No. 12-1229

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Salem Fuad Aljabri,
Plaintiff-Appellant,

v.

ERIC H. HOLDER, JR., Attorney General of the United States, JANET NAPOLITANO, Secretary of the Department of Homeland Security; ALEJANDRO MAYORKAS, Director of U.S. Citizenship and Immigration Services; and LORI PIETROPAOLI, Director of the Chicago Field Office of U.S. Citizenship and Immigration Services,
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 11 C 793 – Charles R. Norgle, *Judge*.

PLAINTIFF-APPELLANT'S OPENING BRIEF

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ORAL ARGUMENT REQUESTED

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 12-1229

Short Caption: Aljabri v. Holder

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Salem Fuad Aljabri

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Attorney's Signature: s/ Charles Rothh Date: May 31, 2013

Attorney's Printed Name: Charles Roth

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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JURISDICTIONAL STATEMENT[1]

Plaintiff-Appellant Salem Fuad Aljabri ("Mr. Aljabri") filed this action alleging that the United States Citizenship and Immigration Services (USCIS) had failed to adjudicate his naturalization application within 120 days of his interview, and seeking a remedy for that conduct. Mr. Aljabri filed his N-400 application for naturalization on February 4, 2003, pursuant to 8 U.S.C. §§ 1421, 1430. He was interviewed by USCIS in regards to that application on July 31, 2003. His application was not adjudicated within 120 days.

Mr. Aljabri filed this action in District Court on February 3, 2011, under under 28 U.S.C. § 1331 and 8 U.S.C. § 1447(b). The case was reassigned to Judge Norgle, who dismissed the case *sua sponte* by written decision on April 20, 2011. A timely motion to alter or amend under Fed.R.Civ.Pro. 59(e) was filed on May 5, 2011. It was denied by written decision on January 10, 2012.

A timely appeal was docketed with this Court on January 27, 2012, within 60 days of the District Court's decision. The Court's jurisdiction is under 28 U.S.C. § 1291. This appeal is from a final order or judgment of the District Court, which disposes of all parties' claims.

Under Federal Rule of Appellate Procedure 43(c)(2), Alejandro Mayorkas, the current Director of U.S. Citizenship and Immigration Services ("USCIS"), is automatically substituted for Michael Aytes, the former Acting Director of

[1] Material in the Required Supplemental Appendix bound with this brief is cited as App. __.

USCIS, and Lori Pietropaoli, the District Director of the Chicago Field Office of USCIS, is automatically substituted for Kamsing Lee.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a District Court's jurisdiction under 8 U.S.C. § 1447(b) is precluded by § 1252(a)(2)(B)(ii).

2. Whether Aljabri's claims are moot because he has received a decision from the Department of Homeland Security on his application for naturalization, or whether the federal courts assumed exclusive jurisdiction over the naturalization application once this action was filed under § 1447(b).

3. Whether 8 U.S.C. § 1429 strips district courts of jurisdiction to hear claims under 8 U.S.C. § 1447(b) by aliens who have been ordered removed or are in removal proceedings.

4. Whether 8 U.S.C. § 1429 prevents the federal courts from granting an effective remedy whenever an individual's naturalization application has not yet been adjudicated by USCIS, where § 1447(b) authorizes a district court to determine the matter or to remand with instructions.

STATEMENT OF THE CASE

This case arises out of a complaint filed by plaintiff-appellant Salem Fuad Aljabri ("Mr. Aljabri) with the Northern District of Illinois ("District Court") on February 3, 2011 asking that court to declare him a United States citizen or to naturalize him, and to remedy the government's failure to adjudicate his application as required by statute. In his complaint, Mr. Aljabri also asked that the court suspend or stay removal proceedings against him. The District

Court dismissed Mr. Aljabri's complaint; finding it lacked subject-matter jurisdiction due to 8 U.S.C. § 1252(a)(2)(B)(ii). Mr. Aljabri filed a timely motion to alter or amend, explaining that he did not seek review over any discretionary action. The District Court denied his motion, and Mr. Aljabri subsequently appealed to this Court.

STATEMENT OF FACTS

Salem Aljabri was born in Jordan and is of Palestinian descent. App. 4. In 1997, he married a United States citizen and based on that marriage he was accorded the status of a lawful permanent resident of the United States on April 10, 2000. App. 11. In February 2003, Mr. Aljabri filed an application for United States citizenship. *Id.* He was interviewed by United States Citizenship and Immigration Service (USCIS), an entity of the Department of Homeland Security ("DHS"), on July 31, 2003. *Id.* Despite visiting the office of USCIS on three occasions to inquire about the status of citizenship application, Mr. Aljabri's application was not decided for more than nine years. App. 43 – 47.

Mr. Aljabri was convicted of wire fraud in violation of 18 U.S.C. § 1343, money laundering under 18 U.S.C. § 1957(a)(1)(A)(i) and structuring under 31 U.S.C. § 5324(a)(3) on August 8, 2006. App. 11. He was sentenced to 90 months incarceration. *Id.* On February 2, 2010, this Court vacated Mr. Aljabri's conviction for money laundering. On June 17, 2011, his sentence was reduced. *Id.* The District Court imposed an improper assessment, triggering a second appeal to this Court. The Court remanded to the District Court on April 23, 2012 to correct that error.

Meanwhile, on February 12, 2008, DHS initiated removal proceedings against Mr. Aljabri by filing a Notice to Appear. App. 31 – 33. DHS asserted Mr. Aljabri was removable under 8 U.S.C. § 1227(a)(2)(A)(iii) for having committed a crime that constituted an aggravated felony under 8 U.S.C. § 1101(a)(43)(M). *Id.* Mr. Aljabri contested the allegation that any of his convictions constituted an aggravated felony and sought to defend himself *pro se* against removal. During this time, Mr. Aljabri was in in federal custody. On April 28, 2010, Mr. Aljabri was prevented from appearing at his immigration court hearing because he had been scheduled for a medical appointment by prison staff. The Immigration Judge ("IJ") ordered him removed *in absentia*. App. 41 – 42. Upon learning he had been ordered removed, Mr. Aljabri filed a motion to rescind with the immigration court, the denial of which he appealed to the Board of Immigration Appeals ("Board"). App. 49 – 50.

On February 3, 2011, Mr. Aljabri filed a complaint in the United States District Court for the Northern District of Illinois, Eastern Division asking that the court naturalize him or declare him a United States citizen based on his 2003 application for citizenship. App. 1 – 10. At that time, Mr. Aljabri's application for citizenship remained pending before USCIS. On April 20, 2011, the District Court dismissed Mr. Aljabri's case, finding it had no subject matter jurisdiction. App. 11 – 12. Mr. Aljabri timely filed a motion to alter or amend – which was denied - and then timely appealed to this Court. App. 17 – 18.

Notwithstanding the pending federal court matter, USCIS denied his application for citizenship on May 3, 2012. App. 43 – 47. USCIS found Mr.

Aljabri ineligible for citizenship because he had been ordered removed in April 2010 and based on its contention that "[t]he structuring crimes for which you were convicted are classified as an aggravated felony as the loss incurred exceeded $10,000." *Id.*

On March 29, 2013, the Board addressed the denial of Mr. Aljabri's motion to reopen the *in absentia* removal order against him. The Board remanded the matter to the immigration court for supplemental analysis and entry of a new decision. App. 48 – 50. Several hearings have been conducted post-remand. Mr. Aljabri's removal case remains pending before the Dallas Immigration Court.

SUMMARY OF ARGUMENT

The District Court plainly erred in finding no jurisdiction over this matter. The District Court found that it lacked jurisdiction to consider naturalization claims due to 8 U.S.C. § 1252(a)(2)(B)(ii). But § 1252(a)(2)(B)(ii) only applies to matters specified as discretionary "under this subchapter." Naturalization and citizenship matters fall under a different subchapter; and are not specified as discretionary in the statute.

The Government offers a bevy of alternate grounds on which to affirm the District Court's decision; but these grounds also fail.

First, the Government argues that the 2012 USCIS decision denying naturalization mooted out this claim. All of the circuit courts to consider the matter, including a unanimous Ninth Circuit en banc panel, have held the federal courts assume exclusive jurisdiction over naturalization after the filing

of a federal court action. Because USCIS was without jurisdiction to act upon the application, its purported denial is of no legal effect. Permitting USCIS to moot out a § 1447(b) claim by denying an application for citizenship after the case is pending would be inefficient and has no basis in the law. The statute accords authorization to District Courts to "determine the matter" once a complaint under § 1447(b) has been filed. If USCIS can oust federal court jurisdiction by issuing its own decision, the statute cannot implemented as authorized by Congress. Likewise, the statute gives District Courts the power to remand, an authorization which would also ring hollow if USCIS can render moot that power by issuing its own decision. Such a reading would also eviscerate the consequences faced by USCIS when it fails to timely act on a naturalization petition and undermine the plain meaning of the statute – which is to accord remedy in the federal courts to citizenship applicants whose cases have languished.

There is no jurisdictional bar to hearing the instant matter. While 8 U.S.C. § 1429 prohibits a grant of citizenship following the commencement of removal proceedings or entry of a final finding of deportability, the Court has already interpreted this statute as not precluding federal of jurisdiction. The Court's holding that § 1429 is not jurisdictional in nature is in keeping with the holdings of other Courts of Appeals, and with the longstanding presumption of reviewability of administrative actions. Nothing in § 1429 references federal court jurisdiction or suggests Congress intended a departure from the presumption of reviewability.

The federal courts may provide an effective remedy for an individual bringing a claim such as Mr. Aljabri's. While an applicant cannot be granted naturalization while removal proceedings are pending or while a final finding of deportability is entered, the District Court could nonetheless provide relief in the form of a declaratory judgment. Such relief was found appropriate in the context of a naturalization appeal under § 1421(c), and would not be categorically inappropriate in § 1447(b) cases. In the § 1447(b) context, the district court is authorized to determine the matter, to remand the matter, or to remand the matter with instructions. That grant of federal court power is broad enough to encompass declaratory judgment relief, in appropriate cases. Such a judgment would provide meaningful relief to applicants, because federal regulations authorize an immigration judge to consider termination of removal proceedings for an individual who is prima facie eligible to naturalize.

Reconsideration of this matter by the District Court is appropriate in this matter because the removal order issued against Mr. Aljabri was found to be defective by the Board, the USCIS determination that he was convicted of an aggravated felony is not legally sound, and it is possible the District Court could find he was, indeed, made a citizen years ago following representations made to him by USCIS that his application had been approved, or would be eligible to naturalize now.

Thus, this matter should be remanded to the District Court of further consideration.

ARGUMENT

I. Jurisdiction over Citizenship Matters Is Not Stripped By 8 U.S.C. § 1252(a)(2)(B)(ii).

The District Court was flatly wrong when it found that it lacked subject-matter jurisdiction to consider Mr. Aljabri's naturalization claim because of 8 U.S.C. § 1252(a)(2)(B)(ii). That provision does not apply to naturalization and citizenship matters.

Section 1252(a)(2)(B) strips the federal courts of power to review various enumerated and non-enumerated discretionary decisions:

> (2) Matters not subject to judicial review
> (B) Denials of discretionary relief
> * * * no court shall have jurisdiction to review--
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is **specified under this subchapter** to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. § 1252(a)(2)(B) (emphasis added). It cannot be argued that naturalization falls within any of the enumerated discretionary provisions in § 1252(a)(2)(B)(i). Moreover, the provisions of § 1252(a)(2)(B)(ii) do not apply to naturalization on their face because naturalization is found in a different subchapter of the INA; and because it is not specified as discretionary in statute.

A. Naturalization and citizenship matters are located in a different subchapter from 1252(a)(2)(B)(ii).

Under 8 U.S.C. § 1252(a)(2)(B)(ii), federal court jurisdiction is precluded over certain non-enumerated decisions specified as discretionary. However, the deprivation of jurisdiction expressly applies only to matters specified as discretionary "under this subchapter." Section 1252 appears in Subchapter II of Chapter 12, Title 8 of the United States Code. As the Supreme Court noted in *Kucana v. Holder*, "[t]his subchapter" refers to Title 8, Chapter 12, Subchapter II, of the United States Code, codified at 8 U.S.C. §§ 1151-1381 and titled "Immigration." 558 U.S. 233, 239 n.3 (2010).

The statutory section governing naturalization is set forth at 8 U.S.C. § 1427, which is located in Subchapter III of Chapter 12. It does not fall within §§ 1151-1381, which are the sections implicated by § 1252(a)(2)(B)(ii).

The District Court did not note or discuss this fact, or explain why it believed that § 1252(a)(2)(B)(ii) would apply more broadly than the text of that provision requires, particularly in light of the backdrop presumption in favor of reviewability of agency action. *Kucana,* 558 U.S. at 251; *INS v. St. Cyr*, 533 U.S. 289, 298 (2001); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995).

Because the jurisdiction-stripping function of § 1252 references only decisions and actions taken under subchapter II, it is plainly inapplicable to naturalization and citizenship, which are located in subchapter III.

B. Nothing in the naturalization statutes grants discretion to the Secretary of Homeland Security.

Even if § 1252(a)(2)(B)(ii) were not inapplicable to naturalization due to its placement in a different subchapter, that provision applies only to matters specified as discretionary in the statute. *Kucana,* 558 at 237.

Mr. Aljabri does not concede that the issues raised in his complaint involve any discretionary findings of the Attorney General or Secretary of Homeland Security. But under *Kucana*, this question is irrelevant. The legal issue in *Kucana* was a motion to reopen, which was concededly discretionary in nature. *Id.* at 242. But as the *Kucana* Court held, only discretion codified in statute eliminates federal court jurisdiction under § 1252(a)(2)(B)(ii). *Id.* at 248.

Naturalization is not specified as discretionary under the various statutes pertaining to that matter. *Cf.* 8 U.S.C. §§ 1421-1450. Because naturalization is not specified as discretionary under the statute, § 1252(a)(2)(B)(ii) is inapplicable for this reason, as well.

Either of these points is sufficient to show that § 1252 (a)(2)(B)(ii) is irrelevant to this case. The District Court thus erred in finding jurisdiction precluded under that section.

II. The Intervening USCIS Naturalization Decision was Without Effect Because the Filing of a Petition Under § 1447(b) Vests the Federal Courts with Exclusive Jurisdiction Over the Naturalization Application.

Mr. Aljbri filed an application for citizenship in February 2003. App. 11 – 12. He was interviewed by USCIS on July 31, 2003. *Id.* Nearly eight years later – well beyond 120 days – Mr. Aljabri filed a complaint challenging the

government's failure to adjudicate the claim. App. 1 – 10. He properly invoked the District Court's authority. Despite the pending federal court matter, USCIS purported to deny Mr. Aljabri's application on May 2, 2012. App. 43 – 47.

Once a matter is properly filed under § 1447(b), the Fourth, Second, and Ninth Circuits have unanimously concluded that the District Court has exclusive jurisdiction over the naturalization matter.[2] The Court should follow those decisions, and hold likewise.

The Courts of Appeals have given several reasons for rejecting the theory that USCIS may exercise concurrent jurisdiction over naturalization applications.

First, such a reading would be inconsistent of the Congressional grant of authority to "determine the matter." 8 U.S.C. § 1447(b). The Government's interpretation of § 1447(b) would effectively "enable[] the CIS, an administrative agency, to divest a federal district court of its congressionally authorized jurisdiction." *Etape v. Chertoff*, 497 F.3d 370, 383 (4th Cir. 2007); *see also*, *United States v. Hovsepian*, 359 F.3d 1144, 1160 (9th Cir. 2004) (*en banc*) ("How can the court 'determine the matter' if the [CIS] has the option to 'determine the matter,' too, and essentially force the court to accept its view?").

Second, that interpretation would essentially read out of the statute the district court's authority to "remand the matter, with appropriate instructions, to the [CIS] to determine the matter." 8 U.S.C. § 1447(b). "Congress would not

[2] The Tenth Circuit has indicated in dicta that it agrees with this proposition. *Al-Maleki v. Holder*, 558 F.3d 1200 (10th Cir. 2009).

have granted district courts the power of 'remand'—the power to 'send back'—if a naturalization application remained with the CIS after the filing of a § 1447(b) petition. For in that situation, there would be no need for the district court to send anything back—because the CIS would have had the matter all along." *Etape*, 497 F.3d at 384 (noting also that "[t]he very word "remand" indicates that Congress intended a hierarchy."). If USCIS had concurrent authority to deny an application and divest district court jurisdiction, the district court's authority to remand with instructions "would be surplusage." *Hovsepian*, 359 F.3d at 1160. Such an interpretation is disfavored. *See*, *e.g.*, *United States v. Menasche*, 348 U.S. 528, 538–539 (1955) (noting the "duty 'to give effect, if possible, to every clause and word of a statute'") (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (applying the canon where interpretation "would render [a] word … insignificant, if not wholly superfluous.")

Third, courts have found the exclusive jurisdiction rule to be most consistent with *Brock v. Pierce County*, 476 U.S. 253 (1986). Under *Brock*, unless a statute requires that the agency act within a particular time period and the statute specifies consequences for failure to comply with the time limit, the agency maintains concurrent jurisdiction over the matter. *Id.* at 259, 266. Here, Congress "clearly prescribe[d] consequences for the CIS's failure to act: upon an applicant's petition, a district court acquires jurisdiction and may either decide the matter itself or remand to the CIS with instructions." *Etape*, 497 F.3d at 385; see also *Hovsepian*, 359 F.3d at 1161.

Finally, courts have found the exclusive jurisdiction rule consistent with the legislative history of the statute and the policy objectives of Congress. Under the government's interpretation: (a) USCIS would have less incentive to adjudicate cases within the 120 day timeframe set by Congress; (b) inefficiencies would occur due to simultaneous consideration of the same matter by USCIS and the federal courts; (c) the rule urged by the government could result in a "race to decide a given case," *Hovsepian*, 359 F.3d at 1164, triggering rushed adjudication; and (d) the stated intention of the legislative sponsors – to give a choice of forum to the applicant – would be undone. *See Hovsepian*, 359 F.3d at 1163-64; *Etape*, 497 F.3d at 385-87; *Bustamante v. Napolitano,* 582 F.3d 403, 409-410 (2d Cir. 2009). The Congressional policy interests support the plain and natural reading of the text, that district courts have exclusive jurisdiction once it has vested.

This Court should adopt the reasoning of the Second, Third and Ninth Circuits, and hold that district court jurisdiction under 1447(b) is exclusive. If the federal courts had exclusive jurisdiction over the naturalization application, the USCIS denial of Mr. Aljabri's application for citizenship was without authority. A purported USCIS action taken without authority would not moot this matter.

The government has the right to ask the District Court to remand the matter to USCIS for adjudication of the application for naturalization, as contemplated in the language of the statute. If the District Court properly remanded a matter, and USCIS denied the application, judicial review could

occur only after completion of the administrative appeal. 8 U.S.C. § 1421(c). Absent such a remand order, USCIS cannot oust the properly invoked naturalization authority of the federal courts by adjudication of the underlying application.

III. Section 1429 Does Not Strip the Federal Courts of Jurisdiction Over § 1447(b) Matters.

Under 8 U.S.C. § 1429, the ability of a court or the agency to grant naturalization is precluded for someone with a final finding of deportability or who is in removal proceedings. However, this statute does not act to limit the jurisdiction of the federal courts as to either provision.

The statute reads, in pertinent part:

> Notwithstanding the provisions of section 405(b), and except as provided in sections 1439 and 1440 of this title no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this chapter or any other Act; and no application for naturalization shall be considered by the Attorney General if there is pending against the applicant a removal proceeding pursuant to a warrant of arrest issued under the provisions of this chapter or any other Act…

8 U.S.C. § 1429.

This brief considers *infra* at Sec. IV the effect of these provisions on the ability of a court to grant effective relief. Pursuant to the Court's order of Sept. 17, 2012 (Docket entry #20), this section addresses specifically the question posed by the Court, i.e., the jurisdictional effect of this provision.

A. This Court has already joined the Second, Third, Sixth, and Ninth Circuits in interpreting § 1429 to be non-jurisdictional in nature.

Klene v. Napolitano held that the initiation of removal proceedings does not cause the District Court to lose jurisdiction over a naturalization matter. 697 F.3d 666, 668 (7th Cir. 2012). This is because §1429 is simply not a jurisdictional statute. Mr. Aljabri believes that *Klene* is dispositive of this matter and therefore quotes the relevant section below:

> *Barnes* and *Saba–Bakare* concluded that, by preventing the Attorney General from naturalizing an alien once removal proceedings have commenced, § 1429 deprives the district court of jurisdiction to act in an alien's suit. That's a non sequitur. What the Attorney General may do—and derivatively what a court may order the Attorney General to do—concerns the merits. During the last decade, the Supreme Court has repeatedly stressed that there is a fundamental difference between mandatory rules, such as the one in § 1429, and jurisdictional limits. *See*, *e.g.*, *Henderson v. Shinseki*, —— U.S. ——, 131 S.Ct. 1197, 1202–03, 179 L.Ed.2d 159 (2011); *Morrison v. National Australia Bank Ltd.*, —— U.S. ——, 130 S.Ct. 2869, 2877, 177 L.Ed.2d 535 (2010); *Reed Elsevier, Inc. v. Muchnick*, —— U.S. ——, 130 S.Ct. 1237, 176 L.Ed.2d 18 (2010); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006); *Kontrick v. Ryan*, 540 U.S. 443, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004). *See also Minn–Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 851–53 (7th Cir.2012) (*en banc*), which discusses this line of decisions. Jurisdiction concerns the tribunal's power to hear a case and decide what the law requires. Congress has authorized district courts to decide whether aliens are entitled to naturalization. No more is necessary for subject-matter jurisdiction. If some other pending proceeding must be completed before a court can resolve the merits, usually the court should stay the suit rather than dismiss it. *See Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). We therefore disagree with *Barnes* and *Saba–Bakare*.

Klene, 697 F.3d at 668.

The reasoning in *Klene* is applicable to the entirety of § 1429, not simply the bar to naturalization due to removal proceedings. Jurisdiction "concerns the tribunal's power to hear a case and decide what the law requires," *Klene*, 697 F.3d at 668, including whether a noncitizen is entitled to naturalization.

To the extent that § 1429 prevents naturalization, that limits available remedies, not the Court's jurisdiction.

While there is a circuit divergence on the issue of remedy, the Courts of Appeals are in broad agreement that the language in § 1429 is non-jurisdictional in nature. *Zayed v. U.S.*, 368 F.3d 902, 906 (6th Cir. 2004); *Bellajaro v. Schiltgen*, 378 F.3d 1042, 10465 (9th Cir. 2004); *Ajlani v. Chertoff*, 545 F.3d 229, 237 (2nd Cir. 2008); *Gonzalez v. Secretary of Homeland Security*, 678 F.3d 254 (3d Cir.2012).[3] Nothing in the instant case would alter the rule adopted in *Klene* and applied in other circuits, that any limitations in § 1429 are not jurisdictional in nature.

B. A presumption of judicial review would apply.

To the extent that the government argues that § 1429 implicates the Court's jurisdiction, the issue implicates longstanding presumptions of reviewability of administrative actions. The Court interprets jurisdiction-stripping provisions against a backdrop presumption in favor of reviewability of

[3] While this Court has interpreted those circuits' case law to adopt a jurisdictional rule, *Klene*, 697 F.3d at 667, Plaintiff believes that the question is not yet resolved in those circuits. The Fourth Circuit decision of *Barnes v. Holder*, 625 F.3d 801, 806-07 (4th Cir. 2010), held that an individual in removal proceedings "had no statutory right to review of his naturalization application." Id. at 807. However, the Fourth Circuit did not disclaim jurisdiction as such; and its reasoning was primarily that no remedy could be provided for such an individual, citing to other circuits finding jurisdiction but no power to grant a remedy. The Fifth Circuit's decision in *Saba–Bakare v. Chertoff*, 507 F.3d 337 (5th Cir. 2007) did not even implicitly decide the jurisdictional issue; it held that "[e]ven if jurisdiction exists under § 1447(b), … invoking jurisdiction under this section would be futile." *Id.* at 340.

agency action. *Kucana,* 558 U.S. at 251; *St. Cyr*, 533 U.S. at 298; *Gutierrez de Martinez*, 515 U.S. at 434.

Thus, any doubt about the jurisdictional implications of 8 U.S.C. § 1429 would implicate the presumption favoring judicial review of administrative action. When a statute is "reasonably susceptible to divergent interpretation, [the courts] adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." *Gutierrez de Martinez,* 515 U.S., at 434. The Supreme Court has repeatedly applied this rule to questions of federal court jurisdiction in immigration matters. *See, e.g.*, *St. Cyr*, 533 U.S. at 298; *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 63–64 (1993); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991). Because of this well-settled presumption, courts assume that "Congress legislates with knowledge of" that presumption. *Kucana*, 558 U.S. at 251-52 (quoting *McNary*, 498 U.S. at 496). "Clear and convincing evidence" is required to dislodge the presumption. *Kucana*, 558 U.S. at 252 (citing *Catholic Social Services, Inc.*, 509 U.S., at 64).

The absence of any textual support in § 1429 to support a view that it strips jurisdiction effectively precludes treatment of that section as jurisdictional in nature.

C. There is no final finding of deportability against Mr. Aljabri.

Mr. Aljabri is not an alien "who ha[s] been ordered removed," because the *in absentia* order of removal against him triggered a motion to rescind, and an

appeal; and because the Board granted his appeal and remanded the matter to the Immigration Court for a new decision on removability. Mr. Aljabri believes that no finding of deportability is currently in effect against Mr. Aljabri; but at any event, any such finding would not be "final" on these facts.

An immigration judge entered a removal order against Mr. Aljabri, *in absentia*, on April 28, 2010, while he was in federal custody. App. 48 – 50. The legality of that order is suspect at best. *Cf.* 8 U.S.C. § 1229a(b)(5)(C)(ii) (rescission where *in absentia* order entered against someone in state or federal custody). A motion to rescind the *in absentia* order was filed by Mr. Aljabri, as required by § 1229a(b)(5)(C)(ii), on May 18, 2012, and when that motion was denied, Mr. Aljabri timely appealed to the Board of Immigration Appeals. *Id.*

On March 29, 2013, the Board granted his appeal of the denial of that rescission motion. Mr. Aljabri's case was remanded by the Board to the Immigration Court. *Id.* This case remains before the Immigration Court, which has not remedied the defect in its decision ordering Mr. Aljabri removed that was identified by the Board.

The government alleges Mr. Aljabri is subject to a final finding of deportability, divesting the District Court of jurisdiction over this matter. That was incorrect when initially argued, due to the pending appeal to the Board. Given the Board's decision in the appeal, it has even less support. Mr. Aljabri is subject to removal proceedings, but not to a final finding of deportability.

D. District Court jurisdiction would not be eliminated by an outstanding removal order.

Even if a final finding of deportability had been issued against Mr. Aljabri, the district court's jurisdiction would not be precluded by statute for all of the reasons noted *supra* at III(A).

The District Court's jurisdiction was conferred by 8 U.S.C. § 1447(b). "No more is necessary for subject-matter jurisdiction." *Klene*, 697 F.3d at 668. Nothing in § 1429 purports to eliminate federal court jurisdiction as such. Rather, § 1429 acts only as a limit to one particular remedy, i.e., naturalization itself.

The Courts of Appeals have treated similar language in § 1429 relating to ongoing court proceedings as non-jurisdictional in nature. *Zayed*, 368 F.3d at 906; *Bellajaro,* 378 F.3d at 1046; *Saba-Bakare,* 507 F.3d at 340; *Ajlani*, 545 F.3d at 237. This Court has agreed with that analysis in regards to the effect of ongoing removal proceedings. *Klene*, 697 F.3d at 668.

The reasoning in those cases is equally applicable to this portion of § 1429. In *Klene*, this Court found the District Court retained subject matter jurisdiction, noting that "Congress has authorized district courts to decide whether aliens are entitled to naturalization." *Id.*

Particularly where, as here, the Attorney General's denial of citizenship is premised wholly or in part of the existence of a removal order which likely does not exist, the District Court is not jurisdictionally barred from reviewing the matter.

E. Ongoing removal proceedings do not strip district court jurisdiction over naturalization matters.

As noted above, *Klene* has already held that § 1429 is not a jurisdiction-stripping provision, and thus, that initiation of removal proceedings do not cause the District Court to lose jurisdiction over a naturalization matter. 697 F.3d at 668. In *Klene*, the applicant for naturalization filed her action in district court under 8 U.S.C. § 1421(c) following the denial of her application for citizenship, but prior to the commencement of removal proceedings brought against her by DHS. In the current case, the sequence of events is different – Mr. Aljabri was placed in removal proceedings before he filed a federal action in District Court and his application for citizenship was denied following dismissal of his case by the District Court – but the jurisdictional holding in *Klene* cannot be distinguished from the instant case.

Section 1447(b) creates a cause of action in federal district court for applicants seeking naturalization to request review where the agency has failed to adjudicate an application for citizenship after 120 days. That section reads:

> (b) Request for hearing before district court
> If there is a failure to make a determination under section 1446 of this title before the end of the 120-day period after the date on which the examination is conducted under such section, the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter. Such court has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to the Service to determine the matter.

This section was enacted by Congress in order to provide recourse to applicants for citizenship whose applications languish before the agency. Just as 8 U.S.C. § 1421(c) created jurisdiction to hear naturalization appeals, and "[n]o more is necessary for subject-matter jurisdiction," *Klene*, 697 F.3d at 668,

8 U.S.C. § 1447(b) creates federal court jurisdiction to hear naturalization petitions after periods of agency inaction. Just as § 1429 prevents naturalization in the context of an appeal under 8 U.S.C. § 1421(c), so it bars naturalization after an action is filed under 8 U.S.C. § 1447(b).

In sum, nothing in § 1429 that causes the District Court to lose jurisdiction over a § 1447(b) action; under *Klene,* there can be no doubt that jurisdiction persists.

IV. A District Court Judge May Grant Appropriate Relief to § 1447(b) Petitioners Notwithstanding § 1429's Prohibition on Naturalization.

Section 1447(b) is a broad grant of federal court power, authorizing district court judges to exercise judgment and prudence in deciding (and deciding to decide) naturalization matters. It authorizes district courts to remand matters to the agency; to decide cases *de novo*; or to grant other remedies.

In *Klene*, the Court considered potential remedies in the context of an individual who filed an appeal of a naturalization denial, and was then placed into removal proceedings. *Klene* arose in a different posture from this case; in *Klene*, USCIS had denied naturalization on the merits, whereas here USCIS made no decision in this case at all until after the filing of this action. However, the remedies approved in *Klene* would be no less available in an action under § 1447(b).

In *Klene*, this Court agreed with the Third Circuit that "a declaratory judgment of entitlement to citizenship would not violate § 1429, because it

would not order the Attorney General to naturalize the alien while a removal proceeding was ongoing." 697 F.3d at 669.

Under § 1447(b), upon petition by a naturalization applicant whose case has remained undecided more than 120 days after the interview, a district court "has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to the Service to determine the matter." This is different in several respects from § 1421(c), governing a naturalization appeal, where "review shall be de novo, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo on the application." While § 1421 calls for *de novo* review generally, a § 1447(b) court has discretion to "*either* determine the matter or remand the matter." (Emphasis added). But to the extent that a district court exercised its discretion to "determine the matter" it would necessarily do so *de novo*, as there would be no agency determination to which deference might be accorded.

The calculus for whether to exercise discretion and to "determine the matter" might be different in § 1421(c) and § 1447(b) cases; both cases would require a federal court judge to "consider whether a multi-track course of litigation is the best way to resolve the dispute." *Klene*, 697 F.3d at 669. A judge considering a § 1421(c) case could decide to stay matters; a judge considering a § 1447(b) case could decide to remand the matter, to remand the matter with instructions, or to determine the case. Nevertheless, the declaratory judgment remedy found available in *Klene* in § 1421(c) cases would

have no different effect for a § 1447(b) petitioner than for a § 1421(c) petitioner. A petitioner in either circumstance would need to seek termination of the removal proceeding in order to actually naturalize, and a petitioner in either circumstance could seek discretionary termination of removal proceedings from an Immigration Judge under 8 C.F.R. § 1239.2(f) if armed with declaratory relief as to naturalization eligibility. *Gonzalez*, 678 F.3d at 260 ("[w]e are confident that the BIA would … accept the declaration of a district court properly exercising its jurisdiction under 8 U.S.C. § 1421(c).").

Thus, as a categorical matter, a district court in a § 1447(b) matter is not disabled from providing a real and substantial remedy to an applicant. The normal civil litigation rules will winnow claims and resolve most cases at a pretrial stage, assuming that a negotiated settlement is unavailable.

The Court need not decide the factors and considerations relevant to the exercise of district court jurisdiction in such a matter. In *Klene* the court was able to discern that questions about the legitimacy of Klene's marriage – upon which her immigration status was based – were in controversy and the resolution of that issue would dictate whether her citizenship application could be granted. *Klene,* 697 F.3d at 668. In *Gonzalez*, the Third Circuit found it appropriate to decide the matter based on the Congressional grant of authority, notwithstanding that the government prevailed on the substantive legal question. 678 F.3d at 261-64. The Court might well determine that the factors which led Congress to provide for § 1447(b) relief would support declaratory judgments in a variety of circumstances.

A. Section 1447 exists to prevent serious harm experienced by applicants for citizenship when their applications are left undecided.

Serious harm emanates from unadjudicated applications for citizenship. Applications pay a hefty filing fee for naturalization. The fee is currently $680. *See* N-400 Form Instructions, http://www.uscis.gov/files/form/n-400instr.pdf (last accessed May 26, 2013).

Delays in the adjudication of a citizenship application force applicants to remain in limbo. International travel is highly significant to many individuals born abroad, who may seek to visit family members living abroad, for births, funerals, and similar activities. *See Vartelas v. Holder*, 132 S.Ct. 1479, 1487-88 (2012). Naturalization applicants may not engage in lengthy travel abroad without abandoning their naturalization claims; any trip exceeding six months in lengths results in a presumption that the applicant's required residence was broken. 8 U.S.C. § 1427(b). Noncitizens cannot petition for certain family members until they are citizens and the wait for available visas for the family members they can petition for is significantly longer than it would be if they were petitioning as citizens. *Cf.* 8 U.S.C. § 1153 (quota system for spouses and children of permanent residents, permitting citizens to file petitions for married children and siblings); § 1151(b)(2)(A)(i) (spouses, children, and parents of U.S. citizens treated as immediate relatives, not subjected to quota). The Child Citizenship Act protects a child only if a parent naturalizes before the children turn 18. 8 U.S.C. § 1431. Delays in adjudication could require the child of an

applicant to ultimately file a separate application instead of deriving status through his or her parent.

In Mr. Aljabri's case, his application for citizenship had been pending for more than nine years. The incident that called into question his eligibility for naturalization occurred more than three years after he applied for citizenship. Section 1447 signals that USCIS is directed by Congress to naturalize eligible applicants in a timely manner, with federal court remedies available where it fails to timely act. USCIS is not authorized to leave applications pending indefinitely, until a possible basis for denial arises.

B. On these facts, even an outstanding removal order would not render a claim moot nor preclude the possibility of an effective remedy.

The removal order entered in this case is a powerful example of why a naturalization-related claim in District Court will often present a live case or controversy, to which a District Court could afford an effective remedy.

First, the removal order entered in this case illustrates the availability of administrative mechanisms to revisit removal orders entered against non-citizens. Where an *in absentia* removal order is entered against an individual while in federal custody, the statute permits a motion to rescind to be filed at any time. 8 U.S.C. § 1229a(b)(5)(C)(ii). Mr. Aljabri has in fact filed such a motion, and then took advantage of an administrative appeal to obtain relief from the removal order.

Second, the availability of declaratory relief in a federal action could affect the administrative agency's handling of the removal matter. For instance,

motions to reopen are generally within the sound discretion of the Immigration Court. *Kucana*, 558 U.S. at 242. A motion to reopen may be denied by the Immigration Court based on the Court's conclusion that ultimate relief is not likely to be granted. *I.N.S. v. Doherty*, 502 U.S. 314 (1992). The possibility of declaratory relief as to naturalization eligibility could play a significant role in the decision of an immigration judge whether to reopen or rescind a removal order, including, as in this case, a removal order entered improperly.

As this Court noted in *Klene*, "[p]arallel civil proceedings are common." 697 F.3d at 668. The fact that the Immigration Court or Board of Immigration Appeals is contemplating removal or has ordered removal does not render moot a finding about eligibility for citizenship by the District Court because a declaratory judgment by the court could affect the matter if reopened, and could affect the agency's decision whether to reopen the matter.

C. A declaratory judgment finding Mr. Aljabri *prima facie* eligible for citizenship could enable an Immigration Judge to terminate removal proceedings.

Under § 1429, Congress gives priority to deportation proceedings, "prohibit[ing] naturalization or the holding of final hearings on naturalization petitions where deportation proceedings were instituted." *Shomberg v. United States*, 348 U.S. 540, 544 (1955). However, as early as 1955, the BIA recognized "the anomalous situation where" a deportable immigrant might actually be eligible to naturalize had deportation proceedings not been filed against him. *See In re B*, 6 I. & N. Dec. 713, 721 (BIA 1955) (vacated by the Attorney General to grant a different form of relief). As one form of relief

available to immigrants in these situations, the BIA pointed to "inherent authority in the Attorney General to terminate deportation proceedings for the limited purpose of permitting the alien to file a petition for naturalization and to be heard thereon by a naturalization court." *Id.* at 720.

Current regulations at 8 C.F.R. § 1239.2(f) allow immigration judges to terminate removal proceedings to permit immigrants to petition for naturalization:

> An immigration judge may terminate removal proceedings to permit the alien to proceed to a final hearing on a pending application or petition for naturalization when the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors * * *.

8 C.F.R. § 1239.2(f). A declaratory judgment from the District Court as to naturalization eligibility could thus support termination of removal proceedings by the Immigration Court to permit naturalization, if the IJ found the matter to involve "exceptionally appealing or humanitarian factors."

Though the Board declines to permit itself or IJs judges from making *prima facie* determinations, the BIA has recognized the declarations of federal district courts as allowing termination under this section. *Matter of Cruz*, 15 I. & N. Dec. 236 (BIA 1975) ("We hold that prima facie eligibility may be established by… a declaration of a court that the alien would be eligible for

naturalization but for the pendency of the deportation proceedings or the existence of an outstanding order of deportation.")[4]

The BIA revisited *Cruz*'s subsidiary holding "that a declaration by a district court could establish an alien's prima facie eligibility for naturalization" and determined that it "does not accurately reflect the current state of naturalization law." *Matter of Hidalgo*, 24 I. & N. Dec. 103, 105 (BIA 2007). However, the BIA is not an authoritative interpreter of federal court jurisdiction over naturalization matters, and the BIA has never held that it

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[4] The phrase "prima facie" has a well-established meaning in law. As an adjective, it means "[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted." Black's Law Dictionary 1228 (8th ed. 2004). As an adverb, "prima facie" means "[a]t first sight; on first appearance but subject to further evidence or information." *Id.* "Eligible," in turn, means "[q]ualified, as for an office or position," Webster's II, New College Dictionary 372 (3d ed. 2005), which is to say "[h]aving met the requirements," id. at 926 (definition of "qualified"). Putting the two together, "prima facie eligibility" is simply a facial showing of meeting the requirements for naturalization that is enough to shift to the other side—i.e., the government—the burden of going forward with the case. *Cf. Berenyi v. Dist. Dir. INS*, 352 F.2d 71, 73 (1st Cir. 1965) ("'Prima facie' evidence does not shift the burden of proof, but it did impose a burden on the government of going forward." (internal citation omitted)). So understood, "prima facie eligibility" is no different from the term "prima facie case," which is either "[t]he establishment of a legally required rebuttable presumption" or "[a] party's production of enough evidence to allow the fact- trier to infer the fact at issue and rule in the party's favor." Black's Law Dictionary, supra at 1228.

A "petitioner for naturalization makes a prima facie case by his sworn petition and the affidavits of his witnesses." *Krausse v. United States*, 194 F.2d 440, 442 (2d Cir. 1952); accord *Berenyi*, 352 F.2d at 73 ("The petitioner's oath subscribing to his petition [for naturalization] made out a prima facie case that his character was good."). Again, no affirmation, or anything else for that matter, is required from the naturalization authorities. Instead, "a prima facie showing is made when the facts asserted, if later proven in a full hearing, would establish eligibility." *In re Velarde-Pacheco*, 23 I. & N. Dec. 253, 262 (BIA 2002) (Rosenberg, B.M., concurring) (citing *In re Coelho*, 20 I. & N. Dec. 464, 473 (BIA 1992), as an example of "tying prima facie eligibility to statutory eligibility").

would disregard a district court finding that an individual was *prima facie* eligible for naturalization. Requiring merely a showing of *prima facie* eligibility to terminate removal proceedings, the § 1239.2(f) regulation calls only for a demonstration that an applicant *can meet* the statutory criteria for naturalization, not that the applicant *has already met* them. The criteria themselves are spelled out in 8 C.F.R. § 316.2 (*e.g.*, minimum age of 18, minimum five years as a lawful permanent resident, good moral character), and their satisfaction can be asserted before an IJ by, for example, submitting a signed Form N-400 application for naturalization, *id.* § 316.4(a)(1). *Prima facie* eligibility is a matter within the capacity of a District Court to reach and decide.

To the extent that the *prima facie* requirement in 8 C.F.R. § 1239.2(f) were found to require a communication from DHS, it would effectively nullify the regulation by allowing DHS a pocket veto over the regulation's applicability. *Bahramizadeh*, 717 F.2d at 1173. "DHS is not required to articulate any objection to prima facie eligibility or to the strength of the humanitarian factors in the case. An immigrant's request is doomed by the mere refusal of the DHS to respond." *Matter of Hidalgo,* 24 I. & N. Dec. at 109 (Filppu, B.M., concurring and dissenting). DHS, however, already has discretion to seek termination of removal proceedings without regard to naturalization eligibility. 8 C.F.R. §§ 239.2(a), (c); 1239.2(a), (c). See *Ahmed v. Gonzales*, 432 F.3d 709, 711 (7th Cir. 2005). The Board's view tends to turn 8 U.S.C. § 1239.2(f) into a duplicative section, which would indicate redundancy. *Cf. United States v.*

Berkos, 543 F.3d 392, 396 (7th Cir. 2008) ("We avoid interpreting a statute in a way that renders a word or phrase redundant or meaningless."). As courts have recognized in other contexts, DHS's expertise "does not justify the imposition of a mechanism by which the DHS, an adversarial party in the proceeding, may unilaterally block [a request for discretionary relief] for any or no reason, with no effective review by the BIA." *Melnitsenko v. Mukasey*, 517 F.3d 42, 51 (2d Cir. 2008); *accord Sarr v. Gonzales*, 485 F.3d 354, 363 (6th Cir. 2007) ("Obviously, affording such importance to [DHS's opposition] would effectively remove all [discretionary] authority * * * by the Board and place it solely within the hands of one of the adversarial parties to the proceedings.").

Allowing declaratory judgment relief could allow the regulation to have independent force, and ameliorate many of these concerns.

V. The Matter Should be Remanded to the District Court to Permit the Court to Consider whether to Exercise its Authority Under § 1447(b).

Because the District Court erroneously found it had no jurisdiction over this matter, Mr. Aljabri's case should be remanded with instructions for the District Court to consider whether to issue a declaratory judgment regarding Ms. Aljabri's eligibility for naturalization.

A. The District Court could determine whether Mr. Aljabri is barred from naturalization for commission of an aggravated felony.

The decision USCIS issued purporting to deny Mr. Aljabri's application for citizenship held that Mr. Aljabri was barred from naturalization (a) because he had a final finding of deportability, and (b) based on its conclusion that his

convictions under 31 U.S.C. § 5324(a)(3) for "Structuring transactions to evade reporting requirement" was an aggravated felony under 8 U.S.C. § 1101(a)(43)(M). As noted infra, III(C), the purportedly final finding of deportability was not final then, and was subsequently overturned by the Board of Immigration Appeals.

Nor is the latter legal conclusion accurate. Various courts have examined the structuring statute and found that it does not require fraud or deceit. The Ninth Circuit held that "[t]he offense of structuring financial transactions to avoid currency reports ... does not involve the use of false statements or counterfeit documents,[ ]or [the obtaining of] anything from the government," and thus that "fraud is not inherent in the nature of this offense." *Goldeshtein v. INS*, 8 F.3d 645, 648 (9th Cir. 1993). The Board of Immigration Appeals agreed in *Matter of L–V–C–*, 22 I. & N. Dec. 594, 602 (BIA 1999) ("not all currency structuring is inevitably nefarious, inherently fraudulent, or damaging to the Government").

Fraud or deceit convictions may be aggravated felonies depending on the amount of loss. 8 U.S.C. § 1101(a)(43)(M). USCIS found that Mr. Aljabri's structuring convictions fit within that definition, as involving fraud or deceit, or income tax fraud upon the United States Government. App. 43 – 47. But the structuring statute is violated without any requirement of fraud, and without any requirement of loss of income tax revenue. 31 U.S.C. § 5324(a)(3) (requiring only that the defendant act "for the purpose of evading the reporting requirements of section 5313(a) or 5325").

As noted above, under the Board's precedential decisions in *Matter of Cruz*, 15 I. & N. Dec. 236 (BIA 1975) and *Matter of Hidalgo*, 24 I. & N. Dec. 103, 106 (2007), the Board considers itself unable to determine *prima facie* eligibility for a naturalization applicant, or to go behind the determination of USCIS or a competent court. Thus, the Board would apparently consider itself bound in removal proceedings to defer to the obviously incorrect determination of USCIS in this case. A district court might legitimately exercise its jurisdiction to reject this reasoning.

USCIS did not rely upon Mr. Aljabri's convictions for wire fraud to deny his naturalization application; but the district court could also consider whether any of those convictions would be an aggravated felony, or whether any other bars to a showing of good moral character would apply. *Cf*. 8 U.S.C. § 1101(f).

B. The District Court could determine whether the Government had a duty to transmit a naturalization certificate and the information necessary for an oath ceremony, and whether it was precluded from reopening the naturalization matter.

Mr. Aljabri argued to the District Court that the Government had a duty to forward his information and a naturalization certificate to the District Court within 10 days of approval of his application, so as to facilitate his oath. App. 1 – 10. He also argued that the Government may not now reopen the naturalization approval. *Id.* A ruling for Mr. Aljabri on these points would establish his *prima facie* eligibility for naturalization, and would authorize an

Immigration Court to terminate proceedings against him under 8 C.F.R. § 1239.2(f).

Under 8 U.S.C. § 1421(b)(1), when an applicant for naturalization "notif[ies] the Attorney General of the intent to be naturalized before the court," the Attorney General (now USCIS) "shall forward to the court (not later than 10 days after the date of approval of an application for naturalization in the case of a court which has provided notice under paragraph (1)(B)) such information as may be necessary to administer the oath of allegiance under section 1448(a) of this title, and … shall promptly forward to the court a certificate of naturalization (prepared by the Attorney General)."

Mr. Aljabri's complaint properly alleges, App. 6, para 28, that he was told by a USCIS agent that his application had been approved; and that the same information was repeated to him a year later. App. 6, para 30. This allegation is taken as true for purposes of this appeal. *Carroll v. Morrison Hotel Corp.*, 149 F.2d 404, 406 (7th Cir. 1945).

If USCIS approved the application for citizenship, it likely violated its duty under the statute to forward to a court the information necessary for the oath of allegiance, and a prepared certificate of naturalization. *See*, *e.g.*, *Escaler v. U.S. Citizenship and Immigration Services*, 582 F.3d 288, 293 (2d Cir. 2009) (denying claim for failure to exhaust administrative remedies); *Baidas v. Jenifer*, 123 Fed.Appx. 663, 670-71 (6th Cir. 2005). Regulations require USCIS to schedule an oath ceremony, and then, if necessary, to reopen the matter for consideration of new, derogatory information. 8 C.F.R. §§ 335.5; 334.5(b).

The District Court has not yet had an opportunity to consider whether the violation of statute could support a grant of prospective or retrospective relief. It might, for instance, find the oath that Mr. Aljabri would have signed at the conclusion of the N-400 examination could suffice as to the public oath require by statute. Cf. *Escaler*, 582 F.3d at 290 (appellant signed document which contained the text of the oath to be used at naturalization ceremonies, but "whether it was a "public" ceremony… [is] not clear."); 8 U.S.C. § 1448(a).

Alternately, the district court could consider whether agency anti-retroactivity principles would afford it the power to decline to apply the law prospectively to encompass Mr. Aljabri's subsequent conduct. *See*, *e.g.*, *Greene v. United States*, 376 U.S. 149, 160 (1964) (finding that individual "obtained the requisite final, favorable determination" where the Government "had acted without authority in denying" relief, and therefore declining to apply law then in effect to individual).

Further, the District Court could consider how the required good moral character periods for naturalization would be affected in the context of agency failure to follow the law. By statute, Mr. Aljabri was required to demonstrate good moral character for a period of two years and nine months, and then for the period between his application and his public oath ceremony. 8 U.S.C. § 1427(a)(3) (requiring good moral character during periods referenced in (a)(1)); 8 U.S.C. § 1430(a) (shortening required period from five to three years for the spouse of a U.S. citizen); 8 U.S.C. § 1445(a) (allowing noncitizens applying under § 1427(a) or § 1430 to apply three months early). Due to the Agency's

failure to adjudicate his claim in a timely manner, the period of good moral character expanded to over 13 years, over four times the length intended to be required by Congress. The Court, following the Board of Immigration Appeals, found the good moral character requirement for Cancellation of Removal, See 8 U.S.C. § 1229b(b)(1)(A)–(B), ambiguous in light of interlocking statutory requirements. *Duron-Ortiz v. Holder*, 698 F.3d 523, 527 (7th Cir. 2012) (deferring to *Matter of Ortega–Cabrera,* 23 I & N. Dec. 793 (BIA 2005)). The rule adopted there – amongst the three options discussed – was that the good moral character period would be counted backwards from adjudication. The Court does not defer to agency interpretations in the naturalization context, *O'Sullivan v. U.S. Citizenship and Immigration Services*, 453 F.3d 809, 811–12 (7th Cir. 2006), and the Court might find a resolution other than that adopted by the Board in *Ortega-Cabrera* to be better in keeping with the statutory purpose. If the District Court looked to good moral character only for the statutory pre-application period through the time that USCIS approved the application, it might find Mr. Aljabri eligible for naturalization at this point.

The Court need not decide these matters in the first instance. Given that the District Court dismissed this matter without full briefing, without a hearing, and on an erroneously cramped view of its jurisdiction, the Court should remand the matter to District Court for full briefing.

CONCLUSION

For the foregoing reasons, Plaintiff's appeal should be sustained and his case remanded to the District Court for consideration of his naturalization

claim. The district court should determine whether relief – including the possibility of a declaratory judgment – is warranted in this matter.

Dated: May 31, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned attorney for Plaintiff certifies that the foregoing brief

(i) complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B) because it contains 9,371 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as supplemented by Circuit Rule 32(b), because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 12-point Bookman Old Style.

Dated: May 31, 2013

/s/ Charles Roth
Charles Roth

CIRCUIT RULE 30(d) CERTIFICATE

Pursuant to Circuit Rule 30(d), the undersigned hereby certifies that all materials required by Circuit Rules 30(a) and (b) are included in the Required Short Appendix bound with the brief.

Dated: May 31, 2013

/s/ Charles Roth

Charles Roth

CERTIFICATE OF SERVICE

I hereby certify that on this 31ST day of May 2013, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Charles Roth
Charles Roth