12-3810

To Be Argued By:
SHANE CARGO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-3810

ABDO HIZAM,

Plaintiff-Appellee,

—v.—

JOHN F. KERRY, Secretary of State, United States Department of State; UNITED STATES DEPARTMENT OF STATE; UNITED STATES OF AMERICA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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—v.—

JOHN F. KERRY, SECRETARY OF STATE,
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UNITED STATES DEPARTMENT OF STATE;
UNITED STATES OF AMERICA,

Defendants-Appellants.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

Preliminary Statement

Nowhere in Hizam's brief to this Court does he contend that he is, or ever was, a citizen of the United States. Nowhere does he identify any statutory or constitutional authority under which he could have become a citizen—indeed, he admits that he has nev-

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[1] John F. Kerry, Secretary of State, has been automatically substituted for his predecessor, Hillary Rodham Clinton. *See* Fed. R. App. P. 43(c)(2).

er met the criteria for U.S. citizenship under any law. And nowhere does he contest the clearly settled authority that a person born outside the United States may acquire citizenship only as provided by statute, that there must be strict compliance with the terms of such a statute, and that no court or agency has any power to confer citizenship in any other way. Unable to overcome these barriers to the relief he seeks, Hizam relies heavily on the considerable equities of his case. But in the final analysis, Hizam is simply not a U.S. citizen. Therefore, the district court had no authority to declare him a citizen or to order that he be given proof of his non-existent citizenship, and the State Department acted well within its authority in revoking the erroneously issued citizenship documents. For those reasons, the district court's judgment must be reversed.

ARGUMENT

A. Hizam Is Not a U.S. Citizen, and Accordingly Is Not Entitled to Proof of U.S. Citizenship

As explained in the government's opening brief (Brief for Defendants-Appellants ("Gov't Br.") 13-14), there are "two sources of citizenship, and two only,—birth and naturalization." *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898).[2] Because Hizam was

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[2] "Naturalization" in this sense refers to any acquisition of citizenship except by birth in the United States, i.e., it includes acquisition of citizenship through birth abroad according to the terms of a

born outside the United States, he could only acquire citizenship at birth as provided by an act of Congress, *Rogers v. Bellei*, 401 U.S. 815, 830 (1971), and "there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship," *Fedorenko v. United States*, 449 U.S. 490, 506 (1981). In short, "[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with." *Rogers*, 401 U.S. at 830 (quotation marks omitted).

Hizam does not contend that he meets the requirements of any statute conferring citizenship; to the contrary, he concedes that the State Department's decision to issue him a CRBA was a "mistake."

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statute. *Wong Kim Ark*, 169 U.S. at 702-703 (person born abroad "can only become a citizen by being naturalized, either by treaty . . . or by authority of congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals"); *see Rogers v. Bellei*, 401 U.S. 815, 841 (1971) (Black, J., dissenting) ("[N]aturalization when used in its constitutional sense is a generic term describing and including within its meaning all those modes of acquiring American citizenship other than birth in this country. All means of obtaining American citizenship which are dependent upon a congressional enactment are forms of naturalization.").

(Brief for Plaintiff-Appellee ("Hizam Br.") 13). He therefore—indisputably—is not a U.S. citizen.

Hizam's entire argument founders on that basic point. Because his U.S. citizen father did not meet the statutory requirements to transmit U.S. citizenship to Hizam at birth and Hizam has never become a U.S. citizen by any other means, no agency of the government can confer citizenship on him, either intentionally, through an error, or through any failure to act in a timely manner. *Fedorenko*, 449 U.S. at 506, 517. Nor can any court: "'An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.'" *INS v. Pangilinan*, 486 U.S. 875, 884 (1988) (quoting *United States v. Ginsberg*, 243 U.S. 472, 474 (1917)); *Fedorenko*, 449 U.S. at 517 ("Once it has been determined that a person does not qualify for citizenship, . . . the district court has no discretion to ignore the defect and grant citizenship." (quotation marks omitted)).

Because he is not a U.S. citizen, Hizam is not entitled to a CRBA or passport—documents that would prove his non-existent citizenship. And because he is not a U.S. citizen or national, the district court had no authority to order the State Department to provide him with a CRBA under 8 U.S.C. § 1503, which by its terms only permits the court to declare a person to be a U.S. national—status that Hizam does not have. Hizam argues that § 1503 permitted a "declara-

tion of his rights as a United States citizen" (Hizam Br. 10), but does not explain what rights as a United States citizen there are to declare when he is not in fact a United States citizen. In any event, the clear language of § 1503 provides only the authority to declare a person's citizenship status, and not the authority to determine rights that may flow from that status. Thus, to the extent that the district court "made clear in its decision that it was ruling solely on the implications of the State Department's past action" (Hizam Br. 10) and not Hizam's underlying status, it exceeded its power under § 1503.

And if the district court held that the "implications of the State Department's past action" were that Hizam was a de facto U.S. citizen without having met any statutory prerequisites for citizenship, it contravened clear limitations on its authority. *See Rogers*, 401 U.S. at 830; *Pangilinan*, 486 U.S. at 884.[3] The

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[3] Hizam seeks to distinguish *Pangilinan* on its facts (Hizam Br. 10-11), but the clear holding of that case is that a person with "no statutory right to citizenship" may not obtain citizenship from the federal courts, which do not "have the power to confer citizenship in violation" of statutory limitations. 486 U.S. at 882-85. Hizam also distinguishes *Pangilinan* on the basis that, in that case, Congress had acted to limit an avenue to U.S. citizenship, whereas after Hizam's birth Congress liberalized the physical-presence requirement that applies to U.S. citizen parents. (Hizam Br. 11 n.6; *see id.* 19 n.9, 23 (citing broad legislative intent of later revisions to immigra-

district court stated that the issuance of the CRBA "binds the State Department as to Mr. Hizam's citizenship status" (JA 200), and Hizam similarly claims that his "citizenship was settled through the adjudication of his CRBA" (Hizam Br. 24). But the State Department has no power to confer citizenship on anyone, whether by implication, adjudication, issuance of a CRBA, or otherwise—Congress has stated explicitly that "[t]he sole authority to naturalize persons as citizens of the United States is conferred upon the Attorney General." 8 U.S.C. § 1421(a); *Perriello v. Napolitano*, 579 F.3d 135, 139-40 (2d Cir. 2009).[4] The State Department's issuance of the CRBA is thus no substitute for satisfaction of the statutory prerequisites to citizenship.

Moreover, the law makes a clear distinction between CRBAs, as documents evidencing citizenship,

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tion statutes)). But the law in effect at the time of Hizam's birth in 1980 required ten years of physical presence for Hizam's father; later changes to that statute are irrelevant. *See Drozd v. INS*, 155 F.3d 81, 86 (2d Cir. 1998).

[4] That authority has been transferred to the Department of Homeland Security. *Johnson v. Whitehead*, 647 F.3d 120, 130 (4th Cir. 2011). Prior to October 1, 1991, and dating back to 1906, the district courts had exclusive authority to naturalize provided all statutory requirements were met. *Perriello*, 579 F.3d at 138; *Chan v. Gantner*, 464 F.3d 289, 290 (2d Cir. 2006).

and citizenship itself. As stated in 8 U.S.C. § 1504, the cancellation of a CRBA does not affect the citizenship status of the person who held it. *See Gorbach v. Reno*, 219 F.3d 1087, 1093 (9th Cir. 2000) (en banc) (cancellation of certificate of citizenship does not affect citizenship itself). And both § 1504 and 22 U.S.C. § 2705 provide that a CRBA "*document[s]* a citizen born abroad" (emphasis added), not that the CRBA itself *confers* citizenship. Thus, while a CRBA serves as proof of citizenship while it is valid, *see* 22 U.S.C. § 2705, once it has been revoked or canceled it has no further effect. In that sense, a CRBA is much like a birth certificate: an official document that evidences a person's birth under certain circumstances, and that may be used as proof of citizenship. *See* 22 C.F.R. § 51.42(a) (birth certificate serves as proof of birth in the United States for purpose of passport application). Both types of records may be corrected if the facts or conclusions they document turn out to be wrong—even if their holders have innocently relied on that erroneous documentation. *See, e.g.*, N.Y.C. Health Code §§ 207.01-.05 (providing for correction of birth certificates).

Hizam attempts to circumvent the State Department's lack of authority to confer citizenship by claiming that 22 U.S.C. § 2705, which states that CRBAs have the "same force and effect as proof of United States citizenship" as naturalization and citizenship certificates, combined with the State Department's authority under 8 U.S.C. § 1104 to determine the nationality of persons abroad, means that the Department's issuance of a CRBA is "conclusive" and "dispositive" as to citizenship. (Hizam Br. 12-16).

But that conflates the authority to determine a person's nationality (which the State Department possesses under § 1104) with the authority to confer citizenship (which the State Department does not have). Furthermore, it attempts to bootstrap the ability to use a CRBA as proof of citizenship (which is undisputed under § 2705) into an irrevocable right to possess a CRBA, even if that CRBA was erroneously, fraudulently, or illegally obtained.[5] The fact that a CRBA serves as proof of citizenship does not mean that it may never be revoked, and nothing in § 2705 says otherwise. (Gov't Br. 24-29). Indeed, in § 2705 itself, Congress provided that a passport only serves as proof of citizenship "during its period of validity," meaning that after a passport has expired it no longer has "force and effect" as evidence of citizenship. The same is true of a canceled CRBA, and nothing in any statute suggests that a CRBA must remain in effect, and remain as proof of citizenship, even if it was wrongly issued. The issuance of the CRBA, therefore, did not and could not confer U.S. citizenship on Hizam.

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[5] In effect, by arguing that the CRBA serves as "conclusive proof" of an incorrect "fact" (that Hizam met the statutory prerequisites for citizenship at birth)—a contradiction in terms—Hizam is advancing an estoppel argument: that once the State Department has issued a CRBA, it is barred from contesting the facts to which that CRBA attests. But estoppel is undeniably unavailable in this context. *Pangilinan*, 486 U.S. at 885.

B. The State Department Had Both Statutory Authority and Inherent Authority to Revoke the CRBA and U.S. Passport

To effectuate this common-sense result—that a document reflecting incorrect facts should not remain in force—and to carry out its obligation to correctly determine the nationality of persons abroad under § 1104, the State Department used its statutory and inherent authority to cancel Hizam's erroneous CRBA.

1. The State Department Had Inherent Authority to Cancel Hizam's CRBA

Although 8 U.S.C. § 1504 gives the State Department the power to cancel a CRBA, this Court need not reach the question of that statute's effect or its application to events before it was enacted. As explained in the government's opening brief, the State Department has the preexisting authority to cancel or correct CRBAs, which arises from its power to issue those documents and is not dependent upon § 1504. (Gov't Br. 20-29).

In arguing that the State Department was powerless to correct its error, Hizam relies primarily on *Gorbach*, a Ninth Circuit decision (Hizam Br. 28), but that case is not to the contrary. In *Gorbach*, the court held that the Attorney General's authority to naturalize citizens does not include the power to denaturalize. 219 F.3d at 1089. But it reached that conclusion because another statute precluded any such inherent authority: "Congress expressly provided for denaturalizations *only* in actions by United States attorneys

in courts." *Id.* at 1091 (emphasis added); *accord id.* at 1093-94 ("the express [statutory] scheme plainly and unambiguously gives the Attorney General the power to naturalize citizens and to cancel certificates of citizenship but not the citizenship itself"). In short, "the express statutory procedure [for denaturalization] is exclusive and fully occupies the field." *Id.* at 1098.[6] The *Gorbach* court's examples of other instances where the power to do something does not include the power to undo that thing also involved situations where the power to undo the act was expressly barred or provided to someone else. *Id.* at 1095 (clergy members can marry people but not grant divorces—*see, e.g.*, N.Y. Dom. Rel. L. § 170 (judgment of court needed for divorce); juries can acquit but cannot revoke acquittal and convict—*see Evans v. Michigan*, 133 S. Ct. 1069, 1074 (2013) (acquittal is unreviewable under Double Jeopardy Clause even if mistaken)).

Hizam also incorrectly suggests that *Gorbach* held that express statutory authority to revisit a past decision is required; he mistakenly characterizes the court as having stated that "even the federal courts require statutory permission to vacate their own judgments." (Hizam Br. 28). To the contrary, *Gorbach* accurately described the courts' authority to vacate judgments as a "traditional inherent power," one that was "confirmed" by Congress in Federal Rule of Civil

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[6] The *Gorbach* court further noted a list a practical and historical reasons Congress did not intend to give the Attorney General the power to denaturalize as part of the power to naturalize. *Id.* at 1095-98.

Procedure 60. 219 F.3d at 1095; *accord Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233-34 (1995) (describing Fed. R. Civ. P. 60 as "reflect[ing] and confirm[ing] the courts' own inherent and discretionary power, firmly established in English practice long before the foundation of our Republic" (quotation marks omitted)). Such traditional inherent judicial powers existed before the Federal Rules and continue to exist after the Rules' passage, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46-51 (1991); there was and is no need for "statutory permission."[7]

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[7] In dicta, *Gorbach* maintained that "[i]f the power of courts to vacate their own judgments needs confirmation by an express rule approved by Congress, it is too much to infer an analogous power in the Attorney General, for so weighty a matter as revocation of American citizenship, from silence." 219 F.3d at 1095. But the court could not have meant to imply that the inherent power of the courts literally "needs confirmation" through the Federal Rules, which would contradict *Chambers*, and which would imply that the courts lacked that power prior to the passage of the Rules, contrary to *Plaut*. In context, this statement is best read as contending that given the "weighty" issue of denaturalization, the history of the statutes, the protections Congress and the courts had afforded those subject to denaturalization, and the express statutory provision that denaturalization authority rests in the courts rather than the Attorney General, the power asserted by the Attorney General would require explicit statutory confirmation. *Id.* at

That conclusion holds true in the agency context as well: contrary to Hizam's argument, courts have repeatedly held that an agency's power to correct its own errors requires no statutory or regulatory basis. *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 229 n.9 (2d Cir. 2002); *Dun & Bradstreet Corp. Found. v. U.S. Postal Service*, 946 F.2d 189, 193 (2d Cir. 1991); *Alberta Gas Chems., Ltd. v. Celanese Corp.*, 650 F.2d 9, 12-13 (2d Cir. 1981); *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360-61 (Fed. Cir. 2008); *Last Best Beef, LLC v. Dudas*, 506 F.3d 333, 340 (4th Cir. 2007); *Macktal v. Chao*, 286 F.3d 822, 825-26 (5th Cir. 2002); *Gun South, Inc. v. Brady*, 877 F.2d 858, 862 (11th Cir. 1989); *see Bell v. Hearne*, 60 U.S. 252, 262 (1856) (agency has "liberal powers of control, to be exercised for the purposes of justice, and to prevent the consequences of inadvertence, irregularity, mistake, and fraud"). That inherent authority may be limited by statute, as occurred in *Gorbach*. *See Chao*, 291 F.3d at 229 n.9. But "in the absence of a specific statutory limitation," the inherent authority continues to exist. *Macktal*, 286 F.3d at 825-26; *accord Tokyo Kikai*, 529

1091 (silent implication of authority insufficient "[b]ecause the power to denaturalize is so important"), 1098-99 (summarizing value of citizenship and attendant need for congressional sanction of denaturalization authority: "For the Attorney General to gain the terrible power to take citizenship away without going to court, she needs Congress to say so.").

F.3d at 1360 ("prohibition against doing something *not* authorized by statute is altogether different from the power to reconsider something that is authorized by statute"); *see Haig v. Agee*, 453 U.S. 280, 290 (1981) (upholding powers to revoke or deny passport where statute "does not in so many words confer upon the Secretary [that] power" but also does not "expressly limit those powers").[8]

Although Hizam notes that many of these cases state that the agency's power to revisit its decisions must "[o]rdinarily" be exercised "within a reasonable time," *Dun & Bradstreet*, 946 F.2d at 193; (Hizam Br. 29-30), that rule should be tempered in this case by the clear prohibitions against granting citizenship to any person who does not satisfy the statutory requirements, or granting citizenship through the exercise of equitable powers. Indeed, Hizam advances essentially the identical argument under the rubric of laches. (Hizam Br. 34-39). But "[l]aches is . . . a form of equitable estoppel." *Teamsters & Employers Wel-*

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[8] Hizam incorrectly states that the government relied on *Friend v. Reno*, 172 F.3d 638 (9th Cir. 1999), and *Fedorenko*, 449 U.S. 490, for agencies' authority to cancel citizenship certificates, and notes (correctly) that there is express statutory authorization for such cancellations. (Hizam Br. 29). But the government cited both cases to support the proposition that a citizenship certificate may be revoked even if the certificate was issued based on agency error alone, as opposed to a mistake by the applicant. (Gov't Br. 22-23). Hizam has not argued to the contrary in this Court.

fare Trust v. Gorman Bros. Ready Mix, 283 F.3d 877, 881-82 (7th Cir. 2002); *accord Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 278 (2d Cir. 2005) (laches and estoppel are "similar doctrines" (quotation marks omitted)). And as the Supreme Court has held, no court has any power to confer citizenship "by application of the doctrine of estoppel, [ ]or by invocation of equitable powers, [ ]or by any other means." *Pangilinan*, 486 U.S. at 885. Applying laches principles, or adhering to the ordinary presumption that the State Department was required to act within a reasonable time to exercise its authority to cancel the CRBA, contravenes both that holding and the fundamental principle underlying it, that "there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship," and a person who does not meet those statutory conditions is not a citizen. *Fedorenko*, 449 U.S. at 506; *see Dixon v. United States*, 381 U.S. 68, 72-73 (1965) (because "Congress, not the [agency], prescribes the . . . law," agency's error cannot change statutory requirements); *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 111 (2d Cir. 2010) ("Governments generally are not estopped by the misdeeds of their agents or employees."). Notably, too, Congress did not incorporate any time limitation on the State Department's power to cancel a CRBA when it codified that authority in § 1504.

More broadly, laches can only be applied against the United States government in exceedingly rare cases, if at all. This Court has clearly stated that laches can never be available against the federal government "when it undertakes to enforce a public right

or protect the public interest." *United States v. Angell*, 292 F.3d 333, 338 (2d Cir. 2002). As the Court put it in *Cayuga Indian Nation*, laches might be (but is not necessarily) permissible as a defense against "government suits in which the government is seeking to enforce either on its own behalf or that of private parties what are in the nature of private rights," but never against "government suits to enforce sovereign rights." 413 F.3d at 278-79. And the power to determine citizenship is unquestionably a sovereign right. *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) ("Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens," resting on its "inherent power as sovereign"); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) ("every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, . . . to admit [foreigners] only in such cases and upon such conditions as it may see fit to prescribe"); *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326, 1340 (2d Cir. 1992) ("Constitution grants Congress the power to 'establish an uniform Rule of Naturalization,' and the Executive Branch of the federal government has inherent sovereign power to regulate in the immigration field."), *vacated as moot*, 509 U.S. 918 (1993); *see Stserba v. Holder*, 646 F.3d 964, 973 (6th Cir. 2011) (power of international states to "decide who are its nationals" is a "sovereign right"); *Faddoul v. INS*, 37 F.3d 185, 189 (5th Cir. 1994) (same); *De Souza v. INS*, 999 F.2d 1156, 1159 (7th Cir. 1993) (same). Accordingly, there can be no laches in this context. *See Costello v. United States*, 365 U.S. 265, 281 (1961) (Supreme Court has

"consistently adhered" to "principle that laches is not a defense against the sovereign" in order to "'preserv[e] the public rights, revenues, and property from injury and loss, by the negligence of public officers'" (quoting Story, J.), though ultimately deciding laches would be inapplicable even if available against the government).

Hizam also contends that by passing § 1504, Congress indicated its understanding that the State Department had no power to cancel previously issued CRBAs, and that to recognize such preexisting authority would violate the canon that a statute must be construed so as not to be superfluous. (Hizam Br. 34, citing JA 176). But "there is no canon against making explicit what is implied," even when doing so would "add nothing." *United States v. Sischo*, 262 U.S. 165, 169 (1923). Indeed, Congress routinely codifies existing rules without changing them. *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2249 n.8 (2011) ("Congress meant to codify [judge-made law], not to set forth a new [standard] of its own making"); *Agee*, 453 U.S. at 294-95 (first Passport Act "worked no change in the power of the Executive to issue passports; nor was it intended to do so"; instead it "merely confirmed an authority already possessed and exercised by the Secretary of State" (quotation marks omitted)); *Sompo Japan Ins. Co. of America v. Union Pacific R. Co.*, 456 F.3d 54, 64 (2d Cir. 2006) (in considering "codification" of existing laws, courts "should not 'infer that Congress . . . intended to change their effect'" (quoting *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957) (alterations omitted)), *abrogated on other grounds*,

Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 130 S. Ct. 2433 (2010); *In re Liberatore*, 574 F.2d 78, 86 (2d Cir. 1978). And particularly "in the areas of foreign policy and national security," such as in this case, "congressional silence is not to be equated with congressional disapproval." *Agee*, 453 U.S. at 291.

Agee itself already recognized the State Department's inherent power in a similar context. *Id.* at 290-91; (Gov't Br. 20-21). Hizam seeks to limit *Agee* to the context of threats to national security (Hizam Br. 31), but the Court's language is not so narrow: it broadly affirmed the State Department's authority to cancel a passport even in the absence of statutory authority. 453 U.S. at 290-91. Just as in *Agee*, prior to the enactment of § 1504 the statute allowing the State Department to issue CRBAs did "not in so many words confer upon the Secretary a power" to revoke or deny them, but also did not "expressly limit those powers"; accordingly the powers exist. *Id.* Moreover, this Court has held that the State Department's authority to revoke a passport extends beyond national security concerns, under the Department's "considerable latitude in developing policies for issuing and revoking passports" recognized in *Agee*. *Weinstein v. Albright*, 261 F.3d 127, 138-39 (2d Cir. 2001) (permitting policy regarding revocation of passports for failure to meet child-support obligations). As stated in *Weinstein*, *Agee* upheld the State Department's policy regarding passport revocation even where "Congress had not specifically authorized the revocation of passports," with no limitation to national security issues. *Id.*

Hizam further contends that *Agee* "only held that the Secretary was authorized to revoke passports in accordance with specific regulations" (Hizam Br. 31-32), but the Court only mentioned those regulations in a short footnote, and only to note that the State Department's "consistent construction of the statute" was in line with the Court's conclusion about the Department's authority. 453 U.S. at 291 n.20; *see id.* at 303. And in any event, the State Department's regulations were promulgated "pursuant to its general statutory authority to issue passports," *Weinstein*, 261 F.3d at 138, confirming the government's argument in this case that no express statutory power is required for the State Department to act to cancel passports or other citizenship documents.

2. The Government Had Authority Under § 1504 to Cancel Hizam's CRBA

In addition to its inherent power to cancel CRBAs arising from its authority to issue them, the State Department may cancel a CRBA under § 1504. Neither Hizam nor the district court has demonstrated otherwise.

a. The Government Did Not Abandon Its Argument Regarding Statutory Authority

As a threshold matter, Hizam and the district court are incorrect that the government "abandoned its Section 1504 argument." (Hizam Br. 17; *see* JA 197). To the contrary, the State Department's memorandum to the district court on the cross-motions for summary judgment contained a subject

heading, "8 U.S.C. § 1504, By its Terms, Authorizes the Revocation of U.S. Passports and CRBAs Where the Bearer Is Not Entitled to Them," and developed that argument in the subsequent pages. Defs.' Mem. of Law in Opp. to Pls.' Mot. for Summ. J. and in Support of Defs.' Cross Mot. for Summ. J., dated April 13, 2012 (district court docket no. 19), at 16-17. The government further advanced the related argument that the State Department had preexisting authority to issue or deny citizenship documents, and that this made the presumption against retroactivity regarding § 1504 inapplicable or irrelevant. *Id.* at 17-19. And while the government did not rebut Hizam's retroactivity counterargument in the summary judgment proceedings as thoroughly as it did in its brief to this Court, a party need not raise every aspect of an argument to avoid forfeiting it. *In re American Express Fin. Advisors Secs. Litig.*, 672 F.3d 113, 137 n.18 (2d Cir. 2011) (party did not abandon argument regarding specific carve-out language in release when it argued generally that its claims had not been released); *United States v. Rapone*, 131 F.3d 188, 196 (D.C. Cir. 1997) (party did not abandon argument by failing to invoke specific controlling legal authority in its favor); *cf. Gill v. INS*, 420 F.3d 82, 85-86 (2d Cir. 2005) (in petition for review of agency action, petitioner must "raise[ ] an *issue* below to present it on appeal" but not "the exact contours" (emphasis in original)). Indeed, the government is aware of no case in which a court held that a party that raised an argument had then abandoned it by failing to rebut possible responses to that argument. Thus, because the State Department in its summary judgment mo-

tion expressly relied on and developed the argument regarding § 1504, the contention that the government abandoned reliance on that statute is incorrect. *See TVT Records v. Island Def Jam Music Grp.*, 412 F.3d 82, 90 n.6 (2d Cir. 2005) (concluding district court was incorrect to conclude argument had been abandoned).

Even if the issue had been abandoned, this Court should still consider it. A "most significant[ ]" factor in whether a court of appeals will address an issue is whether the district court considered it. *United States v. Harrell*, 268 F.3d 141, 147 (2d Cir. 2001). In this case, the district court fully passed upon the applicability of § 1504, including whether it was barred by the presumption against retroactivity. (JA 169-74). And the government indisputably pressed those arguments in connection with its application for a stay of the district court's judgment, *see* Mem. of Law in Supp. of Defs.' Mot. for Stay Pending Consideration of Appeal, dated August 21, 2012 (district court docket no. 27), at 6-10, and the district court then passed upon them again (JA 197-98).

Finally, this Court retains discretion to consider arguments not raised below, and is particularly inclined to do so "where the argument presents a question of law and there is no need for additional fact-finding." *Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir. 2004). Such is the case here. As the district court noted, the question of the State Department's authority and the retroactivity of § 1504 involves "serious legal questions," and this appeal presents "only questions of law" on which the State De-

partment's arguments are "far from frivolous." (JA 198-99). For all those reasons, there should be no impediment to this Court's consideration of the State Department's authority under § 1504.

b. Section 1504 Is Not Impermissibly Retroactive

As for the retroactivity of § 1504, Hizam argues that under the Supreme Court's decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), § 1504 attaches new legal consequences to past events because "[h]ad Hizam been aware that his CRBA was subject to readjudication at any time, he would have pursued alternative routes to lawful residence and/or citizenship available to him before turning 18 years old." (Hizam Br. 21). But Hizam never—either before or after § 1504 was passed—had a vested right to U.S. citizenship, or to documents that would prove U.S. citizenship. And while it may be true that Hizam would have pursued alternative routes to citizenship had he earlier learned that he is not actually a U.S. citizen, his decision to forgo those avenues resulted from his lack of accurate knowledge about his citizenship status, not from the existence *vel non* of statutory authority for the State Department to cancel his

CRBA.[9] There is accordingly no bar to applying § 1504 to Hizam's CRBA.[10]

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[9] Were it otherwise, Hizam would have been expected to pursue alternative means of obtaining citizenship promptly upon the enactment of § 1504 in 1994. There is no indication that he did so.

[10] Hizam, pointing to *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), attempts to rebut the government's point that § 1504 only affected the State Department's powers rather than substantive rights. But the Court in that case held a statutory amendment could not apply retroactively precisely because it did affect substantive rights, by "eliminat[ing] a defense" to a suit and "creat[ing] a new cause of action," therefore "attaching a new disability, in respect to transactions or considerations already past." *Id.* at 948 (quoting *Landgraf*, 511 U.S. at 269; quotation marks and alterations omitted). While it was true in *Hughes Aircraft* that the conduct underlying the newly authorized lawsuit was already unlawful and could be the subject of a suit by someone else, the Court concluded that the newly authorized action imposed a substantially different burden on defendants, to the detriment of substantive rights. *Id.* at 949-50. Here, Hizam's substantive rights are determined by whether or not he is a citizen, not whether or not a statute gives the State Department the power to cancel citizenship documents.

Finally, Hizam argues that the Court should apply the *Charming Betsy* canon of statutory construction, that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). According to Hizam, "[r]eading 8 U.S.C. § 1504 as authorizing retroactive revocation of CRBAs for agency error risks the possibility of statelessness for the class of individuals in the same position as Mr. Hizam." (Hizam Br. 26). Therefore, Hizam argues, "the scope of § 1504 must be determined in light of the international norm against policies that lead to statelessness." (Hizam Br. 26). But Hizam does not allege that he himself would be rendered stateless by application of § 1504, or that he lacks citizenship in Yemen or elsewhere. He accordingly has no standing to raise this argument. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 & n.1 (1992) (to support standing, "injury must affect the plaintiff in a personal and individual way"). Even if Hizam holds no citizenship in any other country, his statelessness results from his undisputed lack of U.S. citizenship, not from the cancellation of his CRBA under § 1504. And the arguments Hizam asserts are speculative and unsupported: he contends that unspecified "individuals in the same position" risk "the possibility of statelessness" because unnamed "[c]ertain countries will not provide citizenship to the children of U.S. citizens," and "[s]till other [unidentified] countries consider individuals who acquire foreign citizenship to have abandoned any prior citizenship." (Hizam Br. 26-27).

Moreover, Hizam has misapplied the *Charming Betsy* canon. The rule of interpretation applies to an "ambiguous statute," but not "where the statute at issue admits no relevant ambiguity." *Oliva v. U.S. Dep't of Justice*, 433 F.3d 229, 235 (2d Cir. 2005). Here, § 1504 is clear: it explicitly permits the Secretary of State to cancel CRBAs and U.S. passports that were "illegally, fraudulently, or erroneously obtained," 8 U.S.C. § 1504, making the determination of whether to cancel those documents rest solely on those factors. And if the Court were required to construe the statute "not to conflict with international law," *Oliva*, 433 F.3d at 235, Hizam has identified no controlling principle of international law, instead offering only the U.S. government objective of reducing statelessness, and citing an international convention to which neither the United States nor Yemen is a party.[11]

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[11] A list of parties to the Convention Relating to the Status of Stateless Persons is available at http://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSONLINE&mtdsg_no=V~3&chapter=5&Temp=mtdsg2&lang=en. Hizam offers no argument that the Convention is otherwise accepted as international law. Nor does he cite any provision of the Convention —which generally addresses the treatment of stateless persons—that supports his view that it embodies a broad "international norm against policies that lead to statelessness." (Hizam Br. 26).

* * *

Hizam, understandably, rests heavily on his long reliance on his belief that he was a U.S. citizen, and the equities of his situation. Yet no matter how sympathetic his case may be, the remedies he obtains must be lawful ones. Here, the law is clear: he is not a U.S. citizen, he is not entitled to citizenship documents, and the State Department acted within its authority to cancel the documents it incorrectly issued to him. As stated in the government's opening brief, the State Department will support other lawful means to provide relief to Hizam, including a private bill in Congress if one is introduced, and is planning to apprise a U.S. Senator of Hizam's situation. But both the State Department and the courts lack authority to make Hizam a U.S. citizen or to grant him documents that would prove his non-existent citizenship.

CONCLUSION

The judgment of the district court should be reversed.

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May 13, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 5992 words in this brief.

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