No. 15-1395

In the Supreme Court of the United States

DAVID ISRAEL SANCHEZ, PETITIONER

v.

JOHN F. KERRY, SECRETARY, UNITED STATES DEPARTMENT OF STATE, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner applied for a United States passport, claiming United States citizenship based on a Texas birth certificate purporting to establish that he was born in the United States. The United States Department of State denied his application, finding he had failed to establish citizenship. Petitioner then filed a suit under 8 U.S.C. 1503(a) seeking a judgment declaring that he is a United States citizen. The district court denied relief, and the court of appeals affirmed. The questions presented are as follows:

1. Whether the Tenth Amendment, the Fourteenth Amendment, or the Full Faith and Credit Clause of Article IV, § 1, required the Department of State and the courts below to treat petitioner's Texas birth certificate or a related Texas administrative determination as conclusively establishing that he was born in the United States.

2. Whether the district court erred in placing the burden on petitioner to establish his citizenship by a preponderance of the evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. IV-X) is not published in the *Federal Reporter* but is available at 2015 WL 8730122. The opinion of the district court granting the government's motion for partial dismissal (Pet. App. XI-XXXIX) and the court's findings of fact and conclusions of law (Pet. App. XLII-LV) are not published in the *Federal Supplement* but are available at 2012 WL 208565 and 2014 WL 2932275.

JURISDICTION

The judgment of the court of appeals was entered on December 14, 2015. A petition for rehearing was denied on February 12, 2016 (Pet. App. II-III). The petition for a writ of certiorari was filed on May 12, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of petitioner's unsuccessful effort to secure a United States passport.

a. A passport is an instrument of diplomacy through which the United States "identif[ies] a citzen, in effect requesting foreign powers to allow the bearer to enter and pass freely and safely, recognizing the right of the bearer to the protection and good offices of American diplomatic and consular officers." *United States* v. *Laub*, 385 U.S. 475, 481 (1967). A passport also serves as a "travel control document" providing "proof of identity and proof of allegiance to the United States." *Haig* v. *Agee*, 453 U.S. 280, 293 (1981). Passports may be issued only to United States nationals, a category that includes citizens and a narrow set of noncitizen nationals owing permanent allegiance to the United States. 22 U.S.C. 212; 22 C.F.R. 51.2(a); see 22 C.F.R. 51.1(*l*) and (m); see also 7 Charles Gordon et al., *Immigration Law & Procedure* § 99.06[1] (rev. ed. 2016) (*Immigration Law & Procedure*). A valid, unexpired passport issued to a citizen generally serves as proof of citizenship. 22 U.S.C. 2705(1).

Only the Secretary of State and his designees may issue passports. 22 U.S.C. 211a. A passport applicant has the burden of proving that he is a United States national. 22 C.F.R. 51.40. If an applicant is denied a passport on the ground that he has not met that burden, he may institute an action in federal district court seeking "a judgment declaring him to be a national of the United States." 8 U.S.C. 1503(a).

b. Petitioner first applied for a passport in 2005. As proof of United States citizenship, he submitted a Texas birth certificate purporting to show that he was born in March 1988 in Brownsville, Texas. The United

States Department of State (State Department) denied petitioner's application, finding that he had not established by a preponderance of the evidence that he is a United States citizen. The State Department noted that petitioner's Texas birth certificate, which was filed more than a month after his purported birth, had been filed by a midwife suspected of creating fraudulent records. The State Department also noted that the Texas Department of State Health Services (THD) had refused to issue a certified copy of the certificate. The THD's refusal was based on an addendum to petitioner's birth certificate that the THD added when it learned of a Mexican birth certificate showing that petitioner's parents gave birth to a child with a similar name in Matamoros, Mexico, in October 1987—five months before petitioner's purported birth in Brownsville, which is directly across the border from Matamoros. Pet. App. V-VI; see *id.* at XII-XIV.

Pursuant to Texas law, petitioner requested that the THD remove the addendum. After a telephonic evidentiary hearing, an administrative hearing officer ordered that the addendum be removed based on his finding that the Mexican birth certificate was not supported by a preponderance of the evidence presented at the hearing. Pet. App. VI; see *id.* at XIV.

In 2010, following the THD's removal of the addendum, petitioner filed a second application for a passport. The State Department denied the application, again finding that petitioner had failed to show by a preponderance of the evidence that he is a United States citizen. Pet. App. VI-VII; see *id.* at XV-XVII.

2. Petitioner filed this action in federal district court, asserting a variety of statutory and constitu-

tional challenges to the denial of his passport application. Pet. App. VII, XVII-XVIII.

a. The district court granted the government's motion to dismiss all of petitioner's claims except his request for a declaratory judgment of citizenship under 8 U.S.C. 1503(a). Pet. App. XI-XXXIX. As relevant here, the court rejected petitioner's contention that the State Department violated the Tenth Amendment or the Full Faith and Credit Clause, U.S. Const. Art. IV, § 1, by refusing to give conclusive effect to his Texas birth certificate or to the THD hearing officer's determination that the certificate is valid. Pet. App. XXVIII-XXXIX. The court explained that, for purposes of petitioner's eligibility for a passport, "[t]he determination of whether [petitioner] was born in Texas is determined by federal law; it is not dependent on the law of any particular state." *Id.* at XXXIV. The court therefore concluded that "[e]ven assuming that the State of Texas determined that [petitioner] was born in Texas, neither the State Department nor a federal court would be bound to follow that decision." *Id.* at XXXIV-XXXV.

b. Following a bench trial, the district court denied relief on petitioner's claim seeking a declaratory judgment that he is a United States citizen. Pet. App. XLII-LV. The court determined that petitioner was born in October 1987 in Matamoros, Mexico, as evidenced by a Mexican birth certificate containing petitioner's fingerprint and the signatures and correct names and addresses of his parents and other relatives. *Id.* at XLIV-XLVI; see *id.* at LV. The court found that testimony by petitioner's parents that he was born in the United States was "not credible." *Id.* at XLVI. And the court further found that petition-

er's remaining evidence was insufficient to carry his burden of establishing by a preponderance of the evidence that he was born in the United States, because it was "too uncertain in both authenticity and evidentiary trustworthiness to displace the evidentiary effect of the valid Mexican birth record." *Id.* at XLVII.

The district court rejected petitioner's contention that the THD hearing officer's decision was entitled to evidentiary weight or preclusive effect. Pet. App. XLVIII. The court reiterated that "[q]uestions regarding passport eligibility and issuance, as well as United States citizenship, are exclusively within the authority of the federal government." *Ibid.* The court added that giving effect to the hearing officer's decision would be inappropriate in any event because "[t]he issues and legal standards in this case are different than the issues and standards before the state agency"; because "the evidence this court heard is far more extensive" than the evidence available to the hearing officer; and because the State Department "had no notice of, or opportunity to be heard in, the Texas proceeding." *Ibid.*

3. The court of appeals affirmed in a unanimous nonprecedential decision. Pet. App. IV-X. After reciting the history of the case and describing petitioner's claims, the court upheld the denial of relief "essentially for the reasons stated in the district court's comprehensive and well-reasoned opinions." *Id.* at X.

4. The court of appeals denied petitioner's request for rehearing en banc with no active judge requesting a vote. Pet. App. II-III.

ARGUMENT

The court of appeals correctly upheld the district court's determination that petitioner is not entitled to

a judgment declaring him to be a citizen of the United States. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals, and the court's brief, nonprecedential opinion does not otherwise warrant this Court's review. The petition for a writ of certiorari should be denied.

1. Petitioner principally contends (Pet. 5-16, 21-32) that the Tenth Amendment, the Fourteenth Amendment, and the Full Faith and Credit Clause required the State Department and the courts below to give dispositive effect to his Texas birth certificate and the Texas hearing officer's determination that the certificate is valid. The court of appeals correctly rejected those arguments, and petitioner does not cite any authority holding that a federal agency or court must treat a state birth certificate (or a related administrative determination) as conclusively establishing birth in the United States.

a. The Citizenship Clause of the Fourteenth Amendment provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. Amend. XIV, § 1, Cl. 1. The Fourteenth Amendment further provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. Amend. XIV, § 5. Congress has implemented the Citizenship Clause through a statute specifying that "person[s] born in the United States, and subject to the jurisdiction thereof," "shall be nationals and citizens of the United States at birth." 8 U.S.C. 1401(a).

Where, as here, a person claims to be a citizen based on birth in the United States, the validity of

that claim typically turns on a question of historical fact: whether the person was, in fact, born in this country.[1] Federal agencies and courts routinely adjudicate that question in a variety of contexts. Most relevant here, the State Department may issue passports only to citizens and noncitizen nationals, 22 U.S.C. 212, and a person denied a passport or other "right or privilege as a national of the United States" on the ground that he is not a citizen may file an action in federal court seeking a declaratory judgment of citizenship, 8 U.S.C. 1503(a). In implementing those provisions, the State Department and the federal courts regularly determine the veracity of claims that persons were born in the United States. See, *e.g.*, *Martinez* v. *Secretary of State*, No. 15-10666, 2016 WL 3181356, at *3-*5 (11th Cir. June 8, 2016); *Mathin* v. *Kerry*, 782 F.3d 804, 807-814 (7th Cir. 2015); *Garcia* v. *Kerry*, 557 Fed. Appx. 304, 308-310 (5th Cir. 2014). Similarly, questions of alienage or citizenship—including questions turning on claims of birth in the United States—are "often a critical issue to be adjudicated in removal proceedings" and other immigration matters. *Immigration Law & Procedure* § 91.01[2]; see, *e.g.*, *Mondaca-Vega* v. *Lynch*, 808 F.3d 413, 426-428 (9th Cir. 2015) (en banc), petition for cert. pending, No. 15-1153 (filed Mar. 14, 2016).

The most common evidence of birth in the United States "is a birth certificate issued by the official cus-

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[1] Birth in the United States is not always dispositive because the additional requirement that a citizen be "subject to the jurisdiction" of the United States excludes certain very narrow categories of persons, such as the children of certain foreign diplomats. See *United States* v. *Wong Kim Ark*, 169 U.S. 649, 693 (1898); see also *Immigration Law & Procedure* § 92.03[3].

todian of the records of the State, municipality, or territory where the birth took place, showing that the record was made at the time of birth or within a reasonable period thereafter." *Immigration Law & Procedure* § 99.02[1][b]; see, *e.g.*, 22 C.F.R. 51.42(a) (passport regulations). But a birth certificate is not essential, and a claimant may carry his burden through other documentary or testimonial evidence. See, *e.g.*, 22 C.F.R. 51.42(b). Conversely, a birth certificate is not always sufficient to prove birth in the United States—particularly where, as here, the birth certificate is not contemporaneous and other evidence indicates that the person was actually born abroad. Cf. *In re Serna*, 16 I. & N. Dec. 643, 645 (B.I.A. 1978) ("[T]he opportunity for fraud is much greater with a delayed birth certificate."). As with other disputed factual questions in administrative and judicial proceedings, "each case must be decided on its own facts with regard to the sufficiency of the evidence presented." *Id.* at 645.

Consistent with those principles, federal agencies and courts often conclude that a person claiming citizenship and presenting a state-issued birth certificate purporting to reflect birth in this country is not a citizen because he was not, in fact, born in the United States. See, *e.g.*, *Martinez*, 2016 WL 3181356, at *3-*5; *Mondaca-Vega*, 808 F.3d at 426-428; *Mathin*, 782 F.3d at 807-808; *Garcia*, 557 Fed. Appx. at 308-310; see also, *e.g.*, *Serna*, 16 I. & N. Dec. at 644-645. Those decisions treat a birth certificate as evidence of birth in this country, but not conclusive proof. *Ibid.*

b. Petitioner asserts (Pet. 5-16, 21-32) that the Fourteenth Amendment, the Tenth Amendment, and the Full Faith and Credit Clause require federal agencies and courts adjudicating questions of citizen-

ship to treat a birth certificate issued by a State as conclusive proof of birth in the United States. None of those constitutional provisions mandates such a radical change in settled practice.

i. Petitioner first asserts (Pet. 5-16) that the lower courts' failure to give determinative effect to his birth certificate violated the Fourteenth Amendment. At times, he frames that argument as an assertion (*e.g.*, Pet. ii, 5, 11) that the decisions below "revoked" citizenship conferred upon him by the Fourteenth Amendment. But that framing is mistaken. There is no dispute that if petitioner was born in the United States, he is a citizen under the Fourteenth Amendment. The question is whether he was, in fact, born in this country. In concluding that petitioner was not born in the United States, the decisions below did not "revoke" his citizenship—they simply concluded that he was never a citizen in the first place.

Properly understood, therefore, petitioner's Fourteenth Amendment argument must rest on his assertion (Pet. 4) that the Citizenship Clause establishes that it is "the States, and not the federal government, who determine which individuals are born within their boundaries" for purposes of determining United States citizenship. But that assertion is mistaken as well—indeed, it fundamentally misunderstands the Citizenship Clause. Before the Fourteenth Amendment, some judges concluded that States had a role in determining who qualified as a citizen of the United States because national citizenship was entirely derivative of state citizenship—that is, "that no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1873). The

Fourteenth Amendment definitively rejected that view by declaring that "[a]ll persons born * * * in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. Amend. XIV, § 1, Cl. 1. After ratification of the Fourteenth Amendment, citizenship depends on birth "in the United States"—not birth in, or citizenship of, a State. Accordingly, as this Court long ago explained, "[i]t is quite clear * * * that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual." *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 74; see *United States* v. *Wong Kim Ark*, 169 U.S. 649, 677-678 (1898).

There is thus no basis for petitioner's assertion that the Fourteenth Amendment assigns the States exclusive authority to decide the location of a person's birth for purposes of determining United States citizenship. To the contrary, the Citizenship Clause makes clear that the "acquisition, retention, and attributes" of national citizenship "are controlled entirely by the federal government, subject only to the mandates of the Constitution," and that "[t]he States have no voice in determining who is a citizen of the United States." *Immigration Law & Procedure* § 91.03[c].

ii. Petitioner next contends (Pet. 21-27) that the State Department and the lower courts infringed on powers reserved to Texas by the Tenth Amendment when they declined to give conclusive effect to his Texas birth certificate. But the State Department and the decisions below did not purport to invalidate petitioner's birth certificate, or to preclude the State of Texas from relying on that certificate in state-law

matters unrelated to citizenship. They simply determined that, under the *federal* Constitution and the relevant *federal* statutes, petitioner is not entitled to a passport or to a declaratory judgment of citizenship because he has not established that he is a citizen.

That determination did not violate the Tenth Amendment because the powers conferred on the federal government by the Constitution include the authority to decide which individuals are citizens of the United States—and thus, where necessary, to determine the location of an individual's birth. The relevant power here is the federal government's broad authority over foreign affairs, which—as this Court has repeatedly held—includes the authority to issue passports to citizens. See, *e.g.*, *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2096 (2015); *Haig* v. *Agee*, 453 U.S. 280, 293 (1981). Similarly, "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona* v. *United States*, 132 S. Ct. 2492, 2498 (2012). That power necessarily includes the authority to resolve disputed questions about whether a person claiming to be a citizen is in fact an alien.

iii. Finally, petitioner contends (Pet. 28-32) that the Full Faith and Credit Clause required the State Department and the courts below to give preclusive effect to the Texas administrative hearing officer's determination that he was born in Texas. But the Full Faith and Credit Clause is inapplicable here. It provides that "Full Faith and Credit shall be given *in each State* to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. Art. IV, § 1 (emphasis added). By its plain terms, therefore, "[t]he Full Faith and Credit Clause is * * * not

binding on federal courts" or federal agencies. *University of Tenn.* v. *Elliott*, 478 U.S. 788, 799 (1986).

Petitioner also contends (Pet. 28-32) that the Full Faith and Credit Statute, 28 U.S.C. 1738, required the State Department and the courts below to give preclusive effect to the administrative hearing officer's findings. But that statutory issue is not presented here because it is not included in the questions petitioner framed for this Court's review. Pet. ii; see *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) ("[T]he fact that petitioner discussed this issue in the text of his petition for certiorari does not bring it before [this Court].") (citation omitted). In any event, the statutory provision on which petitioner relies does not assist him. It specifies the full faith and credit owed to "[t]he records and judicial proceedings *of any court*" of a State. 28 U.S.C. 1738 (emphasis added). That provision thus "governs the preclusive effect to be given the judgments and records of state courts," but it "is not applicable to the unreviewed state administrative fact-finding at issue in this case." *University of Tenn.*, 478 U.S. at 794.

This Court has held that, in some circumstances, a state administrative agency's adjudicative findings are entitled to preclusive effect as a matter of federal common law. *University of Tenn.*, 478 U.S. at 794-795, 798-799. But petitioner does not rely on federal common law. And, in any event, basic principles of the law of preclusion make clear that the State Department is not bound by the administrative findings at issue here. First, and most fundamentally, the State Department was not a party to the Texas hearing because it "had no notice of, or opportunity to be heard in, the Texas proceeding." Pet. App. XLVIII.

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Taylor* v. *Sturgell*, 553 U.S. 880, 884 (2008) (citation omitted). Second, "[t]he issues and legal standards in this case are different than the issues and standards before the state agency"—most obviously, because in this case petitioner bore the burden of proof. Pet. App. XLVIII; cf. *Medtronic, Inc.* v. *Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 850 (2014) ("[R]elitigation of an issue * * * decided in one suit 'is not precluded' in a subsequent suit where the burden of persuasion 'has shifted' from the 'party against whom preclusion is sought . . . to his adversary.'") (quoting 1 Restatement (Second) of Judgments § 28(4) (1982)).

c. Petitioner does not contend that the court of appeals' refusal to give conclusive effect to his birth certificate or to the hearing officer's findings conflicts with any decision by another court of appeals. Indeed, the Eleventh Circuit recently stated that it could not "find any federal case that has ever created [a] presumption" that a person "who presents a U.S. birth certificate" is a United States citizen—much less a decision holding that a birth certificate must be accepted as conclusive proof of citizenship. *Martinez*, 2016 WL 3181356, at *5.

2. Petitioner separately asserts (Pet. 16-20, 33-40) that the district court erred in placing the burden on him to prove his citizenship by a preponderance of the evidence, and that the court instead should have required the State Department to prove by clear and convincing evidence that he is not a citizen. That

contention does not merit this Court's review for at least three reasons.

First, petitioner did not raise it in the court of appeals. To the contrary, he expressly accepted that this case is governed by the "preponderance of the evidence standard." Pet. C.A. Br. 49. This Court generally does not consider questions not raised or passed upon below, see *United States* v. *Williams*, 504 U.S. 36, 41 (1992), and petitioner offers no reason to depart from that rule here.

Second, petitioner's argument lacks merit. The decisions on which he relies (Pet. 16-19) hold that the government bears a higher burden when it seeks to strip a naturalized citizen of citizenship, see *Fedorenko* v. *United States*, 449 U.S. 490, 505 (1981); *Chaunt* v. *United States*, 364 U.S. 350, 353 (1960); *Schneiderman* v. *United States*, 320 U.S. 118, 125 (1943), or to remove a person from the United States, see *Mondaca-Vega*, 808 F.3d at 419-420. But this case arises in a very different posture. Petitioner sought a judgment declaring him to be a citizen so that he could seek a United States passport. The applicable passport regulations expressly provide that "[t]he applicant has the burden of proving that he or she is a U.S. citizen or non-citizen national," 22 C.F.R. 51.40, and those regulations are consistent with the general rule "that a person who claims to be a citizen of the United States has the burden of providing that claim," *Immigration Law & Procedure* § 99.01; cf. 5 U.S.C. 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); *Director, Office of Workers' Comp. Programs* v. *Greenwich Collieries*, 512 U.S. 267, 272-276 (1994) (holding

that "burden of proof" under 5 U.S.C. 556(d) means "burden of persuasion").

Third, petitioner does not contend that the application of the preponderance standard in this context conflicts with any decision by another court of appeals. Indeed, he does not cite any decision by any court supporting his assertion that a claim of citizenship made in a passport application or a suit under 8 U.S.C. 1503(a) shifts the burden to the government to negate that claim by clear and convincing evidence.[2]

[2] Petitioner briefly asserts (Pet. 20-21) that the district court erred by stating, in a footnote, that although petitioner had withdrawn any claim to derivative citizenship, he would not be entitled to derivative citizenship through his mother because she is not a United States citizen. Pet. App. XLIII n.1. Petitioner objects to that statement, asserting (Pet. 20) that the court erred by making a "gratuitous finding on an issue not before the court." But "[t]his Court 'reviews judgments, not statements in opinions.'" *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted). Petitioner's contention that dicta in the district court's opinion was erroneous does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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