No. 17-1135

In the Supreme Court of the United States

ARUTYUN DEMIRCHYAN, PETITIONER

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a district court's factual findings in a proceeding to resolve "a genuine issue of material fact about the petitioner's nationality" under 8 U.S.C. 1252(b)(5)(B) are reviewed de novo or for clear error.

2. Whether the courts below applied permissible burdens of proof in adjudicating petitioner's nationality claim under 8 U.S.C. 1252(b)(5)(B).

3. Whether the court of appeals erred in concluding that any error by the district court in admitting petitioner's prior convictions for perjury under Federal Rule of Evidence 609(b) was harmless.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the Federal Reporter but is reprinted at 698 Fed. Appx. 335. The opinions of the district court (Pet. App. 5-32, 33-80) are not published in the Federal Supplement but are available at 2010 WL 3521784 and 2013 WL 1338784. The decisions of the Board of Immigration Appeals (Pet. App. 81-82) and the immigration judge (Pet. App. 83-91) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 2017. A petition for rehearing was denied on December 11, 2017 (Pet. App. 92). The petition for a writ of certiorari was filed on February 9, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following convictions in California state court for cocaine possession and perjury, petitioner was placed in removal proceedings. Petitioner contended that he was a U.S. citizen, but an immigration judge (IJ) rejected that claim and ordered him removed. Pet. App. 83-91. The IJ denied petitioner's motion to reopen the proceedings, and the Board of Immigration Appeals (Board) affirmed. *Id.* at 81-82. On petition for review, the court of appeals transferred the proceeding to a district court to decide petitioner's nationality claim under 8 U.S.C. 1252(b)(5)(B). Pet. App. 33-34. The district court found that petitioner was not a U.S. citizen. *Id.* at 34-80. The court of appeals allowed petitioner to present additional evidence, and the district court again found that petitioner was not a U.S. citizen. *Id.* at 5-32. The court of appeals affirmed. *Id.* at 1-4.

1. Petitioner, a native of Armenia, was admitted to the United States in October 1988. Pet. App. 2, 65-66; see Pet. 4. His mother was naturalized as a U.S. citizen in December 1994. Pet. App. 65.

In September 1998, petitioner was convicted once of cocaine possession and twice of perjury in California state court. Pet. App. 65, 83-84. Immigration officials instituted removal proceedings under 8 U.S.C. 1227(a)(2)(A)(iii) and (B)(i), which provide for the removal of aliens convicted of certain crimes. Pet. App. 65, 84. Petitioner contended that he was not an alien but rather a U.S. citizen not subject to removal. *Id.* at 65. He based his citizenship claim on 8 U.S.C. 1432(a)(4) (1994), which at that time granted citizenship to the

child of a parent naturalized "while such child is * * * under the age of" 18. *Ibid.*; see Pet. App. 65.[1]

An IJ agreed that petitioner was a U.S. citizen and terminated his removal proceedings. Pet. App. 84. The government appealed to the Board, which remanded for the IJ to review newly discovered evidence, including an Armenian birth certificate and medical records indicating that petitioner was born in 1976 and thus was not under the age of 18 when his mother was naturalized in December 1994. *Id.* at 84-85.

On remand, the IJ ordered petitioner removed. Pet. App. 83-91. After reviewing the new evidence, the IJ determined that petitioner's testimony that he was born in 1977—and thus was under 18 when his mother was naturalized in 1994—lacked credibility in light of the contrary identification documents and petitioner's prior convictions for perjury. *Id.* at 88-90. Petitioner did not appeal that decision to the Board, but he later filed a motion to reopen proceedings, which the IJ denied. 278 Fed. Appx. 778, 779. Petitioner then appealed to the Board, which adopted and affirmed the IJ's decision declining to reopen proceedings. Pet. App. 81-82.

2. Petitioner filed a petition for review. The court of appeals concluded that the Board did not abuse its discretion in declining to reopen the removal proceedings. 278 Fed. Appx. at 779. The court "nonetheless" decided to "retain jurisdiction to determine [petitioner]'s claim of citizenship," pursuant to 8 U.S.C. 1252(b)(5). Pet. App. 33 (citation omitted). The court concluded that petitioner's assertion of U.S. citizenship presented a "genuine issue of material fact about the petitioner's nation-

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[1] Congress repealed this provision in the Child Citizenship Act of 2000, Pub. L. No. 106-395, § 103, 114 Stat. 1632-1633. Pet. App. 34.

ality," and the court accordingly "transfer[red] the proceeding to" a 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 under [the Declaratory Judgment Act, 28 U.S.C. 2201 (DJA)]." 8 U.S.C. 1252(b)(5)(B); see Pet. App. 33-34.

3. The district court held two evidentiary hearings on petitioner's nationality claim. Pet. App. 34. The court explained that the "crux of the dispute" was whether petitioner was born in 1976, in which case he would be "precluded from obtaining derivative United States citizenship because he was over the age of 18 when his mother became a United States citizen," or instead in 1977, in which case he would be "entitled to derivative United States citizenship because he was under the age of 18 when his mother became a United States citizen." *Ibid.* After reviewing extensive documentary evidence and witness testimony, the court concluded that petitioner "failed to prove that he was born in 1977," and that "the entirety of the admissible and credible evidence supports a finding that [p]etitioner was born in 1976." *Id.* at 79-80. The court accordingly concluded that petitioner "is not entitled to citizenship." *Id.* at 80.

Petitioner did not file a timely notice of appeal. The government then moved to dismiss the case in the court of appeals, contending that the court lacked jurisdiction to review the district court's decision. The court of appeals held that it retained jurisdiction and that petitioner was not required to file a notice of appeal contesting the district court's decision. 641 F.3d 1141, 1142-1143. Petitioner sought to supplement the record with new evidence, and the court of appeals returned the

case to the district court for further evidentiary proceedings. Pet. App. 7. After an additional hearing, the district court found that petitioner "failed to meet his burden of proving by a preponderance of evidence that he is a United States citizen," because "the entirety of the admissible and credible evidence supports a finding that [p]etitioner was born in 1976." *Id.* at 31.

4. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. 1-4. Relying on its en banc decision in *Mondaca-Vega* v. *Lynch*, 808 F.3d 413 (9th Cir. 2015), cert. denied, 137 S. Ct. 36 (2016), the court explained that it would review the "district court's factual findings, including its ultimate conclusion about [petitioner's] citizenship," for clear error. Pet. App. 2. The court concluded that the "district court did not clearly err in determining that [petitioner] was born in 1976 rather than 1977 and that he is therefore not a citizen." *Ibid.* The court also rejected petitioner's argument that the district court improperly placed the burden of proof on him. *Ibid.* Finally, the court rejected all challenges to the district court's evidentiary rulings, including petitioner's objection that the district court improperly relied on his prior perjury convictions without conducting a balancing inquiry under Federal Rule of Evidence 609(b). Pet. App. 3. The court explained that any error under Rule 609(b) was harmless because it could not have changed the outcome of the district court proceeding. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-11) that courts of appeals must review de novo—rather than for clear error—a district court's factual findings on a nationality claim in a proceeding under 8 U.S.C. 1252(b)(5)(B). That contention lacks merit. Although independent review of

factual findings may be appropriate in actions to denaturalize a citizen based on "broadly social judgments" such as lack of allegiance to the Constitution, *Baumgartner* v. *United States*, 322 U.S. 665, 671 (1944), Federal Rule of Civil Procedure 52(a)(6) requires clear-error review of the district court's finding that petitioner was born in 1976 rather 1977 and therefore is not a citizen under the applicable naturalization statute. The only other court of appeals to consider the question agrees that clear-error review applies to district court factual findings in a proceeding under Section 1252(b)(5)(B), and this Court recently declined to review the same question decided in a published en banc decision of the Ninth Circuit reaching the same result. *Mondaca-Vega* v. *Lynch*, 808 F.3d 413 (2015), cert. denied, 137 S. Ct. 36 (2016).

Petitioner further contends (Pet. 14-19) that the courts below erred by failing to assign to the government the burden to prove his lack of citizenship by clear and convincing evidence in the Section 1252(b)(5)(B) proceeding. But the government bears a clear-and-convincing-evidence burden in a removal proceeding, not a proceeding under Section 1252(b)(5)(B). No court of appeals has reached a contrary result, with the possible exception of the Ninth Circuit itself in a decision postdating the district court decision here. Regardless, petitioner's claim would not have succeeded under the more favorable rule, and any internal conflict within the Ninth Circuit does not warrant this Court's review.

Finally, petitioner contends (Pet. 20-24) that the court of appeals created a circuit conflict when it found harmless any error that the district court may have committed by admitting petitioner's prior perjury convictions without conducting a balancing inquiry under Federal Rule of Evidence 609(b). But it is well-established that

a harmless evidentiary error does not require reversal, and the Rule 609-balancing cases cited by petitioner create no conflict with the decision below.

1. The court of appeals correctly reviewed the district court's "factual findings, including its ultimate conclusion about citizenship," for clear error. Pet. App. 2.

a. Under Federal Rule of Civil Procedure 52(a)(6), a court of appeals must not set aside a district court's "[f]indings of fact, whether based on oral or other evidence, * * * unless clearly erroneous." Fed. R. Civ. P. 52(a)(6). Rule 52(a)(6) applies to all factual findings; it "does not make exceptions or purport to exclude certain categories of factual findings." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982); see *Teva Pharm. USA, Inc.* v. *Sandoz, Inc.*, 135 S. Ct. 831, 837 (2015). Likewise, Rule 52(a)(6) does not "divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts." *Pullman-Standard*, 456 U.S. at 287. Thus, the rule applies even when "a factual finding may be nearly dispositive" of the key legal question. *Teva*, 135 S. Ct. at 842.

The court of appeals correctly applied Rule 52(a)(6) to the district court's finding that petitioner was not a U.S. citizen. Pet. App. 2. As the district court explained, the "crux of the dispute" was whether petitioner was born in 1976 or 1977. *Id.* at 34. The district court resolved that quintessentially factual question by reviewing extensive documentary evidence and witness testimony, concluding that "the entirety of the admissible and credible evidence supports a finding that [p]etitioner was born in 1976." *Id.* at 31, 79-80. Reviewing for clear error under its en banc decision in *Mondaca-Vega*, 808 F.3d at 422-426, the court of appeals concluded that

the "district court did not clearly err in determining that [petitioner] was born in 1976 rather than 1977 and that he is therefore not a citizen," because, *inter alia*, key documents "reflect a 1976 birthdate," Pet. App. 2. That straightforward application of Rule 52(a)(6) complied with the rule and this Court's precedent addressing clear-error review of factual findings.

Deference to the district court's factual findings under Rule 52(a)(6) was particularly appropriate given this case's procedural posture and the system of judicial review of nationality claims established by Congress. The court of appeals "transfer[red] the proceeding to" the 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 under" the DJA. 8 U.S.C. 1252(b)(5)(B). Rule 52(a)(6) requires clear-error review of a district court's factual findings in a typical action brought under the DJA. See Fed. R. Civ. P. 57 (stating that the Federal Rules apply to declaratory judgment actions); *Teva*, 135 S. Ct. at 837 (explaining that Rule 52(a)(6) requires clear-error review of "the findings of a district court sitting without a jury") (citation and internal quotation marks omitted). By directing that district court decisions on nationality claims be treated like declaratory judgment actions, "Congress has spoken to the scope of judicial review" applicable here. *Mondaca-Vega*, 808 F.3d at 434 (N.R. Smith, J., concurring in part and dissenting in part). "If Congress wanted [courts of appeals] to independently review the district court's ultimate findings of fact, it could have easily provided for that review. It did not." *Id.* at 436.

A related statute, 8 U.S.C. 1503(a), further supports the court of appeals' conclusion. Under that statute, a

person who claims to be a U.S. citizen or national can bring an action under the DJA seeking "a judgment declaring him to be a national of the United States." *Ibid.*; see, *e.g.*, *Montana* v. *Kennedy*, 366 U.S. 308, 309 (1961). Courts of appeals that have addressed the standard of review of a district court's factual findings in an action under 8 U.S.C. 1503(a) have all concluded that clear-error review applies. See, *e.g.*, *Mathin* v. *Kerry*, 782 F.3d 804, 805 (7th Cir. 2015); *Wong Ho* v. *Dulles*, 261 F.2d 456, 459 (9th Cir. 1958); see also *Martinez* v. *Secretary of State*, 652 Fed. Appx. 758, 761 (11th Cir. 2016) (per curiam); *Garcia* v. *Kerry*, 557 Fed. Appx. 304, 307-308 (5th Cir. 2014) (per curiam); *Wilks* v. *Farquharson*, 450 Fed. Appx. 1, 2 (2d Cir. 2011). The application of clear-error review in that related context underscores that clear-error review applies here.

b. Petitioner contends that a court of appeals "must exercise 'independent review,'" rather than clear-error review, of a claim implicating U.S. citizenship. Pet. 7. The court of appeals analyzed that argument at length in *Mondaca-Vega* and rejected it. See 808 F.3d at 422-428; *id.* at 434-436 (N.R. Smith, J., concurring in part and dissenting in part). This Court then declined to review a petition for a writ of certiorari that focused largely on the same argument. See Pet. at 18-27, *Mondaca-Vega* v. *Lynch*, *supra* (No. 15-1153). Petitioner does not identify any subsequent developments that support a different result here. Indeed, much of petitioner's argument relies on the *Mondaca-Vega* dissents. See Pet. 7, 9 n.2, 10 & n.3, 11.

In any event, petitioner's position is unpersuasive. Petitioner relies entirely on denaturalization cases such as *Baumgartner*, which involved actions to revoke citizenship of individuals who had indisputably been naturalized.

322 U.S. at 666; see 8 U.S.C. 1451(a) (outlining grounds for revocation of naturalization). Here, by contrast, the question is whether petitioner became a derivative citizen by statute in the first place and thus is not subject to removal as a criminal alien. Those different inquiries implicate different considerations and call for different standards of review.

In *Baumgartner*, for example, the precise question was whether a naturalization decree should be set aside because a citizen with pro-Hitler views "did not truly and fully renounce his allegiance to Germany" when he was naturalized and "did not in fact intend to support the Constitution and laws of the United States." 322 U.S. at 666. This Court reviewed the facts de novo, explaining that the "conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based." *Id.* at 670-671. Because the finding that the citizen had renounced his allegiance to Germany resembled a "so-called ultimate 'fact[]'" that "cannot escape broadly social judgments," the Court concluded that the "[d]eference properly due to the findings of a lower court" did not preclude independent review. *Id.* at 671. Subsequent denaturalization cases cited by petitioner (Pet. 8-11) applied a similar approach in reviewing broadly social judgments, such as whether naturalized citizens had truthfully professed "attach[ment] to the principles of the Constitution." *Knauer* v. *United States*, 328 U.S. 654, 656 (1946); see *Costello* v. *United States*, 365 U.S. 265, 270 (1961); *Chaunt* v. *United States*, 364 U.S. 350, 353 (1960); *Nowak* v. *United States*, 356 U.S. 660, 663-665 (1958).

Baumgartner and its progeny do not help petitioner here. The factual question whether petitioner was born in 1976 or 1977 does not implicate any "broadly social

judgments" that could be invoked by petitioner in urging a departure from traditional appellate deference. 322 U.S. at 671. It is instead a quintessential "[f]inding[] of fact" that "must not be set aside unless clearly erroneous." Fed. R. Civ. P. 52(a)(6). And "[w]hatever *Baumgartner* may have meant by its discussion of 'ultimate facts,' it surely did not mean that whenever the result in a case turns on a factual finding, an appellate court need not remain within the constraints of Rule 52(a)." *Pullman-Standard*, 456 U.S. at 287 n.16; see *Teva*, 135 S. Ct. at 842. By insisting (Pet. 7) that the court of appeals should have applied "independent review" to the district court's factual determinations, therefore, petitioner has read *Baumgartner* to mean what "it surely did not mean." *Pullman-Standard*, 456 U.S. at 287 n.16; accord *Mondaca-Vega*, 808 F.3d at 424 (concluding that district court's "entirely fact-bound" determination of alienage was subject to clear-error review).

c. Contrary to petitioner's assertion (Pet. 11-13), there is no conflict among the courts of appeals on this question. Petitioner contends (Pet. 12) that the Fifth Circuit reviews district court findings of fact de novo in cases involving "citizenship issues," but the cases he identifies all involved review of decisions by the Board, not a district court. More specifically, the Fifth Circuit cases involved the standard of review that applies to the Board's decision if the court of appeals determines under 8 U.S.C. 1252(b)(5)(A) that "no genuine issue of material fact about the petitioner's nationality is presented" and proceeds to "decide the nationality claim," without transferring the case to the district court "for a new hearing on the nationality claim" under 8 U.S.C. 1252(b)(5)(B). See *Iracheta* v. *Holder*, 730 F.3d 419, 422 (5th Cir. 2013); *Marquez-Marquez* v. *Gonzales*,

455 F.3d 548, 554 (5th Cir. 2006); *Alwan* v. *Ashcroft*, 388 F.3d 507, 510 (5th Cir. 2004).

The Fifth Circuit's application of de novo review to a Board decision when there is no dispute of material fact under Section 1252(b)(5)(A) says nothing about the standard of review that applies to a district court decision on a disputed question of material fact under Section 1252(b)(5)(B). Moreover, many of the cases cited by petitioner expressly turned on disputed "question[s] of law," *Iracheta*, 730 F.3d at 423, or statutory interpretation, *Marquez-Marquez*, 455 F.3d at 559-560; *Alwan*, 388 F.3d at 513, not on inherently factual issues like petitioner's date of birth. There is accordingly no conflict between the Fifth and Ninth Circuits as to the proper standard of review.

There is likewise no conflict between the Ninth and Eleventh Circuits. Contra Pet. 13. The only Eleventh Circuit case that petitioner identifies states that de novo review applies to "*legal* questions arising from claims of nationality," *Sebastian-Soler* v. *United States Att'y Gen.*, 409 F.3d 1280, 1283 (2005) (per curiam) (emphasis added), cert. denied, 547 U.S. 1055 (2006), not to factual determinations of a district court.

Indeed, the only court of appeals other than the Ninth Circuit to state a standard of review for district court factual findings under 8 U.S.C. 1252(b)(5)(B) in a published decision has similarly applied the clear-error standard. See *Leal Santos* v. *Mukasey*, 516 F.3d 1, 3 (1st Cir.) ("We review the factual determination of the district court as to Santos's eligibility for derivative citizenship under a clearly erroneous standard."), cert. denied, 555 U.S. 839 (2008). The Third Circuit addressed this question in an unpublished decision, and likewise applied the clear-error standard. *Ogundoju* v. *Attorney*

Gen., 390 Fed. Appx. 134, 137 (2010) (per curiam). This Court's review is unwarranted.

2. Certiorari is also unwarranted with respect to petitioner's contention (Pet. 14-19) that the court of appeals misapplied the burden of proof.

a. It is undisputed that the government bears the burden of proving an alien's removability by "clear and convincing evidence" in proceedings before an IJ. 8 U.S.C. 1229a(c)(3)(A); see *Nijhawan* v. *Holder*, 557 U.S. 29, 42 (2009); *Mondaca-Vega*, 808 F.3d at 419-420. But petitioner has not contended that the IJ or the Board failed to apply that standard in his removal proceeding. This case, rather, concerns how to allocate the burden in the distinct context of a district court "decision" on a nationality claim in a proceeding that operates "as if an action had been brought" under the DJA. 8 U.S.C. 1252(b)(5)(B).

The district court stated that petitioner had the "burden of proving by a preponderance of the evidence that he is a United States citizen." Pet. App. 31. That approach reflected Ninth Circuit precedent at the time, see *Sanchez-Martinez* v. *INS*, 714 F.2d 72, 74 & n.1 (1983) (per curiam), cert. denied, 466 U.S. 971 (1984), and it accords with the approach of other courts of appeals that have addressed the question, see *Kamara* v. *Lynch*, 786 F.3d 420, 425 (5th Cir. 2015); *Leal Santos*, 516 F.3d at 4. It is also consistent with the decisions of the courts of appeals under 8 U.S.C. 1503(a), which require a plaintiff in a declaratory judgment action to prove nationality by a preponderance of the evidence. See *Mathin*, 782 F.3d at 807; *Eng* v. *Dulles*, 263 F.2d 834, 835 (2d Cir. 1959) (per curiam); *Lee Hon Lung* v. *Dulles*, 261 F.2d 719, 720 (9th Cir. 1958); *De Vargas* v.

Brownell, 251 F.2d 869, 870-871 (5th Cir. 1958); *Delmore* v. *Brownell*, 236 F.2d 598, 600 (3d Cir. 1956); see also *Martinez*, 652 Fed. Appx. at 761.[2]

Contrary to petitioner's contention, the court of appeals did not "depart[] from the view of *all* other circuits and of this Court which places the ultimate burden of proving deportability on the government by clear and convincing." Pet. 17 (citing *Nijhawan*, 557 U.S. at 42, and *Dwumaah* v. *Attorney Gen.*, 609 F.3d 586, 589 (3d Cir. 2010) (per curiam)). That contention equates the burden of proving removability in removal proceedings with the burden that applies in a district court proceeding to resolve a nationality claim under 8 U.S.C. 1252(b)(5)(B). As indicated above, the Ninth Circuit and all other courts agree the government "bears the ultimate burden of establishing all facts supporting deportability" by "clear and convincing evidence" in a removal proceeding. *Mondaca-Vega*, 808 F.3d at 419 (citations omitted); accord *Nijhawan*, 557 U.S. at 42; *Dwumaah*, 609 F.3d at 589.

b. At most, petitioner may be able to argue that the Ninth Circuit could be understood to require the government to prevail in some circumstances under a burden-shifting scheme in district court proceedings under 8 U.S.C. 1252(b)(5)(B). In reviewing such a proceeding in *Mondaca-Vega*, the court of appeals invoked the three-step burden-shifting framework that it had previously applied to *removal proceedings*. See 808 F.3d at 419. Under that approach, (1) "[e]vidence of foreign

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[2] This Court's decision in *Perez* v. *Brownell* , 356 U.S. 44, 47 n.2 (1958), stated that the plaintiff in an action under 8 U.S.C. 1503(a) carried an initial burden of "establishing his citizenship by birth or naturalization," with the government then having to "prove the act of expatriation" by clear and convincing evidence.

birth gives rise to a rebuttable presumption of alienage, shifting the burden to the alleged citizen to prove citizenship," (2) the alleged citizen can rebut the "presumption of alienage" by producing "substantial credible evidence in support of his citizenship claim," and (3) the government then "bears the ultimate burden of proving" removability "by clear and convincing evidence." *Ayala-Villanueva* v. *Holder*, 572 F.3d 736, 737 n.3 (9th Cir. 2009); see *Mondaca-Vega*, 808 F.3d at 419.

The court of appeals in *Mondaca-Vega* did not indicate that it was departing from its precedent requiring a petitioner to bear the initial burden of proving nationality by a preponderance of the evidence in a district court proceeding under 8 U.S.C. 1252(b)(5)(B), see *Sanchez-Martinez*, 714 F.2d at 74 & n.1, and, in any event, the burden-shifting approach described in *Mondaca-Vega* would not lead to a different result here. Petitioner acknowledges that he was born abroad, so he would bear the burden of producing "substantial credible evidence" in support of his citizenship claim at the second step of the burden-shifting scheme. *Mondaca-Vega*, 808 F.3d at 419 (quoting *Ayala-Villanueva*, 572 F.3d at 737 n.3). It is unclear how that substantial-credible-evidence burden would differ, if it all, from the preponderance-of-the-evidence standard that the district court applied here. See Pet. App. 31. Indeed, *Mondaca-Vega* expressly declined to recognize a fourth burden of proof beyond preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt. See 808 F.3d at 422; cf. *Leal Santos*, 516 F.3d at 4 (describing the second step of the burden-shifting framework as "preponderance of the evidence"). And *Mondaca-Vega* affirmed a district court decision that placed the initial burden on the petitioner to prove

U.S. citizenship "by a preponderance of the evidence." *Mondaca-Vega* v. *Holder*, No. 04-cv-339, 2011 WL 2746217, at *9 (E.D. Wash. July 14, 2011). Nothing supports a different result here.[3]

In any event, petitioner does not ask this Court to review the court of appeals' application of its own precedent. And even if he had, it "is primarily the task of a Court of Appeals," not this Court, "to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam); cf. Pet. App. 92 (court of appeals denying petition for rehearing en banc).

c. Petitioner's remaining arguments on this question (Pet. 14-19) largely amount to factbound disputes about the proper weighing of the evidence. In particular, petitioner contends that his 2002 and 2009 passports constitute substantial, credible evidence of citizenship. But the courts below reasonably concluded that those passports, which were revoked, are "unreliable," Pet. App. 2, 26, because they were issued after removal proceedings began in 2000, at which point petitioner had "a motive to prove that his birth year was 1977," *id.* at 27. Likewise, petitioner relies on the 1997 birth certificate that he presented (Pet. 16), but the district court reasonably concluded that the birth certificate was inadmissible because it could not be authenticated, Pet. App. 9-26, and the court of appeals agreed, *id.* at 2. In addition, the courts below observed that documents presented by petitioner in support of his initial admission to the United States—before he faced any prospect of

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[3] The court of appeals here stated that the district court applied the burden-shifting framework from removal proceedings to petitioner's claim. Pet. App. 2. As explained above, however, the district court placed the burden on petitioner to prove nationality by a preponderance of the evidence. *Id.* at 31.

removal and any possible motive to misrepresent his date of birth—indicated that he was born in 1976, not 1977. *Id.* at 2, 6-7. Those fact-intensive determinations do not warrant this Court's review.

3. Petitioner also contends (Pet. 20-24) that the court of appeals' decision created a circuit conflict regarding the application of Federal Rule of Evidence 609(b). No such conflict exists.

As relevant here, Federal Rule of Evidence 609(b)(1) provides that a prior conviction that is more than ten years old is admissible for impeachment only if "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect." Fed. R. Evid. 609(b)(1). The district court stated in two footnotes that petitioner's 1998 convictions for perjury, along with his "clear bias" and lack of personal knowledge, undermined certain representations about his date of birth. Pet. App. 27 n.11, 69 n.16. Petitioner contended that the district court had not conducted the balancing required by Rule 609(b)(1) before relying on the prior convictions. *Id.* at 3. The court of appeals did not directly resolve that objection, but instead determined that any error would be harmless because it would not likely have affected the outcome of the proceedings. *Ibid.* (citing *United States* v. *Edwards*, 235 F.3d 1173, 1178-1179 (9th Cir. 2000)). The court noted that the district court had "articulated additional reasons for his credibility assessment, including" petitioner's bias and lack of personal knowledge. *Ibid.*

Petitioner does not contend that the court of appeals' harmlessness analysis conflicts with the approach of any other circuit. Indeed, Federal Rule of Evidence 103(a) expressly provides that evidentiary objections may only be asserted if they affect a party's substantial

rights, and courts of appeals routinely apply harmlessness analysis to evidentiary errors. See, *e.g.*, *Padilla* v. *Troxell*, 850 F.3d 168, 178 n.11 (4th Cir. 2017). Petitioner instead reiterates his argument (Pet. 21) that the district court erred by failing to conduct an adequate balancing under Rule 609(b). But that contention is unresponsive to the decision below, as are petitioner's citations to various courts' Rule 609(b) balancing determinations (Pet. 22-24) that do not involve harmless-error questions.

In any event, petitioner's contention is unpersuasive. Petitioner's perjury convictions for "falsifying information to receive certain privileges"—including misrepresenting his age—are highly probative in analyzing the question about his date of birth. Pet. App. 89; see *id.* at 27 n.11, 69 n.16. The probative value of those convictions substantially outweighed any prejudicial effect, Fed. R. Evid. 609(b)(1), particularly given that the perjury convictions were a basis for petitioner's removal, see 8 U.S.C. 1101(a)(43)(S), 1227(a)(2)(A)(iii). Further review is unwarranted.[4]

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[4] In addition, this case would be a poor vehicle for reviewing any of the questions presented because it contains a potential jurisdictional defect. Under 8 U.S.C. 1252(b)(5)(B), the district court renders a "decision" on a nationality claim "as if an action had been brought in the district court" under the DJA. In a typical "action" under the DJA, a court of appeals may review a district court's "decision" only upon the filing of a timely notice of appeal. *Ibid.*; see 28 U.S.C. 2107; Fed. R. App. P. 4(a). Petitioner failed to file a timely notice of appeal challenging the district court's decision on his nationality claim, but the court of appeals rejected the government's contention that it therefore lacked jurisdiction. The court reasoned that nationality hearings under 8 U.S.C. 1252(b)(5)(B) are "limited remand[s]" that do not require a notice of appeal. 641 F.3d 1141, 1142-1143. This threshold jurisdictional question weighs against further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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