No. _____

IN THE

Supreme Court of the United States

CLAUDIA LORENA MARQUEZ MORENO

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

DAVID R. FINE
(Counsel of Record)
K&L GATES LLP
17 North Second St., 18th Fl.
Harrisburg, PA 17101
(717) 231-4500

Counsel for Petitioner

QUESTION PRESENTED

A divided panel of the Third Circuit affirmed Petitioner's conviction for falsely claiming to be a United States citizen. The statute at issue here, 22 U.S.C. § 2705, makes the Secretary of State's issuance of a particular type of passport conclusive proof of citizenship. The Third Circuit majority interpreted Section 2705 to mean that a passport is conclusive proof of citizenship only so long as the holder is actually a U.S. citizen – an interpretation no court or administrative body has ever reached. The dissenting judge wrote that the majority's interpretation not only reads the "conclusive-proof" language out of Section 2705, but that the holding placed the Third Circuit directly in conflict with the Ninth Circuit and with the Board of Immigration Appeals on the statute's meaning.

The question presented is as follows:

Whether the Secretary of State's issuance of a passport based on a determination of a person's United States citizenship is conclusive proof of the passport holder's citizenship such that it may not be collaterally attacked.

LIST OF PARTIES

The parties include Petitioner Claudia Marquez Moreno and Respondent the United States of America.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

Claudia Lorena Marquez Moreno respectfully requests that this Court issue a writ of *certiorari* to review the decision of the Third Circuit in her case.

OPINIONS BELOW

There is no reported district court opinion. The Third Circuit's opinion (App. A) is not yet reported in the Federal Reporter, but it is available at *United States v. Moreno,* No. 12-1460, 2013 WL 3481488 (3d Cir. July 3, 2013). The Third Circuit's order denying rehearing (App. B) is not reported.

JURISDICTION

The court of appeals entered its judgment on July 3, 2013. Petitioner filed a timely petition for rehearing on July 9, 2013. The court of appeals denied the petition for rehearing on July 30, 2013. The district court had jurisdiction under 18 U.S.C. § 3231, and the court of appeals had jurisdiction under 28 U.S.C. § 1291. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 911 of Title 18, United States Code, provides as follows:

> Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. § 911.

Section 2705 of Title 22, United States Code, provides as follows:

> The following documents shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attor-

> ney General or by a court having naturalization jurisdiction:
>
> (1) A passport, during its period of validity (if such period is the maximum period authorized by law), issued by the Secretary of State to a citizen of the United States.
>
> (2) The report, designated as a "Report of Birth Abroad of a Citizen of the United States," issued by a consular officer to document a citizen born abroad. For purposes of this paragraph, the term "consular officer" includes any United States citizen employee of the Department of State who is designated by the Secretary of State to adjudicate nationality abroad pursuant to such regulations as the Secretary may prescribe.

22 U.S.C. § 2705.

STATEMENT OF THE CASE

It has long been the case that certificates of citizenship or naturalization issued by the Attorney General of the United States or a naturalization court are conclusive proof of citizenship or naturalization. *See Magnuson v. Baker,* 911 F.2d 330, 333 (9th Cir. 1990). In 1982, Congress enacted 22 U.S.C. § 2705, which "plainly states that a passport has the same force and effect as a certificate of naturalization or citizenship issued by the Attorney General or a naturalization." *Id.* Thus, because the holders of citizenship or naturalization certificates may use those documents as conclusive evidence of citizenship, "so can a holder of a passport." *Id.* Moreover, the citizenship of a passport holder may not be collaterally attacked and may only be challenged in a proceeding initiated by the Secretary of State according to regulations that afford due process for the passport holder. *Id.*

Notwithstanding the plain language of Section 2705, Petitioner Claudia Marquez Moreno – who at the time held and still holds a valid United States passport – was convicted of falsely representing herself to be a United States citizen.

Ms. Moreno was adopted by a United States citizen when she was nine years old. In the 1990s, she was convicted of certain criminal acts, and she was deported to Mexico in 2006. She reentered the United States in 2007.

In 2007, Ms. Moreno applied to the Secretary of State for a passport, and the Secretary of State issued to her the type of passport issued to United States citizens. In 2008, the United States Border Patrol confiscated Ms. Moreno's passport, but the Secretary of State has never revoked it such that it remains valid as of the date on which this petition is filed.[1]

In 2011, Ms. Moreno traveled to the United States Virgin Islands. While she was there, an immigration officer questioned her about her citizenship. She told him that she was a U.S. citizen and showed him her New Mexico driver's license.

Ms. Moreno was arrested and charged in the District of the Virgin Islands with falsely representing herself as a U.S. citizen in violation of 18 U.S.C. § 911, which provides that "[w]hoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or im-

---

[1] In this petition, Ms. Moreno will for convenience refer to herself as "holding" a valid U.S. passport. In using that shorthand, she means that there remains in existence a valid U.S. passport for her even though the actual document is in the possession of the Border Patrol. The distinction is not relevant to this petition.

prisoned not more than three years, or both." As the district judge later instructed the jury, for a defendant to be convicted under Section 911, the government must prove beyond a reasonable doubt (1) that the defendant knowingly and falsely represented herself to be a United States citizen, (2) that she was not a citizen at the time of her representation and (3) that she made the false representation willfully. *See United States v. Moreno*, No. 12-1460, 2013 WL 3481488 at *3 (3d Cir. July 3, 2013) (App. A at 2a).

At trial, Ms. Moreno's principal defense was that, because the Secretary of State had issued Ms. Moreno a still-valid passport based on her determination that Ms. Moreno was a citizen, the second element for conviction under Section 911 (that she was not a citizen) could not be met. She pointed to 22 U.S.C. § 2705, which provides in relevant part as follows:

> The following documents shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction: (1) A passport, during its period of validity (if such period is the maximum period authorized by law), issued by the Secretary of State to a citizen of the United States. . . .

22 U.S.C. § 2705(1). Certificates of naturalization or of citizenship are treated as conclusive proof of citizenship, *Magnuson*, 911 F.2d at 333, and so Ms. Moreno argued that Section 2705 gives the same effect to valid passports.

The district judge denied Ms. Moreno's motion for acquittal based on Section 2705, and he refused to give a jury instruction based on Section 2705. Ms.

Moreno was convicted, and the district judge sentenced her to 29 months imprisonment.

On appeal, a divided panel of the Third Circuit affirmed.[2] The majority and the dissenting judge split on the purely legal question of how Section 2705(1) should be interpreted.

The majority, per Judge Roth, interpreted the statute as follows:

> Under the language of the statute, the logical premise needed to establish conclusive proof of citizenship consists of two independent conditions: (1) having a valid passport and (2) being a U.S. citizen. The second condition is not necessarily satisfied when the first condition is satisfied.

Moreno, 2013 WL 3481488 at *3 (App. A at 5a). Thus, the majority held that Ms. Moreno's valid passport was not conclusive without additional evidence that she was a U.S. citizen. *Id.* at *4 (App. A at 7a).

Judge Smith dissented. He asserted that the majority interpretation "eviscerates the statute." *Moreno*, 2013 WL 3481488 at *6 (Smith, J., dissenting) (App. A at 12a). He wrote that the majority's interpretation runs afoul of the rules of statutory construction because, if a person may only use a passport as conclusive evidence of U.S. citizenship if she first proves that she is a U.S. citizen, "conclusive evidence of citizenship is unnecessary, and so the statute becomes inoperative by depriving passports of

---

[2] On appeal, Ms. Moreno raised issues other than the statutory interpretation issue discussed in the text above. Because those issues are not relevant to this petition, she mentions them here but will not discuss them further.

any special evidentiary value." *Id.* (App. A at 12a-13a).

Judge Smith wrote that no other court of appeals has held that Section 2705 requires a preliminary showing that the passport holder is a U.S. citizen, and he noted that the Ninth Circuit, a number of district courts and the Board of Immigration Appeals have held that a passport, standing alone, serves as conclusive proof of citizenship. *Id.* at *7 (App. A at 13a). He wrote that the majority's broad holding about Section 2705's meaning created a circuit split. *Id.* (App. A at 13a) (*citing Magnuson).*

Judge Smith explained how he interprets the statute. He first noted that the Secretary of State may issue passports both to U.S. citizens and to noncitizens "owing allegiance…to the United States" *Id.* at *7 (App. A at 14a) (citing 8 U.S.C. § 212). Passports given to such noncitizens specify that the holder is a United States national but not a citizen.

> The phrase "citizen of the United States in § 2705 thus has the effect of preventing those determined by the State Department to be noncitizen nationals from using their passports as conclusive evidence of U.S. citizenship. At the same time, it allows those determined to be citizens to use their passports as conclusive evidence of their citizenship.

Moreno, 2013 WL 3481488 at *6 (Smith, J., dissenting) (App. A at 14a).

Thus, Judge Smith concluded that the district judge should have granted Ms. Moreno's motion for a judgment of acquittal and that, "[i]f the prosecutors wanted to go after Moreno, they should have asked the State Department to revoke her passport." *Id.* at *8 (App. A at 15a).

The majority responded to the dissent by suggesting that Judge Smith's interpretation of Section 2705 "elevates the State Department's role in the determination of citizenship beyond its historic status…" The majority continued that its "reading of § 2705 gives effect to the statute as written but does not go so far as to empower the State Department to determine citizenship through the issuance of a passport." *Moreno*, 2013 WL 3481488 at *4 (App. A at 7a-8a). The majority also sought to distinguish *Magnuson* and the other cases Judge Smith cited by pointing out that all of them interpreted Section 2705 in settings other than criminal prosecutions under 18 U.S.C. § 911. *Id.* at *3 n.3 (App. A at 7a).

Ms. Moreno filed a timely petition for rehearing, which the Third Circuit denied. Notably, three judges would have granted rehearing (McKee, C.J.; Smith, J., and Fuentes, J.) (App. B at 2b).

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's holding creates a split among the circuits and between the Third Circuit and the Board of Immigration Appeals.

In this case, the Third Circuit reached a particularly broad holding. It held that Section 2705 only provides conclusive proof of citizenship if the person invoking it has a valid passport *and* if that person can otherwise prove she is a citizen.

As Judge Smith correctly noted in his dissent, the majority's holding was not only incorrect, but it created a circuit split. *See Moreno*, 2013 WL 3481488 at *7 (Smith, J., dissenting) (App. A at 13a).

In *Magnuson*, the Ninth Circuit considered a case in which the Secretary of State sought to revoke Charles Vernon Myers' passport. *See* 911 F.2d at 332. In 1986, the State Department had determined that Mr. Myers was a U.S. citizen and, on that basis, issued him a U.S. passport. Nearly a year later, the State Department wrote to Mr. Myers and demanded the passport's immediate return.

Mr. Myers filed an action in the U.S. District Court for the Eastern District of Washington arguing that, once the State Department issues a passport, it has no statutory authority to revoke the passport without meeting certain due-process requirements. The district judge granted summary judgment to Mr. Myers.

The Ninth Circuit affirmed.

> The parties agree that section 2705 has had two consequences which set the stage for the conflict in this case. First, by section 2705, Congress has vested the power in the Secretary of State to decide who is a United States citizen. Prior to the enactment of section 2705, only the Attorney General or a naturalization court could determine who is a citizen of the United States. Congress granted the Attorney General and naturalization courts the power respectively to issue certificates of citizenship or nationalization as conclusive evidence of their determinations. *By deeming passports conclusive evidence of citizenship, Congress has thus also granted power to the Secretary of State to determine who is a citizen.*

> Second, through section 2705, Congress has authorized passport holders to use the passport as conclusive proof of citizenship. The statute plainly states that a passport has the same force and effect as a certificate of naturalization or citizenship issued by the Attorney General or by a naturalization court. The holders of these other documents can use them as conclusive evidence of citizenship. Therefore, so can a holder of a passport.

911 F.2d at 333 (emphasis added, footnotes omitted). The Ninth Circuit then held that, because Section 2705 provides to passport holders the same protections as holders of citizenship or naturalization certificates, the Secretary of State may only revoke a passport after providing notice and an opportunity to be heard and only when there are exceptional grounds such as fraud or misrepresentation. *Id.* at 336.[3]

Thus, in *Magnuson,* the Ninth Circuit indisputably held that the existence of a valid passport in and of itself is conclusive proof of citizenship not subject to collateral challenge in a judicial proceeding.[4]

---

[3] Four years after the Ninth Circuit decided *Magnuson*, Congress amended the Immigration and Nationality Act to make it easier for the State Department to revoke a passport. *See* 8 U.S.C. § 1504. That change in the law is not relevant here, and *Magnuson* remains binding law in the Ninth Circuit with respect to the effect of Section 2705.

[4] The case caption refers to "Magnuson" rather than "Myers" because Mr. Myers died during the pendency of the case and his personal representative was substituted as the plaintiff. *See Magnuson*, 911 F.2d at 332 n.4.

As Judge Smith correctly noted in his dissent in this case, the Third Circuit majority created a split with the Ninth Circuit.

The Third Circuit majority made a modest attempt to distinguish *Magnuson* by asserting that case did not arise in a criminal context. *See Moreno*, *Moreno,* 2013 WL 3481488 at *3 n.3 (App. A at 7a). Later in its opinion, perhaps recognizing that the particular context in which Section 2705 was being interpreted was irrelevant, the Third Circuit majority simply acknowledged that "the Ninth Circuit took a different position in *Magnuson*" and that "we are not bound by this case and do not find it persuasive." *See Moreno*, 2013 WL 3481488 at *4 n.4 (App. A at 8a). Thus, the majority implicitly admitted what Judge Smith explicitly stated: there is now a circuit split.

There is, then, a clear split between the Ninth Circuit's holding in *Magnuson* and the Third Circuit's holding in this case. The Ninth Circuit's holding that a still-valid passport is conclusive proof of citizenship not subject to collateral attack would have precluded Ms. Moreno's conviction under Section 911.[5]

While the Court generally focuses its *certiorari* inquiry on inconsistencies among the federal courts of appeals, it is important to note that the Third Cir-

---

[5] This is not to suggest that there is no remedy for a passport that has been falsely obtained. The Secretary of State has authority to invalidate passports, but there is a defined process for him to do so. *See* 8 U.S.C. § 1504(a); 22 C.F.R. § 51.62. As of the date on which this petition is filed, Ms. Moreno is unaware of any initiative by the Secretary of State to revoke her passport.

cuit's decision in this case not only conflicts with the Ninth Circuit, but also directly conflicts with the precedent of the Board of Immigration Appeals (the "BIA" or the "Board"), the administrative tribunal that most often considers and applies Section 2705. In *Matter of Villanueva,* 19 I. & N. Dec. 101, 103 (BIA 1984), the BIA held that, under Section 2705, the existence of a valid passport is itself conclusive proof of citizenship. The Board has followed that precedent consistently and recently. *See, e.g., Matter of Barcenas-Barrera*, 25 I. &N. Dec. 40 (BIA 2009).

The consequences of the conflict between the Third Circuit and the BIA are real. The BIA is required to follow the law of the circuit in which the administrative hearing was held, *see Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993), and petitions for review of BIA determinations are heard by the court of appeals for the circuit in which the immigration hearing occurred. *See* 8 U.S.C. § 1252(a)(2)(B)(2). Prior to the Third Circuit's decision in this case, the BIA followed its holding in *Villanueva* and could do so consistently regardless of the venue from which an administrative appeal arose. That is no longer so. The Third Circuit's holding in this case will bind the BIA in matters arising in that circuit, but the Ninth Circuit's contrary holding will bind the BIA with respect to matters arising there.[6] Thus, the split in the circuits will cause an inconsistency in the BIA's juris-

---

[6] The Third Circuit's decision in this case has already begun to have effects. The month following that decision, and relying on it, the Third Circuit overturned a district judge's determination that a passport holder is in fact a U.S. citizen. *See Edwards v. Tony Bryson,* No. 12-3670, 2013 WL 4504783 (3d Cir. Aug 26, 2013).

prudence, which has otherwise to date been uniform on the interpretation of Section 2705.

II. The breadth of the Third Circuit's holding implicates legal issues far beyond those presented in this case.

The breadth of the Third Circuit's holding is important not only because it highlights the split with the Third Circuit on one side and the Ninth Circuit and the BIA on the other, but also because the Third Circuit's holding implicates a wide range of proceedings.

Determination of citizenship is more important now than ever before in the nation's history.

The rights of the accused often rest on their citizenship. In the aftermath of the attacks of September 11, 2001, this Court and others have confronted critical questions regarding the rights of those detained. The citizenship of the accused is frequently a material factor in the rights afforded. *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 767-68 (2009) (citizenship a factor in whether right to *habeas* review may be suspended).

The citizenship of the victim can define both the crime and the jurisdiction of the court. For example, the Hostage Taking Act, 18 U.S.C. § 1203, allows U.S. courts to exercise jurisdiction over defendants charged with kidnapping U.S. citizens outside the United States.[7]

---

[7] Indeed, one case brought under that statute is notable because it highlights the government's inconsistent approach to the issue. In *United States v. Clarke*, 628 F. Supp.2d 15 (D.D.C. 2009), citizens of Trinidad and Tobago were extradited to this

Voting rights often depend on citizenship. While in *Arizona v. Inter Tribal Council of Arizona, Inc.,* 133 S. Ct. 2247 (2013), the Court rejected Arizona's particular requirement for proof of citizenship, there is no question that citizenship is still a requirement and that the issue of what evidence will suffice to prove citizenship remains critical and open. *Id.* at 2259-60.

A person's citizenship is also vital to his eligibility for many critical federal or state benefits. For example, since 1986, persons who seek Medicaid benefits have had to verify under threat of perjury that they are citizens or nationals of the United States. As a result of the Deficit Reduction Act of 2005, those who seek Medicaid benefits and who identify themselves as U.S. citizens must also pro-

---

country to stand trial for the kidnapping and murder of a U.S. citizen in Trinidad. The defendants sought dismissal for lack of jurisdiction, arguing that the victim was not, in fact, a U.S. citizen. In opposing the defense motion, the government relied on Section 2705 and the Ninth Circuit's holding in *Magnuson* to argue that "[b]ecause the Department of State *issued* Mr. John/Maharaj [the victim] United States passports in 1995 and 2000, Mr. Maharaj was *conclusively* a United States citizen in and about April 6, 2005 [when the victim was kidnapped and killed]." *See* Government's Opposition to Defendant Clarke's Motion to Reconsider Motions to Dismiss and Motions *In Limine*, *U.S. v. Clarke*, No. 06-102 (JDB) (D.D.C.), at 7 (emphasis in original) (ECF Doc. No. 554). The district judge agreed and, finding the conclusive effect of the passport so strong, he precluded the defendants from offering evidence challenging the victim's citizenship. *See* 628 F. Supp.2d at 20-22.

Clarke demonstrates that, when it suits the government's litigation goals, the government emphatically shares Ms. Moreno's interpretation of Section 2705.

duce documentation of their citizenship. *See* 42 U.S.C. 1396b(x)(1). One acceptable form of documentation is a U.S. passport. *See* 42 U.S.C. § 1396b(x)(3)(B)(i).

The continuing – and in many circumstances increasing – attention paid to whether a person is a United States citizen makes all the more important the issue presented here: whether the issuance by the Secretary of State of a passport in the "citizen" category serves as conclusive proof of that status or whether the citizenship determination made by the Secretary of State in issuing a passport is subject to collateral attack.

III. The Third Circuit's holding is in error because it strips Section 2705(1) of any effect.

As the dissenting Third Circuit judge explained, the majority's holding is in error because it renders the statute mostly (if not wholly) inoperative. *See Moreno*, 2013 WL 3481488 at *6 (Smith, J., dissenting) (App. A at 12a) (*citing Corley v. United States*, 556 U.S. 303, 314 (2009) (statutes should be construed so that no part will be inoperative, superfluous, void or insignificant)). The majority's holding runs afoul of the interpretative canon because, if Section 2705 required separate proof of citizenship before providing "conclusive proof" of citizenship, the existence of a valid passport would become superfluous and conclusive of nothing. Since the only facial purpose of the statute is to give conclusive evidentiary effect to valid passports, Congress could not

have intended the interpretation the Third Circuit adopted here.[8]

The Third Circuit has interpreted Section 2705 in a way that no other circuit has, and the Third Circuit's interpretation conflicts directly with those of the Ninth Circuit and the BIA.

IV. This case provides a particularly appropriate vehicle for the Court to resolve the conflict.

Ms. Moreno's case presents a particularly appropriate vehicle for the Court to resolve the split between the Third Circuit and the Ninth Circuit (and between the Third Circuit and the BIA).

First, there are no facts in dispute. Ms. Moreno indisputably held a valid U.S. passport at the time she made the statement at the center of the government's criminal case. (Indeed, as of the date on which she files this petition, Ms. Moreno still holds that passport, and she is unaware of any effort by the Secretary of State to revoke it.)

Second, the purely legal issue of the proper interpretation of Section 2705 is dispositive in this criminal case. If the statute should be interpreted as Ms. Moreno and Judge Smith believe it should be, Ms. Moreno's conviction would be voided because an

---

[8] It may be that the Third Circuit majority was swayed in its analysis by the other evidence before it regarding Ms. Moreno's history with the criminal courts and immigration authorities. But, as Judge Smith noted, "bad facts" do not justify an unsupportable statutory interpretation. If the statute as written allows results some find discomforting, the proper response is for Congress to amend the statute, not for judges to distort its language.

element necessary to prove the criminal offense (a false statement) would be unprovable.

CONCLUSION

The Court should grant this petition for a writ of *certiorari.*

Respectfully submitted,

K&L GATES LLP

DAVID R. FINE
(*Counsel of Record*)
Market Square Plaza
17 North Second St., 18th Floor
Harrisburg, PA 17101
(717) 231-4500

October 4, 2013

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-1460

UNITED STATES OF AMERICA

v.

CLAUDIA LORENA MARQUEZ MORENO,
Appellant.

On Appeal from the
District Court of the Virgin Islands
(Division of St. Thomas)
(D. C. No. 3-11-cr-00017-001)
District Judge: Honorable Curtis V. Gomez
Argued on December 3, 2012
Before: Smith, Hardiman and Roth, Circuit Judges
(Opinion filed: July 3, 2013)

Roth, *Circuit Judge*: Claudia Marquez Moreno appeals her conviction for falsely and willfully representing herself as a United States citizen in violation of 18 U.S.C. § 911. Her principal argument is that her validly issued passport constitutes conclusive proof of U.S. citizenship under 22 U.S.C. § 2705. For this reason, she alleges that the government failed to prove lack of citizenship and that the District Court erred in denying her motion for acquittal. Because we hold that, under the language of 22 U.S.C. § 2705, a passport constitutes conclusive proof of citizenship

only if the passport was issued to a U.S. citizen, we will affirm the District Court's judgment.

I.

Moreno was born in Mexico in 1971. She was adopted by a U.S. citizen when she was nine years old. In 1981, New Mexico issued her a certificate of live birth indicating that her place of birth was Mexico. In 1994, Moreno was convicted of possession with intent to distribute a controlled substance. In 1998, she was convicted of false imprisonment. In 2006, she was deported to Mexico, after an immigration judge, the Board of Immigration Appeals, and the Fifth Circuit found that she was not a U.S. citizen. *Marquez-Moreno v. Gonzales,* 455 F.3d 548, 560 (5th Cir. 2006). Although she was prohibited from reentering the United States without permission, she returned to the United States in 2007.

In 2007, Moreno applied to the State Department for a passport, listing her place of birth as New Mexico. The State Department issued Moreno a valid passport. In 2008, Moreno's passport was confiscated by United States Border Patrol in El Paso, Texas. However, it was never revoked. In 2010, she was placed into Immigration and Customs Enforcement (ICE) custody pending deportation, but she was released pending further investigation and action by the State Department when Department of Homeland Security (DHS) officials discovered that she had been issued a valid passport.

In March 2011, before taking a trip to St. Thomas, Moreno contacted a DHS official to determine whether she was a U.S. citizen. She was told that she was not a citizen. On March 16, 2011, when she arrived in St. Thomas after taking a cruise to a neighboring island, she was asked by an immigration officer about her citizenship. She responded that she

was a U.S. citizen and presented her New Mexico driver's license. The officer contacted a DHS agent who then interviewed Moreno. When he asked her about her citizenship, she responded that she was a U.S. citizen and presented a certificate of live birth from the state of New Mexico, a New Mexico driver's license, and a copy of her U.S. passport.

Moreno was arrested and indicted for falsely representing herself to be a U.S. citizen, in violation of 18 U.S.C. § 911, which states: "[w]hoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned not more than three years, or both." 18 U.S.C. § 911. As the District Court instructed the jury at the trial, the three elements of a § 911 violation are (1) that the defendant knowingly and falsely represented herself to be a United States citizen, (2) that she was not a citizen at the time of her representation, and (3) that she made the false representation willfully.

At 7 p.m. the day before trial, the government disclosed two documents to Moreno: (1) a DHS report describing an investigation concluding that Moreno's passport was valid but recommending further investigation into her citizenship, and (2) a DHS report stating that Moreno should be released into the United States and that her deportation should be stayed until the State Department revoked her passport. Moreno did not request a continuance, even though one was offered by the District Court. The District Court did not admit either document into evidence and rejected Moreno's claim of a *Brady* violation on the grounds that the information in the reports did not contain exculpatory information and that the same information had been previously disclosed.

During the trial, Moreno also sought to introduce her FBI criminal history report, which listed her citizenship as "United States," and an accompanying FOIA letter. The District Court, however, denied her motion on the grounds that under Federal Rule of Evidence 403 the evidence was cumulative and could confuse the jury.

Moreno's principal defense was that she had been issued a valid U.S. passport and that the passport constituted conclusive evidence of citizenship. The government conceded that the passport had never been revoked. Nevertheless, the government argued to the District Court and the jury that the passport was "issued in error." Moreno objected to this argument on the grounds that the government impermissibly took inconsistent positions as to the passport's status.

Moreno requested that the District Court instruct the jury that a passport "is conclusive evidence of U.S. citizenship." The District Court refused to issue this instruction. Moreno then filed a Rule 29 motion for acquittal, which the District Court also denied. Moreno was convicted of violating 18 U.S.C. § 911 and was sentenced to twenty-nine months imprisonment. This appeal followed.

II.[1]

A.

Moreno argues on appeal that (1) the District Court should have granted her motion for acquittal because, under 22 U.S.C. § 2705, her validly issued passport constituted conclusive proof of citizenship and (2) the District Court should have instructed the jury that her passport was conclusive proof of citi-

---

[1] The District Court had jurisdiction under 18 U.S.C. § 3231, and this Court has jurisdiction under

zenship. We hold that a passport constitutes conclusive proof of citizenship under 22 U.S.C. § 2705 only if it has been issued to a U.S. citizen. For that reason, the District Court did not err in denying Moreno's Rule 29 motion for acquittal or in refusing to adopt Moreno's proposed jury instruction.

1.

We exercise plenary review over the denial of a motion for acquittal. *United States v. Bobb,* 471 F.3d 491, 494 (3d Cir. 2006). However, we "review the record in the light more favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence." *Id.*

Moreno argues that her U.S. passport constituted conclusive proof of her U.S. citizenship under 22 U.S.C. § 2705 and that therefore the government failed to prove lack of citizenship, a necessary element of a § 911 violation. 22 U.S.C. § 2705 provides:

> The following documents shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction: (1) A passport, during its period of validity (if such period is the maximum period authorized by law), issued by the Secretary of State to a citizen of the United States. . . .

22 U.S.C. § 2705.

The text of 22 U.S.C. § 2705 does not permit Moreno's interpretation. In any case involving statutory interpretation, we must begin with the statutory text. *See United States v. Gonzales,* 520 U.S. 1, 4

(1997). "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the test is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (citations omitted). "An interpretation is absurd when it defies rationality or renders the statute nonsensical and superfluous." *United States v. Fontaine,* 697 F.3d 221, 228 (3d Cir. 2012) (citations and internal quotation marks omitted).[2]

2.

By its text, § 2705 provides that a passport will serve as conclusive proof of citizenship only if it was "issued by the Secretary of State *to a citizen of the United States*." 22 U.S.C. § 2705 (emphasis added). Under the plain meaning of the statute, a passport is proof of citizenship only if its holder was actually a citizen of the United States when the passport was issued. Under the language of the statute, the logical premise needed to establish conclusive proof of citizenship consists of two independent conditions: (1) having a valid passport and (2) being a U.S. citizen. The second condition is not necessarily satisfied when the first condition is satisfied. For example, the Secretary of State issues passports not only to U.S. citizens but also to U.S. nationals. See 22 C.F.R. § 50.4 (noting that United States nationals may apply for a United States passport); *see also* 8 U.S.C. § 1101(22) ("The term 'national of the United States'

---

[2] The Court should look to the statute's legislative history only if the text of the statute is ambiguous. *Gonzales,* 520 U.S. at 6. Moreover, there is no legislative history here guiding the inquiry into the scope of § 2705. *See Magnuson v. Baker,* 911 F.2d 330, 334 n.8 (9th Cir. 1990) (noting that the statute was enacted without controversy in 1982 after a Congressman sent a question to the State Department and received a response stating that the State Department and INS would support legislation to make a passport evidence of citizenship).

means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.").

Here, Moreno satisfies the first condition but not the second: she has a valid U.S. passport but is not a U.S. citizen—and was not one at the time the passport was issued. As a result, this textual interpretation of the statute leads to the conclusion that the District Court properly denied Moreno's Rule 29 motion for acquittal because, under § 2705, a valid U.S. passport serves as conclusive proof of U.S. citizenship only if the passport was issued to a U.S. citizen, which Moreno is not.

This is an issue of first impression in the Third Circuit. Moreno argues that other courts that have interpreted § 2705 as establishing that a valid passport is conclusive proof of U.S. citizenship. *See, e.g., Vana v. Att'y Gen.,* 341 F. App'x 836, 839 (3d Cir. 2009) (per curiam) ("[A] United States passport is considered to be conclusive proof of United States citizenship . . . ."); *Magnuson v. Baker,* 911 F.2d 330, 333 (9th Cir. 1990) ("[T]hrough section 2705, Congress authorized passport holders to use the passport as conclusive proof of citizenship.") (dictum); *Edwards v. Bryson*, 884 F. Supp. 2d 202, 206 (E.D. Pa. 2012) (finding the holder of an expired valid U.S. passport to be a U.S. citizen and reasoning that "[t]o hold otherwise, would lessen the import of a passport as compared to that of a certificate of naturalization or a certificate of citizenship, which is exactly what § 2705 forbids . . . ."); *United States v. Clarke*, 628 F. Supp. 2d 15, 21 (D.D.C. 2009) ("§ 2705 puts passports in the same status as certificates of naturalization for the purpose of proving U.S. citizenship."); *In re Villanueva,* 19 I. & N. Dec. 101, 103 (B.I.A. 1984) ("Accordingly, we hold that unless void on its face, a valid United States passport issued to an individual as a citizen of the United States is not subject to col-

lateral attack in administrative immigration proceedings but constitutes conclusive proof of such person's United States citizenship.").

However, we are not bound by these cases and believe that this interpretation is atextual because it effectively reads the phrase "to a citizen of the United States" out of the statute. Thus, it does not give effect to the statute as written.[3] "[W]here the text of a statute is unambiguous, the statute should be enforced as written and only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language." *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 314 (3d Cir. 2010) (citation and internal quotation marks omitted). Because the text of § 2705 is unambiguous, we hold that a passport is conclusive proof of citizenship only if its holder was actually a citizen of the United States when it was issued.

Judge Smith asserts in his dissenting opinion that the relevant inquiry under § 2705 is not whether the passport holder is a U.S. citizen but rather whether the State Department has determined the passport holder to be a U.S. citizen. (Dissenting Op. at 4). We disagree. Such a reading elevates the State Department's role in the determination of citizenship beyond its historic status. Traditionally, citizenship can be proved by: (1) certificate of naturalization; (2) certificate of citizenship; or (3) birth certificate. Certificates of naturalization and certificates of citizenship are granted by a court having naturalization jurisdiction or by the Attorney General. *See* 8 U.S.C. §

---

[3] Moreover, none of these cases addressed the precise question presented here: whether § 2705 constitutes conclusive proof of citizenship in the context of a prosecution under 18 U.S.C. § 911. In fact, as the Eighth Circuit noted in *Keil v. Triveline*, "no court has held that possession of a passport precludes prosecution under [18 U.S.C.] § 911." 661 F.3d 981, 987 (8th Cir. 2011).

1443(e); *see also Magnuson*, 911 F.2d at 333; *Clarke,* 628 F. Supp. 2d at 17-18. While the State Department historically has had exclusive authority to grant and revoke passports, 22 U.S.C. § 211a; 8 U.S.C. § 1504, it has not had the power to determine citizenship. *See Magnuson*, 911 F.2d at 333 ("Prior to the enactment of section 2705, only the Attorney General or a naturalization court could determine who is a citizen of the United States."). We should not let § 2705, a statute with a thin and peculiar legislative history, *see supra* note 2, overwhelm the historic way of determining citizenship.[4] Our reading of § 2705 gives effect to the statute as written but does not go so far as to empower the State Department to determine citizenship through the issuance of a passport.

For these reasons, the District Court did not err in denying Moreno's Rule 29 motion for acquittal.[5]

---

[4] We acknowledge that the Ninth Circuit took a different position in *Magnuson*, stating that "by section 2705, Congress has vested the power in the Secretary of State to determine who is a United States citizen." 911 F.2d at 333. Again, we are not bound by this case and do not find it persuasive.

[5] Moreno also argues that the government failed to show that Moreno made a false assertion of citizenship willfully. This argument is meritless. In 2006, she was deported after an immigration judge, the Board of Immigration Appeals, and the Fifth Circuit found that she was not a U.S. citizen. *Marquez-Moreno,* 455 F.3d at 560. In 2008, her passport was confiscated. Immediately prior to her trip to St. Thomas in March 2011, a DHS official informed her that she was not a citizen. Despite receiving all of these notifications that she was not a U.S. citizen, Moreno asserted that she was a U.S. citizen when interviewed in St. Thomas. Therefore, the government presented sufficient evidence for the jury to conclude that Moreno's misrepresentation was willful.

2.

Moreno also argues that the District Court should have used her proposed jury instruction stating that "[a] passport issued by the Secretary of State is conclusive proof of United States citizenship." "We exercise plenary review to determine whether jury instructions misstated the applicable law, but in the absence of a misstatement we review for abuse of discretion." *United States v. Hoffecker*, 530 F.3d 137, 173-74 (3d Cir. 2008) (citation and internal quotation marks omitted). Because we find that a valid passport is conclusive proof of U.S. citizenship under 22 U.S.C. § 2705 only if its holder was actually a citizen when it was issued, the District Court properly declined to adopt Moreno's proposed instruction.

B.

Moreno raises three additional arguments on appeal: (1) the District Court should have ruled that the government's untimely disclosure of reports regarding the validity of her passport violated *Brady*; (2) the District Court should have allowed Moreno to introduce FOIA documents and an FBI report listing her citizenship as "United States"; and (3) the District Court should have ruled that the government engaged in misconduct by stating that Moreno's passport had been "issued in error" despite acknowledging that the passport had not been revoked. We find that none of these arguments merit reversal of the District Court's judgment.

1.

Moreno argues that the disclosure of documents at 7 p.m. on the day before trial violated *Brady v. Maryland,* 373 U.S. 83, 87 (1963). In reviewing *Brady*

claims, we review the District Court's conclusions of law *de novo* and its findings of fact for clear error. *United States v. Risha,* 445 F.3d 298, 303 (3d Cir. 2006).

The government has an obligation to disclose any evidence favorable to the defense that is material as to guilt or punishment. *Brady*, 373 U.S. at 87. "Where the government makes *Brady* evidence available during the course of a trial in such a way that a defendant is able effectively to use it, due process is not violated and Brady is not contravened." *United States v. Johnson,* 816 F.2d 918, 924 (3d Cir. 1987). *Brady* is not implicated if there is no prejudice to the defendant. *See United States v. Bansal,* 663 F.3d 634, 670 (3d Cir. 2011).

Here, the two documents, a DHS report describing an investigation concluding that Moreno's passport was valid but recommending further investigation into her citizenship and a DHS report stating that Moreno should be released into the United States and that her deportation should be stayed until the State Department revoked her passport, were made available to Moreno before trial. Moreno had the opportunity to cross-examine a government witness about the contents of the documents. Further, Moreno did not request a continuance, even though the District Court offered one. Moreno therefore cannot establish a *Brady* violation because she was able to use the documents and suffered no prejudice as a result of the government's allegedly untimely disclosure.

2.

Moreno argues that the District Court should have allowed her to introduce FOIA documents and an FBI report listing her citizenship as "United States." The District Court excluded these documents under

Rule 403. "We review a district court's decision to admit or exclude evidence for abuse of discretion, and such discretion is construed especially broadly in the context of Rule 403." *United States v. Kemp,* 500 F.3d 257, 295 (3d Cir. 2007) (citation and internal quotation marks omitted). "In order to justify reversal, a district court's analysis and resulting conclusion must be arbitrary or irrational." *United States v. Universal Rehab. Servs. (PA), Inc.,* 205 F.3d 657, 665 (3d Cir. 2000) (en banc) (citation and internal quotation marks omitted).

The documents Moreno sought to introduce into evidence listed her citizenship as "United States," but the jury had already heard testimony about government documents listing her as a United States citizen, making this evidence cumulative. Moreover, the documents also listed Moreno's criminal history, including multiple arrests and convictions. Thus, the documents would have had to be heavily redacted if they were to be presented to the jury, which could cause juror confusion. These facts do not show that the District Court abused its discretion in excluding these documents under Rule 403.

3.

Moreno argues that the District Court should have ruled that the government engaged in misconduct by stating that Moreno's passport had been "issued in error" despite acknowledging that the passport had not been revoked. Moreno made a timely objection at trial. This Court reviews contemporaneous objections of prosecutorial misconduct for abuse of discretion. *See United States v. Brennan*, 326 F.3d 176, 182 (3d Cir. 2003).

Moreno claims that the doctrine of judicial estoppel should have precluded the government from arguing that the passport was issued in error after having conceded at another point that Moreno's passport

had never been officially revoked. *See Whiting v. Krassner,* 391 F.3d 540, 543 (3d Cir. 2004) ("Judicial estoppel prevents parties from taking different positions on matters in litigation to gain advantage." (citation omitted)). Moreno's argument is unavailing because a "revoked" passport is distinct from a passport "issued in error." Under 8 U.S.C. § 1504, the Secretary of State may revoke a passport issued in error. However, passports issued in error are not automatically revoked. *See* 8 U.S.C. § 1504 (noting steps to be taken to revoke a passport). As a result, the government's position that the passport was never revoked is not inconsistent with the statement that the passport was issued in error. Therefore, Moreno's claim of misconduct fails because the government did not take inconsistent positions at trial.

III.

For the foregoing reasons, we will affirm the District Court's judgment.

Smith, *Circuit Judge*, dissenting.

My colleagues and I agree that Claudia Moreno acquired her passport through mendacity. Bad facts, however, should not cause us to rewrite a statute. In my view, 22 U.S.C. § 2705(1) requires us to treat Moreno's passport as conclusive evidence of her U.S. citizenship. For that reason, I respectfully dissent.

The majority's reading of § 2705 contains a critical flaw—one that eviscerates the statute. To see the flaw, one needs simply to restate the holding: "a passport constitutes conclusive proof of citizenship only if the passport was issued to a U.S. citizen." Majority Op. at 3. In other words, a person can use a passport as conclusive evidence that she is a U.S. citizen only if she first proves that she is a U.S. citizen.

At that point, of course, conclusive evidence of citizenship is unnecessary, and so the statute becomes inoperative by depriving passports of any special evidentiary value. This reading is "at odds with one of the most basic interpretive canons, that '[a] statute should be construed . . . so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. United States,* 556 U.S. 303, 314 (2009) (*quoting Hibbs v. Winn,* 542 U.S. 88, 101 (2004)). Congress surely did not intend to pass a statute without any legal effect.

No other circuit has said that § 2705 requires a preliminary showing that the passport holder is a U.S. citizen. Not one. Instead, most courts have said that passports have the same evidentiary effect as certificates of naturalization, which are conclusive proof of citizenship and are not subject to collateral attack. *E.g., Magnuson v. Baker,* 911 F.2d 330, 333 (9th Cir. 1990) ("The statute plainly states that a passport has the same force and effect as a certificate of naturalization or citizenship . . . . The holders of these other documents can use them as conclusive evidence of citizenship. Therefore, so can a holder of a passport."); *Edwards v. Bryson,* 884 F. Supp. 2d 202, 206 (E.D. Pa. 2012); *United States v. Clarke,* 628 F. Supp. 2d 15, 21 (D.D.C. 2009); *Banchong v. Kane,* No. CV-09-0582-PHX-MHM (JRI), 2009 WL 6496505, at *5 (D. Ariz. Dec. 23, 2009); *Matter of Villanueva,* 19 I. & N. Dec. 101, 103 (B.I.A. 1984). Indeed, we have said as much in an admittedly nonprecedential opinion. *Vana v. Att'y Gen. of U.S.*, 341 F. App'x 836, 839 (3d Cir. 2009) (per curiam).* To be sure, the Eighth Circuit has suggested that passports offer no protection

* Although "[t]he Court by tradition does not cite [ ] its not precedential opinions as authority," Third Circuit I.O.P. 5.7, I cite *Vana* merely to point out the intracircuit conflict created by the majority.

in criminal cases, but even it acknowledged that passports would be "conclusive proof of citizenship in administrative immigration proceedings." *Keil v. Triveline,* 661 F.3d 981, 987 (8th Cir. 2011).

The majority goes well beyond any of these cases. Through its reading of the requirement that passports be "issued by the Secretary of State to a citizen of the United States," the majority suggests that passports are not conclusive evidence of citizenship in any proceeding—a suggestion that creates a circuit split.

How then to interpret this requirement without effectively rewriting the statute? The answer is straightforward, but it requires us to recognize that citizens are not the only ones who hold passports. The State Department may issue passports to noncitizens "owing allegiance . . . to the United States." 22 U.S.C. § 212. Such passports specify that "[t]he bearer is a United States national and not a United States citizen." U.S. Dep't of State, 7 Foreign Aff. Manual § 1141(e) (Mar. 5, 2013), http://www.state.gov/documents/organization/86758.pdf. The phrase "citizen of the United States" in § 2705 thus has the effect of preventing those determined by the State Department to be noncitizen nationals from using their passports as conclusive evidence of U.S. citizenship. At the same time, it allows those determined to be citizens to use their passports as conclusive evidence of their citizenship. *See Mondaca-Vega v. Holder,* No. CV-04-339-FVS, 2011 WL 1195877, at *1 (E.D. Wash. Mar. 29, 2011) (concluding that § 2705 requires a passport holder to show that "the Secretary of State has previously determined he is a United States citizen" (emphasis added)). In short, the inquiry is whether the State Department has determined the passport holder to be a U.S. citizen, not whether she actually is one.

That is consistent with the idea that Congress has "centralize[d] passport authority . . . specifically in the Secretary of State." *Haig v. Agee*, 453 U.S. 280, 294-99 (1981) (noting similarities between the original Passport Act and the current scheme). For example, the State Department has exclusive authority to grant and revoke passports, 22 U.S.C. § 211a; 8 U.S.C. § 1504(a), to limit their period of validity, 22 U.S.C. § 217a, and to set fees, id. § 214. *See also Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1436 (2012) (Alito, J., concurring) (recognizing the executive branch's historical authority over passports). In fact, the State Department may revoke passports that were obtained through error or fraud. *See* 8 U.S.C. § 1504(a); 22 C.F.R. § 51.62. Such passports become invalid and lose their conclusive evidentiary status. See 22 C.F.R. § 51.4(f)(1); 22 U.S.C. § 2705 (limiting a passport's conclusive proof of citizenship to its "period of validity"). Section 2705 thus strengthens the State Department's authority over passports by preventing courts from second-guessing its decisions.

And that is precisely where the District Court went wrong. Moreno still has a valid passport, so the Court should have granted her motion for acquittal. If the prosecutors wanted to go after Moreno, they should have asked the State Department to revoke her passport.

I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-1460

UNITED STATES OF AMERICA

v.

CLAUDIA LORENA MARQUEZ MORENO,
Appellant.

On Appeal from the District
Court of the Virgin Islands
(Division of St. Thomas)
(D. C. No. 3-11-cr-00017-001)

SUR PETITION FOR REHEARING

Before: McKEE, Chief Judge, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ and ROTH*, Circuit Judges

The petition for rehearing en banc filed by the Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no

judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing by the panel and the Court en banc is hereby DENIED. Chief Judge McKee, Judge Fuentes and Judge Smith voted for rehearing en banc.

By the Court,
/s/ Jane R. Roth
Circuit Judge

---

* Judge Roth's vote is limited to panel rehearing only.