No. 12-1229

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, District Director of the Chicago Field Office of U.S. Citizenship and Immigration Services,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
Case No. 1:11-cv-00793
The Honorable Judge Charles R. Norgle, Sr.

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INTRODUCTION

This is an immigration case. Plaintiff-Appellant Salem Fuad Aljabri ("Mr. Aljabri") sought a declaration of U.S. citizenship and stay of execution of a final order of removal until a decision was made on his naturalization application. The case is on appeal from the Northern District of Illinois, Eastern Division, where the district court erroneously *sua sponte* dismissed the case for lack of subject-matter jurisdiction under 8 U.S.C. § 1252(a)(2)(B)(ii). On September 17, 2012, this Court asked both parties to submit new briefs and appointed counsel for Mr. Aljabri. After the district court dismissed this case on April 20, 2011, the record materially changed. Defendant-Appellee U.S. Citizenship and Immigration Services ("USCIS") provided Mr. Aljabri with the decision he was seeking in filing this suit – an adjudication of his naturalization application. The application was denied on May 3, 2012. Because USCIS had concurrent jurisdiction to consider the application at the time that it issued its denial, this case is now moot.

If the Court finds that the case is not moot, it should remand the case with instructions limited to the basis of dismissal relied upon by the district court. Remand is proper because USCIS agrees that the district court's basis for dismissal was erroneous and because 8 U.S.C. § 1429 does not strip jurisdiction from the district court. Additionally, this Court should remand the case to the district court to review the updated record and entertain applicable motions from both parties, which they previously were unable to file before the district court dismissed the case *sua sponte*.

The court should not remand with instructions for the district court to provide declaratory relief as Mr. Aljabri has requested. Section 1429, while not jurisdictional, precludes the Court or the district court from issuing a decision on Mr. Aljabri's application and declaratory relief is not

proper in this case brought under 8 U.S.C. § 1447(b). Even if declaratory relief were proper, Mr. Aljabri is not entitled to the exercise of discretion. Mr. Aljabri was convicted of nine counts of wire fraud and is permanently and statutorily barred from naturalizing.

COUNTER-JURISDICTIONAL STATEMENT

Mr. Aljabri's jurisdictional statement is incomplete and incorrect. On February 3, 2011, Mr. Aljabri filed this action, *pro se*, in district court seeking adjudication of his Form N-400, Application for Naturalization. USCIS contends that the only proper statute providing jurisdiction to Mr. Aljabri's claim is 8 U.S.C. § 1447(b), which he failed to cite in his complaint. Because USCIS adjudicated his Form N-400 on May 3, 2012, the case is now moot and the district court now lacks jurisdiction to consider Mr. Aljabri's cause of action under 8 U.S.C. § 1447(b).

Until the case became moot on May 3, 2012, jurisdiction in this Court was proper under 28 U.S.C. § 1291. Mr. Aljabri's appeal is timely. The district court entered its judgment on April 20, 2011. On May 5, 2011, Mr. Aljabri filed a timely motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). On January 10, 2012, the district court entered a written opinion denying Mr. Aljabri's motion under Rule 59(e). Mr. Aljabri thereafter had until March 12, 2012 to file an appeal of the judgment and order dismissing the motion to alter or amend the judgment. Mr. Aljabri's filed his timely appeal on January 27, 2012.

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, his predecessor. Lori Pietropaoli, the current District Director of the Chicago Field Office of USCIS, is similarly substituted for Kamsing Lee.

COUNTER-STATEMENT OF THE ISSUES

I. Whether Mr. Aljabri's claims are moot because USCIS adjudicated his application for naturalization on May 3, 2012.

II. In the alternative, 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, as Mr. Aljabri had been ordered removed when this case was pending before the district court.

III. In the alternative, whether this case should be remanded based on changed circumstances and for failure to perfect service under Federal Rule of Civil Procedure 4(i) prior to the district court's *sua sponte* dismissal.

IV. Whether declaratory relief is inappropriate for claims brought under 8 U.S.C. § 1447(b) by aliens who have been ordered removed or are subject to removal proceedings.

STATEMENT OF THE CASE

Mr. Aljabri filed his complaint with the U.S. District Court for the Northern District of Illinois on February 3, 2011. Appellants' Appendix (hereinafter "App.") 1-10. He asked the court to "declare him a United States citizen and prevent the [Department of Homeland Security] and Defendants from initiating any deportation proceedings until this matter is resolved." App. 10. On April 20, 2011, the district court *sua sponte* dismissed the complaint with prejudice for lack of subject-matter jurisdiction. App. 11-12. On May 5, 2011, Mr. Aljabri filed a motion under Federal Rule of Civil Procedure 59(e) to alter or amend the judgment of dismissal. App. 13-16. On January 10, 2012, the district court denied Mr. Aljabri's motion to amend, again finding that it lacked subject-matter jurisdiction to consider his cause of action. App. 17-18. On

January 27, 2012, Mr. Aljabri filed a notice of appeal with the district court, and this Court docketed the appeal on January 30, 2012. *See* Dkt. No. 1.

FACTUAL BACKGROUND

Mr. Aljabri is a native of Jordan. App. 4. He entered the United States in 2000 as a lawful permanent resident as the spouse of a U.S. citizen. *Id.* On February 4, 2003, he filed a Form N-400 Application for Naturalization ("Form N-400") with USCIS that is at issue in this case. App. 44. USCIS conducted an interview with Mr. Aljabri as a step towards adjudication of the Form N-400 on July 31, 2003. *Id.* At no point has USCIS ever approved Mr. Aljabri's naturalization application, nor did he ever take the Oath of Allegiance required to become a U.S. citizen. *See* App. 43-45. Instead, as discussed below, USCIS denied Mr. Aljabri's Form N-400 on May 3, 2012. *Id.*

Beginning in March 2003, one month after Mr. Aljabri filed his Form N-400, he engaged in food stamp fraud, purchasing benefits from program participants at a discounted cash price. App. 35. Mr. Aljabri later redeemed over $1,000,000 in program benefits. *Id.* On August 8, 2006, the United States charged Mr. Aljabri with nine counts of wire fraud in violation of 18 U.S.C. § 1343, five counts of money laundering in violation of 18 U.S.C. § 1957(a)(1)(A)(i), and eleven counts of structuring under 31 U.S.C. § 5324(a)(3). App. 7, 34-35. After a jury in the U.S. District Court for the Northern District of Illinois returned a guilty verdict on all 24 counts submitted to the jury, Mr. Aljabri was sentenced to a prison term of 90 months. App. 20, 34. Mr. Aljabri appealed the sufficiency of the evidence supporting the money-laundering and structuring convictions. App. 34-35. On February 2, 2010, this Court entered a final judgment vacating the money-laundering convictions, but affirming the structuring convictions. App. 40. Mr. Aljabri did not challenge the nine counts of wire fraud. App. 34-35. This Court remanded

to the district court for resentencing on the nine wire fraud counts and the ten structuring counts and the district court resentenced Mr. Aljabri to 84 months on June 17, 2011. App. 40; Amended Judgment, *United States v. Aljabri*, No. 1:06-cr-00562, Dkt. 155 (N.D. Ill. Jun. 17, 2011) (Supplemental App. 1–4).[1] Mr. Aljabri served his sentence at the Big Spring Correctional Facility in Big Spring, Texas, from December 28, 2007 until November 29, 2012.[2] Supplemental App. 12–15.

On February 12, 2008, during his penal confinement, U.S. Immigration and Customs Enforcement issued a Notice to Appear to Mr. Aljabri, initiating removal proceedings against him. App. 31-33. The Notice to Appear indicated that Mr. Aljabri was subject to removal from the United States under 8 U.S.C. § 1227(a)(2)(A)(iii) for being convicted of an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(M). App. at 33. On April 28, 2010, the Dallas Immigration Court ordered Mr. Aljabri to be removed *in absentia* from the United States based on his aggravated felony convictions. App. 41-42. Mr. Aljabri was ordered removed *in absentia* because he refused to leave his cell to attend his immigration proceedings. App. 44.

On May 3, 2012, USCIS denied Mr. Aljabri's naturalization application. App. 43-47. USCIS concluded that Mr. Aljabri was not eligible to naturalize on three independent bases. App. 44-45. First, it denied his application because Mr. Aljabri was no longer a lawful permanent resident because he was subject to a final removal order for which he waived his right

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[1] The U.S. District Court for the Northern District of Illinois issued a second Amended Judgment on April 24, 2012. The judgment was issued to correct a clerical mistake, modifying the total special assessment from $2,400 to $1,900. Mr. Aljabri's convictions and 84-month sentence were unchanged. Amended Judgment, *United States v. Aljabri*, No. 1:06-cr-00562, Dkt. 167 (N.D. Ill. Apr. 24, 2012) (Supplemental App. 5–7).

[2] Mr. Aljabri has also filed a habeas petition on September 14, 2012, in the U.S. District Court for the Northern District of Illinois further challenging his convictions. *See* Complaint, *United States v. Aljabri*, No. 1:12-cv-07380 (N.D. Ill. Sept. 14, 2012).

to appeal. App. 44. Second, it denied Mr. Aljabri's naturalization application because he was convicted of an aggravated felony as defined in 8 U.S.C. § 1101(a)(43), so he was unable to demonstrate good moral character and is permanently ineligible for naturalization. App. 44-45. Third, it found that Mr. Aljabri was ineligible to naturalize under 8 U.S.C. § 1429 because he was subject to a final outstanding order of removal. App. 45.

On November 14, 2012, the Dallas Immigration Court denied Mr. Aljabri's motion to reopen and terminate his removal proceedings. App. 49. Mr. Aljabri then appealed this denial to the Board of Immigration Appeals, which remanded the record for further proceedings to the Immigration Judge on March 29, 2013. App. 49–50. On June 10, 2013, the Dallas Immigration Court ordered Mr. Aljabri removed from the United States. Supplemental App. 8–9. Mr. Aljabri reserved appeal and submitted his Notice of Appeal to the Board of Immigration Appeals on July 8, 2013, in advance of the July 10, 2013 deadline. Supplemental App. 10.

SUMMARY OF THE ARGUMENT

The Court should dismiss this case because it is moot. Mr. Aljabri filed his complaint seeking adjudication of his Form N-400 naturalization application, though he failed to cite 8 U.S.C. § 1447(b) in his complaint. App. 1. After the district court dismissed the suit, USCIS adjudicated Mr. Aljabri's N-400 naturalization application on May 3, 2012, which provides him with the final resolution he was seeking in his complaint. USCIS's denial was proper because the agency maintained jurisdiction to consider Mr. Aljabri's naturalization application after it was dismissed by the district court, and because Mr. Aljabri was barred from naturalization based on his criminal convictions and subject to a final removal order at the time that USCIS issued its denial.

If the Court finds that the case is not moot, it should remand the case to allow the district court to review the changed factual record and to permit USCIS to respond to Mr. Aljabri's complaint with applicable motions, since USCIS was not served before the district court erroneously dismissed the case *sua sponte*.

If the Court remands, it should do so with instructions only as to the district court's basis of dismissal. Declaratory relief is not proper under the facts in this case. While this Court in *Klene v. Napolitano*, 697 F.3d 666 (7th Cir. 2012), held that declaratory relief was available where a final decision had been made on a naturalization application and review was sought under 8 U.S.C. § 1421(c), declaratory relief is not proper in a case filed under 8 U.S.C. § 1447(b). Declaratory relief is particularly inappropriate where an alien files a suit under 8 U.S.C. § 1447(b) after removal proceedings have already been initiated, as Mr. Aljabri did in this case.

If the Court determines that declaratory relief is available to Mr. Aljabri, he is in no way entitled to it. Mr. Aljabri is subject to a permanent, statutory bar from naturalizing under 8 U.S.C. § 1101(f)(8) because he was convicted of nine counts of wire fraud, an aggravated felony. Mr. Aljabri began unlawfully purchasing food-stamp benefits from program recipients in March 2003, one month after he filed his Form N-400 and four months before he was interviewed. Had Mr. Aljabri's naturalization application been adjudicated within 120 days of that interview, he could not have shown that he had the requisite good moral character because he had already committed wire fraud, an aggravated felony for which he was later convicted, and is therefore statutorily precluded from naturalizing. Moreover, Mr. Aljabri served 180 days or more in penal confinement during the statutory good moral character period, which independently prevents Mr.

Aljabri from naturalizing based on his February 4, 2003 naturalization application. 8 U.S.C. § 1101(f)(7).

ARGUMENT

I. Standard of Review

The Court reviews *de novo* a district court's decision to dismiss an action for lack of subject-matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. *Transit Exp., Inc. v. Ettinger*, 246 F.3d 1018, 1023 (7th Cir. 2001); *see also Long v. Shorebank Development Corp.*, 182 F.3d 548, 554 (7th Cir. 1999) (reviewing *de novo* a district court's decision to dismiss claims – including the *sua sponte* dismissal of some claims – for lack of subject-matter jurisdiction).

II. Statutory Background

Certain aliens may apply to become naturalized citizens of the United States and, under 8 U.S.C. § 1421(a), only the Attorney General has the authority, delegated to USCIS, to naturalize an alien. The Supreme Court has declared that "[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with." *United States v. Ginsberg*, 243 U.S. 472, 475 (1917). For a lawful permanent resident to naturalize, "there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship." *Fedorenko v. United States*, 449 U.S. 490, 505 (1981). Generally, aliens who were lawfully admitted to permanent residence and who have held lawful permanent resident status for at least five years may apply. 8 U.S.C. § 1427(a). Aliens who have obtained their lawful permanent resident status "by reason of his or her status as a spouse or child of a United States citizen" may be naturalized if they have held their lawful permanent resident status for at least three years and have resided continuously in the United States during that period. 8 U.S.C. § 1430(a).

Aliens must also demonstrate, *inter alia*, that they have good moral character for at least three years before filing the Form N-400 naturalization application and from the date of the Form N-400 filing to the administration of the Oath of Allegiance. 8 U.S.C. § 1427(a). Aliens who have committed an aggravated felony on or after November 29, 1990, are statutorily unable to demonstrate good moral character and permanently ineligible for naturalization. *See* 8 U.S.C. §§ 1001(f)(8), 1427(a); 8 C.F.R. § 316.10(b)(1)(ii). "[A]n offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," such as wire fraud in excess of $10,000, constitutes an aggravated felony that permanently prevents an applicant from demonstrating good moral character. 8 U.S.C. § 1101(a)(43)(M). Additionally, aliens who have been confined as a result of a conviction for 180 days or more in penal confinement during the statutory good moral character period preceding the Form N-400 filing or during the period from the filing date to the administration of the Oath of Allegiance cannot demonstrate that they possess the requisite good moral character to naturalize. *See* 8 U.S.C. §§ 1001(f)(7), 1427(a); 8 C.F.R. § 316.10(b)(2)(v).

If USCIS does not adjudicate an alien's Form N-400 application within 120 days of the date on which the examination is conducted, the alien may seek a hearing in the district court in which the alien resides. 8 U.S.C. § 1447(b). The district court may "either determine the matter or remand the matter, with appropriate instructions" to USCIS to determine the matter. *Id.* Under 8 U.S.C. § 1429, however, "no person shall be naturalized against whom there is outstanding a final finding of deportability" and "no application for naturalization shall be considered" by USCIS if removal proceedings are pending against the alien applicant. *Id.*

III. The Court Lacks Subject-Matter Jurisdiction to Consider the Case Because It Is Moot.

In his complaint, Mr. Aljabri sought adjudication on his naturalization application. USCIS provided that adjudication when it denied Mr. Aljabri's application on May 3, 2012. App. 43–47. Because USCIS has issued a final decision on Mr. Aljabri's naturalization application, this case is now moot. *Id.* Mr. Aljabri alleged in his complaint that USCIS had a duty to adjudicate his naturalization application. App. 9. He asked the district court to "declare him a United States citizen and prevent DHS and Defendants from initiating any deportation proceedings until this matter is resolved." App. 10. Because this matter is now resolved, the case is moot and should be dismissed for lack of subject-matter jurisdiction.

A. Mr. Aljabri's Case Is Moot Because It No Longer Presents a Live Case or Controversy.

A valid case or controversy must exist at all stages of appellate review. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950). Article III of the U.S. Constitution limits this Court's jurisdiction to "live cases and controversies." *Stotts v. Community Unit School Dist. No. 1*, 230 F.3d 989, 990 (7th Cir. 2000); *see also Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978) ("Constitutional limitations on federal jurisdiction make federal courts 'courts of limited jurisdiction.'"). "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) (internal citation and some quotation marks omitted); *Powell v. McCormack*, 395 U.S. 486, 496 (1969); *see also Ayyoubi v. Holder*, 712 F.3d 387, 391 (8th Cir. 2013) ("A court is without power to adjudicate disputes in the absence of a case or controversy.").

Where there is no longer any controversy, an Article III court lacks subject-matter jurisdiction because a controversy must exist at all stages of litigation. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 45 (1997). "This [C]ourt, like all federal courts, has a continuing obligation to determine whether it has subject-matter jurisdiction over the disputes coming before it." *Christianson v. Colt Indus. Operating Corp.*, 798 F.2d 1051, 1055 (7th Cir. 1986); *see also Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (holding that "every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it") (internal quotation marks omitted). This Court has held that if a case becomes moot while on appeal, the Court loses its jurisdiction to decide the merits of the action and should dismiss the case. *Bd. of Educ. v. Nathan R.*, 199 F.3d 377, 380-81 (7th Cir. 2000); *Stotts*, 230 F.3d at 991 (holding that "[w]hen a case is moot, it must be dismissed as non-justiciable").

This case became moot after USCIS adjudicated Mr. Aljabri's naturalization application. *See, e.g., Xie v. Mukasey*, 575 F. Supp. 2d 963, 963 (E.D. Wis. 2008) (dismissing complaint as moot after USCIS adjudicated naturalization application as requested); *Bashkin v. Keisler*, No. 06-C-2518, 2008 WL 4866352 (N.D. Ill. June 13, 2008) (same).

There are two narrow exceptions to the mootness doctrine, neither of which applies here because if Mr. Aljabri again applies for naturalization, USCIS will not likely need to delay the adjudication of a subsequent application. *See Walsh v. U.S. Dep't of Veterans Affairs*, 400 F.3d 535, 537 (7th Cir. 2005) (finding neither exception applied when the Department of Veterans Affairs eventually produced plaintiff's entire administrative file). First, a district court may entertain a moot case if it arises from a situation that is "capable of repetition, yet evading

review." *United States v. Peters*, 754 F.2d 753, 757-58 (7th Cir. 1985). Voluntary cessation of allegedly illegal conduct, the second exception, does not render a case moot unless the defendant can "demonstrate that 'there is no reasonable expectation that the wrong will be repeated.'" *Milwaukee Police Ass'n v. Jones*, 192 F.3d 742, 747 (7th Cir. 1999) (quoting *DiGiore v. Ryan*, 172 F.3d 454, 466 (7th Cir. 1999)). Here, Mr. Aljabri will never be eligible to naturalize because of his nine aggravated felony convictions. Supplemental App. 5–7. Mr. Aljabri's claim for relief, *i.e.*, the final adjudication of his naturalization application and an oath ceremony to become a United States citizen, is not capable of repetition under the current facts and circumstances. Mr. Aljabri's naturalization application has been denied, and unless he successfully appeals the denial under 8 U.S.C. § 1447(a) and 8 U.S.C. § 1421(c), he will be permanently barred from naturalizing on account of his aggravated felony conviction. App. 42. Moreover, the Dallas Immigration Court has ordered him removed from the United States, although the order is not yet final. Supplemental App. 8–9. Under any scenario, the facts and circumstances of any future attempt by Mr. Aljabri to naturalize would be different than those facts alleged in the complaint.

Mr. Aljabri can assert no reasonable expectation that his claims may be considered capable of repetition. There is no longer a "live" controversy affecting Mr. Aljabri, and he lacks a legally cognizable interest in the outcome. Thus, his claims are moot, this Court lacks subject-matter jurisdiction, and this case should be dismissed.

B. USCIS's Denial of Mr. Aljabri's Form N-400 Was Proper Because USCIS Maintained Concurrent Jurisdiction over His Naturalization Application.

This Court should find that when USCIS adjudicated Mr. Aljabri's Form N-400, USCIS properly had concurrent jurisdiction under 8 U.S.C. §1447(b) to do so. This Court has not decided the question, but has indicated that, in the immigration context, concurrent review is

sometimes apt. *See Doctors Nursing & Rehab. Ctr. v. Sebelius*, 613 F.3d 672, 678 (7th Cir. 2010) (citing *Gao v. Gonzales*, 464 F.3d 728 (7th Cir. 2006)). In *Sebelius*, this Court distinguished the Department of Health and Human Services reopening a Medicare reimbursement claim from a deportation order reopened by the Board of Immigration Appeals. *Id.* at 678. In the latter immigration scenario, this Court held that "because the petitioner had challenged only the agency's refusal to reopen his case, there was no more relief that the court could have granted once the agency itself decided to give the petitioner the very thing he was asking of the court." *Id.* In this instant action, USCIS has given Mr. Aljabri "the very thing" – adjudication of his naturalization application – he is asking of this Court. *See id.* Since the agency provided Mr. Aljabri with the adjudication he demands, the Court should find that this case is moot and dismiss for lack of subject-matter jurisdiction.

The Second, Fourth, and Ninth Circuits have concluded that district courts have exclusive jurisdiction in 8 U.S.C. §1447(b) cases. *Bustamante v. Napolitano*, 582 F.3d 403, 408 (2d Cir. 2009); *Etape v. Chertoff*, 497 F.3d 370, 383 (4th Cir. 2007); *United States v. Hovsepian*, 359 F.3d 1144, 1164 (9th Cir. 2004) (*en banc*). District courts in the Seventh Circuit have split on the issue. At least one court has held that USCIS maintains concurrent jurisdiction. *See Xie v. Mukasey*, 575 F. Supp. 2d 963 (2008). Others in this circuit have held that 8 U.S.C. §1447(b) provides district courts with exclusive jurisdiction. *See Popnikolovski v. U.S. Dep't of Homeland Security*, 726 F. Supp. 2d 953, 957 (N.D. Ill. 2010); *Zaidi v. Chertoff*, No. 06 C 1133, 2006 WL 3147722, at *3 (N.D.Ill. Nov. 1, 2006); *Meraz v. Comfort*, No. 05 C 1094, 2006 WL 861859, at *2–3 (N.D.Ill. Mar. 9, 2006). Other district courts outside of this circuit have held, consistent with *Xie*, that USCIS maintains concurrent jurisdiction. *See, e.g.*, *Kim v. Gonzales*, No. 07–

1817, 2008 WL 1957739, at *3 (D. Colo. May 5, 2008); *Al–Saleh v. Gonzales*, No. 06–604, 2007 WL 990145, at *2 (D. Utah Mar. 29, 2007).

USCIS maintained concurrent jurisdiction over Mr. Aljabri's naturalization application for four reasons: (1) the plain language of 8 U.S.C. §1447(b) indicates that concurrent jurisdiction is appropriate; (2) its legislative history leads to contextual consistency with the statute's plain language; (3) the Supreme Court has held that federal courts should be "most reluctant" to conclude that agencies lose the power to act absent clear congressional intent to that effect, *Brock v. Pierce County*, 457 U.S. 253, 260 (1986); and (4) Congress's intent to ensure swift adjudication of naturalization applications supports a finding of concurrent jurisdiction. Consequently, USCIS's denial of Mr. Aljabri's Form N-400 renders this case moot.

First, the statute's plain meaning indicates that Congress did not intend to strip USCIS of its authority to adjudicate naturalization applications after a case had been filed under 8 U.S.C. §1447(b). As the Supreme Court explained, "there is every reason to expect Congress to take great care in its use of explicit language when it wishes to confer exclusive jurisdiction, given our longstanding requirement to that effect." *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 259 (1992). Indeed, Congress could have and often does explicitly provide for the court's exclusive jurisdiction over administrative agencies in the statute itself. *See* 15 U.S.C. § 78y(a)(3) ("[O]n the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record."); 7 U.S.C. § 27d(c)(3) ("On the date of the filing of a petition under paragraph (1), the court shall have jurisdiction, which shall become exclusive on the filing of the materials set forth in paragraph (2), to affirm and enforce or to set aside the rule or determination at issue."); 7 U.S.C. § 136n(b) ("Upon the filing of such petition the court shall have exclusive jurisdiction to affirm or set aside the order complained of in whole or in part.").

In other cases, Congress has explicitly provided for exclusive jurisdiction of one court over another. *See, e.g.*, 8 U.S.C. § 1252(a)(5) ("Notwithstanding any other provision of law . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter."). In writing 8 U.S.C. §1447(b), however, Congress did not provide for exclusive jurisdiction or attempt to preclude USCIS from adjudicating a Form N-400 once court proceedings commenced under this statute.

In *Hovsepian*, the Ninth Circuit reasoned that the use of the word "remand" in § 1447(b) was an indication of congressional intent to divest the agency of jurisdiction, because there would be no need to "remand" the case if the agency "retained jurisdiction . . . all along." 359 F.3d at 1160. Mr. Aljabri makes a similar argument. Appellant Br. 11-12. This line of reasoning fails to recognize that courts of appeals and district courts typically do not have concurrent jurisdiction because only final orders, *i.e.*, orders that end the case in district court, are appealable. *See* 28 U.S.C. § 1291. Where, as here, there is no final agency action that ends consideration of the application at the agency level, there is no reason to believe that Congress's use of the word "remand" is an indication that the agency is divested of jurisdiction. Indeed, in circumstances where a non-final district court order is appealable, Congress has made clear that the district court retains concurrent jurisdiction with the court of appeals, notwithstanding the fact that a "remand" would undoubtedly be appropriate in such circumstances. *See* 28 U.S.C. § 1292(b) (providing that request for interlocutory appeal does not stay proceedings in district court); *United States v. City of Chicago*, 542 F.2d 708, 711 (7th Cir. 1976) ("An appeal from an interlocutory order does not divest the trial court of jurisdiction to continue deciding other issues involved in the case.").

Furthermore, Congress included the option for the district court to remand to USCIS for the same reasons that USCIS maintains concurrent jurisdiction over the application: Congress and most courts recognize that USCIS has greater expertise in naturalization matters and develops an administrative record that can more readily serve as the basis of its decision. The option to remand therefore serves not as a novel grant of power, but as a reminder of Congress's preference for agency adjudication. *See I.N.S. v. Orlando Ventura*, 537 U.S. 12, 16-17 (2002) ("Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands. This principle has obvious importance in the immigration context."); *see also Antonishin v. Keisler*, 627 F. Supp. 2d 872, 877-78 (N.D. Ill. 2007) ("We conclude that remand is appropriate, consistent with the 'vast majority' of courts that have addressed the issue. USCIS possesses expertise in this area and should be given the opportunity to adjudicate plaintiffs' applications in the first instance.") (citation omitted).

Before 1990, Congress vested the authority to naturalize aliens in the district courts, while the Attorney General retained authority over removing aliens. *See Zayed v. United States*, 368 F.3d 902, 905 (6th Cir. 2004). In 1990, the "sole authority" to naturalize aliens was transferred from district courts to the Attorney General, and to USCIS by delegation. *Id.*; 8 U.S.C. § 1421(a). In empowering USCIS as the sole adjudicator of naturalization applications, Congress intended to free the federal courts of their immigration caseload backlog, entrust USCIS with responsibility for naturalization matters, and reduce waiting time for applicants. *See Chan v. Gantner*, 464 F.3d 289, 290 (2d Cir. 2006); *Hovsepian*, 359 F.3d at 1163. By explicitly stating that a district court may remand a case with instructions to USCIS, Congress encouraged the court to instruct the agency to make a timely determination, therefore supplying the alien with the answer he desired as quickly as possible from the expert agency that Congress had

authorized to make such decisions. *See, e.g.*, *Popnikolovski*, 726 F. Supp. 2d 953 at 961. Concurrent jurisdiction furthers this same goal.

Second, the legislative history of 8 U.S.C. §1447(b) indicates that Congress did not intend for the statute to confer exclusive jurisdiction. Congress explored that possibility during the drafting stages, but discarded any mention of exclusive jurisdiction in its final version. *See* H.R. Rep. No. 101-187, at 34. An early draft of the statute provided that district courts "shall upon the demand of the petitioner exercise *exclusive* jurisdiction over the matter." *Id.* (emphasis added). As the Supreme Court has explained, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (internal citation and quotation marks omitted). When Congress "delete[s]" language from a proposed bill, as it did in excising "exclusive" from what would become 8 U.S.C. §1447(b), "its action strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974).

Third, the Supreme Court has held that courts should not strip agencies of their power to act unless Congress has explicitly intended such a consequence. When "less dramatic remedies" are available, "courts should not assume that Congress intended [agencies] to lose [their] power to act," even when they fail to observe procedural requirements, absent a clear and unmistakable indication of congressional intent to the contrary. *Brock v. Pierce Cnty.*, 457 U.S. 253, 260 (1986). In this case, there is no failure by the agency to meet a statutory deadline, as USCIS is under no statutory obligation to rule on naturalization applications within any time frame. In writing 8 U.S.C. §1447(b), Congress did not provide any adverse consequences for USCIS if the

agency failed to act on a naturalization application within 120 days. Section 1447(b) specifies no "consequence" to the agency for its failure to act; rather, it simply provides an applicant with an additional avenue of relief if he chooses to pursue it. The statute allows for the "less dramatic remedy" that the Supreme Court instructs courts to utilize. *See Brock*, 457 U.S. at 260. Rather than finding that Section 1447(b) strips USCIS of its power to adjudicate naturalization applications, this Court should recognize that Congress provided a less dramatic remedy in permitting the applicant the right to file a petition in district court to obtain adjudication through either the district court or the agency, which maintains concurrent jurisdiction over the application.

Finally, a finding that USCIS maintains concurrent jurisdiction over naturalization applications after a suit has been filed under 8 U.S.C. § 1447(b) comports with congressional intent: the alien more quickly receives the response he requested in filing his suit and the court more quickly reduces its immigration caseload. *See Hovsepian*, 359 F.3d at 1163 (holding that "[a] central purpose of the statute was to reduce the waiting time for naturalization applicants"); *Xie*, 575 F. Supp. 2d at 964. The purpose of 8 U.S.C. §1447(b) is not to punish USCIS for its delay or advantage the naturalization applicant with a different, less stringent standard of review by permitting the applicant to seek adjudication in district court. Instead, "the express purpose of § 1447(b), enacted as part of the Immigration Act of 1990, was to reduce delays in the processing of naturalization applications. On a practical level, concurrent jurisdiction is the best way to effectuate this purpose." *Xie*, 575 F. Supp. 2d at 964. If USCIS approves the application while the case is pending in district court, the applicant gains his citizenship more quickly than waiting for the district court to rule. Additionally, the court expends fewer resources, helping to alleviate the backlog that Congress sought to eliminate in transferring naturalization authority

from the courts to USCIS. *See Zayed*, 368 F.3d at 905. If USCIS denies the application, the applicant is not left without recourse, nor is he deprived of district court review. Rather, he can exhaust his administrative remedies and ultimately petition the district court for *de novo* review under 8 U.S.C. § 1421(c), at which point the court will have the benefit of a fully developed administrative record.

Mr. Aljabri contends that "USCIS would have less incentive to adjudicate cases within the 120 day timeframe set by Congress" if this Court found that the agency maintained concurrent jurisdiction. Appellant Br. 13. Mr. Aljabri cannot presume that USCIS has or will take advantage of its concurrent jurisdiction. Absent a clear and convincing showing to the contrary, a court is not permitted to speculate that an agency will not act in good faith. *See, e.g.*, *Comcast Corp. v. FCC*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008) ("We must presume an agency acts in good faith.").

In passing 8 U.S.C. §1447(b), Congress attempted to reduce waiting times for an alien seeking a decision on his naturalization application. Congress did not intend to upset the role of USCIS as the entity charged with making naturalization determinations nor did it desire that the agency be reprimanded for purported previous inaction alleged by an applicant by stripping the agency of its jurisdiction to adjudicate naturalization applications. Instead, Congress sought to supplement, rather than substitute, USCIS's authority with district court review "as a means of last resort to stimulate action on the naturalization application." *Perry v. Gonzales*, 472 F. Supp. 2d 623, 628 (D.N.J. 2007).

USCIS provided Mr. Aljabri with the decision he was seeking and that is available under 8 U.S.C. §1447(b), which he did not cite in his complaint. App. 2. Because USCIS had concurrent jurisdiction to adjudicate his naturalization application at that time, which allowed

Mr. Aljabri to receive a more timely adjudication of his Form N-400, Mr. Aljabri's case is now moot.

C. At the Time USCIS Denied Mr. Aljabri's N-400, He Was Subject to a Final Order of Removal.

At the time that USCIS denied Mr. Aljabri's Form N-400, in part because he was subject to a final order of removal, Mr. Aljabri's removal order was final and USCIS was statutorily barred from naturalizing him. App. 44. Mr. Aljabri was ordered removed *in absentia* on April 28, 2010. *Id.* On May 3, 2012, USCIS denied Mr. Aljabri's naturalization application. App. 43. Mr. Aljabri did not move to reopen the Immigration Judge's decision until after USCIS denied his Form N-400 and, as such, the removal order was final at the time that USCIS issued its decision. 8 U.S.C. § 1229a(b)(5)(C)(ii); App. 49; Appellant Br. 18.

USCIS cannot naturalize an alien "against whom there is outstanding a final finding of deportability." 8 U.S.C. §1429. Even before removal proceedings are final, neither the courts nor USCIS can approve an application for naturalization or order an alien to be naturalized. 8 U.S.C. §1429; *see, e.g.*, *Klene*, 697 F.3d at 669. The order of removal issued *in absentia* against Mr. Aljabri is a final order of removal; the "the only way to 'appeal' the removal order is to file a motion to reopen the proceedings" pursuant to 8 U.S.C. §1229a(b)(5)(C).[3] *Kay v. Ashcroft*, 387 F.3d 664, 672 (7th Cir. 2004).

A final order of removal was issued *in absentia* against Mr. Aljabbri because he chose not to attend his removal proceedings. App. 43. As this Court noted, an "alien can waive his

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[3] Under 8 U.S.C. §1229a(b)(5)(C), an alien may reopen his final order of removal by demonstrating within 180 days of the removal order that his failure to appear was because of exceptional circumstances or by demonstrating at any time either that he did not receive notice of the proceeding or that he was in custody and his failure to appear was through no fault of his own. Prior to any motion to reopen, however, an order of removal *in absentia* is a final order of removal.

right to a removal hearing; he does so if having received notice of the hearing he decides to skip it; and in that case he can be ordered removed without a hearing—that is, ordered '*in absentia*' to be removed." *Smykiene v. Holder*, 707 F.3d 785, 786-87 (7th Cir. 2013). In denying Mr. Aljabri's Form N-400, USCIS found that:

> The record reflects that on April 28, 2010, a final order of removal was issued against you by the Immigration Judge. You were ordered removed in absentia due to the fact that you refused to attend your removal hearing. The record reflects you were incarcerated at the time of your removal hearing and you refused to leave your cell to attend the hearing. . . . You did not appeal the removal order.

App. 44.

Because Mr. Aljabri was subject to a final removal order at the time that USCIS denied his Form N-400 naturalization application, USCIS could not approve his naturalization application and properly denied his application on May 3, 2012, thereby mooting this case. *See id.*

IV. In the Alternative, the Court Should Remand the Case with Instructions Only as to the District Court's Basis of Dismissal.

If the Court finds that this case is not moot, the case should be remanded because the district court erroneously dismissed the case for lack of subject-matter jurisdiction on the basis of 8 U.S.C. § 1252(a)(2)(B)(ii). Additionally, USCIS concurs with Mr. Aljabri that, after *Klene*, 8 U.S.C. § 1429 does not strip the district court of jurisdiction to hear 8 U.S.C. § 1447(b) cases in this Circuit. In the alternative, the case should be remanded because of the changed factual record since the district court's dismissal and because USCIS was not originally served while the case was before the district court and could not therefore move to remand the case for agency adjudication or make any other applicable motions while the case was pending in district court.

A. USCIS Acknowledges that 8 U.S.C. § 1252(a)(2)(B)(ii) Constitutes an Erroneous Basis for Dismissal by the District Court.

The district court dismissed Mr. Aljabri's case on the grounds that 8 U.S.C. § 1252(a)(2)(B)(ii) "strips federal courts of jurisdiction to review ultimate decisions of the Attorney General on immigration matters, as well as the time frame during which the Attorney General makes such decisions." App. 11-12. USCIS agrees that a court does not have jurisdiction to review certain statutorily-designated discretionary decisions under 8 U.S.C. § 1252(a)(2)(B), *see Kucana v. Holder*, 558 U.S. 233, 252 (2010), but 8 U.S.C. § 1447(b) provides specific jurisdiction to address delays in adjudication of naturalization applications, as occurred here.[4] Accordingly, USCIS concedes that the basis of the district court's dismissal for lack of subject-matter jurisdiction, with due respect, was in error and this Court should therefore remand this case for further proceedings.

Because the only issue on appeal is whether the district court's basis for dismissal for lack of subject-matter jurisdiction was proper, and since USCIS agrees with Mr. Aljabri that it

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[4] While 8 U.S.C. § 1447(b) does provide specific jurisdiction for the delayed adjudication of naturalization applications, Mr. Aljabri did not cite this statute in his complaint. *See* App. 2 ("The court has jurisdiction under Title 28 U.S.C. §§ 1331 and 1361, and under Title 8 U.S.C. § 1421, and under Title 5 U.S.C. §§ 702, 704 and 706(1)."). Although *pro se* complaints are held "to less stringent standards than formal pleadings drafted by lawyers," *Haines v. Kerner*, 404 U.S. 519, 520 (1972), this Court has also held that "[i]t is well settled law that a party cannot complain of errors which it has committed, invited, induced the court to make, or to which it consented." *Int'l Travelers Cheque Co. v. BankAmerica Corp.*, 660 F.2d 215, 224 (7th Cir. 1981). This Court, however, has also "warned that *sua sponte* dismissals without prior notice or opportunity to be heard are hazardous and that unless the defect is clearly incurable a district court should grant the plaintiff leave to amend, allow the parties to argue the jurisdictional issue, or provide the plaintiff with the opportunity to discover the facts necessary to establish jurisdiction." *Frey v. E.P.A.*, 270 F.3d 1129, 1132 (7th Cir. 2001) (internal quotation marks omitted). In addition to USCIS's other arguments for remand, since Mr. Aljabri failed to cite the appropriate statutory basis for his suit and because he was provided no notice of this deficiency, the case should be remanded.

was not,[5] the Court should remand the case without proceeding beyond this jurisdictional question. *See, e.g.*, *Health Cost Controls v. Skinner*, 44 F.3d 535, 536 (7th Cir. 1995) ("The narrow question presented for our review is whether [plaintiff] properly invoked the subject-matter jurisdiction of the district court. This Court reviews de novo a dismissal for lack of subject matter jurisdiction."); *Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1256 (7th Cir. 1994) (reviewing only the district court's *sua sponte* dismissal for lack of subject-matter jurisdiction, vacating the district court's dismissal, and remanding for further proceedings); *see also Joyce v. Joyce*, 975 F.2d 379, 382-83 (7th Cir. 1992) (reviewing *de novo* a district court's *sua sponte* dismissal for lack of subject-matter jurisdiction and affirming the dismissal after reaching only the question of jurisdiction).

B. The Court Should Remand this Case Because 8 U.S.C. § 1429 Does Not Strip the District Court of Jurisdiction to Hear 8 U.S.C. § 1447(b) Cases.

Additionally, this Court held in *Klene* that 8 U.S.C. § 1429 is non-jurisdictional. 697 F.3d at 669. The Court found that 8 U.S.C. § 1429 is instead a mandatory rule that "prevent[s] the Attorney General from naturalizing an alien once removal proceedings have commenced," but determined that the statute does not "concern[] the tribunal's power to hear a case and decide what the law requires." *Id.* at 668. USCIS does not challenge this jurisdictional holding in the context of suits brought under 8 U.S.C. § 1447(b). Rather, USCIS contends below that the holding in *Klene* that declaratory relief is proper in suits brought under 8 U.S.C. § 1421(c) is not applicable to suits brought under 8 U.S.C. § 1447(b). *See id.* USCIS therefore does not suggest

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[5] USCIS does not concede that the Court now has subject-matter jurisdiction over the case, but only states that the basis for dismissal by the district court – 8 U.S.C. § 1252(a)(2)(B)(ii) – in the context of a suit brought under 8 U.S.C. § 1447(b) is improper. As stated above, USCIS maintains that the case is currently moot since the agency has adjudicated Mr. Aljabri's application and that this Court therefore lacks subject-matter jurisdiction. App. 40-44.

that 8 U.S.C. § 1429 strips the district court of subject-matter jurisdiction. Accordingly, this section does not serve as a proper basis for the district court's dismissal for lack of subject-matter jurisdiction.

C. In the Alternative, the Court Should Remand This Case Because the Factual Record Has Changed and USCIS Was Not Served Before the District Court's Subject-Matter Jurisdiction Dismissal.

This Court should remand this case to the district court to review the current factual record and permit USCIS to respond to Mr. Aljabri's complaint, which USCIS was not able to do in the first instance because the agency was not served before the district court dismissed the suit *sua sponte* on April 20, 2011. Because of the district court's erroneous *sua sponte* dismissal on jurisdictional grounds, no lower court has yet reached the merits of the case or reviewed the factual record to determine if Mr. Aljabri is eligible to naturalize. These questions of fact and "mixed question[s] of law and fact should not be resolved in the first instance by this Court, least of all without an appropriate record." *See Int'l Primate Prot. League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991).

The factual record has changed substantially since Mr. Aljabri filed his complaint on February 3, 2011. Since the district court dismissed this case, USCIS denied Mr. Aljabri's Form N-400 naturalization application, providing Mr. Aljabri with the decision he was seeking when he filed this suit. App. 43–45. And, since filing his appeal on January 27, 2012, the record in his removal proceedings has also changed. Mr. Aljabri moved to reopen his final order of removal and had that motion denied by the Dallas Immigration Court. App. 49-50. Subsequently, the Board of Immigration Appeals reopened and remanded the case for further proceedings on March 29, 2013. *Id.* On June 10, 2013, after Mr. Aljabri had filed his brief in the instant action, the Dallas Immigration Court ordered Mr. Aljabri removed from the United States.

Supplemental App. 8–9. Mr. Aljabri timely appealed such order to the Board of Immigration Appeals. Supplemental App. 10.

Additionally, because USCIS was not served before the district court issued its *sua sponte* dismissal via service to the U.S. Attorney's Office under Federal Rule of Civil Procedure 4(i), the agency was not able to file applicable motions at that time.[6] A court may provide a plaintiff with additional time to serve required parties, but "nothing in the Federal Rules of Civil Procedure allows a judge to excuse service altogether." FED. R. CIV. P. 4(m); *McMasters v. United States*, 260 F.3d 814, 817 (7th Cir. 2001). This Court has held that "[t]he fact that [the plaintiff] was proceeding *pro se* does not excuse her failure to comply with procedural rules," including effectuating proper service. *Id.* at 818.

Given these changed circumstances and because the government was not originally served in the case before the district court erroneously dismissed the case *sua sponte*, USCIS respectfully requests that the Court remand the case to the district court to review the current record and permit both parties to submit applicable motions based on that record.

V. If the Court Remands the Case, the Court Should Remand With Instructions Only as to the District Court's Basis of Dismissal Because *Klene* is Not Controlling in Suits Brought Under 8 U.S.C. § 1447(b).

If the Court remands the case, it should do so with instructions only as to the district court's basis of dismissal and without an instruction that declaratory relief is proper in 8 U.S.C. § 1447(b) cases. While this Court in *Klene* held that such relief is proper in the 8 U.S.C.

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[6] "The plain language of Rule 4(i) of the Federal Rules of Civil Procedure requires that, in order to properly serve the United States or its agencies, corporations, or officers, a plaintiff must deliver a copy of the summons and the complaint to the U.S. Attorney's Office for the district in which the action is brought, as well as to the Attorney General of the United States." *McMasters v. United States*, 260 F.3d 814, 817 (7th Cir. 2001).

§ 1421(c) context, declaratory relief is inappropriate here because of the differences in the language of the respective statutes and the purpose that each statute serves is providing an alien review of agency decisions. Section 1421(c) serves as a final means of judicial review of a naturalization application denial and broadly instructs district courts to make their own "findings of fact and conclusions of law." In contrast, Section 1447(b) merely serves as a catalyst to spark an initial decision and invites district courts only to "determine the matter or remand the matter, with appropriate instructions" to USCIS.

Additionally, this case is factually distinguishable from *Klene*. In *Klene*, the agency opened removal proceedings *after* plaintiff filed his complaint in district court. *See* 697 F.3d at 667. Here, Mr. Aljabri's removal proceedings began nearly three years before he filed his complaint – and he was already subject to a final removal order. App. 1, 31. Given the facts of this case, Mr. Aljabri cannot allege that USCIS commenced removal proceedings to prevent the district court from acting on his naturalization application. Rather, as of February 12, 2008, when Mr. Aljabri received his Notice to Appear, 8 U.S.C. § 1429 prevented USCIS from adjudicating Mr. Aljabri's application.

A. Section 1429 Precludes the District Court from Approving Mr. Aljabri's Naturalization Application.

The district court could not have approved Mr. Aljabri's Form N-400 naturalization application at the time he filed his complaint when he had a final order of removal, nor could the district court approve his application now because his removal proceedings are pending. Under 8 U.S.C. § 1429, "no person shall be naturalized against whom there is outstanding a final finding of deportability" and "no application for naturalization shall be considered by the Attorney General if there is pending against the applicant a removal proceeding." As this Court held in *Klene*, "[i]f the Attorney General cannot naturalize an alien after removal proceedings

have begun, the court cannot direct the Attorney General to naturalize the alien. Judges must not order agencies to ignore constitutionally valid statutes." 697 F.3d at 668.

At the time Mr. Aljabri filed his complaint, the Dallas Immigration Court had issued a final finding of deportability against him and he had waived his right to appeal, so neither USCIS nor the district court could approve his Form N-400. *See* 8 U.S.C. § 1429; App. 42. Currently, removal proceedings are pending against Mr. Aljabri; he was ordered removed by the Dallas Immigration Court on June 10, 2013 and has filed his appeal with the Board of Immigration Appeals. Supplemental App. 10. Section 1429 therefore prevents this Court or the district court on remand from approving his application. *See* 8 U.S.C. § 1429; *Klene*, 697 F.3d at 668.

B. Declaratory Relief is Not Proper in 8 U.S.C. § 1447(b).

While this Court held in *Klene* that declaratory relief was available even where 8 U.S.C. § 1429 prevented the district court from adjudicating the naturalization application in question, such relief is improper in cases brought under 8 U.S.C. § 1447(b). *See Klene*, 697 F.3d at 669. A declaratory judgment is not proper given the language of 8 U.S.C. § 1447(b) and the statute's function in the naturalization process.

Section 1447(b) provides, in relevant part, that the district court in which the applicant resides may "either determine the matter or remand the matter, with appropriate instructions, to [USCIS] to determine the matter." Congress provided district courts with two options: adjudicate the alien's naturalization application or instruct USCIS to adjudicate it. Because 8 U.S.C. § 1429 prevents the former when, as here, removal proceedings are underway, the district court is left only with the option to remand. The narrow language of 8 U.S.C. § 1447(b) is distinguishable from the broad language of 8 U.S.C. § 1421(c), which served as the statutory basis for the alien's suit in *Klene*. 697 F.3d at 667. Section 1421(c) provides an alien whose application has been denied with *de novo* review of that denial wherein the court "shall make its

own finding of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo of the application." While a declaratory judgment that an alien is entitled to citizenship may be apt where a district court is charged with making "its own finding of fact and conclusions of law," declaratory relief is inappropriate where Congress narrowly instructs a district court to either remand to the agency or to simply approve or deny an alien's unresolved application. *Compare* 8 U.S.C. § 1421(c), *with* 8 U.S.C. § 1447(b).

In addition to the more limited scope of 8 U.S.C. § 1447(b), the statute serves a different purpose at a different stage in the naturalization application review process than does 8 U.S.C. § 1421(c). Section 1421(c) provides a final opportunity for the alien to seek review of USCIS's denial of his naturalization application. The district court's *de novo* review benefits from a developed administrative record in determining whether or not the applicant is entitled to citizenship and this review is available to the alien only after he has exhausted his administrative remedies. *See* 8 U.S.C. § 1421(c) ("A person whose application for naturalization under this subchapter is denied, after a hearing before an immigration officer under section 1447(a) of this Title, may seek review of such denial before the United States district court . . . ."); 8 U.S.C. § 1447(a) ("If, after an examination under section 1446 of this title, an application for naturalization is denied, the applicant may request a hearing before an immigration officer."). Section 1421(c) prioritizes agency expertise in requiring administrative exhaustion and affords an alien judicial review only after an agency has adjudicated an application.

Section 1447(b) only serves only to provide the alien with an initial decision after USCIS has delayed in adjudicating his naturalization application after the naturalization interview. Under 8 U.S.C. § 1447(b), district courts generally remand the case to the agency, in large part because courts prefer that expert agency adjudicators make the initial determination. *See*

Antonishin, 627 F. Supp. 2d at 877-78 ("USCIS possesses expertise in this area and should be given the opportunity to adjudicate plaintiffs' applications in the first instance") (citation omitted). If after remanding the case to USCIS, the alien's application is denied, he may pursue his administrative remedies under 8 U.S.C. § 1447(a) and ultimately seek final judicial review under 8 U.S.C. § 1421(c).[7]

Since the agency has yet to issue an initial decision and because the alien will have the opportunity to pursue additional administrative remedies and subsequent review in district court of any denial, declaratory relief is not proper under 8 U.S.C. § 1447(b) where 8 U.S.C. § 1429 otherwise bars the district court from directing USCIS to naturalize the alien. Under Section 1421(c), declaratory relief serves as a last resort; under 8 U.S.C. § 1447(b), it both disregards the agency's prerogative as the body charged with evaluating naturalization applications and circumvents the statutory requirement that the agency not approve such applications while removal proceedings are pending. *See* 8 U.S.C. § 1429.

In *Klene*, this Court emphasized the importance of two competing goals, finding that declaratory relief in the 8 U.S.C. § 1421(c) context "preserves the alien's entitlement under § 1421(c) to an independent judicial decision while respecting the limit that § 1429 places on the Attorney General's powers." 697 F.3d at 669. The Third Circuit similarly weighed these two

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[7] If a final order of deportability is issued against an alien, he may not be afforded judicial review in the naturalization application context. Instead, he may appeal an Immigration Judge's decision to the Board of Immigration Appeals and may ultimately file a Petition for Review with the court of appeals in which the removal proceedings took place. *See* 8 U.S.C. § 1252. If the alien remains subject to a final order of removal, the alien will likely be removed before he can file a case under 8 U.S.C. § 1421(c). This outcome is one that Congress intended, however, in instructing USCIS to give priority to removal proceedings over naturalization proceedings. *See Gonzalez v. Sec'y of Dep't of Homeland Sec.*, 678 F.3d 254, 257 (3d Cir. 2012) (finding that "priority for removal proceedings was maintained" when Congress passed the Immigration Act of 1990).

objectives, holding that "[d]eclaratory relief, in the form of a judgment regarding the lawfulness of the denial of naturalization, permits the alien a day in court, as required by § 1421(c), while not upsetting the priority of removal over naturalization established in § 1429 because it affects the record for—but not the priority of—removal proceedings . . . ." *Gonzalez v. Sec'y of Dep't of Homeland Sec.*, 678 F.3d 254, 261 (3d Cir. 2012). Finding that declaratory relief in the context of a case involving both 8 U.S.C. §§ 1447(b) and 1429 is improper preserves this same balance; the priority of removal proceedings is maintained and the alien may realize his day in court by exhausting his administrative remedies and bringing suit under 8 U.S.C. § 1421(c).

C. Declaratory Relief is Particularly Improper Under 8 U.S.C. § 1447(b) When Removal Proceedings Have Begun Prior to the Alien Filing His Complaint.

Declaratory relief is particularly improper when, as here, removal proceedings were initiated in advance of an alien filing a suit under 8 U.S.C. § 1447(b) for delayed adjudication. *See* App. 1, 31. This Court stated in *Klene* that what makes declaratory relief "possible is the fact that the Attorney General acted on Klene's application before the agency commenced removal proceedings." 697 F.3d at 669. The Court further explained that Section 1429 "tells the Attorney General to put an application aside once removal proceedings begin." *Id.* As of February 12, 2008, when Mr. Aljabri's removal proceedings began, USCIS was required by statute to put his "application aside." *See* App. 31.

If declaratory relief were proper in this context, 8 U.S.C. § 1429 would lose all effect in cases brought under 8 U.S.C. § 1447(b). USCIS cannot consider a naturalization application while removal proceedings are pending against an alien. 8 U.S.C. § 1429. As such, USCIS often must delay adjudication of applications beyond 120 days after the initial interview. If an alien could then obtain declaratory relief by bringing a suit alleging that USCIS has not promptly adjudicated his naturalization application, despite USCIS's statutory requirement not to

adjudicate that same application, aliens could upend the priority of removal proceedings that Congress specifically intended in enacting 8 U.S.C. § 1429. *See Gonzalez*, 678 F.3d at 261. If such relief were permitted, a preposterous result would ensue; the alien could circularly use the district court's declaration in the very removal proceedings that prevented approval of his application, eviscerating the purpose of 8 U.S.C. § 1429. The statute would therefore no longer serve any purpose except to shift adjudication of naturalization applications from USCIS to the courts once removal proceedings began, in direct conflict with congressional intent to designate USCIS as "the sole authority to naturalize." *See* 8 U.S.C. § 1421(a).

Moreover, when a Notice to Appear is issued before the filing of an alien's complaint under § 1447(b), the alien cannot allege that USCIS is attempting to prevent the district court from deciding the alien's naturalization application. Rather, both USCIS and the district court are precluded by 8 U.S.C. § 1429 from deciding the alien's application because of the extant removal proceedings. *See Klene*, 697 F.3d at 668.

Unlike in *Klene*, where removal proceedings postdated the alien's § 1447(b) complaint, Mr. Aljabri's removal proceedings began on February 12, 2008 and predate his Complaint. App. 31. As of that date, USCIS could no longer approve his naturalization application. *See* 8 U.S.C. § 1429. Until a final removal order, the agency could not consider the application; once a final order was issued on April 28, 2010, the only action USCIS could take was to deny the application, which the agency did on May 3, 2012. App. 43-47. Mr. Aljabri cannot be entitled to declaratory relief given these facts because when his removal proceedings began, 8 U.S.C. § 1429 prevented USCIS from approving his application. Accordingly, this Court should hold that declaratory relief is unavailable to Mr. Aljabri because he filed his suit under 8 U.S.C. § 1447(b) after removal proceedings had been initiated. App. 1, 31.

VI. Even if Declaratory Relief Were Generally Proper, Remanding This Case With Instructions to the District Court to Consider Declaratory Relief Is Inappropriate Because Mr. Aljabri Is Ineligible to Naturalize.

Mr. Aljabri is permanently barred from naturalizing because he has nine aggravated felony convictions. *See* 8 U.S.C. § 1427(a); 8 U.S.C. § 1101(f)(8); App. 34. Even if this Court held that declaratory relief was proper in cases brought under 8 U.S.C. § 1447(b) after removal proceedings had commenced, Mr. Aljabri is not entitled to such relief because of such convictions. Mr. Aljabri is permanently and statutorily barred from naturalizing on the basis of his wire fraud conviction, an aggravated felony. *See* 8 U.S.C. § 1427(a); 8 U.S.C. § 1101(f)(8); App. 34. Mr. Aljabri is also statutorily prohibited from naturalizing on his N-400 application because he has spent 180 days or more in penal confinement as the result of a conviction during the statutory good moral character period attached to his N-400 application. *See* 8 U.S.C. § 1427(a); 8 U.S.C. § 1101(f)(7); Supplemental App. 11–20. Finally, Mr. Aljabri's additional claims that the district court could determine that the government was under a duty to transmit a naturalization certificate is wholly inapt. *See* 8 C.F.R. § 335.5; Appellant Br. 3.

A. Mr. Aljabri Is Ineligible to Naturalize Because He Committed an Aggravated Felony During the Good Moral Character Period and Was Convicted of an Aggravated Felony After November 29, 1990.

As of March 1, 2003, less than one month after Mr. Aljabri filed his Form N-400 naturalization application and nearly five months before he was interviewed, Mr. Aljabri committed wire fraud. App. 35. As such, only weeks after he filed his naturalization application, Mr. Aljabri lacked the good moral character required to naturalize because he committed an aggravated felony for which he was later convicted. *See* 8 U.S.C. § 1101(f)(3)

(which defines a person that committed an aggravated felony during the statutory period as lacking good moral character).[8]

On August 8, 2006, the United States charged Mr. Aljabri with nine counts of wire fraud in violation of 18 U.S.C. § 1343, five counts of money laundering in violation of 18 U.S.C. § 1957(a)(1)(A)(i), and eleven counts of structuring under 31 U.S.C. § 5324(a)(3). App. 7. One count of structuring was not submitted to the jury and Mr. Aljabri was convicted of all remaining counts. App. 20, 34. 34. Mr. Aljabri appealed his money-laundering and structuring convictions and this Court entered a final judgment vacating the money-laundering convictions and affirming the structuring convictions. App. 34-35, 40. Mr. Aljabri did not challenge the nine counts of wire fraud. App. 34.

Wire fraud is an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(M)(i); *Doe v. Attorney General*, 659 F.3d 266, 275 (2d. Cir. 2011) (finding that because aiding and abetting wire fraud "clearly 'involves fraud or deceit,' it qualifies as an 'aggravated felony' if 'the loss to the victim or victims exceeds $10,000'); *see also Eke v. Mukasey*, 512 F.3d 372, 379 (7th Cir. 2008) ("Under the modified categorical approach, we conduct a limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generically defined crime even though his or her statute of conviction was facially overinclusive."). Mr. Aljabri redeemed over $1,200,000 in food-stamp

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[8] When USCIS denied Mr. Aljabri's Form N-400, the agency referenced his wire fraud conviction and noted that Mr. Aljabri was, in part, ineligible to naturalize because he lacked the requisite good moral character. App. 44-45. The Form N-400 denial, however, does not specify 8 U.S.C. § 1101(f)(7) or 8 U.S.C. § 1101(f)(8) as one of the legal bases for its decision nor does it define wire fraud as an aggravated felony. *Id.* Plaintiff, however, has the burden of demonstrating eligibility for citizenship in every respect, and doubts should be resolved in favor of the United States and against the claimant. *See Bernyi v. INS*, 385 U.S. 630, 637 (1967); *see also* 8 C.F.R. § 316.10(a)(1) ("An applicant for naturalization bears the burden of demonstrating that . . . he or she has been and continues to be a person of good moral character.").

benefits between March 2003 and June 2004 and the U.S. District Court for the Northern District of Illinois ordered Mr. Aljabri to pay $1,084,999 in restitution. App. 36-37; Supplemental App. 6. As such, Mr. Aljabri's wire fraud caused a loss over 100 times in excess of the $10,000 statutory minimum. *See* 8 U.S.C. § 1101(a)(43)(M)(i); App. 26-27; Supplemental App. 6.

Because Mr. Aljabri committed an aggravated felony during the statutory good moral character period, he was ineligible to naturalize as of March 2003 and he remains ineligible. *See* 8 U.S.C. § 1101(f)(3). To the extent that Mr. Aljabri contends that he would have been eligible to naturalize had USCIS decided his application promptly,[9] his claim is contradicted by the facts of his nine-count food stamp wire fraud convictions that rendered him ineligible only weeks after filing his Form N-400 and months before his naturalization interview. App. 35. Moreover, because Mr. Aljabri was convicted of an aggravated felony, he is permanently barred from naturalizing. *See* 8 U.S.C. § 1101(f)(8); 8 C.F.R. § 316.10(b)(1)(ii) ("An applicant shall be found to lack good moral character, if the applicant has been . . . (ii) convicted of an aggravated felony . . . on or after November 29, 1990."). Under no circumstances can Mr. Aljabri demonstrate that he possesses the good moral character required to naturalize.

B. Mr. Aljabri Is Ineligible to Naturalize Because He Spent 180 Days or More in Penal Confinement During the Statutory Good Moral Character Period.

Mr. Aljabri is additionally barred from naturalizing because he served 180 days or more in penal confinement during the statutory good moral character period. *See* 8 U.S.C.

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[9] The Court may not retroactively approve Mr. Aljabri's Form N-400 naturalization application as a procedural matter because the good moral character period extends in this case from three years prior to Mr. Aljabri's filing of his N-400 to the date the Oath of Allegiance is administered. *See* 8 U.S.C. §§ 1427(a), 1430(a). The Oath of Allegiance was never administered. Because Mr. Aljabri committed an aggravated felony during this good moral character period, this Court cannot now approve his naturalization application.

§ 1101(f)(7); Supplemental App. 11–20. When evaluating an application to naturalize, "no person shall be regarded as, or found to be, a person of good moral character . . . who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period." 8 U.S.C. § 1101(f)(7). Federal immigration regulations similarly define an applicant as lacking good moral character if the applicant "[i]s or was confined to a penal institution for an aggregate of 180 days pursuant to a conviction or convictions." 8 C.F.R. § 316.10(b)(2)(v).

Mr. Aljabri was originally sentenced to a prison term of 90 months. App. 20. This Court remanded to the district court for resentencing on the nine wire fraud counts and the ten structuring counts and the district court resentenced Mr. Aljabri to 84 months on June 17, 2011. App. 40. Mr Aljabri ultimately served over 1,700 days in penal confinement. Supplemental App. 15. Mr. Aljabri began his confinement at Big Springs Federal Correctional Institution, Texas, on December 28, 2007 and was released on November 29, 2012. Supplemental App. 11–20. Since Mr. Aljabri served 180 days or more in penal confinement as a result of his wire fraud and structuring convictions, Mr. Aljabri remains ineligible to naturalize. *See* 8 U.S.C. § 1101(f)(7).

C. Mr. Aljabri's Claim that the District Court Could Determine That the Government Had a Duty to Transmit a Naturalization Certificate Is Invalid.

Mr. Aljabri argues that he was informed that his Form N-400 had been approved and that USCIS accordingly has a duty to forward a citizenship certificate to the district court so he can be administered the Oath of Allegiance. App. 8, ¶ 47-49; Appellant's Br. 33. Mr. Aljabri's application was not approved and was instead denied on May 3, 2012. Furthermore, Mr. Aljabri, submitted a status inquiry form on August 31, 2004, thirteen months after his naturalization

interview, where he noted that he had his interview and passed the history and English test, but acknowledged that he did not yet know the status of his application. On August 2, 2005 and November 29, 2005, he submitted additional status inquiries. As these disputed facts are not being assessed in light of a motion for summary judgment or a motion to dismiss, Mr. Aljabri's assertion in his complaint that he believed his application had been approved should not be accepted as true for purposes of the appeal as he suggests in his brief. Appellant Br. 33.

Even if all of Mr. Aljabri's allegations are true – and the government concedes none of them – he cannot succeed because USCIS has clear authority under 8 C.F.R. § 335.5 to withhold the Oath of Allegiance from any alien "whose application has already been granted" if the government "receives derogatory information" concerning the alien in the time between approval of the application and administration of the oath. *See Fedorenko*, 449 U.S. at 505. Thus, it is the oath that completes the act of naturalization, not the approval of a naturalization application, and until the moment that an alien takes the oath, USCIS may revisit its earlier determination and even revoke its approval in light of new evidence made available about that alien. *See Ajlani v. Chertoff*, 545 F.3d 229, 234 (2d Cir. 2008) (quoting 8 C.F.R. § 335.5) ("The grant of an application for naturalization is not determinative of citizenship. An alien who has not taken the oath in a public ceremony remains a non-citizen. The statute's implementing regulations similarly identify the taking of a public oath as a prerequisite for naturalization . . . and specifically provide that, when USCIS receives 'derogatory information concerning an applicant . . . , the Service shall remove the applicant's name from any list of granted applications.'").

CONCLUSION

For the foregoing reasons, the Court should dismiss this case for lack of subject-matter jurisdiction. In the alternative, the Court should remand this case to the district court to review the changing record and entertain applicable motions from both parties. If the Court remands the

case, it should do so with instructions only as to the district court's basis of dismissal. Declaratory relief is not proper in this case brought under 8 U.S.C. § 1447(b) and Mr. Aljabri is in no way entitled to it to the extent that such form of relief is available to him.

DATED: July 29, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2013, I electronically filed the foregoing with the Clerk of the Court for 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.

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