or testimony proving that Mr. Olivas was born outside the United States, nor did any other admissible

evidence establish that fact. The government produced no foreign birth certificate for Mr. Olivas, as it has commonly done in other cases to disprove U.S. citizenship. *See, e.g.*, *Sanchez-Martinez*, 714 F.2d at 75 (individual's "Mexican birth certificate" showed he "is not an American citizen"); *Corona-Palomera v. Immigration & Naturalization Serv.*, 661 F.2d 814, 815 (9th Cir. 1981) (government offered "properly authenticated Mexican birth certificates recording the births of individuals with names identical to the petitioners.").

The record shows the government knows how to obtain a Mexican birth certificate, because it did so for Ms. Perez. VII ER 1198-1205. The State Department investigator who interrogated her testified it would have been normal practice to search for Mr. Olivas's birth certificate and obtain it if it existed. IV ER 738-39. If Mr. Olivas was born in a Tijuana clinic as the government asserted, it is likely his birth would have been registered in Mexico, yet the government produced no Mexican birth certificate for him or any other admissible evidence proving he was born in Mexico.

1. The Juarez Statement is Hearsay that Is Inadmissible to Prove Mr. Olivas Was Born in Mexico.

The Juarez Statement, essentially the only evidence proffered to prove Mr. Olivas was born outside the United States, cannot carry the government's burden. It was admitted only "for limited purposes of impeachment" as a prior inconsistent

statement. I ER 43 n.11. It was therefore "not admissible as substantive evidence."[4] *United States v. Crouch*, 731 F.2d 621, 623 (9th Cir. 1984); *see also United States v. Ragghianti*, 560 F.2d 1376, 1381 (9th Cir. 1977) ("There is a crucial distinction between the use of a prior inconsistent statement of a witness only to impeach the credibility of the witness and its use to prove as a fact what is contained in the statement."); *United States v. Tavares*, 512 F.2d 872, 873 (9th Cir. 1975) (noting otherwise excludable "prior inconsistent statements may be used to impeach," but are "inadmissible to prove the truth of the matter asserted").

The district court did not abuse its discretion in finding the Juarez Statement "is not admissible for the truth of the matter it asserts." I ER 43 n.11. Because it was not made by a witness "while testifying at the current trial or hearing," it was hearsay that could not be used "to prove the truth of the matter asserted in the statement" unless it qualified as nonhearsay or fell within an applicable exception to the hearsay rule. Fed. R. Evid. 801(c), 802. As the district court found, neither is true here.

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[4] The government expressly waived any argument that the Juarez Statement was admissible under Fed. R. Evid. 801(d)(1)(A). IV ER 676. In any event, the statement was not "given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition." Fed. R. Evid. 801(d)(1)(A); *see Santos v. Murdock*, 243 F.3d 681, 684 (2d Cir. 2001); *United States v. Jaramillo*, 69 F.3d 388, 391-92 (9th Cir. 1995); *United States v. Micke*, 859 F.2d 473, 476-77 (7th Cir. 1988); *United States v. Day*, 789 F.2d 1217, 1221-2 (6th Cir. 1986); *United States v. Livingston*, 661 F.2d 239, 242-43 (D.C. Cir. 1981).

The court properly found the statement did not fall within "the public records or business records exceptions." I ER 43 n.11. The business records exception "does not apply to records of government agencies," and "statements by third parties who are not government employees (or otherwise under a legal duty to report) may not be admitted pursuant to the public records exception," including, for example, "statements made by aliens and reported by government officials." *United States v. Morales*, 720 F.3d 1194, 1201-02 (9th Cir. 2013) (citing Fed. R. Evid. 803(6), (8)). Therefore, the assertions made in the Juarez Statement are not admissible to prove their truth.

The district court did not abuse its discretion in finding Juarez Statement was not admissible as a statement "made by a person whom [Mr. Olivas] authorized to make a statement on the subject." Fed. R. Evid. 801(d)(2)(C). The court properly declined to find that Mr. Olivas "authorized his mother to make a statement on the subject of his birth." I ER 43 n.11. A statement does not fall within Rule 801(d)(2)(C) unless the proponent shows by a preponderance of the evidence that the party against whom it is offered authorized the declarant to speak as an agent on the subject in question. *United States v. Bonds*, 608 F.3d 495, 503-04, 507 (9th Cir. 2010); *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 321 (4th Cir. 1982). "An agent is one who 'act[s] on the principal's behalf and subject to the principal's control,'" and "an agency relationship" requires that

"both the principal and agent must manifest assent to the principal's right to control the agent." *Bonds*, 608 F.3d at 506. The statement "does not by itself establish the declarant's authority" to speak on the subject in question or the existence of an agency relationship. Fed. R. Evid. 801.

Here, the district court did not abuse its discretion in finding Ms. Perez was not an agent authorized to speak for Mr. Olivas on the subject of his place of birth. In applying for a visa for his first wife, Mr. Olivas did not ask, direct, or authorize Ms. Perez to speak for him, much less serve as his agent at all. Instead, the record shows only that government asked his first wife to bring Ms. Perez to Juarez for an interview. III ER 552; IV ER 632-33, 654; VI ER 1139-40. The government proffered no facts proving that Mr. Olivas asked Ms. Perez to serve as his agent, that she assented to his control, or that she was authorized to make any statements on his behalf. It certainly did not overcome the general rule that even if agency is shown, an agent is "not authorized to make damaging admissions." *Portsmouth Paving*, 694 F.2d at 321. With no independent evidence establishing agency or authority to speak for Mr. Olivas, the district court properly found the Juarez Statement was inadmissible under Rule 801(d)(2)(C).[5]

[5] Without proof of agency, the statement is also inadmissible under Fed. R. Evid. 801(d)(2)(D). *Bonds*, 608 F.3d at 504-07.

The district court similarly did not abuse its discretion in rejecting the government's assertion that Mr. Olivas's counsel "stipulated to the admissibility of the Juarez Statement for all purposes" during a brief colloquy at a deposition. I ER 43 n.11. In that colloquy, counsel stated various documents, including but not limited to the Juarez Statement, would be "admissible" at trial. II ER 220; VI ER 1037. Counsel did not discuss what was meant by "admissible," and the government never sought consent to submit a joint motion, as ordinarily required by the district court's local rules for "[a]ny stipulation for which court approval is sought." Civ. LR 7.2. In these circumstances, the alleged stipulation is without effect.

Like a contract, a stipulation "is ambiguous if it is reasonably susceptible of more than one construction or interpretation." *Castaneda v. Dura-Vent Corp.*, 648 F.2d 612, 619 (9th Cir. 1981). As applied to documents, the term "admissible" standing alone can mean many things. For example, it could mean a document is authentic. *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002) ("Authentication is a 'condition precedent to admissibility.'"). It could also mean "[a] duplicate is admissible to the same extent as the original." Fed. R. Evid. 1003. And it could mean admissible for limited purposes such as impeachment, as opposed to substantive proof of facts asserted in the document.

The ambiguity of the brief colloquy concerning what would be "admissible" destroys any binding effect of the alleged stipulation. *NLRB v. Carolina Natural Gas Corp.*, 386 F.2d 571, 573 (4th Cir. 1967) (alleged "stipulation to include field clerks" in bargaining unit based on "fleeting reference to field clerks," without "description of the duties of field clerks" or "identification of the people who served in that capacity," was "so shrouded in ambiguity as to merit no binding effect"); *Decker v. Comm'r of Soc. Sec.*, No. 2:12-CV-00454, 2013 WL 4830961, at *2 (S.D. Ohio Sept. 10, 2013) (although "Plaintiff's Counsel stipulated that the vocational expert could testify at the administrative hearing … it is not clear that the stipulation included testifying by telephone" and "it is ambiguous whether this stipulation included telephonic testimony"); *cf. Fernandez v. Virgillo*, No. 2:12-CV-02475 JWS, 2014 WL 2930749, at *4 (D. Ariz. June 30, 2014) ("stipulated judgment" was "ambiguous" because it "awards plaintiffs 'compensatory damages on [their] claims' but does not specify how those damages were calculated or whether they represent full compensation or some compromised amount").

Even if a stipulation is made, a court may decline to enforce it to prevent manifest injustice. *United States v. Kanu*, 695 F.3d 74, 78 (D.C. Cir. 2012); *Jeffries v. United States*, 477 F.2d 52, 55 (9th Cir. 1973). The district court properly found that "given subsequent objections by Petitioner's counsel to the admissibility of the Juarez Statement for the truth of the matter asserted," any "stipulation by

Petitioner's counsel that the Juarez Statement was admissible does not make the Juarez Statement nonhearsay or subject to a hearsay exception." I ER 43 n.11. The court correctly declined to enforce any alleged stipulation because it would have unfairly deprived Mr. Olivas of the right to challenge the primary evidence on which the government summarily exiled him to Mexico. In these circumstances, "the balance of equities favors" disregarding any alleged stipulation. *Kanu*, 695 F.3d at 78; *cf. Sam Galloway Ford, Inc. v. Universal Underwriters Ins. Co.*, 793 F. Supp. 1079, 1082 (M.D. Fla. 1992) (disregarding stipulation because party "should not be punished" due to alleged "oversight on the part of its attorneys"). Accordingly, the district court correctly declined to admit the Juarez Statement to prove the truth of matters asserted therein.

2. No Other Admissible Evidence Established that Mr. Olivas Was Born Outside the United States.

The record contains no other admissible evidence that Mr. Olivas was born outside the United States. Other documents contained double hearsay references to the Juarez Statement that the district court properly did not consider for the truth of the matter asserted. IV ER 723, 744; II ER 135-37, 143-44, 162-63, 174-78, 190, 193-95; VI ER 994-98, 1130-31. Even if such documents were otherwise admissible, they could not be used to prove the truth of assertions drawn from the Juarez Statement. Fed. R. Evid. 805; *United States v. Pena-Gutierrez*, 222 F.3d

1080, 1087 (9th Cir. 2000) ("Even if we were to find the report itself admissible, the statement of the deported witness it contained was inadmissible hearsay."); *Sana v. Hawaiian Cruises, Ltd.*, 181 F.3d 1041, 1045 (9th Cir. 1999) ("For the document to be admissible, each layer of hearsay must satisfy an exception to the hearsay rule.").

The government proffered a "Record of Sworn Statement" containing statements made by Mr. Olivas when he was detained at the Calexico port of entry, but it cannot be used to prove Mr. Olivas was born in Mexico. VI ER 1123-26. According to that record, Mr. Olivas told a CBP officer, "I believe I was born in Los Angeles, California," but Ms. Perez "has claimed I was born in Mexicali, then in Tijuana Mexico." VI ER 1124. Although Mr. Olivas's statement may otherwise have been a party admission, the supposed assertion by Ms. Perez reported therein cannot be used to prove he was born in Mexico, because it is hearsay. As with the Juarez Statement, Ms. Perez's assertion as reported in the Record of Sworn Statement is inadmissible to prove the truth of the matter asserted. Fed. R. Evid. 802; *Pittman by Pittman v. Grayson*, 149 F.3d 111, 124 (2d Cir. 1998) (assuming employee's statement was otherwise "nonhearsay" admission, it "contained hearsay" that was "properly excludable" to extent it "purported to describe statements made to her by others," because "she was repeating a story she had heard from someone else"). Therefore, the Record of Sworn Statement cannot

prove Mr. Olivas was born in Mexico, because "it merely repeats hearsay" on that issue without evidence that he manifested "adoption or belief in its truth." *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 239 (2d Cir. 1999) (quoting Fed. R. Evid. 801(d)(2)(B)).

The district court admitted the Record of Sworn Statement, II ER 265, but necessarily considered Ms. Perez's statement as reported therein only for limited purposes. The court could not have used it to find Mr. Olivas was born in Mexico, especially in light of the court's scrupulousness in refusing to consider Ms. Perez's out of court statements for the truth of the matter asserted. *Williams v. Illinois*, 567 U.S. 50, 69 (2012) (plurality opinion) ("When the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose."); *Harris v. Rivera*, 454 U.S. 339, 346 (1981) ("In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions."); *United States v. Stinefast*, 724 F.3d 925, 931 (7th Cir. 2013) ("Judges often hear improper argument and other forms of inadmissible evidence that they are presumed to disregard when deciding matters of importance."). As a result, the Record of Sworn Statement cannot be used to prove Mr. Olivas was born in Mexico.

The same is true for the "I-213" report prepared by the CBP officer who processed Mr. Olivas. I ER 32-33; VI ER 1127-29. As the district court noted, the officer "had no independent recollection of what happened at the Calexico Port of Entry," but she "offered testimony based on the I-213 report she prepared during the event." I ER 32-33; *see also* II ER 168 (court held officer could testify using the I-213 as "past recollection recorded"). The district court properly rejected the government's attempt to admit the I-213 itself. II ER 168; *see* Fed. R. Evid. 803(5) (recorded recollection "may be read into evidence but may be received as an exhibit only if offered by an adverse party").

Based on the I-213, the officer testified she called Ms. Perez from the port of entry and Ms. Perez "claimed her son was born in Los Angeles, California," despite stating in Juarez that Mr. Olivas "was born in Tijuana." II ER 143-44. The government conceded that it offered that testimony "not for what is contained in the report," and the court properly confirmed, "I am not going to consider that for the truth of the matter asserted."[6] II ER 144. Accordingly, the officer's testimony as to what Ms. Perez said out of court cannot be considered to prove that Mr. Olivas was born in Mexico.

[6] When the officer testified that a "TECS hit" stated Mr. Olivas's "mother sign[ed] a sworn statement indicating [Mr. Olivas] was not born in the US," the court similarly confirmed, "I am not taking that as it being offered for the truth of the matter asserted." II ER 136-37.

Even if the I-213 itself were admissible for some purposes, it cannot be used to prove Mr. Olivas was born in Mexico. It recites that Mr. Olivas stated "he believed that he was born in Los Angeles, California but admitted that his mother had stated to him that he was born in Mexicali" and "then again stated to him that he was born in Tijuana." II ER 153; VI ER 1128. The record shows that this portion of the I-213 is merely drawn from the Record of Sworn Statement.[7] II ER 149. As with the Record of Sworn Statement where his alleged statement originally appears, even if Mr. Olivas's statement as reported in the I-213 might otherwise be a party admission, it cannot be used to prove the truth of what Ms. Perez allegedly told him out of court. *Schering*, 189 F.3d at 239; *Pittman*, 149 F.3d at 124. Accordingly, the record contains no admissible evidence that Mr. Olivas was born outside the United States.

B. Without Admissible Evidence Mr. Olivas Is Not a U.S. Citizen, the Government Cannot Meet Its Burden of Proof by Impeaching the Evidence that He Was Born in the United States.

Because the record contains no admissible evidence proving Mr. Olivas is not a U.S. citizen, the government did not meet its burden. It is a "bedrock rule" that "when there is insufficient evidence on a particular issue, that issue must be

[7] To the extent the I-213 reports that Mr. Olivas asserted that Ms. Perez stated "to him" that he was born in Mexico, it appears to be inaccurately drawn from the Record of Sworn Statement, which reports that Mr. Olivas only acknowledged Ms. Perez had made such a claim in the past. II ER 149; VI ER 1124, 1128.

resolved *against* the party who bears the burden of proof," and "[e]ven when the burden is to prove a negative … the absence of evidence on the issue redounds to the detriment of the burden-holder." *United States v. 15 Bosworth St.*, 236 F.3d 50, 55 (1st Cir. 2001) (emphasis in original); *see also NLRB v. Louis A. Weiss Mem'l Hosp.*, 172 F.3d 432, 446 (7th Cir. 1999) ("An absence of evidence does not cut in favor of the one who bears the burden of proof on an issue"). Since the government "failed to meet its burden" to introduce admissible evidence that Mr. Olivas is not a U.S. citizen and the record otherwise contains no such evidence, "the court must award judgment to the plaintiff as a matter of law."[8] *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993).

Although the district court found testimony that Mr. Olivas was born in the United States not credible due to various inconsistencies & impairments, the government cannot carry its burden merely by impeaching Mr. Olivas's evidence. While the trier of fact "may simply disregard" testimony that it does not believe, "the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion" on which the opposing party bears the burden of proof. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512 (1984) (although

[8] Although Mr. Olivas objected that the evidence was insufficient to prove he is not a U.S. citizen, he was not required to do so to preserve that issue on appeal from a bench trial. Fed. R. Civ. P. 52(a)(5), (c); *Fed. Ins. Co. v. HPSC, Inc.*, 480 F.3d 26, 32 (1st Cir. 2007).

discredited testimony in defamation case "does not rebut any inference of actual malice that the record otherwise supports … it does not constitute clear and convincing evidence of actual malice" which plaintiff bears burden to prove); *see also Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987) ("Discredited testimony is not a sufficient basis for drawing an affirmative contrary conclusion.").

In other words, "[i]f all of the witnesses deny that an event essential to the plaintiff's case occurred, the plaintiff cannot get to the jury simply because the jury might disbelieve these denials. There must be some affirmative evidence that the event occurred." *Goldhirsh Grp., Inc. v. Alpert*, 107 F.3d 105, 109 (2d Cir. 1997). In the context of a bench trial, that means the court must enter judgment against a party with the burden to prove a fact if the record contains no affirmative evidence establishing that fact. Even if the court "thoroughly disbelieved" the evidence of a party without the burden of proof, "that disbelief is insufficient to support a verdict" for the party with the burden of proof "in the absence of affirmative evidence" proving the fact in question. *Id.*; *see also Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573, 575-76 (1951) (where "burden was upon petitioner to prove that decedent fell after the train stopped without warning" and "engineer was the only witness to the accident," disbelief of "engineer's testimony that he stopped after—indeed, because of—the fall" would mean "there is no evidence as to when

decedent fell" and thus petitioner would suffer "failure of proof"); *Kendall v. Daily News Pub. Co.*, 716 F.3d 82, 97 (3d Cir. 2013) (noting "plaintiff must show more than mere disbelief to establish" essential element of claim); *Eckenrode v. Pennsylvania R. Co.*, 164 F.2d 996, 999 (3d Cir. 1947), *aff'd*, 335 U.S. 329 (1948) (factfinder's belief "that testimony is false will not support an affirmative finding that the reverse of that testimony is true"). Here, no admissible evidence established that Mr. Olivas was born outside the United States, and disbelief of evidence that he was born in Los Angeles cannot sustain the government's burden.

C. This Court Should Reverse the Judgment and Direct Entry of Judgment in Mr. Olivas's Favor, Because the Government Failed to Meet its Burden of Proof Despite Ample Opportunity and Express Agreement to Present All Available Evidence.

The government's previous determinations of citizenship established a prima facie case that Mr. Olivas is a U.S. citizen, and the record contains no admissible evidence proving he is not. This Court should therefore reverse the judgment and direct the district court to enter judgment in Mr. Olivas's favor.

Assuming the district court's error in allocating the burden of proof can be reviewed for harmlessness, *cf. Kennedy v. S. California Edison Co.*, 268 F.3d 763, 770 (9th Cir. 2001) (reviewing "jury instructions relating to the parties' respective burdens of proof" for harmless error), the error was not harmless here, because

there is no admissible evidence from which the district court could have found the government sustained its burden. This Court must therefore reverse the judgment.

This Court should also direct the entry of judgment in Mr. Olivas's favor that he is a U.S. citizen. A court of appeals may "direct the entry of such appropriate judgment … as may be just under the circumstances." 28 U.S.C. § 2106. It is just for this Court to direct judgment in favor of Mr. Olivas, because the government's previous determinations of his citizenship made a prima facie case of citizenship that the government did not carry its burden to rebut. Though it incorrectly allocated the burden of proof to Mr. Olivas, the district court directed the government to present all available evidence, which the government agreed to do. IV ER 669-74. The government "had a full and fair opportunity to present the case" and was "on notice every step of the way" that Mr. Olivas challenged the allocation of burden of proof and the admissibility and sufficiency of the evidence against him, yet it "made no attempt to add or substitute other evidence." *Weisgram*, 528 U.S. at 444, 456; *cf. Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 897 (1990) ("[A] litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk."). In these circumstances, where "the properly admitted evidence [is] insufficient" to sustain the government's burden and the government assumed the risk of not prevailing on the question whether it bore the burden of proof, this Court should

direct entry of judgment as a matter of law for Mr. Olivas. *Weisgram*, 528 U.S. at 456. He has already endured over six years of stateless exile in Mexico, and no just purpose is served by prolonging his exile.

III. THE DISTRICT COURT HAD JURISDICTION BECAUSE MR. OLIVAS STATED CITIZENSHIP CLAIMS AND THIS CASE DOES NOT ARISE FROM ANY DISCRETIONARY DECISION TO COMMENCE IMMIGRATION PROCEEDINGS.

This case does not fall within the limited reach of 8 U.S.C. § 1252(g), which provides "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien…." By its terms, section 1252(g) only applies to claims brought by an "alien." It cannot prevent courts from deciding claims to citizenship. Because a court has jurisdiction to determine its jurisdiction, which in this case depends on whether Mr. Olivas is a citizen, "the jurisdictional question and the merits collapse into one." *Rosales-Rosales v. Ashcroft*, 347 F.3d 714, 717 (9th Cir. 2003). Therefore, section 1252(g) does not strip the district court of jurisdiction to decide a claim to U.S. citizenship. Accordingly, the district court was initially correct in holding it had jurisdiction because Mr. Olivas "asserted a non-frivolous claim of U.S. citizenship," I ER 34-35, and erred in later concluding otherwise. I ER 5-6.

In addition, the statute "applies only to three discrete actions" not at issue here: the "discretionary determinations" to "*commence* proceedings, *adjudicate* cases, or *execute* removal orders." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482, 485 (1999) (emphasis in original); *see also Barahona-Gomez v. Reno*, 236 F.3d 1115, 1121 (9th Cir. 2001) (section 1252(g) "applies only to the three specific discretionary actions mentioned in its text"). When "narrowly construed" as it must be, *Kwai Fun Wong v. United States*, 373 F.3d 952, 964 (9th Cir. 2004), section 1252(g) does not apply to this case, which does not arise from a decision whether to commence removal proceedings. As the government has conceded, the failure to commence proceedings against Mr. Olivas was an "administrative error," not a decision, much less the exercise of discretion to make a decision. ECF No. 209-1 at 7:2. Narrowly construed, the term "decision" does not cover the failure to commence any proceedings due to administrative error. Similarly, because the government never adjudicated any removal proceedings or issued any removal order against him, this case does not implicate section 1252(g). Accordingly, section 1252(g) did not deprive the district court of jurisdiction over Mr. Olivas's claims for relief as a U.S. citizen.

CONCLUSION

For the foregoing reasons, Mr. Olivas respectfully requests that this Court reverse the judgment of the district court and direct entry of judgment in his favor granting a writ of habeas corpus and corresponding declaratory and injunctive relief recognizing him as a citizen of the United States.

Dated: November 28, 2017

Respectfully submitted,

/s/ Bardis Vakili
Bardis Vakili
David Loy
Counsel for Appellant

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-56276

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

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Signature of Attorney or Unrepresented Litigant: s/ Bardis Vakili

Date: 11/28/2017

("s/" plus typed name is acceptable for electronically-filed documents)

(Rev.12/1/16)

STATEMENT OF RELATED CASES

Petitioner-Appellant is not aware of any related cases pending before this Court, as defined by Ninth Circuit Rule 28-2.6.

Respectfully submitted,

/s/Bardis Vakili
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CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Respectfully submitted,

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