No. 07-337

In the Supreme Court of the United States

SANJAY H. PATEL, PETITIONER

v.

CONDOLEEZA RICE, SECRETARY OF STATE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's denial of petitioner's claim for a declaratory judgment that he was a United States citizen by birth.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Statutes and regulation: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is unreported. The decision of the district court (Pet. App. 2-18) is reported at 403 F. Supp. 2d 560.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2007. A petition for rehearing was denied on June 11, 2007 (Pet. App. 19-20). The petition for a writ of certiorari was filed on September 10, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Pursuant to 8 U.S.C. 1503(a), an individual who is within the United States and claims "a right or privilege as a national of the United States and is denied such

right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States * * * may institute an action [under 28 U.S.C. 2201] against the head of such department or independent agency for a judgment declaring him to be a national of the United States." The action must be filed in district court within five years after the final administrative denial of a right or privilege as a national of the United States. 8 U.S.C. 1503(a).

b. Under 22 U.S.C. 2705, a "passport, during its period of validity * * * , 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 a certificate of naturalization issued by the Attorney General or a court having naturalization jurisdiction. A United States passport is invalid whenever the passport has been formally revoked by the Department of State or whenever the Department of State "has registered a passport reported either in writing or by telephone to the Department of State, or in writing to a [United States] passport agency or to a diplomatic or consular post abroad as lost or stolen." 22 C.F.R. 51.4(h).

2. a. Petitioner asserts he is a United States citizen by virtue of having been born on September 4, 1973, in Chicago, Illinois. Pet. App. 2. The Department of State denied petitioner's application for a replacement of a lost United States passport because he did not meet his burden of proving that he was born in the United States and because petitioner's prior passport, issued in 1995, was approved in error. *Id.* at 3.

On February 24, 2004, petitioner sought a declaratory judgment in the district court that he is a United States citizen by birth and is entitled to a United States passport. Pet. App. 3, 5. The parties stipulated to the follow-

ing facts before the district court. Petitioner's biological father, Harikrushna S. Patel (Harikrushna), a native of India, traveled to the United States on August 31, 1973, without his wife and became a naturalized United States citizen in 1981. *Id.* at 3. Petitioner was married in the United States and has a daughter who was born in the United States. *Ibid.* In 1994, petitioner applied for and received a delayed birth certificate issued by the State of Illinois. *Id.* at 4. On August 10, 1995, petitioner applied for a United States passport and claimed United States citizenship by birth. *Ibid.* In support of the application, petitioner submitted the Illinois delayed birth certificate, an affidavit from Harikrushna, and copies of what were represented to be medical records from the Chicago Department of Health from 1973 and 1974. *Ibid.* On November 3, 1995, the Department of State issued petitioner a United States passport. *Ibid.*

On February 5, 1996, petitioner wrote a letter to the passport office indicating his passport was lost. Pet. App. 4. The next day, petitioner applied to the Houston passport office for a new passport. *Ibid.* The passport office requested additional evidence of the circumstances of petitioner's birth; petitioner withdrew his application in order to gather the requested evidence. *Ibid.* On March 3, 1996, petitioner provided additional documents to the passport office but did not submit a new passport application. *Ibid.* Over five years later, on December 27, 2001, petitioner submitted a new passport application with accompanying documents to the Boston passport office. *Ibid.* On January 3, 2003, petitioner submitted another application for a new passport with accompanying documents to the Chicago passport office. *Id.* at 4-5.

b. Beginning on September 19, 2005, the district court conducted a three-day bench trial on petitioner's

request for declaratory relief. Pet. App. 5. Petitioner presented the testimony of Harikrushna, Mirza Jesani (Jesani), and Ghanshyam Patel (Ghanshyam). *Id.* at 9. Petitioner also relied on his prior passport, his Illinois delayed birth certificate, and the purported records from the Chicago Department of Public Health Uptown Clinic. *Id.* at 6, 9. The government presented the testimony of Sharon Buffalo, the Administrator for the Chicago Department of Health. *Id.* at 14. On November 15, 2005, after receiving post-trial briefs, the district court denied petitioner's request for declaratory relief. *Id.* at 17. The district court concluded that the government had "discredited [petitioner's] evidence, and that [petitioner] ha[d] failed to meet his overall burden of proving, by a preponderance of the evidence, that he was born in the United States." *Id.* at 16-17.

The district court rejected petitioner's argument that his lost passport was prima facie evidence of his citizenship. Pet. App. 6-7. The court noted that by statute, a passport is proof of citizenship only "during its period of validity," *id.* at 7 (citing 22 U.S.C. 2705), and that petitioner's passport "was not valid at the time of trial" because it had been reported lost over nine years earlier, *id.* at 8 (citing 22 C.F.R. 51.4(h)(2)). The district court also doubted "whether issuance of the passport, by itself, would be sufficient to satisfy [petitioner's] burden of persuasion." *Ibid.* (citing *Reyes* v. *Neelly*, 264 F.2d 673, 675 (5th Cir. 1959)).

The district court also rejected petitioner's argument that the totality of the evidence presented at trial established a prima facie case of petitioner's citizenship. Pet. App. 9-16. The court first concluded that the weight to be accorded the Illinois delayed birth certificate depended upon the evidence petitioner relied upon to obtain

it. *Id.* at 9. The court noted that the certificate "apparently" had been issued based on two documents, a record from a high school in India and an affidavit from a Dr. Dabyabhai S. Patel. *Ibid.* Petitioner had been ordered by a magistrate judge to produce the originals of those documents in order to rely upon them at trial, but had failed to do so. *Id.* at 10 n.3. The district court therefore gave "no evidentiary weight to [petitioner's] delayed birth certificate." *Id.* at 10.

The district court found that the testimony of petitioner's father, Harikrushna, was "not worthy of credence." Pet. App. 10. The district court noted that Harikrushna had prior convictions for conspiracy, arson, mail fraud, and tampering with a witness, and that he had fled to India before his sentencing. *Ibid.* The district court also recited specific instances in which Harikrushna's trial testimony was misleading or inconsistent, and observed as well that Harikrushna had misrepresented in his sworn application for naturalization that he had no children. *Id.* at 10-11.

The district court determined that witness Jesani, a long-time family friend of Harikrushna, was "an interested witness." Pet. App. 12. In addition, Jesani admitted that his memory of the relevant events from the 1970s was "somewhat vague." *Ibid.* Jesani conceded on cross-examination that his belief that, in 1973 in Chicago, he saw petitioner's pregnant biological mother and petitioner as an infant was "based solely on Harikrushna's statements to him." *Ibid.* Because the court had discredited Harikrushna's testimony, it determined that Jesani's testimony "must be viewed skeptically and can be given little weight." *Ibid.*

Similarly, the district court ruled that witness Ghanshyam was an "interested" witness by virtue of his long-

time friendship with Harikrushna. Pet. App. 12-13. Ghanshyam also conceded on cross-examination that he had not seen petitioner since 1974. *Id.* at 13. Because Ghanshyam's testimony, like Jesani's, was based on Harikrushna's statements concerning petitioner's identity, the district court likewise did not credit Ghanshyam's testimony. *Ibid.*

Finally, the district court found that the authenticity of the medical records from the Chicago Department of Health, which purported to show that petitioner was treated as an infant in Chicago in 1973 and 1974, was discredited by the testimony of the government's witness, Ms. Buffalo, the Administrator for the Chicago Department of Health.[1] Pet. App. 13-16. Ms. Buffalo testified that certain records petitioner submitted "did not exist in 1973." *Id.* at 14-16. Other documents were not completed in a manner consistent with the clinic's procedures, and one bore the signature of someone who had never been affiliated with the clinic. *Id.* at 15. One document referred to an Illinois state program that did not exist until 1990. *Ibid.* An immunization record relied on by petitioner was the 1992 version. *Id.* at 16. Because of these discrepancies, the district court concluded that petitioner had failed to demonstrate that the medical records were "genuine and worthy of belief." *Ibid.*

c. Petitioner appealed the district court's decision to the Fifth Circuit. Petitioner contended that the district court erred by (1) denying relief when it was "plausible" petitioner was born in Chicago and no evidence showed he was born elsewhere; (2) discrediting three pages of the Chicago medical records; (3) considering certain of

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[1] Those medical records were the same documents petitioner submitted in support of his passport applications. Pet. App. 13.

Harikrushna's convictions; and (4) giving no weight to petitioner's prior passport. Pet. C.A. Br. 10-33. The court of appeals found "no error of fact or law" and affirmed. Pet. App. 1.

ARGUMENT

Petitioner raises assorted challenges to the Fifth Circuit's unpublished per curiam affirmance of the district court's ruling. Some of petitioner's claims are raised for the first time in this Court and warrant no review on that basis. None of petitioner's contentions concerns any conflict among the circuits or otherwise merits review by this Court.

1. Petitioner contends (Pet. 5-9) that the Fifth Circuit's decision creates a conflict among the circuits on the question whether a previously-issued passport and a birth certificate constitute prima facie evidence of citizenship. Petitioner demonstrates no such conflict and, in any event, that narrow question does not warrant the Court's review.

To the extent petitioner seeks to address any issue concerning the evidentiary value of his delayed birth certificate issued by the State of Illinois in 1994, petitioner abandoned that claim in the court of appeals. Petitioner raised no challenge in that court to the district court's ruling that petitioner's delayed birth certificate would receive "no evidentiary weight" because petitioner had failed to produce the original documents supporting his application for the certificate, as the magistrate judge had ordered. Pet. C.A. Br. 8 (conceding that the district court refused to give any weight to some evidence admitted at trial and arguing only that other evidence established petitioner's citizenship). The Court does not con-

sider questions not addressed by the court below. See *Gonzales* v. *Duenas-Alvarez*, 127 S. Ct. 815, 823 (2007).

With respect to petitioner's lost passport, the district court did not err in concluding that it did not constitute prima facie evidence of petitioner's citizenship. The passport had been reported lost nine years previously. It thus was not valid under 22 C.F.R. 51.4(h) and, under 22 U.S.C. 2705, did not constitute proof of United States citizenship. See *Atem* v. *Ashcroft*, 312 F. Supp. 2d 792, 801 (E.D. Va. 2004) (because passport was revoked by the Department of State and thus was invalid, petitioner "plainly may no longer rely" on it as proof of United States citizenship).

Moreover, petitioner demonstrates no conflict among the circuits on the question whether an invalid passport constitutes prima facie evidence of citizenship. Petitioner cites *Delmore* v. *Brownell*, 236 F.2d 598 (3d Cir. 1956), but that case did not involve a passport at all. It involved a letter written by the Commissioner of Immigration stating that it was "the view of the Service" that the plaintiff could "properly be regarded a native and citizen of the United States." *Id.* at 600. The Third Circuit held that the letter established a prima facie case of citizenship and that the government was required "to disprove its own determination by 'clear, unequivocal, and convincing evidence.'" *Ibid.*[2] Nor has any other

[2] A plaintiff seeking a declaratory judgment of citizenship bears the burden of proving citizenship by a preponderance of the evidence. See *United States* v. *Ghaloub*, 385 F.2d 567, 570 (2d Cir. 1966); *De Vargas* v. *Brownell*, 251 F.2d 869, 871 (5th Cir. 1958); *Mah Toi* v. *Brownell*, 219 F.2d 642, 643 (9th Cir. 1955). Like the Third Circuit, the Second and Ninth Circuits have held that when a plaintiff establishes a prior governmental determination of citizenship, the government must overcome that prima facie case by showing that the prior administrative determi-

court of appeals addressed the question whether an invalid passport constitutes prima facie evidence of citizenship. That issue therefore does not warrant review by this Court.

Review of that issue is particularly unwarranted in this case, because the burden-shifting rule urged by petitioner would have no effect on the result. Even if the government's previous issuance of a passport to petitioner were considered prima facie evidence of petitioner's citizenship, the government satisfied any burden it could have had to rebut that evidence by demonstrating that the passport was issued in error or was fraudulently obtained. See *Ghaloub*, 385 F.2d at 570 (where plaintiff seeking declaration of citizenship shows prior governmental determination of citizenship, government must show that prior administrative determination was erroneous); *Montana* v. *Rogers*, 278 F.2d 68, 72 (7th Cir. 1960) (if plaintiff's prior admission to United States as a citizen was sufficient to establish prima facie case of citizenship, "it was rebutted convincingly by the showing that the Immigration officers committed legal error"); *Lee Hon Lung* v. *Dulle*s, 261 F.2d 719, 720 (9th Cir. 1958) (plaintiff established prima facie case of citizenship by showing prior admission to United States as an American citizen, but government was entitled to overcome the

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nation was erroneous or obtained by fraud. See *Ghaloub*, 385 F.2d at 570; *Lee Hon Lung* v. *Dulles*, 261 F.2d 719, 720 (9th Cir. 1958). In *Reyes*, cited by the district court in this case (see Pet. App. 8), the Fifth Circuit rejected a burden-shifting rule and instead viewed the record evidence as a whole, including the evidence on which a previously-issued certificate of citizenship was based, to assess whether the plaintiff carried his burden of establishing citizenship. *Reyes* v. *Neelly*, 264 F.2d 673, 675 (5th Cir. 1959).

prima facie case by showing that prior determination "had been obtained by fraud or error").

The evidence before the district court established that the materials submitted by petitioner in support of his original passport application—the Illinois delayed birth certificate, an affidavit from petitioner's father, and the purported medical records from the Chicago Department of Health—were unreliable, if not fraudulent. Petitioner was unable or unwilling to produce the original documents that led to issuance of the delayed birth certificate. Pet. App. 9-10. The district court determined, based on the in-court testimony of Harikrushna, that he was not worthy of belief. *Id.* at 10-11. And the government presented abundant evidence, credited by the district court, that the purported Chicago medical records from 1973 and 1974 were created years later. *Id.* at 13-16. Indeed, the district court found no need to address whether the evidence of citizenship relied upon by petitioner shifted to the government a burden to rebut that evidence, because even if it did, petitioner retained the ultimate burden of persuasion and failed to satisfy that burden. *Id.* at 6 n.2. This same reasoning counsels against review by this Court of the narrow, and ultimately inconsequential, issue presented by petitioner.

2. Petitioner asserts (Pet. 17-21) that the "Fifth Circuit's affirmance of the district court's opinion decides important questions of burdens and proof in ways that conflict with" *Kwock Jan Fat* v. *White*, 253 U.S. 454 (1920), *Yip Mie Jork* v. *Dulles*, 237 F.2d 383 (9th Cir. 1956), and *Mar Gong* v. *Brownell*, 209 F.2d 448 (9th Cir. 1954). That contention lacks merit.

As already noted, the Fifth Circuit did not decide any "important question[ ] of burdens and proof" in this case. It affirmed the judgment of the district court without

discussion, and the district court expressly *declined* to decide whether petitioner's evidence shifted a burden to the government. Thus, the premise of petitioner's argument lacks record support.

Moreover, the decisions on which petitioner relies did not address burdens of proof. They instead involved fact-bound claims of procedural unfairness and provide no justification for further review in this case. In *Kwock Jan Fat*, the petitioner had departed the United States for a temporary visit to China after securing from the Commissioner of Immigration in San Francisco a formal determination that he was a United States citizen by birth. 253 U.S. at 455-456. The Commissioner's determination followed an "elaborate investigation," including testimony by multiple witnesses. *Id.* at 455. During the petitioner's absence from the United States, however, officials in the same immigration office initiated a new investigation based on anonymous information. *Id.* at 456. After hearing further testimony from witnesses for and against the petitioner, the Commissioner denied the petitioner readmission to the United States based on a finding that the petitioner's citizenship claim was not established to the Commissioner's "satisfaction." *Ibid.*

In ordering that a petition for a writ of habeas corpus issue, this Court found that critical testimony that supported the petitioner's claim of citizenship was never provided to the Commissioner who denied the petitioner readmission to the United States. *Kwock Jan Fat*, 253 U.S. at 463-464. The Court concluded that "a report which suppressed or omitted [that testimony] was not a fair report and a hearing based upon it was not a fair hearing." *Id.* at 464.

The Ninth Circuit cases upon which petitioner relies also involved fact-bound claims of unfairness in the pro-

ceedings. In *Yip Mie Jork*, *supra*, the Ninth Circuit reversed the denial of the appellant's request for a declaratory judgment that he was a United States citizen because the district court had based its ruling on "mere conjecture" and had discredited witnesses "without good reason." 237 F.2d at 385. In *Mar Gong*, *supra*, the Ninth Circuit reversed a district court decision that had based the denial of declaratory relief on evidence it had received in "similar cases" involving Chinese individuals that "followed a certain pattern." 209 F.2d at 450. The Ninth Circuit ruled that the district court "should not have given weight to its experiences, unfortunate as they may have been, in other cases, in arriving at its findings with respect to this appellant." *Id.* at 453.

Petitioner demonstrates no conflict between the fact-bound determinations in those cases and the Fifth Circuit's summary affirmance here. The district court in this case fully explained the adverse credibility determinations it made with respect to petitioner's witnesses, and those determinations were based on proper considerations, such as bias, demeanor, and prior criminal convictions. See *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974) (through cross-examination, witness may be discredited by introducing evidence of a prior criminal conviction, or by questioning directed toward revealing the witness's motive to testify). There is no allegation in this case, as there was in *Kwock Jan Fat*, that petitioner's claim was adjudicated on an incomplete record. And, unlike any of the cases relied upon by petitioner, the district court here received substantial evidence that petitioner's claim of United States citizenship was based on fraudulent documents. Petitioner's assertion (Pet. 21) that the Fifth Circuit has "effectively overrule[d]" *Kwock Jan Fat* is without merit.

3. Petitioner also seeks review (Pet. 12-15) of the question whether this Court's decisions in *Afroyim* v. *Rusk*, 387 U.S. 253 (1967), and *Vance* v. *Terrazas*, 444 U.S. 252 (1980), prohibited the Fifth Circuit from "depriv[ing] Petitioner of citizenship" based on his failure to produce at trial his lost passport or the original documents submitted in support of the Illinois delayed birth certificate. This argument was not raised in the court of appeals, and review therefore is unwarranted. See, *e.g.*, *Gonzales*, 127 S. Ct. at 823; *Heller* v. *Doe*, 509 U.S. 312, 319 (1993); *Demarest* v. *Manspeaker*, 498 U.S. 184, 188-189 (1991).

Petitioner's argument also is without merit. *Afroyim* and *Vance* both addressed proceedings in which the government *conceded* that the individuals in question had been United States citizens, but sought to show that those individuals had relinquished their citizenship by engaging in expatriating acts. In *Afroyim*, the Court held that the Fourteenth Amendment prevents Congress from "enact[ing] a law stripping an American of his citizenship which he has never voluntarily renounced or given up." 387 U.S. at 256. In *Vance*, the Court held that to establish loss of citizenship under 8 U.S.C. 1481(a)(2), the government must prove that "the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship." 444 U.S. at 546.

Unlike *Afroyim* and *Vance*, petitioner's case arose not in a proceeding to establish relinquishment of citizenship where prior citizenship status was conceded by the government, but in a declaratory judgment action in which petitioner's claim of citizenship in the first place was disputed and in which petitioner bore the burden of proof. Moreover, contrary to petitioner's assertions (Pet. 12-

15), the district court did not deny petitioner relief merely because he lost his passport and failed to produce the original documents submitted in support of his delayed birth certificate. The district court found that the government had "discredited" petitioner's claim that he was born in the United States, both through cross-examination of petitioner's witnesses and through the testimony of Ms. Buffalo (Pet. App. 16-17). Petitioner shows no conflict between the result here and this Court's decisions in *Afroyim* and *Vance*.[3]

4. Petitioner also seeks review (Pet. 10-11, 15-16) of the district court's finding that petitioner's passport was invalid within the meaning of 22 C.F.R. 51.4(h). Petitioner argues that there was no evidence that his pass-

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[3] Petitioner's reliance (Pet. 13-15) on *Rivera* v. *Ashcroft*, 394 F.3d 1129 (9th Cir. 2005), as "analogous" is equally misplaced. *Rivera* involved a petition for a writ of habeas corpus under 28 U.S.C. 2241 challenging the fairness of removal proceedings conducted before an immigration judge. The court of appeals determined that the district court had erred in ruling that it lacked jurisdiction over the habeas petition. *Rivera*, 394 F.3d at 1140. The court ruled that the petitioner had a "colorable citizenship claim" and thus had a "constitutional right to judicial review" that could be obtained through habeas corpus despite the petitioner's failure to appeal the immigration judge's decision. *Id.* at 1137. In so ruling, the Ninth Circuit also offered "some scrutiny of the facts and procedural history of [the] case," including observations that the Immigration and Naturalization Service "took no position" before the immigration judge as to whether the petitioner was a United States citizen and that the immigration judge had acted with partiality and had rejected the petitioner's evidence arbitrarily. *Id.* at 1134-1136. Unlike the facts of *Rivera*, petitioner received a fair and impartial judicial hearing on his claim to United States citizenship, the government investigated and contested petitioner's claim of citizenship, and petitioner received appellate review of the district court's determination. There are simply no analogies to be drawn between petitioner's case and *Rivera*.

port was "registered" as lost under that regulatory provision and asks this Court to decide whether "registration" requires the State Department "to make a list of lost passports" (Pet. 16). That narrow issue is of limited importance and was not raised in the district court or addressed by the court of appeals in its unpublished order of affirmance; this Court's traditional practice therefore precludes certiorari consideration of the argument. See *Gonzales*, 127 S. Ct. at 823. Petitioner also demonstrates no conflict among the circuits on this issue. And as previously discussed, the question whether petitioner's passport was invalid under 22 C.F.R. 51.4(h) was of no consequence in this case, where the evidence credited by the district court established that the passport was issued in error or was obtained by fraud.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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