No. 98-1505

In the Supreme Court of the United States

JESUS MANUEL FRIAS-MUNOZ, PETITIONER

v.

MADELEINE K. ALBRIGHT, SECRETARY OF STATE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly declined to review petitioner's challenge to the admissibility of a sworn out-of-court statement on the ground that petitioner's trial counsel, who stipulated to admission of the document and relied on it at trial, intentionally waived any right to object to its admission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 152 F.3d 925 (Table). The opinion of the district court (App., *infra*, 1a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5) was entered on July 27, 1998. A petition for rehearing was denied on February 17, 1999. The petition for a writ of certiorari was filed on March 18, 1999. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was born in Sinaloa, Mexico, on June 25, 1954. App., *infra*, 1a. Petitioner's mother held only Mexican citizenship, but his father had been born in Arizona, and was therefore also a citizen of the United States. *Id.* at 2a; E.R. 5, at Exh. 1.[1] The applicable provision of the Immigration and Nationality Act (INA) in effect at the time of petitioner's birth declared that a child born abroad to married parents, only one of whom was a citizen of the United States, would become a citizen at birth only if the citizen parent had, by the time of the birth, been "physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years." INA § 301(a)(7), 8 U.S.C. 1401(a)(7) (1952).[2]

Petitioner's father was born in Arizona on November 24, 1917, to parents who were both Mexican citizens. App., *infra*, 2a. In 1960, he appeared at the United States Consulate in Nogales, Mexico, and applied for registration as a citizen of the United States. *Ibid.* The application asserted that he was brought to Mexico in

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[1] "E.R." refers to the Excerpts of Record filed by petitioner in the court of appeals. Because the pages in the Excerpts are not consecutively numbered, we cite documents in the Excerpts using numbers that correspond to the order in which they appear therein. "S.E.R." refers to the Supplemental Excerpts of Record filed by the government below.

[2] Unless otherwise noted, references to this provision are to the version in effect at the time of petitioner's birth. See App., *infra*, 5a. The comparable provision of current law is Section 301(g) of the Act, 8 U.S.C. 1401(g) (1994).

July 1921, when he was three years old, and that he had lived with his parents in Mexico until he married petitioner's mother, a Mexican citizen, in August 1938. *Ibid.* In response to a question on the written application asking him to list all absences from the United States "of more than 2 months' duration," he stated that he was absent from the United States, living in Mexico, from July 1921 until May 1959, and from October 27, 1959, until May 17, 1960. *Ibid.*; S.E.R. 43. The consul's opinion, which is attached to the application and was written after "a close questioning" of the applicant (S.E.R. 47), similarly relates that, after being brought to Mexico by his parents, petitioner's father had "lived [t]here continuously to date, with the exception of a five months visit to the United States in 1959." *Ibid.* During that time he and his wife had eight children, all of whom were born in Mexico. App., *infra*, 3a.

Petitioner's father's application for registration of citizenship was approved in 1960. App., *infra*, 3a. In September 1966, petitioner obtained an immigrant visa from the United States Consulate in Tijuana, Mexico. He entered the United States lawfully as a permanent resident alien, on the basis of his status as the child of a citizen parent. *Ibid.*

In February 1989, a California court convicted petitioner on state felony charges involving the sale of cocaine. S.E.R. 109-110. Petitioner was sentenced to ten years' imprisonment, and he served five years of that sentence. S.E.R. 110. In March 1994, when petitioner was released from prison, the INS initiated deportation proceedings against him on the basis of his controlled-substance conviction. S.E.R. 108-110; see generally former INA § 241(a)(2)(B), 8 U.S.C. 1251(a)(2)(B) (1994).

2. In November 1995, petitioner applied to the Secretary of State for the issuance of a United States passport, claiming that he became a citizen, under former Section 301(a)(7), when he was born abroad to a citizen father. App., *infra*, 3a; E.R. 5, at Exh. 1; S.E.R. 5 (¶ 4), 52. The Secretary denied petitioner's application on the ground that his citizen father had not, at the time of petitioner's birth, been physically present in the United States for the time required under that Section for the transmission of citizenship. App., *infra*, 3a-4a; S.E.R. 52-53. In reaching that conclusion, the Secretary relied on the factual recitations in petitioner's father's application for registration as a United States citizen. S.E.R. 52.

Petitioner filed this action under INA § 360(a), 8 U.S.C. 1503(a) (Supp. III 1997), challenging the Secretary's refusal to issue him a passport, and seeking a judicial declaration that he is a citizen of the United States. See S.E.R. 4-5. In February 1997, counsel for petitioner and counsel for the government signed and filed with the district court a Joint Exhibit List. S.E.R. 7. That list included, as Exhibit 18 for petitioner and as Exhibit 101 for the government, the application for registration as a United States citizen filed by petitioner's father in 1960. S.E.R. 9-10. It also included, directly above the signatures of counsel for both parties, the statement: "The parties hereby agree that the following exhibits should be admitted into evidence at trial without objection: Exhibits Nos. 1, 2, 4, 13, 14, 18, 19, 20, and 101 through 120." S.E.R. 12.

In March 1997, the district court held a pre-trial conference and filed a Pre-Trial Conference Order, which the parties had jointly drafted and previously lodged with the court. S.E.R. 16-35. That order reflected and approved the parties' agreement that with

the exception of certain exhibits not at issue here, to which the government preserved objections, all exhibits set forth in the Joint Exhibit List were to be admitted without objection. S.E.R. 34. The court thereafter conducted a two-day trial, during which petitioner's counsel presented a number of witnesses in an effort to demonstrate that petitioner's father had satisfied Section 301(a)(7)'s physical presence requirement before petitioner's birth in 1954. Petitioner's counsel further relied on factual assertions in the 1960 application for registration of citizenship to demonstrate that petitioner's father had been physically present in the United States for almost four years immediately after he was born, before his parents took him back to Mexico in 1921. See S.E.R. 126-128.

3. After trial, the district court found in favor of the government. App., *infra*, 1a-7a. The court found that the evidence established that petitioner's father was physically present in the United States for forty-three months after his birth; for nine months in 1942, as an employee of the South [*sic*] Pacific Company; for twelve months in 1944, as an employee of the North [*sic*] Pacific Company; and for about twelve months from July 1953 through June 25, 1954. *Id.* at 4a, 6a. Because those periods, taken together, were insufficient to demonstrate physical presence in the United States for at least ten years, five of them after the age of fourteen, before the date of petitioner's birth, the court concluded that petitioner did not acquire United States citizenship from his father under Section 301(a)(7). *Id.* at 1a-2a, 6a-7a.

The court of appeals affirmed. Pet. App. 1-2. On appeal, petitioner challenged only the admission of his father's 1960 application for registration of citizenship, claiming that it was inadmissible hearsay, and that if it

had been excluded he would have prevailed at trial. Pet. C.A. Br. 1, 17. The court of appeals declined to consider petitioner's evidentiary claim, holding that, by stipulating to the admission of the application at trial, he had "intentionally relinquished his right to object to the admission of the document." Pet. App. 2. Because any evidentiary error had been invited by petitioner, it could not be raised as a ground for reversal on appeal. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 5-14) that the court of appeals erred in concluding that he waived any right to object to the admission of the factual assertions in his father's application for registration of citizenship, when instead he merely "failed to object in a timely manner because he, and his attorney, failed to recognize" that the sworn statements in the application were "inadmissible hearsay" (Pet. 14). He argues that the court of appeals should have applied a "plain error" standard drawn from *United States* v. *Olano*, 507 U.S. 725 (1993), and on that basis should have vacated the district court's judgment and remanded for retrial. None of petitioner's arguments has merit.

1. The court of appeals correctly concluded that petitioner, through his trial counsel, "intentionally relinquished" any right to object to admission of the factual statements in petitioner's father's application for registration of citizenship. Pet. App. 2. In the Joint Exhibit List filed before trial, petitioner's counsel explicitly agreed that the application "should be admitted into evidence at trial without objection." This Court has long recognized that parties may enter into such stipulations, and that courts may enforce them without further inquiry into whether the evidence in

question would otherwise be admissible. See *Harris* v. *Wall*, 48 U.S. (7 How.) 693, 695-696 (1849) (reporter's statement of relevant facts); *id.* at 705 (Court's opinion) ("When parties, with a full knowledge of the contents of a deposition, agree that it shall be read to the jury on the trial of the cause, they have no right to complain of the court for *not* excluding from the consideration of the jury the very matter which they themselves have agreed should be read to them."); *Vattier* v. *Hinde*, 32 U.S. (7 Pet.) 252, 265- 266 (1833) (Marshall, C.J.); 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5039, at 200 & n.7, 206 & n.26 (1977 & Supp. 1999) (Wright & Graham), and cases there cited; see also 22 Wright & Graham § 5194 (1978 & Supp. 1999) (discussing stipulations in context of determining relevance). In this case, moreover, petitioner's counsel not only agreed to the admission of the application as a government exhibit; he obtained the government's reciprocal agreement that the same document would be admitted without *government* objection as one of *petitioner's* exhibits. S.E.R. 12; see p. 4, *supra*; cf. 21 Wright & Graham § 5039, at 202-204 & n.18.1.

The Pre-Trial Order, drafted jointly by both parties' counsel, also dealt expressly with the application. That Order, which detailed the factual representations made by petitioner's father as part of the application (S.E.R. 17-18), specifically acknowledged that petitioner was *not* contending that the statements at issue "were not made, or that the Consul in any way inaccurately or improperly recorded those statements" (S.E.R. 24). The Order reserved, instead, petitioner's right to present "relevant evidence to support contradictory claims * * * as to the truth of the matter therein stated." S.E.R. 25. Petitioner's counsel did present such "contradictory" evidence at trial, and the district court

credited some of that evidence when it found that petitioner's father had, in fact, been physically present in the United States for three periods not reflected in the registration application. E.R. 4, at 4-6; see p. 5, *supra*. To prove physical presence for the longest period recognized by the district court, however, both petitioner and the court relied on the uncontradicted assertion, in the registration application, that petitioner's father had remained in the United States from the time of his birth until his parents took him back to Mexico when he was almost four years old. See S.E.R. 126-128; App., *infra*, 2a-6a.

In short, petitioner's trial counsel did not "fail[] to object" (Pet. 14) to admission of the statements in the father's application. He actively sought, and obtained, both admission of those statements as part of his case, and selective reliance by the fact-finder on the truth of some, but not all, of those statements. As the court of appeals properly held (Pet. App. 2), counsel's decision to pursue that trial strategy precludes consideration at this juncture of petitioner's belated argument that the statements in his father's application should have been excluded in their entirety. Cf. *Johnson* v. *United States*, 318 U.S. 189, 201 (1943) ("We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him.").

2. Even if petitioner's present claim were reviewed under the standard for which he contends, he could not prevail. Under *Olano*, an appellate court should notice and correct a forfeited error in the proceedings below only if the error is "plain," "affect[s] substantial rights," and "seriously affect[s] the fairness, integrity or public

reputation of judicial proceedings." 507 U.S. at 731-737.[3]

In this case it is far from "plain" that the district court committed any error at all. First, as we have explained (see pp. 6-7, *supra*), the parties stipulated to the admission of the statements in question, and the district court was not required to consider the question of admissibility any further. Moreover, although petitioner asserts (Pet. 4) that the statements in his father's registration application were "not within any exception to the hearsay rule," he makes no argument in support of that contention. Nor could any such argument show "plain" error, given the variety of different hearsay exceptions under which the father's statements would likely have been held to be admissible, had the issue been presented to the district court. See Fed. R. Evid. 804(b)(4) (statements of family history), 803(16) (statements in documents more than 20 years old); see also Fed. R. Evid. 804(b)(1) (former testimony), 803(8)(C) (findings of government investigations), 803(6) (busi-

[3] *Olano* was a criminal case, and construed Rule 52(b) of the Federal Rules of Criminal Procedure. The Federal Rules of Civil Procedure do not contain a general "plain error" rule, although there is such a provision in the Federal Rules of Evidence. Fed. R. Evid. 103(d); compare 28 U.S.C. 2111 (harmless error); Fed. R. Civ. P. 60(b) (motions for relief from judgment), 61 (harmless error). Some courts of appeals have applied *Olano* in the civil context; and the standard in civil cases should, in any event, be no *less* stringent. See, *e.g.*, *Owens-Illinois, Inc.* v. *Rapid Am. Corp.* (*In re Celotex Corp.*), 124 F.3d 619, 631 (4th Cir. 1997) (citing cases). This case presents no issue concerning the limits of plain-error review in civil cases, because petitioner cannot in any event satisfy the standards articulated in *Olano*.

ness records), 807 (statements with "equivalent circumstantial guarantees of trustworthiness").[4]

Even if, however, petitioner's father's statements would have been excluded on timely objection, and petitioner should be excused from having failed to object, any resulting error was harmless in this case. Petitioner had the burden of showing that his father satisfied the physical presence requirements of former Section 301(a)(7). After considering all the admitted evidence, including the testimony of petitioner's relatives and other documentary evidence introduced by petitioner, the district court found that petitioner's father had been physically present in the United States not only for 43 months immediately following his (the father's) birth, but also for later periods, before petitioner's birth, totaling some 33 additional months. Given that the latter finding contradicts the statements made by petitioner's father in his registration application, the court was plainly willing to credit petitioner's other evidence where appropriate. Excluding all statements in the application accordingly would not have assisted petitioner; to the contrary, it would have removed a primary evidentiary support, relied on by petitioner's counsel, for the single finding most favorable to petitioner—his father's 43-month presence in this country immediately following his birth.

Finally, exclusion of the statements at issue is not necessary to safeguard the integrity or public reputation of judicial proceedings. Indeed, rather the reverse is true. We agree with petitioner (Pet. 12) that accu-

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[4] Petitioner's father died before petitioner applied for a passport, and he was therefore not available to testify at trial. See S.E.R. 23 (designating copy of death certificate as petitioner's Exhibit 14); Fed. R. Evid. 804(a)(4).

rate determinations of citizenship are a matter of the utmost importance. Petitioner has, however, been afforded a full and fair opportunity to present all available evidence that his father satisfied the requirements established by Congress for transmitting United States citizenship to a child born abroad. It is requiring retrial of that issue *without* admission of the evidence at issue here that would tend to impugn "the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1999

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. CV 95-6968-RAP(AJWx)

JESUS MANUEL FRIAS-MUNOZ, PLAINTIFF

v.

MADELEINE ALBRIGHT, SECRETARY OF
STATE OF THE UNITED STATES OF AMERICA,
DEFENDANT

[Filed: May 5, 1997]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was tried to this Court on April 22 and April 23, 1997. The court having considered the evidence adduced at trial, and the arguments of the parties, and having judged the credibility of the witnesses and being fully advised, now makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. Plaintiff was born in Sinaloa, Mexico on June 25, 1954. Plaintiff has not met the statutory requirements under 8 U.S.C. § 1401(a)(7) to establish a claim to United States citizenship as a person born outside the United States to a United States citizen father.

2. Plaintiff's father, Juan de la Cruz Frias, was born in Arizona on November 24, 1917, to Mexican citizen parents, Raymundo Frias and Belen Gomez.

3. On May 18, 1960, plaintiff's father applied for registration as a United States citizen at the United States Consulate in Nogales, Mexico.

4. In his application for registration, plaintiff's father stated under oath before a consular officer that the following was true: (1) plaintiff's father had been brought to Mexico by his parents in July, 1921, when plaintiff's father was three years old; (2) plaintiff's father had lived with his parents in Navolato, Mexico, until he married Andrea Munoz, a Mexican citizen on August 27, 1938; and (3) except for a five-month visit in 1959, plaintiff's father lived in Mexico from July, 1921, to May, 1960, and was absent from the United States during this period of time.

5. As evidence of United States citizenship, plaintiff's father submitted to the consular officer a Certificate of Baptism issued on August 9, 1945, stating that plaintiff's father was born on November 24, 1917, in Mayer, Arizona, and baptized on January 1, 1918. Plaintiff's father also submitted an Arizona Delayed Birth Certificate filed on March 8, 1954, which was based on the submission of the following: (1) Certificate of Baptism issued in 1945; (2) affidavit of uncle, Jose G. Gomez, dated August 30, 1949; (3) copy of a Kenosha County, Wisconsin, Court Order filed on March 10, 1950; and (4) copy of plaintiff's grandparents' 1938 marriage certificate.

6. Plaintiff's father also stated under oath in his application for registration that he presented his parents' affidavit of March 24, 1960, which indicated that his parents left the United States in 1921. Plaintiff's father stated under oath that he and his wife had eight children, all of whom were born in Mexico. Plaintiff's father's application for registration as a United States citizen was approved in 1960.

7. On September 22, 1966, the United States Consulate at Tijuana, Mexico, issued plaintiff an Immigrant Visa and Alien Registration to enter the United States as a Mexican citizen child of a United States citizen. On September 23, 1966, plaintiff was admitted to the United States by the Immigration and Naturalization Service as an alien child of a United States citizen parent.

8. Plaintiff filed an application for a United States passport with the Los Angeles Passport Agency on November 27, 1995. Plaintiff submitted the following with his passport application: (1) plaintiff's father's Arizona Delayed Birth Certificate, issued on April 26, 1994; (2) plaintiff's parents' marriage certificate; (3) plaintiff's birth certificate; (4) 1978 death certificate; and (5) three affidavits, each dated September 21, 1995, from relatives stating that plaintiff's father allegedly lived and worked in Arizona from approximately 1940 until 1955 when he moved to California.

9. Defendant's Passport Agency at Los Angeles denied plaintiff's application for a United States passport on December 11, 1995, based on plaintiff's father's sworn statement in 1960 that he had been brought to Mexico by his parents at age three and had

lived there continuously until he applied for registration as a United States citizen, except for a five-month visit to the United States in 1959.

10. Plaintiff father was physically present in the United States from November 24, 1917, to July, 1921, for a period of forty-three months. Plaintiff's father was also physically present in the United States for nine months in 1942, when he worked for the South Pacific Company, and one year in 1944, when he worked for the North Pacific Company, for a period totaling twenty-one months. Plaintiff's father was further physically present in the United States from July 1953 through June 25, 1954.

11. Plaintiff failed to provide evidence to support his contention that plaintiff's father was physically present in the United States for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years.

12. Any of the foregoing findings of fact deemed to be conclusions of law are hereby incorporated into the conclusions of law.

II. CONCLUSIONS OF LAW

1. United States citizenship is acquired only by: (1) birth or naturalization in the United States under the Fourteenth Amendment to the United States Constitution; or (2) statute enacted by Congress pursuant to its power over naturalization set forth in Art. I, § 8, Cl. 4 of the United States Constitution. *Rogers v. Bellei*, 401 U.S. 815, 827-31 (1971); *see United States v. Wong Kim Ark*, 169 U.S. 649, 673-74 (1898). Congress can

impose conditions on non-Fourteenth Amendment citizenship for persons born outside the United States, such as residence requirements. *Runnett v. Shultz*, 901 F.2d 782, 786 (9th Cir. 1990).

2. The law under which a person born abroad to a United States citizen parent may acquire United States citizenship is the statute that was in effect at the time of the child's birth. *Runnett v. Schultz*, 901 F.2d 782, 783 (9th Cir. 1990). The provisions of 8 U.S.C. § 1401(a)(7), which were in effect at the time of plaintiff's birth, provide that a person born abroad to one United States citizen parent and one alien parent acquires United States citizenship at birth if the citizen parent was physically present in the United States or its outlying possessions prior to the birth of the child for a period or periods totaling not less than ten years; at least five of which were after attaining the age of fourteen years.

3. Plaintiff has the burden of proving his claim of United States citizenship by a fair preponderance of the evidence. *Lim v. Mitchell*, 431 F.2d 197, 199 (9th Cir. 1970); *Gay v. Rusk*, 290 F.2d 630, 631 (9th Cir. 1961). The applicable citizenship law is 8 U.S.C. § 1401(a)(7), pursuant to which plaintiff must prove that prior to plaintiff's birth in Mexico on June 25, 1954, his United States citizen father had been physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, five of which were after attaining the age of fourteen years. *Runnett*, 901 F.2d at 783; *United States v. Ortiz-Diaz*, 849 F. Supp. 734, 740 (E.D. Cal. 1994).

4. The Ninth Circuit Court of Appeals has stated that only objective facts and not subjective intent are considered when applying the statutory requirements for United States citizenship for a person born outside the United States. *Runnett*, 901 F.2d at 784-85. Substantive evidence, furthermore, cannot be based upon an inference drawn from facts which are uncertain or speculative which raise only a conjecture of possibility. *Woods v. United States*, 724 F.2d 1444, 1451 (9th Cir. 1984).

5. The objective, documentary evidence in this action does not show that plaintiff's father was physically present in the United States for a total of ten years, five after the age of fourteen, prior to plaintiff's birth on June 25, 1954. The evidence shows that plaintiff's father was physically present in the United States from November 24, 1917 to July, 1921 (from plaintiff's father's birth to age three). The documentary evidence offered by plaintiff to support his relatives' testimony shows that before plaintiff's birth, plaintiff's father was working in the United States from about July-September, 1953 to April-June 1954. The documentary evidence does not support a claim that plaintiff's father's visits amounted to a total of ten years of physical presence in the United States prior to plaintiff's birth on June 25, 1954. Nor does the evidence support an inference, as argued by plaintiff's counsel, that plaintiff's father was physically present in the United States for the years required by 8 U.S.C. § 1401(a)(7). Plaintiff, therefore, is not a United States citizen pursuant to 8 U.S.C. § 1401(a)(7). *Rodriguez-Romero v. INS*, 434 F.2d 1022, 1023-24 (9th Cir. 1970); *Ortiz-Diaz*, 849 F.Supp. at 740; *see Matter of Lee*, 11 I&N Dec. 34, 36 (BIA 1965).

6. Based on the foregoing, plaintiff's father's visits to the United States do not total ten years as required under 8 U.S.C. § 1401(a)(7). Plaintiff has not established his claim of United States citizenship by a fair preponderance of the evidence. *See Lim v. Mitchell*, 431 F.2d 197, 199 (9th Cir. 1970); *Gay v. Rusk*, 290 F.2d 630, 631 (9th Cir. 1961). Plaintiff, therefore, has failed to state a claim for declaratory judgment of United States citizenship pursuant to 8 U.S.C. § 1401(a)(7). Plaintiff has failed to produce evidence that would support a judgment in his favor.

7. Any of the foregoing conclusions of law deemed to be findings of fact are hereby incorporated into the findings of fact.

DATED: May 2, 1997.

/s/ RICHARD A. PAEZ
RICHARD A. PAEZ
UNITED STATES DISTRICT JUDGE