No. 13-457

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

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT IN REPLY

Not surprisingly, the government makes no real effort to defend the actual holding the Third Circuit reached in its precedential opinion. The government concedes that the Third Circuit interpreted Section 2705 too broadly. *See* BIO at 13. Instead of defending the actual opinion, the government defends the holding it believes the Third Circuit *should* have reached and argues that the preferred-but-never-reached holding does not warrant review.

But the Court is confronted with the Third Circuit's *actual* holding. In their opinions, the majority and dissenting Third Circuit judges recognized that the holding created a circuit split. Nothing the government offers in its brief in opposition meaningfully draws into question the existence of that split.

Even if the Third Circuit had followed the reasoning the government now commends to the Court, the decision would still have been wrong, in tension with the Ninth Circuit's binding precedent and worthy of this Court's review.

Finally, the government points to certain factual matters to suggest that this case is a poor vehicle to review the legal issue presented. As demonstrated below, the government is wrong.

The Third Circuit's holding, which it refused to revisit when presented with a rehearing petition and which the court reemphasized in a later decision in a different, non-criminal case, is squarely at odds with binding authority in the Ninth Circuit (and with the longstanding authority of the Board of Im-

migration Appeals). The case warrants this Court's review.

I. THE GOVERNMENT'S ARGUMENT THAT THERE IS NO CIRCUIT SPLIT MISCONSTRUES THE THIRD CIRCUIT'S DECISION IN THIS CASE AND THE NINTH CIRCUIT'S DECISION IN *MAGNUSON*.

As the dissenting judge recognized, the Third Circuit's decision in this case held that "passports are not conclusive evidence of citizenship in any proceeding." *United States v. Moreno,* 727 F.3d 255, 264 (3d Cir. 2013) (Smith, J., dissenting). In *Magnuson v. Baker,* 911 F.2d 330 (9th Cir. 1990), the Ninth Circuit held that a passport is conclusive proof of citizenship. Both holdings remain binding law in their respective circuits.

In its attempt to disprove the circuit split, the government first abandons the Third Circuit's actual holding. The holding is that, without additional evidence of citizenship, possession of a passport is conclusive proof of nothing. *See Moreno,* 727 F.3d at 260. The government makes no effort to defend that broad and circular interpretation of the statute. Instead, it asserts that what the Third Circuit *really* meant was that Section 2705 has conclusive effect only in administrative and civil proceedings and not in criminal proceedings and, so, there is no circuit split.

Ms. Moreno will demonstrate below why, even if the Third Circuit had only limited the reach of Section 2705 as the government now suggests, the holding would still have been at odds with the Ninth Circuit's holding in *Magnuson.* But for present purpos-

es, there can be no question that the Third Circuit's holding was as broad as the dissenting judge understood it to be.

The Third Circuit's actual, broad holding is directly in conflict with the Ninth Circuit's holding in *Magnuson*. In that case, the plaintiff (and, later, his estate) sued the Secretary of State for unilaterally revoking the plaintiff's passport without complying with regulations requiring the passport holder to receive notice and an opportunity to be heard. The Ninth Circuit agreed with the plaintiff and held that Section 2705 permits the Secretary of State to revoke a passport only after providing notice and an opportunity to be heard and only when he has proven fraud, misrepresentation or some other exceptional ground. *See* 911 F.2d at 334. In its analysis, the Ninth Circuit held that, when enacted in 1981, Section 2705 had two effects: (1) it vested power in the Secretary of State to decide who is a United States citizen and (2) it authorized passport holders to use their passports as "conclusive proof of citizenship." 911 F.2d at 333.

The Third Circuit expressly disagreed with both points. *See Moreno,* 727 F.3d at 261 n.4 (describing the Ninth Circuit's determination in *Magnuson* that Section 2705 vests power in the Secretary of State to decide who is a citizen and then concluding that "we are not bound by this case and do not find it persuasive."); 260 (describing the holding in *Magnuson* that Section 2705 authorizes passport holders to use the passport as conclusive proof of citizenship and then rejecting it as "atextual.").

There is, then, a direct conflict between the courts of appeals.

In an effort to minimize the importance of the conflict, the government asserts that the Ninth Circuit's statements on the two points are *dicta*. The government is wrong. In determining whether the Secretary of State could revoke a passport without notice and an opportunity to be held, the Ninth Circuit in *Magnuson* first had to determine the nature of the rights conferred by Section 2705. It concluded that the statute granted the Secretary the power to determine citizenship and to issue a passport to be used as conclusive evidence of citizenship. "Consistent with the interest at stake, Congress has decided the Secretary can revoke a passport evidencing citizenship only (1) after affording the holder an opportunity to be heard and (2) on exceptional grounds such as fraud or misrepresentation." *Magnuson,* 911 F.2d at 336. Thus, the Ninth Circuit itself treated its conclusions regarding the Secretary's authority and the conclusive effect of a passport as necessary to ultimately deciding the case.

Thus, on the issue presented here – 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 – the two circuits are in conflict. The Ninth Circuit held that the passport is conclusive evidence not subject to collateral attack and the Third Circuit held just the opposite.

II. EVEN IF THE THIRD CIRCUIT HAD REACHED THE HOLDING THE GOVERNMENT NOW ESPOUSES, THE THIRD CIRCUIT WOULD STILL HAVE BEEN IN ERROR AND THERE WOULD STILL BE A CIRCUIT SPLIT.

The government concedes that the Third Circuit's actual holding was too broad and, so, the government defends the holding it would have preferred: that Section 2705 make issuance of a passport based on citizenship conclusive proof of that citizenship not susceptible to collateral attack only "in administrative settings and vis-à-vis third parties." BIO at 7.

Even if the Third Circuit had espoused the government's current analysis, the decision would have been no more correct and no less in tension with the Ninth Circuit's decision in *Magnuson,* which did not limit the application of Section 2705.

In arguing for the limitation on Section 2705's effect, the government notably fails ever to discuss the actual language of the statutes or authorities at issue – none of which support the government's interpretation. Section 2705 mandates, without limitation, that the sort of passport Ms. Moreno received "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." Congress has mandated, again without limitation, that a certificate of citizenship issued by the Attorney General shall have the same effect as a certificate of naturalization issued by a court. *See* 8 U.S.C. §1443(e). This Court long ago established that a certificate of naturalization issued by a court is conclu-

sive proof of citizenship that may not be collaterally challenged. *See Totun v. United States,* 270 U.S. 568, 577 (1926). No court has ever held that the principle set out in Section 2705, Section 1443(e) or *Totun* applied only in certain settings.[1]

The government's current effort to validate the Third Circuit's conclusion has no support in the text of the statute or the authorities the statute incorporates. There is nothing in any of the relevant statutes or cases that would justify carving out the exception to Section 2705 the government now suggests.[2] Thus, had the Third Circuit relied upon the narrower holding now espoused by the government, it would still have been an incorrect interpretation of what in reality is a clearly worded statute.

Such a holding would also still have been in conflict with the Ninth Circuit's holding in *Magnuson.* The Ninth Circuit held that the issuance of a passport could not be collaterally attacked, and it did not limit the reach of that holding. *See* 911 F.2d at 334.

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[1] In *Keil v. Triveline,* 661 F.3d 981 (8th Cir. 2011), the Eighth Circuit doubted that Section 2705's conclusiveness applies in criminal proceedings, but it did not reach such a holding.

[2] In the BIO, the government takes an odd approach. It points to certain situations in which courts have held that Section 2705 provides conclusive proof of citizenship and then suggests that those are the only circumstances in which the statute could have that effect. As noted in the text, above, the statute does not suggest such delineation.

III. THE GOVERNMENT'S CONTENTION THAT SECTION 2705 IS "RELATIVELY INFREQUENTLY" AT ISSUE IS INCORRECT.

The government asserts that the issue presented in Ms. Moreno's petition is insufficiently important because "litigation concerning the proper interpretation of 22 U.S.C. 2705 occurs relatively infrequently." BIO at 16. The government is wrong.

Consider just the last five years.

The Third Circuit has interpreted and applied Section 2705 in three cases: *Vana v. Atty Gen'l,* 341 Fed. Appx. 836 (3d Cir. 2009); this case and *Edwards v. Bryson,* No. 12-3670, 2013 WL 4504783 (3d Cir. Aug. 26, 2013) (rehearing petition pending). The Eighth Circuit has interpreted Section 2705. *See Keil,* 661 F.3d 981.

The issue of whether a passport is conclusive proof of citizenship not susceptible to collateral attack is presently before the D.C. Circuit in *United States v. Straker,* Nos. 11-3054, *et al.* (oral argument to be scheduled). *Straker* is the appeal from the convictions in *United States v. Clarke,* 628 F. Supp.2d 15 (D.D.C. 2009). in which the government was permitted to use a victim's passport as proof of his citizenship in a prosecution under 18 U.S.C. § 1203.[3]

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[3] In the BIO, the government seeks to distinguish *Clarke/Straker* from this case by asserting that Section 2705 allows the government to attack collaterally a passport in a criminal proceeding but that it does not allow a "third party" (*i.e.,* a criminal defendant) to do so. *See* BIO at 13 n.5. Thus, the government's position is that, notwithstanding the lack of anything in the text or background of Section 2705 to justify such

Moreover, while the government pushes the point to one side, it remains the case that the Board of Immigration Appeals (the "BIA") relies frequently on Section 2705 and interprets it differently than does the Third Circuit. *See, e.g., Matter of Barcenas-Barrera*, 25 I. &N. Dec. 40 (BIA 2009) (*following Matter of Villanueva,* 19 I. & N. Dec. 101, 103 (BIA 1984)). As Ms. Moreno demonstrated in her petition, the Third Circuit's approach in her case will have broader effects because the BIA is required to apply the law of the circuit in which an immigration appeal arises. Thus, the effect of the disagreement between the Third Circuit and the Ninth Circuit will be compounded in ongoing BIA proceedings.[4]

Simply stated, in just the last five years, the interpretation of Section 2705 has arisen in several courts of appeals and in several contexts.[5]

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fine distinctions, the government is free to use Section 2705 for conclusive proof in criminal proceedings but a defendant is not.

[4] The government is wrong to assert that *Villanueva* is not in conflict with the Third Circuit's decision in Ms. Moreno's case. *See* BIO at 16 n.7. As the government concedes, the Third Circuit's holding was very broad. It interpreted the text of Section 2705 and held that the statute would only be conclusive if the passport holder were a U.S. citizen. The Third Circuit did not limit that holding to criminal matters, and there is no principled way to read that distinction into the opinion.

[5] The government suggests that "if faced with the application of Section 2705 in a context other than a criminal prosecution, the Third Circuit might modify or limit its interpretation to confirm to the understanding discussed above." *See* BIO at 16. In *Edwards*, the Third Circuit considered a civil case in which the plaintiff sought a declaratory judgment that he is a citizen. The district court granted relief. Relying on *Moreno,* the court of appeals reversed because the plaintiff "made no showing that, at the time he obtained the passport, he was a U.S. citizen." The Third Circuit is not retreating from its broad and undisputedly incorrect interpretation of Section 2705.

IV. THE GOVERNMENT'S SUGGESTION THAT THIS CASE IS A POOR VEHICLE FOR REVIEW OF THE ISSUE PRESENTED IN INCORRECT.

The government suggests that this case is a poor vehicle for the Court to clarify the meaning of Section 2705. In support of that contention, the government offers three arguments, none of which has merit.

First, the government contends that only the data and signature pages of Ms. Moreno's passport were introduced at trial rather than the entire passport. *See* BIO at 17. From that, the government now suggests that "[i]t is not clear that [Section 2705] applies were, as here, the document at issue is a partial photocopy of a passport from an unofficial source – in this case, petitioner herself." BIO at 18. But the government did not, does not and could not suggest that, at the time Ms. Moreno made her now-challenged statement to the customs officer in the Virgin Islands, there was not a full, properly issued United States passport in her name that was already in the government's possession. Section 2705 speaks to the evidentiary weight given the issuance of the passport, not the particular version adduced at trial when there is no doubt a full passport exists.

Second, the government now argues that the passport on which Ms. Moreno relied might at the time have been invalid because of statements she made on a subsequent application. *See* BIO at 17-18. But the government admits that it never raised that argument in either the district court or in the court of appeals and so, while Ms. Moreno does not concede its correctness, the argument is in any event waived.

Third, the government suggests that the Secretary of State's 2011 denial of Ms. Moreno's subsequent passport application somehow muddies the waters of this case. *See* BIO at 18-19. The problem with that argument is that it relies on an incorrect legal assumption that the government relegates to a footnote: that the proper time to measure the effect of Section 2705 is at the time of trial. *See* BIO at 19 n.9. That makes no sense, and the government offers no support for it. In a prosecution for falsely claiming to be a citizen, the focus of course is on whether the statement was false when made. Thus, the issue is whether Ms. Moreno had a valid passport when she spoke with the customs agent in the Virgin Islands, not many months later when she was tried.

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The government admits that the Third Circuit's holding – which that court has now relied on in a subsequent case – was overbroad. Moreover, despite the government's meritless suggestions to the contrary, the Third Circuit's holding is in conflict with the law in the Ninth Circuit, and the proper interpretation of Section 2705 arises in both judicial and administrative proceedings with sufficient frequency that this Court should accept this case to impose uniformity in application of the statute.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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