No. __-_____

IN THE

Supreme Court of the United States

RODRIGO MARTINEZ-MENDOZA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. The "Clear Error" standard of review has been criticized as "elastic, capacious, malleable, and above all variable." Edward H. Cooper, *Civil Rule 50(A): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 645-46 (1988). And this Court "has not provided detailed guidance as to what makes a finding 'clearly erroneous.'" Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 Cal. L. Rev. 1185, 1199–200 (2013). Given this amorphous gap in the law, there have been recent calls to "dial[] down the deference – even slightly" to law enforcement opinion and speculation testimony. *United States v. Drakeford*, 992 F.3d 255, 266 (4th Cir. 2021) (Wynn, J., concurring). This case presents an opportunity to do so.

The district court here credited an Immigration and Customs Enforcement officer's opinion that Mr. Martinez-Mendoza could not have been voluntarily returned to Mexico in 1997. But the documentary evidence from his immigration file reflected that he had been voluntarily returned, and the officer on cross-examination repudiated the factual bases for the opinions he provided. Still, the Fourth Circuit affirmed under the "clear error" standard of review. This case presents an opportunity to place an objective but deferential limitation on the subjective clear error standard.

The question presented is whether an appellate court reviewing factual findings for clear error must take account of undisputed contrary evidence provided by a law enforcement officer's own testimony and the government's own recordkeeping.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Martinez-Mendoza*, 2021 WL 3138578 (4th Cir. 2021)

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PETITION FOR WRIT OF CERTIORARI

Rodrigo Martinez-Mendoza respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at pages 1a to 12a of the appendix to the petition and is available at 2021 WL 3138578 (4th Cir. 2021).

JURISDICTION

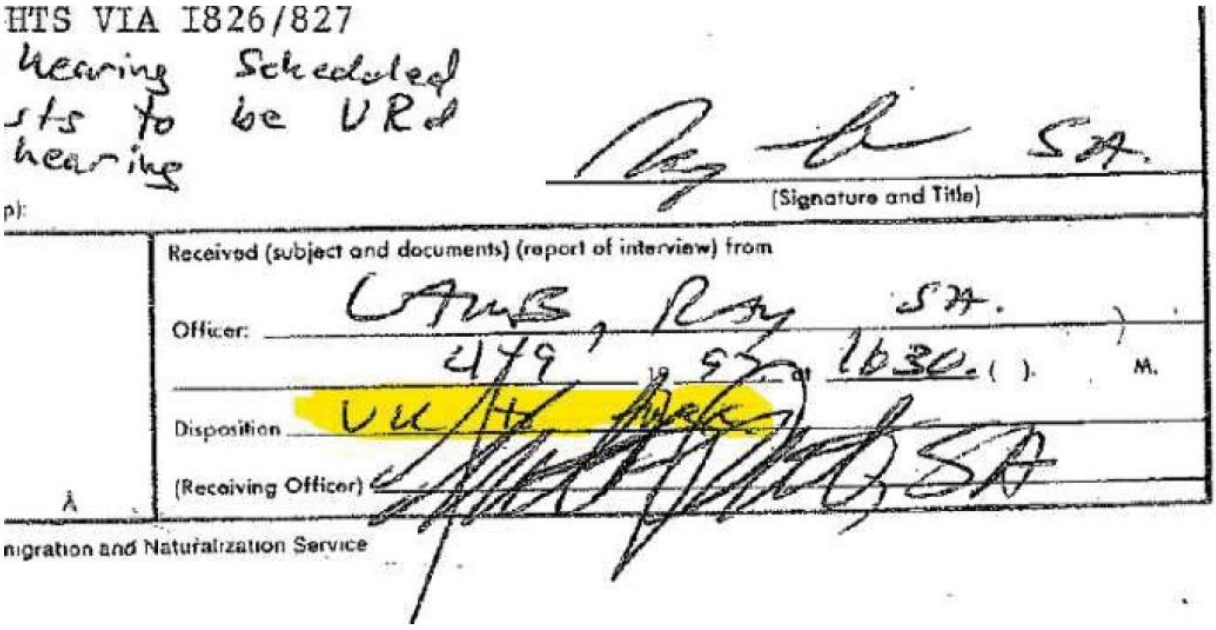
The district court in the Eastern District of Virginia had jurisdiction under 18 U.S.C. § 3231. The Fourth Circuit had jurisdiction under 28 U.S.C. § 1291. That court issued its opinion and judgment on July 26, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Introduction

Twenty one years before this case arose, in 1996, Mr. Martinez-Mendoza entered the United States without inspection and was served an Order to Show Cause. App. 3a. The order did not contain a date on which he was to appear before an immigration judge, and he was released on bond. *Id.*

While waiting for his hearing, Mr. Martinez-Mendoza was arrested in a workplace raid by the Immigration and Naturalization Serivce ("INS") in Galveston, Texas in April of 1997. App. 4a. INS officer Ray Lamb filled out an I-213 alien arrest report noting that Mr. Martinez-Mendoza had an immigration court hearing scheduled for May 1997. Handwritten contemporaneous notes by Mr. Lamb reflect that Mr. Martinez-Mendoza requested voluntary return ("VR") to Mexico in lieu of proceedings. In the disposition section of the I-213, Officer Lamb wrote "VR'd to Mex" App 4a.


HTS VIA I826/827
Hearing Scheduled
sts to be VR'd
hearing

(Signature and Title)

Received (subject and documents) (report of interview) from

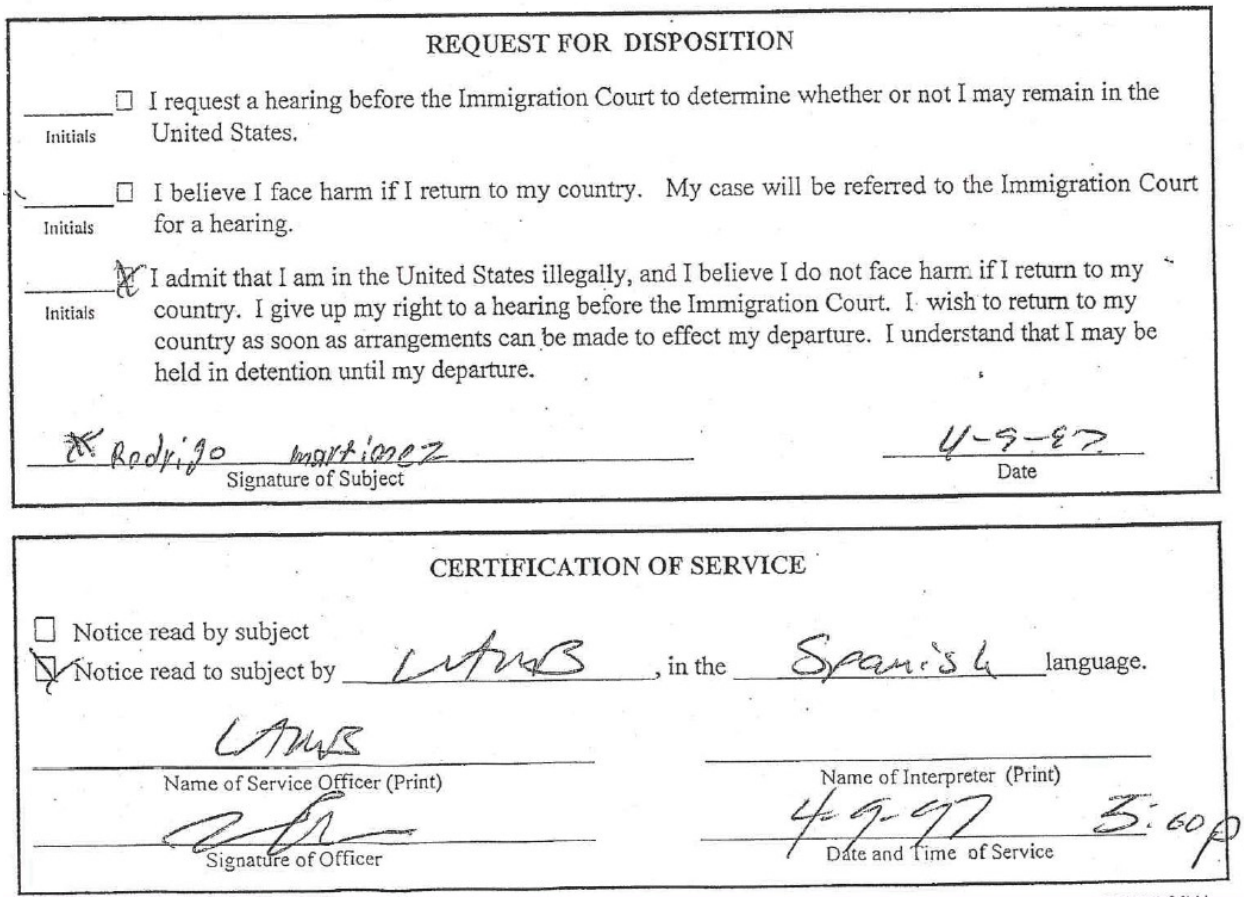
Officer:

Disposition

(Receiving Officer)

migration and Naturalization Service

App. 16a. Also later found in Mr. Martinez's A file was a waiver of rights form formally requesting voluntary departure.



REQUEST FOR DISPOSITION

_____ ☐ I request a hearing before the Immigration Court to determine whether or not I may remain in the United States.
Initials

_____ ☐ I believe I face harm if I return to my country. My case will be referred to the Immigration Court for a hearing.
Initials

_____ ☒ I admit that I am in the United States illegally, and I believe I do not face harm if I return to my country. I give up my right to a hearing before the Immigration Court. I wish to return to my country as soon as arrangements can be made to effect my departure. I understand that I may be held in detention until my departure.
Initials

Rodrigo martinez
Signature of Subject

4-9-97
Date

CERTIFICATION OF SERVICE

☐ Notice read by subject
☒ Notice read to subject by LATAS, in the Spanish language.

LATAS
Name of Service Officer (Print)

Name of Interpreter (Print)

Signature of Officer

4-9-97 3:60 P
Date and Time of Service

C.A.J.A. 326.[1]

What happened next was disputed. Either Mr. Martinez-Mendoza was voluntarily returned to Mexico as the forms indicated, or, as the district court later found, he was released and returned to Mexico on his own. App. 4a. In any event, Mr. Martinez-Mendoza was in Mexico on May 6, 1997 when his *in absentia* hearing took place. *Id.*

[1] "C.A.J.A." Refers to the Joint Appendix filed with the Court of Appeals, No. 20-4025, Doc. 18.

Moving ahead twenty years, Mr. Martinez-Mendoza was charged with illegal reentry after deportation in December 2017. App. 5a. He moved to dismiss the indictment under 8 U.S.C. § 1326(d), alleging that his *in absentia* order was defective and unavailable for use in the prosecution. *Id.*

As a factual matter, Mr. Martinez-Mendoza, relying on the April 1997 I-213 and its disposition of "VR to Mex," argued that he had been voluntarily returned to Mexico in April 1997 by INS before his hearing on May 6, 1997. Initially, the government informed counsel for Mr. Martinez-Mendoza that Ray Lamb the INS officer who filled out the form, had retired and they were unable to locate him. C.A.J.A. 207. However, after the motion was denied, the defense independently located Ray Lamb (who had never retired and was still employed as an officer with Immigrations and Customs Enforcement). App. 44a-45a.

E-mails and Contradictory Testimony

In a series of e-mails between ICE officer Ray Lamb and defense counsel, Officer Lamb confirmed that "VR to Mex" on the I-213 was his handwriting. App. 15a. He stated that the reviewing officer's signature was not that of his immediate supervisor at the time, and he did not know whose it was. App. 15a. He wrote, "I would say that a VR prior to the hearing could possibly have happened. There is no doubt he requested a VR. And it is possible that he was very quickly shuffled onto a bus headed to the border." App. 15a. After consulting "a couple of other old timers here," Officer Lamb indicated that "there might not be a document in an A file which

confirms that a VR took place." He stated there could be a bus passenger list, but that form "isn't always included in an A file." App. 15a.

Mr. Martinez raised this newly discovered evidence, and a second evidentiary hearing was scheduled. At the hearing, Officer Lamb admitted he had no memory of his encounter with Mr. Martinez-Mendoza. App. 22a. But then Officer Lamb repudiated the opinions in the e-mails, and provided new opinions (emphases added):

Written Statement	Testimony
"[A] VR prior to the hearing could possibly have happened . . . **it is possible that he was very quickly shuffled onto a bus headed to the border.**" App. 15a.	Gov't Counsel: "[W]as the defendant shuffled onto a bus in this case?" A No, I don't believe that happened. **I don't believe it could have happened.**" App. 36a-37a.
"[T]here **might not be a document** in an A file which confirms that a VR took place." App. 15a.	"had [a VR] happened, there **would definitely be documents** in the A-file to support that." App. 38a.

Examination forced Officer Lamb to disclose the factual bases for his new, changed opinions, which he then acknowledged were unfounded:

Proffered Basis for Opinion	Contrary Facts Admitted
A [T]here was a local policy in Houston at the time that precluded anyone with criminal history from VR[in]g." App. 29a.	Q The highest you know personally that [this policy] went was your supervisor? A Yes, sir." App. 52a Q Okay. Who was your supervisor at the time? A Robert Montgomery. Q And that's not his signature [approving the I-213]? A I don't believe that is his signature. App. 24a.

Q The disposition line, you had, prior to talking to the defendant, put in VRd to Mexico? A Yes, sir." App. 30a.	Q And you said you also prefilled in VRd to Mexico for each of those? A No, sir. I said I could have done that. . . . I don't know that I went and wrote VRd to Mexico on every single 213. . . . But clearly I wrote that on the bottom of this when I shouldn't have." App. 39a-40a.
A Regarding this individual, there are a number of documents that should have been in the A-file had he been VRd. Q Is an I-826 one of those documents? A In this particular case, yes. App. 24a-25a.	[Reviewing, confirming existence of I-826 and authenticating signatures] App. 26a.

Then, Officer Lamb explained the process by which Mr. Martinez-Mendoza would have been taken to Mexico based on his "mistaken" notation of "VR to Mex" on the I-213.

Officer Lamb expressed a distinction between whether Mr. Martinez-Mendoza was *intentionally* VR'd to Mexico and whether he was *accidentally* VR'd to Mexico. App. 47a. As soon as counsel for Mr. Martinez tried to clarify and explore the possibility that Mr. Martinez-Mendoza was accidentally VR'd to Mexico, opposing counsel objected, calling it speculation; and the district court sustained the objection. App. 47a. The district court noted that officer Lamb did "not believe" a voluntary return happened in this case." App. 13a. It claimed that Officer Lamb "went through in detail why he believes in this particular case the defendant was not allowed to voluntarily deport himself back to Mexico." App. 13a. The district court therefore

declined to find that Mr. Martinez-Mendoza was voluntarily returned, and denied the motion. App. 14a.

Proceedings in the Court of Appeals

The Fourth Circuit reviewed the district court's factual finding under the clear error standard. It held that the district court's conclusion was one of "two permissible views of the evidence." App. 11a. In particular, it noted the assertions by the government's witnesses that Mr. Martinez's "file was missing documentation that would have been included had he been voluntarily returned," and because "local policies would have precluded voluntary return in Martinez-Mendoza's case." The opinion did not discuss the testimony of the same officer or documentary evidence refuting those facts. Instead, it held that it "owe[d] special deference to a district court finding, like this one, that is based on an assessment of witness credibility." App. 11a-12a. Finding no clear error, it affirmed the district court's denial of the motion to dismiss "on that ground alone." App. 8a.

This petition follows.

REASON FOR GRANTING THE PETITION

This Court's review is warranted to establish an objective aspect to the clear error standard of review on appeal. For over 35 years, Courts of Appeal have reviewed district courts' factual findings not only deferentially, but subjectively – to determine if they are "plausible" or "permissible" or whether the panel on appeal is "firmly convinced" of an error.

When the factual finding, as here, consists of a law enforcement officer's opinion about what could have happened over 20 years prior (regarding an even which he admitted he did not remember), and courts are not required to take account of contradictory and undisputed documentary evidence or a lacking factual basis for the opinion, the danger of affirming a factually erroneous determination is too high.

Academics and judges have sounded the alarm on such extreme deference, including at the stage of appellate review. The focus of public debate at the moment, and the effect of such deference on the public's perception of the administration of justice favor this Court's intervention.

I. The Question Presented is Important Because the Subjective Application of the Clear Error Standard of Review Undermines Public Confidence in the Criminal Justice System and Leads to Inconsistent Outcomes

The flagship case for clear error is *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985).[2] This Court expressed the standard in a variety of ways. Courts of Appeal must affirm a finding if it is "plausible in light of the record viewed in its entirety;" or if the finding is one of two "permissible views of the evidence." *Id.* at 574. Plausibility is, of course, subjective; and stating that a finding must be "permissible" is a tautology. Another common formulation is more explicitly subjective: the reviewing court reverses only when "firmly convinced a mistake has been made." *See, e.g.*, *United States v. Thompson*, 335 F.3d 782, 784 (2003).

Since *Anderson*, this Court has not apparently taken any steps to clarify when a factual finding is "plausible" or "permissible." Leaving the standard this amorphous, however, has generated academic criticism and calls by some in the judiciary for a more concrete standard, especially when reviewing as here opinion testimony by law enforcement officers. And the extreme deference often accorded such testimony has begun to undermine confidence in the judiciary. This case provides a good opportunity to "dial[] down the deference – even slightly" and set an administrable objective standard for conducting clear error review.

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[2] Some state courts have refused to follow *Anderson*, and retain the rule that deference is warranted only for credibility determinations because appellate courts "are as capable of reading and understanding the documentary evidence as is the trial court." *Varnson v. Satran*, 368 N.W.2d 533, 536 (N.D. 1985); *see also Commonwealth v. Tremblay*, 480 Mass. 645, 646 (Mass. 2018).

A. Academic Commentators, Media, and Surveys of Public Opinion Reflect a Perception That Opinions and Speculation by Law Enforcement Are Accepted by Some Courts Uncritically

1. Academic Criticism

In an influential and widely-cited article, Professor Anna Lvovsky traced the historical roots and causes for deference to law enforcement opinion testimony. Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017). Professor Lvovsky highlighted the risk of undue deference to "police's professional insights" simply due to "the cumulative effect of judges' many encounters with the police" *Id*. at 2080. Even a critic of Prof. Lvovsky has agreed that "courts have tumbled over themselves in their eagerness to endorse police actions and viewpoints, often with slim basis for doing so." Barry Friedman, *Why Do Courts Defer to Cops?*, 130 HARV. L. REV. F. 323 (2017).

The debate over judicial deference to law enforcement witnesses has occupied large swathes of academic publications over the last decade. *See*, *e.g.*, David Jaros, *Criminal Doctrines of Faith*, 59 B.C. L. REV. 2203, 2233 (2018) (positing that judicial deference to police opinions derived from confidence in character of police officers); Jennifer E. Laurin, *Quasi-Inquisitorialism: Accounting for Deference in Pretrial Criminal Procedure*, 90 NOTRE DAME L. REV. 783, 792-93 (2014); Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1378-79 (2018); Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 652-56 (2011). Not a few of them posit the deferential and subjective standard of review on appeal as a source of error. *See* Caitlin E. Borgmann, *Appellate Review of Social*

Facts in Constitutional Rights Cases, 101 CAL. L. REV. 1185, 1199–200 (2013); s*ee also* Kenji Yoshino, *Appellate Deference in the Age of Facts,* 58 WM. & MARY L. REV. 251 (2016); Adam N. Steinman, *Rethinking Standards of Appellate Review*, 96 IND. L.J. 1, 18 (2020).

2. News Reports and Public Discussion

For better or for worse, the debate on the deference accorded police opinions (such as that applied in this case) has spilled beyond academia and is part of the current national conversation. The New York Times has labeled police perjury an ongoing problem. Joseph Goldstein, *'Testilying' by Police: A Stubborn Problem*, N.Y.Times (Mar. 18, 2018) (available at https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html). USA Today published an article noting that prosecutors are not tracking which officers have been found to have testified untruthfully, resulting in continued testimony without impeachment and factually wrong decisions from arrest to conviction. Steve Reilly and Mark Nichols, *Hundreds of police officers have been labeled liars. Some still help send people to prison*, USA Today (Oct. 14, 2019).[3]

For the first time in 27 years of surveys, Gallup reports that a majority of American adults do not trust law enforcement. Aimee Ortiz, *Confidence in Police is*

[3] Professor William Baude has speculated that the extreme consequences of a negative credibility finding may influence courts to avoid making such determinations. Will Baude, *Judges weigh in on credibility findings for law enforcement*, The Volokh Conspiracy (Apr. 18. 2014) (available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/18/judges-weigh-in-on-credibility-findings-for-law-enforcement/).

at Record Low, Gallup Survey Finds, N.Y. Times (Aug. 12, 2020) (available at https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html).

Clear error review, and the proper resolution of this case do not require any court to find that the ICE officer committed perjury; those are the extreme and easy cases, when they are found out. Instead, this Court should take the opportunity to provide a workable framework for clear error review that provides objectivity, and requires that police provide the bases for disputed opinions and accounts for both internal inconsistencies and extrinsic impeachment.

B. The Subjective Clear Error Standard Leads to Confusion and Inconsistent Reasoning as Well as Outcomes

Notes of caution have sounded from the judiciary, especially recently. In *United States v. Willis*, 14 F.4th 170, 186 (2d Cir. 2021), the Second Circuit echoed Professor Lvovsky, and advocated that judges be "cautious of the risk" that providing both fact and opinion testimony may "inflat[e] an officer's expert opinions through his personal involvement in the case and bath[e] his lay testimony in the aura of expertise." *Id*. (citations, quotations omitted).

Judge Wynn in the Fourth Circuit highlighted concerns with judicial deference to police-as-experts, especially in the Fourth Amendment context. *United States v. Drakeford*, 992 F.3d 255, 266 (4th Cir. 2021) (Wynn, J., concurring). Judge Wynn advocated "dialing down the deference – even slightly, and treating police officers like other expert witnesses." *Id*. As Judge Wynn notes, an officer providing an opinion based on facts he or she knows "can later explain in court why [a] fact is significant" but the explanation is "paltry or conclusory, . . . the judge must not hesitate to assign

it less weight." *Id.* "[I]t is not a heavy burden for courts to demand such an explanation from officers who, as in this case, testify as to *both* the underlying, objective facts *as well as* the significance of those facts." *Id.*

Because the clear error standard is so subjective, not only are outcomes inconsistent, but even the reasons appellate courts provide to affirm are inconsistent. For example, in *United States v. Span*, 789 F.3d 320, 327 (4th Cir. 2015), the Fourth Circuit held clear error when the district court "necessarily had to disregard" offense dates in a judgment, instead of contradictory dates in an indictment and plea transcript. But in this case, the same Court did not reverse, despite black-and-white documentary evidence in the record contradicting the officer's testimony. *See also United States v. Pulley*, 987 F.3d 370, 382 (4th Cir. 2021) (Keenan, J., dissenting) (involving allegation that detectives recklessly omitted relevant information from warrant application, criticizing majority for "simply reciting the standard of review for factual findings that were never made"). The Fifth Circuit, at least in theory, has a requirement that the district court not "arbitrarily disregard[]" "unimpeached, competent, and relevant testimony." *In re Super Van, Inc.*, 71 F.3d 877 (5th Cir. 1995).

In sum, a subjective clear error standard of review, without even a requirement to address contradictory evidence, removes the last obstacle to extreme and abject deference to the opinions of law enforcement. And without this Court's intervention, the confusion and harm to the public's view of the partiality of the judiciary will persist.

II. This Case is a Good Vehicle for Resolving the Question Presented

This case is an excellent vehicle to resolve the question presented. The factual dispute around solely through the government's own witnesses and documentation; the witness was thoroughly examined on the bases for his opinion, and the documentary evidence is clear and present in the record. That is to say it involves only internal contradictions of information (documents and testimony) within the government's control, and not a credibility contest between law enforcement and civilian witnesses.

And the issue is dispositive. If Mr. Martinez-Mendoza was voluntarily returned to Mexico in INS custody in April 1996, his later *in absentia* deportation hearing and order in 1997 would undoubtedly have been fundamentally unfair, and deprived him of the opportunity for judicial review or exercising administrative remedies. *See* 8 U.S.C. § 1326(d); *United States v. El Shami*, 434 F.3d 659 (4th Cir. 2005) (holding *in absentia* removal order invalid under § 1326(d)). The Fourth Circuit expressly declined to reach these issues here in light of its holding under the clear error standard. App. 9a-10a ("We need not consider those questions here, however . . . [b]ecause the district court's factual findings are not clearly erroneous, we affirm its judgment on that ground alone.").

Last, this case does not involve accusations that Officer Lamb deliberately lied about a factual matter; the defense disputed only the district court's uncritical adoption of Officer Lamb's speculative opinion testimony about events he admitted he did not remember. The clear error standard must require that courts address

undisputed contradictory facts in the record, as a modest step toward limiting undue judicial deference to law enforcement opinions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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