No. 13-457

In the Supreme Court of the United States

CLAUDIA LORENA MARQUEZ MORENO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, by virtue of 22 U.S.C. 2705's provision that a U.S. passport has the same "force and effect" in proving U.S. citizenship as a certificate of naturalization or citizenship, the existence of an unrevoked U.S. passport issued to the defendant precludes a prosecution for falsely claiming to be a citizen of the United States in violation of 18 U.S.C. 911.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, regulations and rules: Page

Miscellaneous: Page

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 727 F.3d 255.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 2013. A petition for rehearing was denied on July 30, 2013 (Pet. App. 1b-2b). The petition for a writ of certiorari was filed on October 4, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the District Court of the Virgin Islands, petitioner was convicted of falsely and willfully representing herself to be a U.S. citizen, in violation of 18 U.S.C. 911. Pet. App. 2a. The district court sentenced her to 29 months of imprisonment, to

be followed by one year of supervised release. The court of appeals affirmed. *Id.* at 1a.

1. Petitioner was born in Mexico in 1971. Pet. App. 1a. Her biological parents were not U.S. citizens, but she was admitted to the United States as a lawful permanent resident in 1976 and adopted by a U.S. citizen in 1980. *Ibid.*; *Marquez-Marquez* v. *Gonzales*, 455 F.3d 548, 549 (5th Cir. 2006).

In 2006, petitioner was removed to Mexico after being convicted of false imprisonment and possession of a controlled substance with intent to distribute. Pet. App. 1a; see 8 U.S.C. 1227(a)(2)(A)(iii) and (B)(i) (providing for the removal of aliens convicted of aggravated felonies or controlled substance offenses). In denying her petition for review of the removal order, the Fifth Circuit rejected petitioner's claim that she gained U.S. citizenship when she was adopted by a U.S. citizen. *Marquez-Marquez*, 455 F.3d at 554-560. The court found that petitioner had failed to raise any "genuine issue of material fact about her nationality" and held that she "is an alien subject to removal." *Id.* at 560.

In 2007, petitioner unlawfully reentered the United States. Pet. App. 1a. The same year, she sought a U.S. passport from the State Department. Petitioner was ineligible for a passport, which by statute may be issued only to a U.S. citizen or to a member of a narrow category of noncitizen nationals owing permanent allegiance to the United States. 22 U.S.C. 212; see 7 Charles Gordon et al., *Immigration Law & Procedure* § 99.06[1] (rev. ed. 2013) (Gordon). In her application, however, petitioner falsely claimed U.S. citizenship and incorrectly listed her place of birth as New Mexico rather than Mexico. Pet. App. 1a; C.A. J.A. 667. In

an apparent oversight, the State Department accepted these assertions and issued petitioner a passport. Pet. App. 1a.[1]

In 2008, petitioner's passport was confiscated by the United States Border Patrol and never returned. Pet. App. 1a; see Pet. 3 & n.1. In 2010, petitioner again came to the attention of immigration officials when she was taken into custody by Immigration and Customs Enforcement (ICE) and held for deportation. Pet. App. 1a. But when ICE learned that the State Department had issued petitioner a valid passport, it released her from custody pending an investigation by the State Department. *Ibid.*; 9/12/11 Tr. 215-222.

The record does not indicate what action the State Department took in response to ICE's 2010 inquiry. In February 2011, however, petitioner submitted a new passport application stating that her passport issued in 2007 had been lost. 9/12/11 Tr. 281; C.A. J.A. 669. The application again included the false assertion that petitioner was a U.S. citizen born in New Mexico. C.A. J.A. 666. This time, however, the State Department declined to issue a passport, ultimately sending petitioner a denial letter in September 2011. 9/12/11 Tr. 281-283; 9/13/11 Tr. 6-7.[2]

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[1] A State Department fraud prevention manager testified at trial that the passport was "issued in error." 9/12/11 Tr. 267. The passport specialist who processed the application apparently failed to notice that although petitioner provided a birth certificate issued by the State of New Mexico, that document lists her place of birth as "Mexico." 9/13/11 Tr. 18-19; C.A. J.A. 627.

[2] Petitioner had also sought documentation of citizenship from the Department of Homeland Security by applying for a certificate of citizenship under 8 U.S.C. 1452(a). C.A. J.A. 634-640. Her application was denied in November 2009. *Id.* at 640.

In the meantime, in March 2011 petitioner traveled to St. Thomas in the U.S. Virgin Islands. Pet. App. 1a. Before traveling, she contacted an ICE agent to inquire about her citizenship status. *Ibid.* The official warned that she is not a citizen. *Ibid.* Nonetheless, petitioner claimed to be a U.S. citizen when she was questioned by an immigration officer in St. Thomas. *Id.* at 1a-2a. In a subsequent interview with another ICE agent, petitioner again claimed to be a U.S. citizen and presented identification documents including a photocopy of the data and signature pages of her 2007 passport. *Id.* at 2a.

2. A grand jury in the District of the Virgin Islands indicted petitioner for falsely and willfully representing herself to be a U.S. citizen during these interviews, in violation of 18 U.S.C. 911. Pet. App. 2a.

Petitioner's principal defense at trial was that she is a U.S. citizen. She relied on 22 U.S.C. 2705, which provides that "[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" 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." The partial copy of petitioner's 2007 passport had been introduced into evidence at trial. That photocopy indicates that the passport would not expire until 2017, see C.A. J.A. 628, and the government conceded that the State Department had not formally canceled or revoked the passport. Petitioner asserted that under Section 2705, the existence of an unexpired, unrevoked passport had to be accepted as conclusive proof that she is a U.S. citizen, precluding a

conviction for making a false claim to citizenship. 9/13/11 Tr. 24, 27-31.

The district court denied petitioner's motion for a judgment of acquittal based on Section 2705. Pet. App. 3a. It also refused to instruct the jury that a passport is conclusive evidence of U.S. citizenship, but allowed petitioner to rely on the passport in arguing to the jury that she is a U.S. citizen. *Ibid.* The jury convicted petitioner after a two-day trial. *Ibid.* The district court sentenced her to 29 months of imprisonment, to be followed by one year of supervised release. 3/14/12 Judgment.[3]

4. The court of appeals affirmed. Pet. App. 1a. As relevant here, the court began with the observation that "[b]y 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*.'" *Id.* at 5a. The court reasoned that this language means that "a passport is proof of citizenship only if its holder was actually a citizen of the United States when the passport was issued." *Ibid.* Any other interpretation, the court believed, would "read[] the phrase 'to a citizen of the United States' out of the statute." *Id.* at 7a. And because petitioner was not actually a U.S. citizen when she received a passport in 2007, the court held that her passport was not proof of citizenship under Section 2705. *Id.* at 6a.

The court of appeals noted that "no court has held that possession of a passport precludes prosecution" under 18 U.S.C. 911. Pet. App. 7a n.3 (quoting *Keil* v. *Triveline*, 661 F.3d 981, 987 (8th Cir. 2011)). It

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[3] According to the Bureau of Prisons website, petitioner was released from custody in October 2013.

acknowledged that, in other contexts, courts and the Board of Immigration Appeals (BIA) have interpreted Section 2705 to make a passport conclusive proof of citizenship without requiring a threshold showing that the holder was a U.S. citizen when the passport was issued. *Id.* at 7a. But the court of appeals rejected this interpretation as inconsistent with the plain language of the statute. *Ibid.*

Judge Smith dissented. Pet App. 12a-15a. He agreed that petitioner had "acquired her passport through mendacity." *Id.* at 12a. In his view, however, the majority's interpretation of Section 2705 rendered the statute effectively inoperative because it would allow a person to "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 which point "conclusive evidence of citizenship is unnecessary." *Id.* at 12a-13a. In Judge Smith's view, Section 2705's requirement that the passport be issued "to a citizen of the United States" merely excludes the special category of passports issued to noncitizen nationals, which expressly state that the bearer is not a U.S. citizen. *Id.* at 14a. Because the State Department issued the 2007 passport to petitioner not as a noncitizen national but rather based on the mistaken conclusion that she was a U.S. citizen, Judge Smith would have held that she could not be prosecuted for violating 18 U.S.C. 911 unless the State Department first revoked the passport. Pet. App. 15a.

The court of appeals denied petitioner's requests for rehearing and rehearing en banc. Pet. App. 2b. Chief Judge McKee and Judges Fuentes and Smith would have granted rehearing en banc. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 7-16) that 22 U.S.C. 2705 makes a passport conclusive proof of citizenship, precluding a prosecution of the passport holder for falsely claiming to be a U.S. citizen unless the passport is first revoked. The court of appeals correctly rejected that argument, and the result it reached does not conflict with any decision of this Court or another court of appeals. As the court of appeals explained, no court has held that a defendant's possession of a passport bars a prosecution under 18 U.S.C. 911. The court of appeals did write too broadly to the extent it stated that a passport can never prove citizenship without further proof that its holder is a citizen; a passport has independent effect in administrative settings and vis-à-vis third parties. But no such context is presented here. And the unusual facts of this case would make it an especially poor vehicle for resolving any abstract difference of opinion about the proper interpretation of the statute. Among other things, petitioner's passport appears to have been rendered invalid under State Department regulations when she reported it lost in 2011, and the passport itself is not even in the record—the evidence at trial included only a partial copy of the document.

1. The court of appeals correctly concluded that the government was not required to revoke petitioner's passport before prosecuting her under 18 U.S.C. 911.

a. Section 2705 does not make a passport conclusive proof of citizenship in all circumstances. By its terms, it provides only that a passport must be given "the same force and effect * * * as certificates of naturalization or of citizenship issued by the Attorney

General or by a court having naturalization jurisdiction." The "force and effect" to which a passport is entitled thus depends on the force and effect of those certificates. And while certificates of citizenship and naturalization are conclusive proof of citizenship in administrative proceedings and against third parties, they do not preclude the government from challenging the holder's citizenship in a criminal prosecution.

i. Until 1990, certificates of naturalization were issued by federal and state courts vested with naturalization jurisdiction. See 8 U.S.C. 1421(a), 1449 (1988). In 1990, Congress gave the Attorney General "sole authority to naturalize persons as citizens of the United States." Immigration Act of 1990 (1990 Act), Pub. L. No. 101-649, § 401(a), 104 Stat. 5038 (8 U.S.C. 1421(a)). Under the 1990 Act, the Attorney General issued a certificate of naturalization after admitting a newly naturalized citizen to citizenship. 8 U.S.C. 1449.

The Attorney General's naturalization authority has now been transferred to the Department of Homeland Security (DHS). See 6 U.S.C. 271(b), 557.[4] DHS also issues replacement certificates of naturalization both to citizens originally naturalized by a court and to those naturalized through the post-1990 administrative process. 8 U.S.C. 1454. Finally, certain categories of citizens can apply to DHS for a certificate of citizenship. 8 U.S.C. 1452(a). Such a certificate "does not confer citizenship, but recognizes and furnishes evidence of citizenship status previously vested." Gordon § 99.04[1].

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[4] References to the Attorney General in the relevant statutes are deemed to refer to the Secretary of Homeland Security or to the DHS official or component to which the statutory authority has been transferred. 6 U.S.C. 557.

By statute, certificates of citizenship or naturalization issued by the Attorney General or DHS "have the same effect * * * as a certificate of naturalization or of citizenship issued by a court having naturalization jurisdiction." 8 U.S.C. 1443(e).

ii. It has long been settled that, in general, "a decree of naturalization or a certificate of naturalization is not subject to impeachment in a collateral proceeding." 41 Op. Att'y Gen. 452, 459 (1960) (citing cases); see Gordon § 99.04[4]. Such certificates are thus conclusive when questions concerning citizenship arise in private litigation. See, *e.g.*, *Campbell* v. *Gordon*, 10 U.S. (6 Cranch) 176, 182 (1810). A facially valid certificate of citizenship or naturalization is also conclusive proof of citizenship in administrative proceedings. In 1960, for example, the Attorney General concluded that the State Department was bound to accept a certificate of citizenship issued by the Immigration and Naturalization Service (INS). 41 Op. Att'y Gen. at 459-461. By authorizing INS (through the Attorney General) to issue certificates of citizenship and providing that such certificates shall have the same effect as a certificate issued by a court, Congress "meant to put the matter to rest and to deprive all other administrative officers of the United States of the power to put in issue the citizenship status recognized by a certificate regular on its face." *Id.* at 461 (relying on 8 U.S.C. 727(f) (1946), which has been recodified at 8 U.S.C. 1443(e)); see *In re Mendiola*, 647 F. Supp. 839, 841-842 (S.D.N.Y. 1986) (holding that INS was required to accept as proof of citizenship a certificate of citizenship issued by the Attorney General).

Although a certificate of citizenship or naturalization is thus conclusive proof of citizenship in many

circumstances, it does not bind the government "for all purposes." *Johannessen* v. *United States*, 225 U.S. 227, 236 (1912). It is well settled, for example, that "neither estoppel nor res judicata" precludes the United States from attacking the validity of a naturalization certificate. Gordon § 96.08[6]. Instead, the Department of Justice is authorized by statute to bring a suit to "revok[e] and set[] aside the order admitting [a] person to citizenship and cancel[] the certificate of naturalization." 8 U.S.C. 1451(a). The grounds for instituting denaturalization proceedings include "a naturalized citizen's failure to comply with the statutory prerequisites for naturalization." *Fedorenko* v. *United States*, 449 U.S. 490, 514 (1981).

Because a judicial denaturalization not only results in the cancellation of the certificate of naturalization but also deprives the holder of citizenship, the grounds for denaturalization must be proved to a court by "clear, unequivocal, and convincing" evidence. *Fedorenko*, 449 U.S. at 505 (internal quotation marks omitted). Cancellation of a certificate of citizenship or naturalization issued by an administrative agency, in contrast, affects "only the document and not the citizenship status of the person in whose name the document was issued." 8 U.S.C. 1453. DHS is thus authorized to cancel an administrative certificate whenever it finds "that such document or record was illegally or fraudulently obtained." *Ibid.* The holder need only be given notice and 60 days to show cause why the certificate should not be canceled. *Ibid.*

iii. Denaturalization proceedings and administrative cancellations are direct attacks on certificates of naturalization or citizenship. But the government may also pursue a criminal prosecution predicated on

the defendant's non-citizenship or ineligibility for naturalization even if it does not first cancel the defendant's certificate of citizenship or naturalization.

This conclusion is most clearly demonstrated by the statutory consequences of a conviction for knowingly procuring naturalization in a manner "contrary to law" in violation of 18 U.S.C. 1425(a). If certificates of naturalization were conclusive against the government in criminal proceedings, the government would be required to cancel the defendant's certificate before pursuing a prosecution under Section 1425(a)—otherwise, the defendant could rely on the certificate as conclusive proof of the validity of the naturalization. Cf. *Johannessen*, 225 U.S. at 236 (ordinarily, a certificate of naturalization is "complete evidence of its own validity"). But 8 U.S.C. 1451(e) makes clear that this preliminary step is not required: it specifies that when a person is convicted of procuring naturalization in violation of law, the court "shall thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled." By specifying that cancellation of the defendant's certificate is an automatic consequence *following* a conviction for violating 18 U.S.C. 1425(a), the statute makes clear that the certificate need not be canceled *before* the criminal proceeding begins.

The same is true of certificates of citizenship and offenses requiring proof of alienage. For example, in *United States* v. *Chin Doong Art*, 180 F. Supp. 446, 447 (E.D.N.Y. 1960), defendants charged with "falsely represent[ing] themselves to be citizens" argued that because they held "certificates of derivative citizenship," they could not be prosecuted unless the gov-

ernment first canceled those certificates. The court rejected that argument, holding that requiring the government to pursue the administrative cancellation process before prosecution would be "unnecessarily cumbersome" and would involve a needless "multiplicity of proceedings." *Ibid.*

This conclusion is entirely sensible. To obtain a conviction on a charge that includes non-citizenship as an element, the government must prove beyond a reasonable doubt that the defendant is not a citizen. That is a higher standard of proof than even the clear and convincing standard that applies in judicial denaturalization proceedings, and it far exceeds the threshold for an administrative cancellation of a certificate of citizenship or naturalization. Requiring the government to cancel the defendant's certificate before pursuing the criminal case would thus compel the parties to litigate the same citizenship dispute in parallel proceedings without adding any meaningful protection for the defendant. Unsurprisingly, therefore, neither petitioner nor Judge Smith's dissenting opinion identifies any case demanding that result.

b. Section 2705 specifies that, "during its period of validity (if such period is the maximum period authorized by law)," a passport issued to a U.S. citizen "shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship." Like such certificates, an unexpired passport must be accepted as conclusive evidence of citizenship in administrative proceedings and against third parties. A passport does not, however, prevent the United States from disproving the holder's citizenship in a criminal prosecution. The relatively few

authorities interpreting 22 U.S.C. 2705 support both of these propositions.

i. Shortly after the statute's enactment in 1982, the BIA held that Section 2705 means that a "valid United States passport" must be treated as "conclusive proof" of citizenship "in administrative immigration proceedings." *In re Villanueva*, 19 I. & N. Dec. 101, 103 (1984). Courts have likewise stated that Section 2705 "makes a passport conclusive proof of citizenship in administrative immigration proceedings." *Keil* v. *Triveline*, 661 F.3d 981, 987 (8th Cir. 2011); accord *Vana* v. *Attorney Gen.*, 341 Fed. Appx. 836, 839 (3d Cir. 2009). And a passport has also been held to preclude a private party from challenging the holder's citizenship. See *United States* v. *Clarke*, 628 F. Supp. 2d 15, 21 (D.D.C. 2009).[5]

The court of appeals thus wrote too broadly to the extent it interpreted 22 U.S.C. 2705 to mean that a passport cannot be invoked as proof of citizenship unless the holder first establishes that she is a citizen. As Judge Smith's dissent explains, that interpretation would deprive the statute of much of its practical effect. Pet. App. 12a-13a. Instead, the statutory requirement that the passport must have been issued

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[5] *Clarke* found that the government's introduction of a passport and certificate of naturalization held by the victim of a foreign hostage-taking conclusively established the victim's U.S. citizenship for purposes of a prosecution under 18 U.S.C. 1203(b)(1)(A). Petitioner is thus wrong to contend (Pet. 12-13 n.7) that the government's position in that case is inconsistent with its position here. *Clarke* merely confirms that a third party cannot challenge the government's citizenship determination as reflected in a valid passport. It does not establish that a passport precludes the government itself from challenging the holder's citizenship in a criminal proceeding.

"to a citizen of the United States" operates to exclude passports issued to noncitizen nationals from proving citizenship in administrative contexts. See *id.* at 14a-15a.[6]

ii. Contrary to Judge Smith's view, however, a passport is not conclusive proof of citizenship against the government in all circumstances. Like an administrative certificate of citizenship, a passport is subject to revocation by the issuing agency: The State Department is authorized to revoke a passport if the agency concludes it was obtained "illegally, fraudulently, or erroneously." 8 U.S.C. 1504(a). The Department need only provide notice of the action and an opportunity for the passport holder to seek "a prompt post-cancellation hearing." *Ibid.*; see 22 C.F.R. 51.62, 51.70-74. And just as 8 U.S.C. 1451(e) makes clear that the government need not cancel a certificate of naturalization before prosecuting the holder for procuring naturalization in violation of law, see p. 11, *supra*, the government is not required to cancel an erroneously issued passport before prosecuting the holder for falsely claiming citizenship in violation of 18 U.S.C. 911. As the Eighth Circuit observed, "no court has held that possession of a passport precludes prosecution under § 911, and there are indications in the case law that it does not." *Keil*, 661 F.3d at 987; see

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[6] This conclusion is consistent with statute's sparse legislative history. The text of 22 U.S.C. 2705 was originally proposed by the State Department in 1979. In its transmittal letter to Congress, the Department explained that the proposed legislation "is concerned with the U.S. passport which is issued to United States citizens" and that "U.S. passports issued to nationals of the United States are not included in the draft bill." 125 Cong. Rec. 25,267, 25,268 (1979).

ibid. ("Non-citizens in possession of passports at the time of their arrests have been convicted of violating § 911 for using those passports as proof of citizenship."). Petitioner provides no sound reason to require the government to revoke a passport through the administrative process before litigating exactly the same citizenship dispute under a higher standard of proof in a criminal prosecution.

2. Petitioner contends (Pet. 7-14) that the decision below creates a conflict between the circuits and predicts that that court of appeals' decision will have sweeping implications. Both claims lack merit.

a. Petitioner's assertion of a circuit conflict rests on the Ninth Circuit's decision in *Magnuson* v. *Baker*, 911 F.2d 330 (1990), which arose in a very different context. In *Magnuson*, the State Department attempted to revoke an erroneously issued passport without prior notice or a hearing. *Id.* at 332. The passport holder sued, and the Ninth Circuit concluded that because 22 U.S.C. 2705 provides that an unexpired passport shall have "the same force and effect" as a certificate of citizenship or naturalization, the State Department could not revoke a passport without following procedures comparable to those required for cancellation of such certificates. *Magnuson*, 911 F.2d at 334-335. In the course of its discussion, the Ninth Circuit stated that a passport is "conclusive evidence of citizenship." *Id.* at 333. But, as the court of appeals observed, the Ninth Circuit's discussion of the evidentiary force of a passport was "dictum." Pet. App. 6a. And *Magnuson* did not discuss, even in dicta, the effect of a passport in a criminal prosecution like this one. See *id.* at 7a n.3 (noting that neither *Magnuson* nor the other cases relied upon by petitioner "ad-

dressed the precise question presented here"). Moreover, Congress has overturned *Magnuson*'s actual holding by enacting 8 U.S.C. 1504, which authorizes the State Department to cancel a passport without observing the same procedures required to cancel a certificate of naturalization or citizenship. Any difference in reasoning between *Magnuson* and the opinion below thus does not constitute a conflict worthy of this Court's review.[7]

b. Petitioner seeks to demonstrate the breadth of the court of appeals' decision and the general importance of the question presented by noting (Pet. 12-14) that questions of citizenship arise in a wide variety of contexts. But while determinations regarding citizenship are undoubtedly both commonplace and important, litigation concerning the proper interpretation of 22 U.S.C. 2705 occurs relatively infrequently. A Westlaw search indicates that despite having been on the books for more than three decades, Section 2705 has been cited in only nine circuit court opinions. Moreover, 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 conform to the understanding discussed above (pp.

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[7] Petitioner also contends (Pet. 11) that the court of appeals' opinion conflicts with the BIA's decision in *Villanueva*, 19 I. & N. Dec. at 103. But as petitioner appears to acknowledge, a conflict between a court of appeals and an administrative agency does not warrant this Court's review. See Sup. Ct. R. 10. *Villanueva*, moreover, does not conflict with the result reached below because it addressed the effect of a passport in "administrative immigration proceedings," not a criminal prosecution. 19 I. & N. Dec. at 103. And the BIA itself has not addressed the effect of the Third Circuit's decision on immigration cases arising in that circuit.

7-15, *supra*).[8] In the absence of any square conflict among the lower courts, a question that arises so rarely does not warrant this Court's review.

3. Even if the interpretation of 22 U.S.C. 2705 were a question warranting this Court's review, this case would be an unusually poor vehicle in which to consider it. Although the government acknowledged below that petitioner's passport has never been formally canceled pursuant to 8 U.S.C. 1504, the passport was confiscated by the Border Patrol in 2008 and never returned. Pet. App. 1a. The passport itself was not introduced into evidence at trial; instead, the record contains only a photocopy of its data and signature pages. C.A. J.A. 628. Moreover, petitioner filed an application for another passport in 2011, in which she reported that her 2007 passport had been "lost." *Id.* at 669. That subsequent application was denied in September 2011, just before the trial. 9/12/11 Tr. 281-283; 9/13/11 Tr. 6-7. These highly unusual facts raise at least three questions about the application of 22 U.S.C. 2705 that would not be presented in a more typical case.

First, petitioner's 2011 passport application identified her 2007 passport by number and checked a box

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[8] Petitioner notes (Pet. 11 n.6) that the Third Circuit relied on the decision below in *Edwards* v. *Bryson*, __ Fed. Appx. __, No. 12-3670, 2013 WL 4504783 (Aug. 26, 2013). But because the passport at issue in *Edwards* had expired, it would not have been conclusive proof of citizenship under any interpretation of Section 2705. *Ibid.*; see 22 U.S.C. 2705 (prescribing the force and effect of a passport "during its period of validity"). In addition, the plaintiff in *Edwards* has raised the interpretation of Section 2705 in a petition for rehearing en banc, and the court has directed the government to respond. No. 12-3670, Doc. No. 3111428831 (Oct. 23, 2013).

indicating that it had been "lost." C.A. J.A. 669. By State Department regulation, "[a] United States passport is invalid as soon as" it has been "reported as lost or stolen to the Department [or] a U.S. passport agency * * * and the Department has recorded the reported loss or theft." 22 C.F.R. 51.4(f)(2). This issue was not raised below, but petitioner's report to the State Department in her 2011 application appears to have rendered her 2007 passport invalid as a matter of law. See *Patel* v. *Rice*, 403 F. Supp. 2d 560, 563 (N.D. Tex. 2005) ("Patel's passport became invalid on * * * the date Patel reported it lost."), cert. denied, 522 U.S. 1179 (2008). An invalid passport is entitled to no weight as proof of citizenship under 22 U.S.C. 2705, which prescribes a passport's "force and effect" only "during its period of validity."

Second, 22 U.S.C. 2705 specifies the evidentiary weight to be given to a "passport." It is not clear that it applies where, as here, the document at issue is a partial photocopy of a passport from an unofficial source—in this case, petitioner herself. See 9/12/11 Tr. 53-54 (the document in the record is the copy petitioner presented to an ICE agent in St. Thomas).

Third, 22 U.S.C. 2705 gives evidentiary weight to citizenship determinations made by the State Department in passport proceedings. Here, the Department incorrectly concluded that petitioner was a U.S. citizen in 2007. But it denied her subsequent passport application in 2011 after discovering that she is not, in fact, a citizen. Even if petitioner were correct about the evidentiary weight to be given to a passport in an ordinary case, it would not necessarily follow that 22 U.S.C. 2705 requires a court to treat as controlling the citizenship determination reflected in a

passport when the State Department itself has subsequently reached a different conclusion and declined to issue the holder a replacement.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2014

[9] The State Department did not deny petitioner's 2011 application until after she committed the offense at issue, but did send a denial letter before trial. 9/12/11 Tr. 281-283; 9/13/11 Tr. 6-7. The date of the trial is the relevant one because that is the point at which petitioner sought to use her passport as "proof of United States citizenship." 22 U.S.C. 2705.