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 REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

The Government concedes that the District Court inappropriately dismissed the lawsuit filed by Plaintiff-Appellant Salem Fuad Aljabri ("Mr. Aljabri") under 8 U.S.C. § 1447(b), and that 8 U.S.C. § 1429 does not bar federal court jurisdiction over the matter. The Government's other contentions are incorrect.

First, the Government asks the Court to create a circuit split with three other circuits, which have held that after a proper § 1447(b) filing the District Court has exclusive jurisdiction over the naturalization matter. The Government argues that the United States Citizenship and Immigration Services ("USCIS") can oust properly invoked § 1447(b) jurisdiction by simply denying the naturalization application, forcing the applicant to undertake further administrative exhaustion before returning to the federal courts. Such an approach would contravene the intent of Congress in enacting § 1447(b), which Congress designed in order to account for adjudication delays, and would be inefficient, which is why the Courts of Appeals have uniformly rejected that contention. Because USCIS lacked jurisdiction over the naturalization application the moment Mr. Aljabri sought district court review under § 1447(b), the purported naturalization denial was without effect. Thus, the instant proceedings are still justiciable.

Second, the Government asks the Court to find declaratory relief categorically unavailable to individuals asking for federal court intervention under § 1447(b). But the limitation on federal court power urged by the

Government is found nowhere in the text of that statute, which specifically allows federal courts to fashion appropriate remedies. Moreover, the Government's position takes no account of the ability of immigration courts to terminate removal proceedings to permit naturalization (declining even to cite the appropriate regulations). The Government says not one word about the effect of declaratory relief on pending removal proceedings in response to Mr. Aljabri's five pages of briefing. The Court should find declaratory relief available in the § 1447(b) context, and should remand to allow the District Court to consider the appropriateness of declaratory relief in this case.

Third, the Government argues that Mr. Aljabri would be barred from naturalization, making declaratory relief inappropriate even if available in this context. It argues for the first time that Mr. Aljabri's wire fraud convictions – not the structuring convictions, as found by USCIS – are aggravated felonies. It does not address Mr. Aljabri's point that the Government's reading would expand the required good moral character period by a factor of four, though the relevant good moral character period is plainly relevant to the question of whether Mr. Aljabri could satisfy that requirement. Rather than resolve this legal issue in the first instance, the Court ought to remand the matter to the District Court.

Finally, the Government asks the Court to find that it did not have a duty to transmit a naturalization certificate to the District Court once it approved his application. To hold as the Government urges would require the Court to ignore the plain text of the relevant regulation, and to create a circuit

split; a point the Government does not acknowledge. Nor does the Government respond to Mr. Aljabri's argument that anti-retroactivity principles would be relevant to this matter, or his argument that the oath he signed at a USCIS interview might be treated as a public oath. Rather than resolve these questions on the basis of minimal briefing, where the larger jurisdictional issues predominate, the Court should find these matters appropriate for the District Court to resolve on remand in the first instance.

ARGUMENT

I. As the Government Concedes, the District Court Erred in Finding Jurisdiction Precluded Over This Matter.

The Government does not dispute that the District Court erred in finding its jurisdiction precluded by 8 U.S.C. § 1252(a)(2)(B). Gov't Brief at 21. The Government also concedes that the District Court's jurisdiction was not precluded by § 1429, notwithstanding the pending removal proceedings. *Id.* The Court is not bound by the Government's concession, but the Court should agree, for the reasons given by the parties, that the federal court does indeed have jurisdiction over this matter.

II. The Purported USCIS Denial of Mr. Aljabri's Naturalization Application Did Not Moot This Action, Because USCIS Lacked Jurisdiction After the District Court Assumed Jurisdiction.

The Government contends that Mr. Aljabri's case is moot because USCIS denied his application for citizenship after he filed his action under § 1447(b).[1]

[1] USCIS purported to act after an Immigration Judge had entered a removal order against Mr. Aljabri *in absentia*. The Government concedes that

The Court should follow the three other circuits to address this issue, and find the USCIS denial of naturalization to be without effect because federal jurisdiction over such complaints is exclusive, and the USCIS is without power to adjudicate such applications unless and until the federal court remands the matter to it.

The Ninth, Fourth, and Second Circuits have determined federal court jurisdiction over a § 1447(b) matter to be exclusive. *United States v. Hovsepian*, 359 F.3d 1144 (9th Cir. 2004) (*en banc*); *Etape v. Chertoff*, 497 F.3d 379 (4th Cir. 2007); *Bustamante v. Napolitano*, 582 F.3d 403 (2d Cir. 2009). The Government asks the Court to create a circuit split on this issue; the Court should decline the invitation.

In support of its position that USCIS retains concurrent jurisdiction with the federal court, the Government relies heavily on *Xie v. Mukasey*, 575 F. Supp. 2d 963, 964 (E.D. Wis. 2008). *Xie* rests on two prior district court decisions: one of which was overturned directly, *Bustamante v. Chertoff*, 533 F. Supp. 2d 373 (S.D.N.Y. 2008), rev'd sub nom., *Bustamante v. Napolitano*, 582 F.3d 403 (2nd Cir. 2009), the other of which, *Perry v. Gonzales*, 472 F. Supp. 2d 623, 630 (D.N.J. 2007), relied on a district court decision that was later

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the *in absentia* removal order has been rescinded. Gov't Brief at 6. Under agency precedent, an *in absentia* removal order "becomes a legal nullity upon its rescission, with the result that the respondent reverts to the same immigration status that he possessed prior to the entry of the order." *Matter of Bulnes*, 25 I. & N. Dec. 57, 59 (BIA 2009). To the extent that the vacatur of the *in absentia* removal order rendered it a nullity, it would seem to follow that USCIS lacked authority to enter its purported naturalization decision, even under the Government's theory.

reversed. *Etape v. Chertoff*, 446 F. Supp. 2d 408 (D.Md. 2006), *rev'd*, 497 F.3d 379 (4th Cir. 2007). For discussion *see Popnikolovski v. U.S. Dep't of Homeland Sec., Citizenship & Immigration Servs.*, 726 F. Supp. 2d 953, 958 (N.D. Ill. 2010). All substantial authority supports Mr. Aljabri's contentions in this matter.

A. The Plain Language of the Statute Indicates that District Court Jurisdiction is Exclusive.

The Government argues that the absence of explicit language stating that federal court jurisdiction is "exclusive" is evidence that jurisdiction is concurrent between the agency and the court in this context. However, if USCIS were able to divest the federal court of jurisdiction, that would run contrary to the plain language of the statute that vests the federal court with jurisdiction and the power to decide whether to remand.

The *Hovsepian* court considered the plain language argument and determined that the inclusion of the authority to "determine the matter" and to "remand" in the statute necessarily means that the federal court alone has jurisdiction. If the agency could also determine the matter, the power to remand would be superfluous and redundant. And, by creating the hierarchy implicit in the power to remand, Congress clearly signaled that federal court jurisdiction is exclusive. *Hovsepian*, 359 F.3d at 1160. Congress is presumed to not create redundancies, and courts "avoid rendering statutory provisions ambiguous, extraneous, or redundant." *Matter of Merchants Grain, Inc. By & Through Mahern*, 93 F.3d 1347, 1353–54 (7th Cir. 1996). Because the interpretation urged by the Government would render the remand provisions

redundant and extraneous, "the plain language of the statute clearly supports the applicants' position that proper filing of a § 1447(b) petition provides a federal court with exclusive jurisdiction over a naturalization application." *Etape*, 497 F.3d at 384.

B. Neither Congressional Intent Nor Legislative History Supports the Government's Argument.

Unable to find support in either the statute's text or case law, the Government turns to Congressional intent and legislative history. These arguments were contemplated by the other circuits and can be dispensed of following brief examination.

Congress created § 1447(b) to grant recourse to citizenship applicants whose applications languished for more than 120 days. After that period has run, an applicant has the option of persisting with the administrative process and waiting for USCIS to issue a decision, or removing the case to federal court in search of a more timely resolution of the matter. The Congressional aim of prompting USCIS to act on a naturalization application within 120 days is frustrated if USCIS faces no repercussion for failing to act. *Hovsepian*, 359 F.3d at 1163. Moreover, as the *Bustamante* Court noted, "nothing in the statute suggests that once the applicant makes a choice in favor of district court adjudication, USCIS may independently rule dispositively on the question." 582 F.3d at 407–08.

Congress's intent is illuminated by the nature of the powers allocated to the court in § 1447(b)—to "determine the matter" or to "remand." Since these powers would be meaningless if the agency could divest the court of the ability

to take action by issuing its own decision, Congress could not have meant for both tribunals to hold jurisdiction together: "Congress intended to vest power to decide languishing naturalization applications in the district court alone, unless the court chooses to 'remand the matter' to the INS, with the court's instructions." *Hovsepian*, 359 F.3d at 1160. Similarly, as the *Etape* Court found, "holding that § 1447(b) vests the district court with exclusive jurisdiction furthers the twin congressional goals of streamlining the process but retaining applicants' judicial rights and ability to choose the forum that will adjudicate their applications." *Etape*, 497 F.3d at 386. The legislative history of § 1447(b) supports this interpretation of Congressional intent.

The Government suggests that the absence of the term "exclusive" is proof that jurisdiction is concurrent, since "exclusive" was in an early version of the bill and was later subtracted. Gov't Brief at 17; H.R.Rep. No. 101–187, at 34 (1989). However, this overstates one alteration in language while ignoring another. Though the final bill did not include the term "exclusive," it contained additional language allowing for remand, which likewise confirms the view that USCIS does not maintain jurisdiction absent an order from a federal court. *Popnikolovski*, 726 F. Supp. 2d at 959. If the statute granted exclusive jurisdiction without permitting remand, then the federal court would have to decide the matter; the amendments to the statute place it in a court's sound discretion whether to decide the matter or to remand with instructions. Nothing in this legislative history supports the Government's strained contention that Congress' elimination of the term "exclusive" was intended to

allow USCIS to oust federal court jurisdiction, rather than to allow the federal court to decide whether to remand to USCIS.

Thus, the legislative history is at best ambiguous, and more likely supports Mr. Aljabri's view of the statute. At any rate, it could not justify avoiding the plain text of the statute. There is no ambiguity in the statute and "reference to legislative history is inappropriate when the text of the statute is unambiguous." *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 132 (2002); *see also*, *Bedroc Ltd. v. United States*, 124 S. Ct. 1587, 1595 n. 8 (2004) ("our longstanding precedents … permit resort to legislative history only when necessary to interpret ambiguous statutory text.").

C. Permitting Concurrent Jurisdiction Would Undermine Judicial Economy.

The Government contends that permitting concurrent jurisdiction would be efficient. Gov't Brief at 29. This is fallacious. Parties in a civil matter are well-capable of settling matters not in dispute; in cases where USCIS intends to grant naturalization, neither party would have an incentive to engage in district court litigation. *See*, *e.g.*, *Al-Maleki v. Holder*, 558 F.3d 1200, 1203 (10th Cir. 2009) (joint motion to remand after USCIS found applicant eligible to naturalize). The only time that concurrent jurisdiction becomes an issue for the courts is when USCIS intends to deny naturalization; and in this context, the statute permits the District Court to decide whether it would make sense to remand the matter to USCIS to allow it to issue such a denial or to maintain jurisdiction and decide the matter itself.

The Government stresses the importance of a "fully developed record," citing *Xie v. Mukasey*, 575 F. Supp. 2d at 964. Certainly, a District Court would have authority to remand in cases where further agency proceedings might be more efficient. But this is a far cry from allowing the federal agency to oust federal court jurisdiction, to impose substantial costs on the individual seeking citizenship, and to frustrate the intent of the statute. In order to invoke § 1447(b), an applicant has to have properly filed an application for citizenship, have been examined by the agency, and have waited 120 days following examination. § 1447(b). Prior to the examination, the agency conducts background checks based on fingerprints, facial recognition, and name checks. *See* USCIS Policy Manual, Volume 12: Citizenship & Naturalization, Part B: Naturalization Examination, Chapter 2: Background and Security Checks, available online at http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartB-Chapter2.html (last accessed August 13, 2013). At the examination conducted by USCIS, the applicant meets in person with a trained USCIS adjudicator who has opportunity to explore the elements of citizenship eligibility during the interview. Following the interview, USCIS is permitted to issue requests for additional evidence if further information is required from the applicant. Given the wealth of information the agency collects from the applicant's filing and the ample opportunity it has to solicit additional information following the examination, minimal weight can be given to the assertion that additional time is necessary for the agency to establish an adequate record.

Moreover, the duplication of efforts simply doesn't make sense. The *Popnikolovski* court observed, "[t]o permit the exercise of concurrent jurisdiction could result in significant inefficiencies if the court and agency simultaneously devote time and resources to adjudicating a plaintiff's application." 726 F. Supp. 2d at 959. An intervening decision from USCIS denying citizenship – if permitted – would most likely serve only to temporarily halt proceedings already underway in district court and give rise to additional new matters under 8 U.S.C. § 1421(c).[2] As such, where a § 1447(b) action is interrupted by a USCIS decision, the court is unable to issue, for example, instructions on remand that would likely resolve the matter. Instead, no guidance is issued by the court – which has already expended resources on the matter – and the case is likely to percolate back up to the federal court, where additional resources would be spent on nearly identical legal questions. "Under a scheme of concurrent jurisdiction … the INS could decide the matter against the applicant. But the applicant then would have the option to appeal the INS's denial under § 1421(c), and the district court would have de novo review. We do not believe that Congress intended such a judicially uneconomical procedure." *Hovsepian*, 359 F.3d at 1163.

As the other circuits have concluded, allowing for parallel adjudications in this context would deplete the resources of both tribunals with no discernible benefit to the court or the applicant.

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[2] Section 1421(c) allows for federal court review of citizenship denials after an applicant exhausts the administrative remedies. § 1421(c).

D. The Court's Case Law Does Not Support, But Undermines, the Government's Argument for Concurrent Jurisdiction.

The Government cites to authority in other contexts in which concurrent jurisdiction has been found appropriate. But authority from other contexts, far from supporting the Government's view, shows why concurrent jurisdiction is inapt here.

The Government cites *Doctors Nursing & Rehab. Ctr. v. Sebelius*, 613 F.3d 672, 678 (7th Cir. 2010). That decision discusses *Gao v. Gonzales*, where this Court found the Board of Immigration Appeals ("Board") could *sua sponte* reopen a matter pending before a federal court of appeals. 464 F.3d 728 (7th Cir. 2006). The Government argues this lends support to a finding of concurrent jurisdiction in the § 1447(b) context because that decision notes that the Board may reopen a final decision thereby rendering moot an appeal to the federal courts. *Doctors Nursing & Rehab. Ctr.*, 613 F.3d at 678. In fact, *Doctors Nursing & Rehab. Ctr.* explains precisely why concurrent jurisdiction is inappropriate in this context.

In *Doctors Nursing & Rehab. Ctr.*, the Court explained two significant differences which distinguish the Board's reopening of a removal order from most other contexts. First, held the Court, "*Gao* was fundamentally a mootness case: 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." *Doctors Nursing & Rehab. Ctr.*, 613 F.3d at 678. Here, Mr. Aljabri does not complain of the denial of reopening, nor did he seek only an

order requiring USCIS to adjudicate the matter; rather, he asked the District Court to assume jurisdiction over his petition, as Congress allowed him to request. While USCIS inaction is a requirement for a § 1447(b) action, such actions are not limited to remedying a problem of timeliness. In no normal sense would one say that an application for naturalization has been mooted by denial of the application.

Second, *Gao* was specific to a context where the Supreme Court had already "interpreted the statutory scheme of immigration review as allowing for concurrent review of a case by both the Board and the courts." *Doctors Nursing & Rehab. Ctr.*, 613 F.3d at 678 (citing *Gao*, 464 F.3d at 729). No similar statutory scheme is applicable here.

The Court's case law notes the inefficiencies generally caused by concurrent jurisdiction. The *Gao* Court noted that where "both tribunals could proceed in the same matter at the same time, confusion and wasted effort would ensue." *Gao*, 464 F.3d at 729 (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982); *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989)); *see also*, *Doctors Nursing & Rehab. Ctr.*, 613 F.3d at 678 (noting the "inefficiencies" caused by concurrent jurisdiction).

The Court in *Doctors Nursing & Rehab. Ctr.* also noted the potential for mischief which such a rule would cause:

> Under the Secretary's proposed rule, any agency could strip jurisdiction from federal courts, seemingly at any stage of the proceeding, for any reason. If the agency became concerned that a Court of Appeals—or even the Supreme Court—might issue a decision adverse to its interests, it could reopen its proceedings and yank the case out of the courts,

> regardless of the amount of resources that had already been expended or the advanced stage of the case. Besides being highly inefficient, it would allow the agency to manipulate federal jurisdiction to frustrate litigants by increasing the time and expense required to pursue claims, and prevent or at least postpone into perpetuity unfavorable precedent….
>
> [W]e reject the Secretary's theory, which would give the agency the unreviewable power to manipulate federal jurisdiction without any guarantee of efficiency. Instead, we read Congress's specification of the district court's power to remand … as a limitation on the agency's authority … to reopen and revise its determination. Thus, we hold that … the agency may not, during the pendency of judicial review, reopen and revise a final decision without permission from the court

613 F.3d at 679.

In short, the Court's case law, far from supporting the Government's contentions here, recognizes that concurrent jurisdiction is proper only in very narrow circumstances, none of which are present here.

Because there is not support in the law for concurrent jurisdiction in this context and because finding otherwise would create a circuit split, this Court should find that jurisdiction under § 1447(b) rests exclusively with the federal court and any decision issued by USCIS following the filing of a § 1447(b) complaint is without effect.

III. Declaratory Relief is an Appropriate Remedy Under 8 U.S.C. § 1447(b).

Declaratory relief is one of several appropriate remedies in an action brought pursuant to § 1447(b). Generally, "in a case of actual controversy within its jurisdiction," a federal court has authority to "declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). The statutory authority for this presumptively applicable

remedial power "confers discretion on the courts rather than an absolute right upon the litigant." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995). The discretionary, equitable remedy of declaratory relief strikes a balance between the general principle that "federal courts should adjudicate claims within their jurisdiction" with prudential "considerations of practicality and wise judicial administration." *Id.* at 288.

Nothing within § 1447(b)'s text forecloses declaratory relief as an available remedy. Under § 1447(b), the district court has the authority to "determine the matter or remand the matter, with appropriate instructions, to the Service to determine the matter." § 1447(b). This statutory directive effectively allows a district court to dispose of the matter in the most just, effective, and efficient way it sees fit. Declaratory relief is one of several available remedies for actions brought pursuant to § 1447(b), and it is particularly appropriate in this case for several reasons.

First, the equity-based factors courts consider when deciding whether to grant declaratory relief weigh in favor of finding such relief appropriate under § 1447(b). Second, this Court has already recognized declaratory relief as appropriate for an applicant who filed under § 1421(c), the functional analog to § 1447(b), and, in the context of available remedies, there is no reason to treat the provisions differently. Lastly, the regulatory framework as a whole does not foreclose declaratory relief as an appropriate remedy.

A. The Relevant Factors a Court Considers When Conferring Declaratory Relief Favor Issuing Such Relief Under § 1447(b).

Notwithstanding the trial court's inherent discretion when conferring equitable remedies such as declaratory relief, a district court typically decides whether to grant such relief against the backdrop of two important considerations: "Will a declaration of rights, under the circumstances, serve to clarify or settle legal relations in issue? Will it terminate or afford relief from the uncertainty giving rise to the proceeding?" *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 983 (10th Cir. 1994). These general questions inform the district court's decision, but several other factors are also relevant, such as (1) the usefulness of the proceeding in clarifying the legal relations at issue, (2) whether the declaratory relief will settle the controversy and implicate res judicata, (3) the presence of public policy issues, and (4) judicial economy, comity, and federalism. *See St. Paul Fire & Marine Ins. Co. v. Runyon*, 53 F.3d 1167, 1168 (10th Cir. 1995); *see generally*, *Wilton*, 515 U.S. at 288. A declaratory judgment need not be the only form of adequate relief available to the requesting party. *Powell v. McCormack*, 395 U.S. 486 (1969).

Here, the relevant factors weigh in favor of finding a declaratory judgment appropriate in the context of § 1447(b) proceedings.

First, deciding whether Mr. Aljabri is *prima facie* eligible for citizenship would allow the Immigration Judge to decide whether to terminate the removal proceedings against him. 8 C.F.R. § 1239.2(f); *see* Appellant's Opening Brief at 26–30. Put another way, a declaratory judgment would clarify Mr. Aljabri's *prima facie* eligibility for citizenship.

Second, a declaratory judgment issued here would resolve the question of whether Mr. Aljabri is *prima facie* eligible for citizenship. Mr. Aljabri "could plead the declaratory judgment in the removal proceedings, because the United States as a whole is bound by principles of mutual issue and claim preclusion." *See Klene v. Napolitano*, 697 F.3d 666, 669 (7th Cir. 2012) (citing *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984)). Here, all of the necessary parties are present and a declaratory judgment would bind both parties in subsequent proceedings. Therefore, a declaratory judgment that Mr. Aljabri is *prima facie* eligible for citizenship would resolve the controversy between the parties.

Third, public policy, as evidenced by statutory concern for naturalization application delays, would support the federal courts' authority in this area, including the authority to render judicial declarations of legal rights in the context of naturalization applications.

Fourth, issues of comity or federalism do not militate against federal court declarations of eligibility for citizenship.[3] There are pending removal proceedings against Mr. Aljabri, but the Immigration Court system disclaims any authority to determine *prima facie* eligibility for naturalization. *Matter of Hidalgo*, 24 I. & N. Dec. 103, 105 (BIA 2007). This guarantees that no

[3] Proceedings before USCIS are not currently pending, and thus cannot be characterized as concurrent, because the federal district court obtains exclusive jurisdiction over an applicant's proceedings as soon as he seeks district court review. *See supra* I; *Cf. Klene*, 697 F.3d at 669 ("The [CIS] wants [the Court] … to understand § 1429 as announcing a general policy against multiple proceedings. But that isn't what § 1429 says. It tells the Attorney General to put an application aside once removal proceedings begin; it does not issue a similar directive to a court.").

divergence is possible between the federal courts and the agency, to the extent that simultaneous proceedings occur.

Finally, there is no hindrance to the federal courts efficiently disposing of the declaratory judgment matter, where appropriate. Indeed, to decline declaratory judgment would likely merely delay federal court review.

In sum, the general factors to which courts look when determining whether declaratory relief is appropriate weigh in favor of finding such relief categorically available in the context of § 1447(b) proceedings.

B. Sections 1421(c) and 1447(b) are Analogous for Purposes of Available Remedies.

This Court should find, consistent with its decision in *Klene*, that declaratory relief is available for applicant's seeking district court review under § 1447(b). There are two avenues under which the immigration statutes authorize district court jurisdiction over naturalization applications. First, if an application for naturalization is not acted upon within 120 days of the naturalization examination, an applicant can seek a hearing in a district court, which may determine the application or remand it to USCIS with instructions. § 1447(b). Second, if an application is denied after completion of the available administrative review procedures, the applicant is able to seek review of the denial in a district court. § 1421(c). The district court reviews applications filed pursuant to both § 1421(c) and § 1447(b) *de novo*. 8 C.F.R. § 336.9; § 1421(c).

These two avenues of judicial review—actions brought under § 1421(c) and § 1447(b)—are mutually exclusive and complement each other based on the posture that the applicant finds himself in when applying to the district

court. If the USCIS has already issued its final determination, the applicant applies under § 1421(c); if the USCIS has failed to issue its report 120 days or more after examining the applicant, the applicant may apply under § 1447(b). A court reviewing an applicant's claim under § 1447(b) may maintain that action to the same extent as a judge adjudicating an action under § 1421(c). Thus, the two actions are functional analogs of each other and should be treated as such.

Several circuits have compared actions filed under § 1421(c) and § 1447(b) when determining the scope of judicial review available the applicant, thereby suggesting, albeit implicitly, that the two provisions should be treated analogously. *See*, *e.g.*, *Gonzalez v. Sec'y of Dep't of Homeland Sec.*, 678 F.3d 254, 259 n. 5 (3d Cir. 2012) (comparing cases brought under § 1447(b) to an action brought under § 1421(c) for the purpose of determining judicial review); *Awe v. Napolitano*, 494 Fed. Appx. 860, 863 (10th Cir. 2012) ("Although *Ajlani* and, in relevant part, *Saba-Bakare* involved jurisdiction under § 1447(b) rather than § 1421(c), we consider their analysis relevant to the question of what effect § 1429 has on judicial review under § 1421(c)."); *Rahman v. Napolitano*, 385 Fed. Appx. 540, 543 n. 5 (6th Cir. 2010) (finding, similar to other courts, that "the effect of § 1429 in an action under § 1421(c) … similarly limits the scope of the district court's review and circumscribes the available remedies in an action brought under § 1447(b)…"). In sum, many courts have implicitly found that § 1421(c) and § 1447(b) are indeed functional analogs, and have conferred the same scope of judicial review for both types of action.

The same reasoning the Court found persuasive in finding declaratory relief to be an appropriate remedy in an action brought under § 1421(c) apply in this context. *Klene*, 697 F.3d at 669. In *Klene*, this Court found declaratory judgment available in a § 1421(c) hearing after removal proceedings had been instituted against the applicant. The Court reasoned that the power to grant a declaratory judgment in the applicant's favor "preserves the [applicant's] entitlement under § 1421(c) to an independent judicial decision while respecting the limit that § 1429 places on the Attorney General's powers." *Id.* The "entitlement" and "limit" to which the Court referred—the applicant's unequivocal right to district court review and the statute barring the USCIS from determining the applicant's status once removal proceedings have commenced—are both equally applicable to § 1447(b) proceedings. Accordingly, this Court should similarly find declaratory relief appropriate in the context of a § 1447(b) proceeding.

As many circuits have assumed without discussion, there is no reason to differentiate between these two, complementary statutes in terms of available remedies. Moreover, treating § 1421(c) and § 1447(b) differently, in the remedial context, would make the broader regulatory scheme internally inconsistent given that the two provisions are functional analogs. Thus, declaratory relief is an appropriate remedy for Mr. Aljabri.

C. Nothing in the Text or Purpose of § 1447(b) Would Make Declaratory Judgment Categorically Inappropriate.

The Government argues that "a preposterous result would ensue" if an applicant could obtain declaratory review under § 1447(b) from a district court

after removal proceedings had begun, because the USCIS is statutorily barred from adjudicating the application within the allotted 120-day period, thereby "eviscerating the purpose of 8 U.S.C. § 1429." Gov't Brief at 30–31.

The Government's argument contains an essential fallacy. Jurisdiction under § 1447(b) turns on 120 days passing from the date of the naturalization examination without a decision. Under § 1429 as interpreted by the Government, USCIS will not "consider" the application, including conducting an examination, once removal proceedings have begun. *See Saba-Bakare v. Chertoff*, 507 F.3d 337, 339–40 (5th Cir. 2007). Thus, an individual invoking district court jurisdiction under § 1447(b) would almost certainly have sought naturalization before being placed into removal proceedings, and before USCIS was prohibited from considering his or her application.

Thus, the logic of *Klene* and the plain meaning of the statute would lead to no "preposterous" result, as the Government suggests, and § 1429 would be far from "eviscerated" by applying the statute as written to these facts. *Cf.* Gov't Brief at 31.

IV. The Court Should Decline to Decide in the First Instance Whether Mr. Aljabri Can Show Good Moral Character; Rather, It Should Remand to District Court.

The Government suggests that the Court should decline to remand Mr. Aljabri's case to the District Court, on the ground that his convictions bar him from naturalization and make declaratory relief inappropriate. It now argues for the first time that Mr. Aljabri's wire fraud convictions – not the structuring convictions, as found by USCIS – are aggravated felonies. It does not address

Mr. Aljabri's point that the Government's reading would expand the required good moral character period by a factor of four, though the relevant good moral character period is plainly relevant to the question of whether Mr. Aljabri could satisfy that requirement. Rather than resolve this legal issue in the first instance, the Court ought to remand the matter to District Court.

First, the Government proffers a new theory for why Mr. Aljabri should be found ineligible for naturalization. The Government no longer attempts to defend the purported USCIS naturalization denial, premised on Mr. Aljabri's convictions for structuring. Cf. App. 43–47. As explained in the opening brief, *see* Appellant's Opening Brief at 31, the USCIS conclusion was untenable; the Government properly concedes the matter and does not attempt to defend the Agency decision.

The Government now argues against eligibility based on Mr. Aljabri's convictions for wire fraud, and offers multiple exhibits attached to its brief, describing those convictions. These matters were never raised in the District Court, and no arguments or evidence was presented on those matters. They should be raised in the first instance to that Court.

At any rate, Mr. Aljabri also argued in his opening brief against the Agency's theory that his required period of good moral character can be extended from 3 to 13 years by agency inaction. Appellant's Opening Brief at 34–35. The Government nowhere responds to this argument in its briefing. In a somewhat analogous provision, the Board held, and the Court upheld, that the good moral character period is counted backwards from the eligibility

decision. *See 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 Court has not considered that question in the naturalization context. Remand to the District Court would allow full briefing on the relevant period for good moral character, and whether the Petitioner is precluded from showing good moral character on any of the statutory grounds. *Cf.* 8 U.S.C. § 1101(f).

V. The District Court Should Also Consider Whether the Government Had a Duty to Transmit a Naturalization Certificate to District Court, Whether Mr. Aljabri's Oath was a Public Oath, and the Effect of Anti-Retroactivity Principles On This Matter.

Finally, two other arguments were raised by Mr. Aljabri, but not addressed in lower court briefing.

First, Mr. Aljabri argued in line with Second and Sixth Circuit opinions that the Government had a duty to transmit a naturalization certificate to District Court, once it approved his application. See Appellant's Opening Brief at 33 (citing *Escaler v. U.S. Citizenship and Immigration Servs.*, 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)). The Government asks the Court to find no such duty. To hold as the Government urges would require the Court to ignore the plain text of the relevant regulations, *see* 8 C.F.R. §§ 335.5, 334.5(b), and to create a circuit split; a point the Government does not acknowledge. Two related questions, which the Government does not address, are whether Mr. Aljabri could show prejudice from that violation of duty, and the appropriate remedy for the violation. To

the extent that the matters are not found to have been forfeited, they may be addressed in the District Court on remand.

Second, the Government does not respond to Mr. Aljabri's argument that the oath he signed in a USCIS interview may properly be treated as a public oath. Appellant's Opening Brief at 34. The Second Circuit has previously found it "not clear" whether a signed oath can be found to be public in nature. *Cf. Escaler*, 582 F.3d at 290. Mr. Aljabri was not alone in a room when he signed that oath; he did so in the presence of a USCIS officer. Mr. Aljabri is unaware of any case law requiring a particular number of individuals to be present in order to make an oath "public." Black's Law Dictionary defines "public" as: "1. Relating or belonging to an entire community, state, or nation. 2. Open or available for all to use, share, or enjoy." Black's Law Dictionary (9th ed. 2009). It is far from clear that a written oath administered by a governmental official in a governmental building would not "relat[e] or belong[]" to the national community at large. Again, the precise setting of the oath could be explored on remand.

Finally, the Government did not respond to Mr. Aljabri's argument that anti-retroactivity principles are relevant to this matter. Appellant's Opening Brief at 34 (citing *Greene v. United States*, 376 U.S. 149, 160 (1964)). Mr. Aljabri argued that anti-retroactivity principles would support his statutory arguments, and his argument that he is, and is eligible to be, a U.S. citizen.

To the extent that the Government seeks to take away his citizenship, it may have statutory authority to do so, 8 U.S.C. §§ 1451, 1481, but in that

context, the Government would bear the burden to prove that his citizenship was invalidly obtained.

Rather than resolve these questions on the basis of minimal briefing – and without adversarial briefing on some points – the Court should find these matters appropriate for the District Court to resolve on remand in the first instance.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court, find that it had jurisdiction over this matter, and remand for the District Court to determine whether declaratory relief would be appropriate in this matter.

Dated: August 14, 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 6,200 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: August 14, 2013

/s/ Charles Roth
Charles Roth

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August 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