No. _____

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**ABDULMALIK MAHYOUB MULHI ABDULLA**,
Petitioner,

v.

**MERRICK GARLAND**,
**ATTORNEY GENERAL OF THE UNITED STATES,**
Respondent

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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## QUESTION PRESENTED

The Constitution provides that "The Congress shall have power ... to establish a uniform rule of naturalization … throughout the United States." Article I, § 8, cl. 4. However, in the Third Circuit, there are two separate laws of naturalizations: one applied by the agency to whom Congress delegated its naturalization authority; the other is the law applied by the Third Circuit Court of Appeals. Petitioner is a citizen of the United States under the standard applied by USCIS; but has been ordered removed under the standard applied by the Third Circuit without a hearing on the merits of his claim.

Under former 8 U.S.C. § 1432(a), a child automatically acquires citizenship through the naturalization of either both parents or in specific statutorily-enumerated situations, only one parent provided that all qualifying events occur before the child's eighteenth birthday. Specifically, 1432(a)(3) allows a child to acquire citizenship from their custodial parent "when there has been a legal separation of the parents" provided all of 1432(a)'s requirements are satisfied before the child's eighteenth birthday.

In the opinion below, the Third Circuit determined a previous panel's ruling was binding Circuit precedent even though issue presented, the meaning of 1432(a)(3)'s first clause, was never determined by a previous panel of the Third Circuit, as that precise was conceded by the parties and the Court did not employ any of the tools of statutory construction or in any manner interpret the statutory language. *See, Jordon v. Att'y Gen.*, 424 F.3d 320, 330 (3d Cir.

2005) (citing *Bagot v. Ashcroft,* 398 F.3d 252 (3d Cir. 2005)). However, USCIS who is the agency Congress has delegated its exclusive naturalization authority only requires legal separation and acquisition of legal custody to occur before the child's eighteen birthday. Thus, if a similarly situated person applies for Certificate of Citizenship before USCIS within the Third Circuit, § 1432(a)(3) requires only that the applicant prove that the parent through whom they acquire citizenship obtained a legal separation and custody of the child before the child's eighteenth birthday. *Matter of Douglas*, 126 I&N Dec. 197 (BIA 2013).

The First and Second, Fifth and Ninth Circuits, have applied 1432(a)(3) in a similar manner as Board of Immigration Appeals and the long-standing agency practice and have only required that all of 1432(a)(3)-(5)'s qualifying events occur before the child's eighteenth birthday.

The question presented is:

1. Whether a child who has satisfied all of the statutory conditions of former 8 U.S.C. § 1432(a) (former section 321(a) of the Immigration and Nationality Act) before the age of 18 years has acquired United States citizenship, when the parent through whom the child acquires citizenship was legally separated from the child's non-citizen parent and obtained legal custody of the child prior to the child's eighteenth birthday but at a time after the parent's own naturalization.

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## PETITION FOR WRIT OF CERTIORARI

Abdulmalik Mahyoub Mulhi Abdulla petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

## OPINIONS BELOW

The decision of the Third Circuit (Pet. App. 2a) is reported at 971 F.3d 409 The decision of the Board of Immigration Appeals (Pet. App. 14a) is unreported. The decision of the immigration judge (Pet. App. 16a) is also unreported. The Third Circuit's order denying rehearing en banc is unreported. (Pet. App. 1a)

## JURISDICTION

The Third Circuit entered its judgment on August 20, 2020. A timely-filed petition for panel and en banc rehearing was denied on November 19, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Former 8 U.S.C. § 1432 provides:

> Children born outside United States of alien parents; conditions for automatic citizenship

(a) A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:

(1) The naturalization of both parents; or

(2) The naturalization of the surviving parent if one of the parents is deceased; or

(3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if

(4) Such naturalization takes place while such child is unmarried and under the age of eighteen years; and

(5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

(b) Subsection (a) of this section shall apply to an adopted child only if the child is residing in the United States at the time of naturalization of such adoptive parent or parents, in the custody of his

adoptive parent or parents, pursuant to a lawful admission for permanent residence.

Former Section 314 of the 1940 Naturalization Act provides:

> SEC. 314. A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:
>
> - (a) The naturalization of both parents; or
> - (b) The naturalization of the surviving parent if one of the parents is deceased; or
>
> (c) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents; and if
>
> (d) Such naturalization takes place while such child is under the age of eighteen years; and
>
> (e) Such child is residing in the United States at the time of the naturalization of the parent last naturalized under subsection (a) of this section, or the parent naturalized under subsection (b) or (c) of this section, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

Article I, § 8, cl. 4 of the Constitution of the United States provides:

> "The Congress shall have power ... to establish a uniform rule of naturalization … throughout the United States."

## INTRODUCTION

The Constitution provides that "The Congress shall have power ... to establish a uniform rule of naturalization … throughout the United States." Article I, § 8, cl. 4. However, in the Third Circuit, there are two separate laws of naturalization, neither of which have been written by Congress. Under former 8 U.S.C. § 1432(a), a child may acquire citizenship from their naturalized parent when their parents are legally separated and the parent who naturalizes has legal custody over the child. § 1432(a)(3) provided all of § 1432(a)'s requirements are satisfied before the child's eighteenth birthday. The Third Circuit has determined that § 1432(a)(3)'s first clause requires the legal separation and custody of the child to be obtained by the naturalizing parent before the parent naturalizes. USCIS and the Board of Immigration Appeals (BIA) only require that legal separation and custody are obtained before the child's eighteenth birthday and applies this law uniformly across all Circuits, including the Third Circuit. *See*, *Matter of Douglas*, 126 I&N Dec. 197, 199 (BIA 2013). However, the Third Circuit has adopted an interpretation of 1432(a)(3) that was not based on the Court's reading of the statutory text or any recognized judicial deference doctrine. Rather the The Court first gave effect to a private party's concession, *Bagot* 398 F.3d at 257 ("Respondent concede[d]" that he "must prove … that his father was naturalized after a legal separation from his mother"); and then determined that this

concession was binding precedent. *Jordon.*, 424 F.3d at 329-330 (citing *Bagot* F.3d at 257) ("we need not labor over the proper construction of § 1432(a)(3)'s first clause or its use of "when," … because a decision of this Court issued post-briefing in this case sets forth the controlling interpretation of § 1432(a)(3)'s first clause."). However, since "the power to bind is limited to the issue that is before" the court, the *Bagot* and *Jordon* Courts "cannot transmute dictum into decision by waving a wand and uttering the word 'hold.'" *United States v. Rubin*, 609 F.2d 51, 69 (2d Cir. 1979) (Friendly, J.); see also, *U.S. Bancorp Mortg. Co. v. Bonner Mall*, 513 U.S. 18, 24 (1994) (noting previous opinion which "lacke[d] [a] reasoned consideration" is not binding).

"Judges owe the people who come before them nothing less than a fair contest, where every party has an equal chance to persuade the court of its interpretation of the law's demands." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J. concurring). By giving precedential effect to a private litigant's concession the Third Circuit has had "had den[ied]" Petitioner the "independent judicial decisions [he] deserve[s]" *id.*, and violated the foremost rule of statutory construction: "As always, [] start with the specific statutory language in dispute." *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018). "Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so." *United States v. Brogan*, 522 U.S. 398, 408 (1998). "If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources, [their] imaginations" (or in the case here because they "need not labor"), they run the "risk [of] amending statutes outside the legislative process reserved for the people's

representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) (citing, *New Prime Inc.* v. *Oliveira*, 139 S.Ct. 532, 538–539, 202 L.Ed.2d 536 (2019).

By failing to start with the statutory text and apply the canons of statutory construction as necessary, the Third Circuit "abdicate[d] their job of interpreting the law," *Kisor* 139 S. Ct. at 2426 as well as its "responsibility to decide cases properly before it." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 125-26 (2015) (Thomas, J. concurring). "This responsibility applies not only to constitutional challenges to particular statutes … but also to more routine questions about the best interpretation of statutes." *Id.* (citing, *Whitfield v. United States,* 574 U.S. ——, ——– – ——, 135 S.Ct. 785, 787–89, 190 L.Ed.2d 656 (2015). This failure has created not only a conflict between the meaning of 1432(a)'s first clause between Circuits, but also a conflict of law within the Circuit depending on whether the federal courts or a federal agency decides whether a person is a citizen of the United States. Congress did not intend this result; and the Constitution does not allow it.

Mr. Abdulla's claim was summarily dismissed under the *Jordon* and *Bagot* precedent by the court below, while USCIS issues Certificate of Citizenship to similarly situated applicants in the Third Circuit. *See, e.g.*, *Identifying Information Redacted by Agency*, 2014 WL 7793582, at *2, *Application for Certificate of Citizenship under Former Section 321 of the Immigration and Nationality Act*. ("The applicant's case arises in the Third Circuit Court of Appeals. In

*Matter of Douglas*, the Board declined to follow *Bagot* … and *Jordon* … for cases arising within the Third Circuit on the issue of the order in which the requirements for citizenship must be fulfilled …. Following *Douglas*, we also apply *Baires-Larios* to cases arising in the Third Circuit for the proposition that a child who has satisfied the statutory conditions of former section 321(a) of the Act before the age of 18 has acquired United States citizenship, regardless of whether the naturalized parent acquired legal custody of the child before or after the naturalization."); *see also*, *Matter of A-D-* Appeal of Philadelphia, Pennsylvania Field Office Decision Application: Form N-600, Application For Certificate of Citizenship, 2017 WL 839704, at *4 ("The record does not establish the Applicant satisfies these conditions, as there is no evidence the Applicant's parents were legally separated before his 18th birthday.");

As noted in *Matter of Douglas*, no other federal circuit has adopted the Third Circuit's interpretation of 1432(a)(3)'s first clause. *Id.* 26 I&N Dec. at 201. Rather, the First Circuit has specifically allowed for the 1432(a)(3)'s requirements to be met at any time before the child's eighteen birthday. *Fierro v. Reno*, 217 F.3d 1, 6 (1st Cir. 2000); *Batista v. Ashcroft*, 270 F.3d 8, 15-16 (1st Cir. 2001). The Second Circuit has also interpreted 1432(a)(3) as allowing for separation and legal custody to occur until the child's eighteen birthday, *Langhorne v. Ashcroft*, 377 F.3d 175, 176 (2d Cir. 2004); and has suggested in an published opinion that the word "when" in 1432(a)(3) is ambiguous and subject to *Chevron* deference. *Spaulding v. Sessions*, 751 F. App'x 130, 133 (2d Cir. 2018) (unpublished). Thus the lack of uniformity within the Third Circuit itself is compounded by an

actual split between the Circuit, a lack of uniformity that only this Court can resolve.

Finally, the ambiguity and conflict between Circuits and within Circuits also encourages forum shopping and presents significant issues with satisfying the requirements of *Padilla v. Kentucky*, 559 U.S. 356 (2010). Given the geographic proximity of the Third Circuit with the First, Second, Fourth and Sixth Circuits. The Petitioner here has never resided in the Third Circuit, first residing in New York City and then moving to Baltimore, Maryland. He was tried and convicted in the District of Maryland and then transferred from the Fourth Circuit to the Third Circuit. A recent case in the District of Maryland highlights both of these concerns, as the District Court vacated convictions for ineffective assistance of counsel under Padilla based on defense counsel's failure to properly advise the defendant his derivative naturalization claim under § 1432(a) a it related to the consequences of deportation. *Klaiber v. United States,* 471 F. Supp. 3d 696, 710 (D. Md. 2020). In *Klaiber*, where the defendant pled guilty in the Fourth Circuit after receiving assurance from an ICE deportation officer that he appeared to be a United States citizen and was then transferred to the Third Circuit where ICE began to seek his deportation. *Id.* Similarly, Mr. Abdulla was tried in the District of Maryland and sentenced to prison in the Third Circuit. If Mr. Abdulla had been sentenced to prison in a federal facility located within any other Circuit, he would have either been determined to be a United States citizen or at a minimum be provided an opportunity to present his case on the merits either before the district court under 8 U.S.C. §

1252(b)(5)(B) or before the Fourth Circuit if fact-finding was unnecessary under 8 U.S.C. § 1252(b)(5)(A).

## STATEMENT OF THE CASE

### I. Statutory Framework

Section 1432(a) is deliberately structured in a logical manner. Subsections (1)-(3) provide for the qualifying parental arrangements that will allow a child to acquire citizenship. Setting the default rule that both parents must naturalize before a child derives citizenship (subsection 1) and then providing for exceptions to the rule in subsections (2) and (3). The legislative text itself supports this purpose as subsections (1),(2) and (3) are connected to each other through the use of the disjunctive "or". Subsection (4) specifically provides for the events governing the naturalization of the parent: naturalization must occur while the child is unmarried and under the age of eighteen. Subsection (5) provides for when the child actually derives citizenship and defines the moment of derivative naturalization at the time when the child begins "residing in the United States pursuant to a lawful admission for permanent residence" provided this occurs before the age of eighteen. Subsection (a)(5) explicitly allows for the subsections (1)-(3)'s requirements to be met "at the time of naturalization" or any time "thereafter...while the [child is'] under the age of eighteen years." 1432(a)(5). For children already residing in the United States pursuant to a lawful admission for permanent residence, subsection (5) makes acquisition automatic "at the time of the naturalization of the parent last naturalized under clause (1)..., or the parent naturalized under clause (2) or (3)." 1432(a)(5). However, in all other cases,

regardless of whether subsection (1), (2) or (3) applies, naturalization of the child occurs when upon the naturalization of the parent under (1), (2), or (3) the child "thereafter begins to reside permanently in the United States while under the age of eighteen years." 1432(a)(5).

Subsection (b) applies only to adopted children, but specifically requires that for adoption children fulfill all of 1432(a)'s requirements at the time of naturalization of such adoptive parent or parents" and does not provide for a child to fulfill requirements subsequent to the parent or parents naturalization by "thereafter begins to reside permanently in the United States while under the age of eighteen years" as provided for non-adopted children in subsection 1432(a)(5).

## II. Factual and Procedural Background

Petitioner, Abdulmalik Abdulla, was born in Yemen on September 6, 1976. His parents had married in 1975, before his birth and were both citizens of Yemen. Mr. Abdulla's father moved to the United States and became a naturalized citizen of the United States on March 20, 1986. On January 8, 1989, Mr. Abdulla's parents were legally separated, and sole legal custody was provided to Mr. Abdulla's father. Mr. Abdulla's father then petitioned for Mr. Abdulla to reside lawfully in the United States as his unmarried son under the age of 21. Mr. Abdulla was lawfully admitted as a Legal Permanent Resident on May 8, 1990 at the age of 14 and thereafter began permanently residing with his father while under the age of eighteen; thus fulfilling all the requirements of 1432(a)(3)-(5) and deriving citizenship from his naturalized United States citizen father. When Mr.

Abdulla arrived in the United States, he entered with his younger brother Fawaz, who was 11 years old at the time, and who has obtained an N-600 Certificate of Citizenship on December 14, 1995 based on the exact same claim of derivation of citizenship that Mr. Abdulla made before EOIR and the Third Circuit; since both Mr. Abdulla (14 years old) and his brother (11 years old) were under age eighteen at the time of fulfilling all of 1432(a)'s requirements. Petitioner's seven siblings, also born in Yemen, are all United States citizens. Mr. Abdulla applied for naturalization in 1996, unaware of his derivative naturalization, but his application remained pending for thirteen years before being denied in 2009 because of his inability to pass the English exam. Additionally, Mr. Abdulla's wife and five children are all citizens or legal permanent residents of the United States.

After Mr. Abdulla arrived in the United States, he resided in New York City until approximately 2010, when he moved to Baltimore, Maryland where he owned and operated a grocery store. In 2014, Mr. Abdulla was arrested and tried in the United States District Court for District of Maryland and was convicted on August 8, 2014. Prior to his sentencing, ICE had placed as immigration detainer on Mr. Abdulla, intending to deport him upon completion of his sentence. On November 14, 2014, Mr. Abdulla was sentenced to serve 4 years in prison at FCI Ft. Dix in New Jersey with a condition of supervised release requiring Petitioner to be surrendered to immigration authorities for deportation. When he was released from prison he was immediately detained and placed in removal proceedings before the Immigration Court in Elizabeth, New Jersey. Petitioner's

immigration counsel at the time did not sufficiently present his claim for derivative citizenship and Petitioner was ordered removed from the United States on October 4, 2018. Petitioner's former counsel also did not timely file an appeal of the Immigration Judge's decision with the Board of Immigration Appeals. Petitioner obtained new counsel who filed a motion with the BIA to certify and accept his late appeal and presented for the first time the evidence supporting Mr. Abdulla's claim to acquisition of citizenship under former 1432(a). The Board denied Mr. Abdulla's motion to certify a late appeal on January 10, 2019. Mr. Abdulla timely file a Petition for Review with the Third Circuit Court of Appeals Among the arguments presented in his petition for review was that Mr. Abdulla had acquired citizenship in 1990 upon fulfilling all the requirements of former 1432(a)(3)-(5) and thus was a United States citizen and could not be removed. The Third Circuit denied Mr. Abdulla's petition for review finding that this claim to derivative citizenship was precluded by Third Circuit precedent in *Jordon*, 424 F.3d at 330, which assumed without deciding first clause of 1432(a)(3) as requiring that Mr. Abdulla's parents had legally separated at the time of Mr. Abdulla naturalization, rather than before Mr. Abdulla's eighteenth birthday. Mr. Abdulla sought panel and en banc reconsideration of the decision, which was denied on November 19, 2020.

## REASONS FOR GRANTING THE PETITION

### I. Third Circuit's Interpretation Conflicts with the Law of Other Circuits Creating a Circuit Split

The third Circuit has held that "a child seeking to establish derivative citizenship under § 1432(a) must prove . . . 'that his [parent] was naturalized after a legal separation from his [other parent].'" *Jordon*, 424 F.3d at 330 (alterations in original) (quoting *Bagot* 398 F.3d at 257). However, *Jordan* did not review the issue presented in the case, which was whether the term "when" in the first clause of 1432(a)(3) "should not necessarily be read in its temporal sense (i.e., 'after')" or "in its conditional sense (i.e., "if")" as well as whether the terms "'when' modifies 'having legal custody of the child,' not "naturalization."" *Jordon*, 424 F.3d at 329. The *Jordon* felt it "need not labor over the proper construction of § 1432(a)(3)'s first clause or its use of "when," … because a decision of this Court issued post-briefing in this case sets forth the controlling interpretation of § 1432(a)(3)'s first clause[,]" *Jordon* 424 F.3d at 329-330 (citing *Bagot*, 398 F.3d 252). However, in *Bagot*, the Court didn't labor over the construction over when either as the "Respondent concede[d] that they "must prove … that his father was naturalized after a legal separation from his mother." *Bagot*, 398 F.3d at 257. Thus, the issue presented both in *Jordon* and by the Petitioner below has never been litigated and determined on the merits by any panel in the Third Circuit.

### A. Conflict with the First Circuit

The First Circuit has interpreted 1432(a) as allowing for the requirements to be met through the child's eighteenth birthday. In *Fierro v. Reno*, the First Circuit held that derivative naturalization is viewed at the time of naturalization and throughout the child's minority. *Fierro v. Reno*, 217 F.3d 1, 6 (1st Cir. 2000). In Fierro, the First Circuit held:

> Congress was concerned with the legal custody status of the child at the time that the parent was naturalized and during the minority of the child. Congress clearly intended that the child's citizenship should follow that of the parent who then had legal custody and it is rather easy to imagine the reasons for this choice: presumably Congress wanted the child to be protected against separation from the parent having legal custody during the child's minority. Here, viewing matters at the time that Fierro's father became naturalized (and indeed through the time that Fierro turned 18.

*Id; see also*, *Henry v. Quarantillo*, 684 F. Supp. 2d 298, 312 n.20 (E.D.N.Y. 2010) *aff'd* 414 F. App'x 363 (2d Cir. 2011) (noting that "*Fierro* granted the possibility that an alien might still qualify for derivative citizenship if he met § 1432(a)(3)'s requirements after his custodial parent's naturalization but before his eighteenth birthday" and contrasting *Fierro* with *Jordon*.).

The following year after *Fierro*, the First Circuit explicitly found a child could derive citizenship from a custodial parent who naturalized in 1982 six years before divorcing the child's mother and obtaining legal custody in 1988.

*Batista v. Ashcroft*, 270 F.3d 8, 15-16 (1st Cir. 2001) (citing 8 U.S.C. § 1432(a) and finding "Cesar Batista can avail himself of derived citizenship under this statute by demonstrating 1) that Julio Batista became a naturalized United States citizen before his son Cesar Batista reached the age of eighteen; 2) that Cesar Batista resided in the United States pursuant to a lawful admission for permanent residence when his father was naturalized, or began to reside here permanently before reaching the age of eighteen; and 3) — the critical element for this petition — that Cesar Batista's parents legally separated and that Julio Batista was awarded legal custody of his son[.]") In *Batista*, the First Circuit explicitly noted that "in June 1982 Julio Batista [the father] became a naturalized United States citizen; [] in October 1983, his son, Cesar Batista, came to the United States; [] Julio and Minerva Batista divorced on November 14, 1988, in the Dominican Republic, and the father was awarded sole legal custody of his son pursuant to the divorce decree. *Id.* at 16. The First Circuit further noted that "Julio Batista's naturalization certificate, dated June 16, 1982, indicates that he became a naturalized citizen before his son reached the age of eighteen. The government does not contend otherwise, nor does it dispute that Cesar Batista was admitted as a legal permanent resident at the age of six. The remaining question is whether the evidence submitted by petitioner-in particular, Julio Batista's affidavit and the Dominican "Divorce Sentence"-present a genuine issue of material fact as to whether Cesar Batista's parents legally separated and whether his father was awarded sole custody of him prior to Batista's eighteenth birthday." *Id.* Finally, the First Circuit revisited 1432(a)(3) in 2015 and applied the same

standard of requiring all qualifying events to occur before the age of 18. See also, *Thompson v. Lynch*, 808 F.3d 939 (1st Cir. 2015) (noting 1432(a) requirements are legal separation, legal custody and lawful permanent residence before the age of eighteen).

**B. Conflict with and Within the Second Circuit**

In the Second Circuit, the court has held that all events must occur before the child reaches eighteen years of age. *Langhorne v. Ashcroft*, 377 F.3d 175, 176 (2d Cir. 2004). ("We conclude that the plain text of Section 321(a) would have conferred derivative citizenship on Langhorne only if *both* the naturalization of his father *and* the legal separation of his parents had occurred before his eighteenth birthday."). Additionally, the facts in Langhorne support this conclusion as "[t]he salient facts [we]re undisputed. Langhorne legally immigrated to the United States at age ten. Langhorne's father became a naturalized citizen when Langhorne was fifteen but his mother never acquired U.S. citizenship. Langhorne's parents divorced when he was nineteen, and afterwards Langhorne remained in the legal custody of his father in the United States." *Id.* at 178. In rejecting Langhorne's reading of the statute, the Court noted that under this reading, "an eighteen-year-old alien child with one naturalized parent and one non-naturalized parent would have been foreclosed from attaining derivative citizenship if the child's parents remained married until the child's twenty-first birthday, but the same child *would* have acquired derivative citizenship if the parents legally separated (or the non-naturalized parent died) before the child turned twenty-one." *Id.* at 179–80

Additionally, the Second Circuit has held that various provisions within 1432(a) are ambiguous and subject to the *Chevron* framework, which "accord[s] substantial deference to the BIA's interpretations of the statutes and regulations that it administers." *Langhorne*, 377 F.3d 175, 177 (2d Cir. 2004) (quoting *Brissett v. Ashcroft,*363 F.3d 130, 133 (2d Cir. 2004) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,*467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). Specifically in an unpublished opinion the Second Circuit has noted the term "when" in subsection (a)(3)'s first clause to be ambiguous and controlled by the BIA precedent, *Spaulding v. Sessions*, 751 F. App'x 130, 133 (2d Cir. 2018) (unpublished) (noting that 1432(a)(3)'s "first clause ... uses the ambiguous 'when'" and "under BIA precedent" a child deriving citizenship under "the first clause of subsection (3)" is "not required" to "satisfy in any particular order" all of "the relevant factors" as "long as he satisfied them all at any point before he turned 18."). See also, *Nwozuzu v. Holder*, 726 F.3d 323, 325 (2d Cir. 2013).

The lack of clarity as to the meaning of 1432(a)(3) creates problems just not in naturalization but also in criminal prosecutions for illegal reentry and illegal entry to the United States. 8 U.S.C. § 1325(a); 8 U.S.C. § 1326(a), not only from the jurisdictional perspective but also relating to the defenses which are allowed to be presented to the jury in such cases. In such a case, the Eastern District of New York found that the Second Circuit "clearly stated that, in order to derive citizenship from one parent in the case of divorce, the naturalization of the parent must occur after the parents are divorced *and* while the child is under the age of eighteen" and refused to allow a jury instruction

providing for such a defense. *United States v. Simpson*, 929 F. Supp. 2d 177, 183 (E.D.N.Y. 2013) (*citing*, *Langhorne* 377 F.3d at 180) (emphasis in the original).

However, such a determination was not made by the Second Circuit in *Langhorne*, nor can it be inferred. In *Langhorne*, the issue was whether a legal separation must occur before the child was 18; not before the naturalization of the parent. *Langhorne* 377 F.3d at 176, 179 (2d Cir. 2004). ("the plain text of Section 321(a) would have conferred derivative citizenship on Langhorne only if *both* the naturalization of his father *and* the legal separation of his parents had occurred before his eighteenth birthday; since Langhorne was nineteen when his parents separated, he did not acquire derivative citizenship."). Thus, the Court's decision specifically allowed for the derivative naturalization of child in cases where the parent's legal separation occurs after the naturalization of the parent with sole legal custody provided "*all* of the conditions in Section 321(a)(3)—including "a legal separation of the parents"—[] occur before the child turns eighteen." *Langhorne*, 377 F.3d at 179. Notably the *Langhorne* Court did not identify subsection (a)(3)'s requirement as a "legal separation of the parents at the time of the custodial parent's naturalization".

**C. Conflict with the Ninth Circuit**

*Jordon* also relied on interpretation of other Circuit decisions that are not even followed in that circuit. Specifically, *Jordan* interpreted the Ninth Circuit case *Minasyan* v. Gonzales, 401 F.3d 1069 (9th Cir. 2005), as supporting the *Jordon* court's reading of section (a)(3) that by "stating that in order to satisfy the first clause of subsection (3), the petitioner must establish that 'at the time of his mother's

naturalization, 'there ha[d] been a legal separation of the parents.'" *Jordon*, 424 F.3d at 330(quoting *Minasyan,* 401 F.3d at 1076 citing § 1432(a)(3)) (brackets in *Minasyan*). However, the Ninth Circuit itself has not held *Minasyan* as creating such a requirement. In *Estrada-Chavez v. Sessions* held that § 1432(a)(3) ("[t]he naturalization of the parent having legal custody of the child when there has been a legal separation of the parents") and § 1432(a)(4) ("[s]uch naturalization takes place while such child is under the age of eighteen years") "taken together … require[d] [the] Petitioner to prove that his parents had legally separated at some point while Petitioner was under the age of eighteen years." 705 F. App'x 604, 605 (9th Cir. 2017) (unpublished). *Estrada-Chavez*, specifically relied on and *Minasyan* as the controlling precedent to determine whether legal separation had occurred and finding the Petitioner did not present "substantial credible evidence of 'a complete and final break in the marital relationship' before Petitioner turned 18 years old. Therefore, Petitioner has not satisfied his burden to show entitlement to derivative citizenship on the basis of his parents' legal separation." *Estrada-Chavez* 705 F. App'x at 606 (internal citations omitted) (unpublished). In *Romo-Jimenez v. Holder*, the Ninth Circuit found that a child whose mother obtained a legal separation three days after her naturalization "satisf[ied] this required element for derivative citizenship" and transferred the case to the district court to determine the issue of custody during the relevant period. 539 F. App'x 759 (9th Cir. 2013). On appeal for a second time, the Ninth Circuit denied ultimately denied the claim for derivative naturalization under 1432(a)(3)-(5) while allowing for because "[t]he only disputed issue is

whether during the relevant time frame (the date of his mother's naturalization until Romo-Jimenez's eighteenth birthday) he was in his mother's or the state's 'legal custody' within the meaning of the statute." *Romo-Jimenez v. Lynch*, 607 F. App'x 745, 746 (9th Cir. 2015); see also, *Dantos v. Holder*, No. 10CV417-MMA (BLM), 2010 WL 11684838, at *5 (S.D. Cal. Sept. 2, 2010) (unpublished) (citing *Minasyan*, 401 F.3d at 1074, 1080 n.20) (noting that "the Ninth Circuit in *Minasyan* implicitly interpreted the statute to require that the legal separation occur while the alien is under the age of eighteen" and denying claim because legal separation occurred in 2003 when the child was over 18 years of age; not because the legal separation did not occur before the mother's naturalization in 1999 when the Petitioner was 16 years of age); *Velazquez v. Holder*, No. C 09-01146 MEJ, 2009 WL 4723597, at *4 (N.D. Cal. Dec. 9, 2009) (unpublished) (citing *Minasyan,* 401 F.3d at 1073–74, 1079) (discussing that in *Minasyan* "the question before the Ninth Circuit was whether there had been a 'legal separation' of the petitioner's parents, such that he automatically became a citizen through his mother, who had become a citizen through naturalization" and that "[a]lthough the petitioner's parents had been separated since 1993 (prior to his eighteenth birthday), his mother did not file an action for dissolution of the marriage until 1999, and the superior court did not grant the dissolution until 2001, after his eighteenth birthday." Rather, "the BIA found that the petitioner failed to establish citizenship under § 321(a) because he was over the age of eighteen at the time the separation was final in 2001" and the Minasyan Court "[u]sing California law to define legal separation" had "found that the

petitioner's parents had been separated prior to his eighteenth birthday, even though the dissolution was not final until 2001.")

**D. Conflict with the Fifth Circuit**

The Fifth Circuit has held that "§ 1432(a) granted derivative citizenship to a child born outside the United States to alien parents if, before that child's eighteenth birthday, (1) he became a legal permanent resident ("LPR") of the United States, (2) his two living parents 'legal[ly] separat[ed],' (3) one (but not both) of his parents became a naturalized U.S. citizen, and (4) that naturalized parent had *'legal custody'* of the child.") *Bustamante-Barrera v. Gonzales*, 447 F.3d 388, 390 (5th Cir. 2006). In *Bustamante-Barrera*, the Fifth Circuit framed the issue before it as: "Petitioner's status as a derivatively naturalized citizen turns entirely on § 1432(a)'s fifth condition, viz., whether, before he reached the age of 18, his parents' joint custody regime satisfied § 1432(a)(3)'s requirement that 'the' naturalized parent be 'the' parent having legal custody." *Bustamante-Barrera* 447 F.3d at 395 (noting that the parties did not "dispute that Petitioner satisfies all but one of these conditions: (1) He was born outside of the United States to alien parents; (2) *his parents' 1991 divorce (which occurred while he was under the age of 18)* qualifies as a 'legal separation'; (3) his mother was naturalized while he was under the age of 18; and (4) at the time of his mother's naturalization, Petitioner was residing in the United States as a LPR." Thus, the Fifth Circuits entire determination of the issue of custody over the child was framed as whether the naturalized parent obtained sole legal custody of the child at the time the child turned eighteen years of age and whether this would satisfy

§ 1432(a)(3)'s first clause. This issue was not whether legal separation must occur not at the time of the parent's naturalization. The Fifth Circuit held that sole legal custody was required by the plain language of the statute, and thus the child did not derive citizenship through his parent's naturalization. *See also*, *Lancaster v. Gonzales*, No. 06 CV 1203, 2006 WL 3533111, at *1-2 (W.D. La. Oct. 2, 2006) (unpublished) (applying *Bustamante-Barrera* and finding that "Petitioner's claim of derivative citizenship turns on whether, prior to Petitioner's eighteenth birthday: (1) "there had been a legal separation" of Petitioner's parents, and (2) petitioner was in the "legal custody" of his mother[;]" and noting among other issues being reviewed was the effect of "what [was] purported to be a divorce decree dated March, 1991" because in March 1991 Petitioner was under 18 years of age as "Petitioner did not turn eighteen until August, 1991."); see also, *Castaneda v. Mukasey*, 281 F. App'x 284, 286, 288 (5th Cir. 2008) (unpublished) (Denying derivative citizenship claim where a parents separated after the father's naturalization ("In July 1990, Castaneda's father became a naturalized citizen of the United States. His parents then separated"); but determining that issue on appeal was whether the "BIA erred in holding that he lacked derivative citizenship" based on the conclusion that that 1432(a) "require[s] that the naturalized parent [to] have *sole* legal custody. We held in *Bustamante-Barrera v. Gonzales* that 'only sole legal custody satisfies'§ [1432]'s requirements.")

## II. The Third Circuit's Interpretation Creates Two Separate Laws of Naturalization Within the Third Circuit and Fails the Basic Constitutional Requirements of Judicial Review

### A. Third Circuit's Poorly Reasoned Decisions Do Not Comport with Minimum Requirements of Judiciary's Constitutional Obligations

"The power, granted to Congress by the Constitution, 'to establish an uniform rule of naturalization,' was long ago adjudged by this court to be vested exclusively in Congress." *United States v. Wong Kim Ark*, 169 U.S. 649, 701 (1898) *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259, 263 (1817). However, "[t]he simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it so far as respects the individual.]" Once exercised, the Constitution requires that the "Judicial power is [] exercised … for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law." *Osborn v. U.S. Bank*, 22 U.S. (9 Wheat.) 738, 827, 866 (1824) (Marshall, C. J., for the Court). Article III of the Constitution provides "the judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Mortgage Bankers Assn.*, 575 U. S. at 119 (Thomas, J. concurring). Accordingly, the judiciary's "role is to interpret the language of the statute enacted by Congress." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461–62 (2002) (citations omitted) (quoting *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

The Third Circuit's precedent in *Jordon* and *Bagot* is not based on a reasoned analysis of the statutory provision as it fails to engage the statutory text itself. The BIA correctly noted that "[t]he Third Circuit, in concluding that "legal separation must occur prior to naturalization" for a child to derive citizenship in *Jordon* ... simply reiterated the language it had used in *Bagot*. However, the court in *Bagot* did not address the question before us now because the sequence of the legal separation of the parents and the naturalization of one parent was not at issue. In fact, the court stated that the case turned only on whether the father had "legal custody" of the child." *Matter of Douglas* at 199 (citing *Bagot*, 398 F.3d at 257). The Board further noted that "[t]he Third Circuit's judicial construction of former section 321(a)(3) in *Bagot* was not concerned with the temporal occurrence of the legal custody of the child, and there is no indication that it interpreted the statute to be unambiguous." *Matter of Douglas* at 200.

The first step in statutory interpretation "as always" is to "start with the specific statutory language in dispute." *Murphy,* 138 S. Ct.at 787; see also, *Engine Mfrs. Ass'n. v. South Coast Air Quality Management Dist*., 541 U.S. 246, 252 (2004) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose"); *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (noting "'strong presumption' that the plain language of the statute expresses congressional intent"). This Court has "insisted that a court bring all its interpretive tools to bear" and "it is not enough to casually remark" on the views presented by the parties in matter as substitute

for the court's own independent required determination of the text. *Kisor* 139 S. Ct.at 2423 (2019) (discussing a court's similar obligations in the context of regulatory interpretation).

### B. The Term "When" Requires Determination of, at a Minimum, Its Ambiguity or Lack Thereof, by Reference to the Surrounding Text, Function and Purpose of the Statute

The issue before the Third Circuit turned on the meaning of the term "when" in 1432(a)(3)'s first clause. As Chief Justice Marshall observed:

> Much depends on the true legislative meaning of the word —when. The plaintiffs in error contend that it designates the precise time when a particular act must be performed . . . ; the defendants insist that it describes the occurrence which shall render that particular act necessary. That the term may be used, and, either in law or in common parlance, is frequently used in the one or the other of these senses, cannot be controverted; and, of course, the context must decide in which sense it is used in the law under consideration.

*United States v. Willings*, 8 U.S. (4 Cranch) 48, 55 (1807). The context, structure, and purpose of 1432 clearly establishes that the term "when" as used in subsection (3) refers to "the occurrence which shall render that particular act necessary;" and does not refer to "the precise time when a particular act must be performed." *Id.*; *see also*, *King v. Burwell*, 135 S.Ct. 2480, 2489, 192 L.Ed.2d 483 (2015)

("[W]e must read the words [of a statute] in their context and with a view to their place in the overall statutory scheme.") (internal quotation marks omitted); *United States v. Montalvo-Murillo*, 495 U.S. 711, 719 (1990) (required statutory terms to be read in a manner that is "consistent with the design and function of the statute"). Additionally, even if "when is determined to be unambiguous, interpretation of all statutory provisions must adhere to "the cardinal rule that a statute is to be read as a whole," *Corley v. United States*, 556 U.S. 303, 315 n.5 (2009) (quoting, *King v. St. Vincent's Hospital,* 502 U.S. 215, 221 (1991). As "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Id.* (quoting, *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132 (2000). Finally, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

Recently, this Court was unified in its determination that the term "when" as used in another provision of the INA was unambiguous upon application of the standard tools of statutory constructions. *Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019) ("Here the text of § 1226 cuts clearly against respondents' position."); *id.* at 978 (2019) (Breyer, J. dissenting) ("The statute's language, its structure, and relevant canons of interpretation make clear that the Secretary cannot hold an alien without a bail hearing unless the alien is 'take[n] into custody ... when the alien is released' from criminal custody. § 1226(c)(1)."). Similarly, the determination of the meaning of 1432(a)(3)' first clause is amenable to

resolution based on the statute's text and the tools of statutory construction.

### C. Standard Tools of Statutory Construction Establish the Term "When" in 1432(a)(3) Refers to An Event That "The Occurrence Which Shall Render" a "Particular Act Necessary"

Subsection (1), (2), and (3) establishes the default rule that both parents must naturalize in order for a child to derive naturalization (subsection (1)), while also recognizing certain single-parent situations that will also allow for derivative naturalization. First, in the event one of the parents dies, (subsection (2) provides that a child may derive citizenship from their surviving parent. Additionally, in cases where the parents are legally separated a child may derive citizenship from the parent with legal custody of the child; or from the child's mother in cases where the child was not "legitimated" i.e. the child was only the legal of the mother (subsection (3)). These terms are connected to each other with the disjunctive "or" meaning that only one of the events must be satisfied, while subsection (4) and (5) are joined to the previous section and each other by the conjunctive "and" meaning that only one of the first three and then both of (4) and (5) are must be satisfied and read together to determine the meaning and application of the statute. *See*, *Jones v. United States* , 527 U.S. 373, 389 (1999) ("Statutory language must be read in context [as] a phrase 'gathers meaning from the words around it'");

Subsection (4) does define "the precise time when a particular act must be performed" *Willings*, 8 U.S. at 55 by

requiring that "[s]uch naturalization takes place while such child is unmarried and under the age of eighteen years." 1432(a)(4). However, in all of these cases, a child does not derivatively naturalize until the child is residing permanently in the United States provided such residency occurs while the child is under the age of eighteen years (subsection 5). Thus, in all cases the child does not derivatively naturalize upon the naturalization; rather the child derivatively naturalizes upon the completion of all the 1432(a)'s requirements which include residing permanently in the United States under the age of eighteen. See, *Nwozuzu,*726 F.3d at 325 (holding that under (a)(5) a child derives naturalization one of two ways, "[u]nder the first clause, a minor who was a lawful permanent resident automatically became a citizen at the time the last parent was naturalized. Under the second clause, a minor could derive citizenship if, after the last parent naturalized, he 'beg[an] to reside permanently in the United States while under the age of eighteen years.'").

Subsection (b) of 1432 reinforces this deliberate arrangement as subsection (b) explicitly provides that "subsection (a) … shall apply to an adopted child *only if* the child is residing in the United States *at the time of naturalization* of such adoptive parent or parents, in the custody of his adoptive parent or parents, pursuant to a lawful admission for permanent residence." 1432(b) (emphasis added). Like subsection (a)(5) Congress again used the term "at the time of naturalization" to describe requirements that must be met at the time of naturalization, rather than the term "when" as used in subsection (a)(3), indicating a purpose and deliberate choice by Congress to assign a different

meaning other than "at the time of naturalization" to the term "when" in (a)(3). See, *Nken v. Holder*, 556 U.S. 418, 430 (2009) (internal quotation marks and brackets omitted) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). In fact, Congress twice in section 1432 used the phrase "at the time of naturalization" to specifically identify when an event must take place in relation to the parent's naturalization (subsections (b) and (a)(5)) further reinforcing Congress's deliberate use of the phrase and the intentional use of the term "when" to mean something other than "at the time" or indicating "the precise time when a particular act must be performed" *Willings*, 8 U.S. at 55.

"Had Congress truly intended to require naturalization to occur after parents legally separate, it easily could have used the word "after" instead of "when". *Bucknor v. Zemski*, No. CIV. A. 01-3757, 2002 WL 221540, at *2 (E.D. Pa. Feb. 12, 2002) (unpublished). "Webster's Dictionary attributes varied meanings to the word "when", and several of them can make sense in the phrase at issue here. Those meanings are: 1) at the time that; 2) as soon as; 3) at whatever time; 4) whenever; and 5) if. *Id.* (citing, *Webster's New World Dictionary* 1663 (College ed. 1957)). Rather:

> [i]f 'when' means 'as soon as' in section 321(a)(3), then at the instant parents have separated, the parent having legal custody must be naturalized. Under that interpretation, the only way for a parent to satisfy the statute would be to naturalize before, or at the same time, legal separation occurs. If when means 'at the time that' in section 321(a)3), then a parent's

> naturalization does not assume such a sense of urgency, but may occur at a time after the parents have legally separated. On the other hand, if when means 'at whatever time', 'whenever' or 'if' in section 321(a)(3), then legal separation may be a timeless condition, except to the extent the rest of section 321(a) imposes a time requirement.

*Bucknor* 2002 WL 221540, at *2 (unpublished).

### D. Third Circuit Violates Rule Against Superfluity of Statutory Provisions

Additionally, subsection (b) does not allow for adopted children to meet the statutes requirements after their parent or parents naturalize by "thereafter beginn[ing] to reside permanently in the United States while under the age of eighteen years" as provided for biological children under 1432(a)(5). If all of 1432(a)(3) required parents to be legally separated and with legal custody of the child at the time of naturalization, rather than before the child reached the age of 18, then former subsection (b) would be superfluous and redundant as it would merely be restating that the same exact requirements of subsection (a). This interpretation of the statute is "at odds with one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (citation omitted); see also, *Mkt. Co. v. Hoffman*, 101 U.S. 112, 115 (1879) (describing it as a "cardinal rule"). The rule forbids any interpretation that would render a statutory provision "substantially redundant" ,"

*Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 837 (1988); or □"render *insignificant*,□" even □"if not wholly superfluous" any statutory provision. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (emphasis added).

## III. Petitioner is Citizen Under the Law Outside the Third Circuit and the Law Within the Third Circuit as Long-Applied by Executive Agencies Within the Third Circuit.

Petitioner satisfied all the qualifying events before the age of eighteen as he was residing in the United States as lawful permanent resident in the legal custody of his United States citizen father after his father had legally separated from his non-citizen mother. Petitioner's brother who entered the United States at the same time under the same circumstances was issued a Certificate of Citizenship in 1995. See, *Matter of Douglas*. Petitioner acquired citizenship under the longstanding administrative construction and application of 1432(a)'s requirements. USCIS, the Department of Justice and Department of State, the agencies with the responsibility of enforcing former 1432 have long interpreted 1432(a) as requiring that all provisions of 1432(a) be met by the child's eighteenth birthday, regardless of sequence. See, Department of State Foreign Affairs Manual, 8 FAM 301.9-9(C)(c) (quoting, "New Interpretation of Claims to Citizenship Under Section 321(a) of the INA", Department of State's Passport Bulletin 96-18 (November 6, 1996) ("Effective November 6, 1996, CA/PPT, CA/OCS and the former INS agreed on a more judicious interpretation of INS 321(a). It was agreed that as long as all

the conditions specified in INA 321(a) are satisfied before the minor's 18th birthday, the order in which they occur is irrelevant. Citizenship would be acquired on the date the last condition is satisfied."); *In re Fuentes-Martinez,* 21 I. N. Dec. 893, 896, (BIA 1997) ("We now hold that, as long as all the conditions specified in Section 321(a) are satisfied before the minor's 18th birthday, the order in which they occur is irrelevant. Citizenship would be acquired on the date the last condition is satisfied."); *Matter of Baires-Larios*, 24 I&N Dec. 467, 470 (BIA 2008) ("in order to establish derivative citizenship under section 321(a) of the former Act, [the applicant] must show only that she was in the legal custody of her father before she reached the age of 18 years, rather than on the date her father naturalized."); *Matter of Douglas*, *supra*. USCIS Policy Manual, 12 USCIS-PM H.4 (stating that a child derives simply if "one parent naturalizes who has legal custody of the child if there is a legal separation of the parents"); INS Interpretations § 320.1(a)(1) (derivation laws "required a combination of elements having a simultaneous existence before a son or daughter arrived at a specified age" but [t]he sequence in which these elements came into being was immaterial."); INS Interpretations § 320.1(a)(6) ("Both the 1940 Act and the current statute perpetuated the rule of the 1907 legislation, as originally enacted, which provided for derivation when the child's lawful permanent residence in the United States began after the parent's naturalization.").

The Third Circuit's failure to consider the longstanding administrative practice further displays its lack of reasoning as "longstanding administrative construction is entitled to great weight particularly when, as here, Congress

has revisited the Act and left the practice untouched." *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974) (citation omitted). As Congress noted in studying the immigration and nationality laws for what would become the 1952 Immigration and Nationality Act, former section 331 of the 1940 Nationality Act, which as relevant here was reenacted without modification: "In the case of separation of parents, the separation referred to must be a judicial separation and not one resulting from private separation agreement. The sole legal custody must be awarded to the custodial parent prior to the child's eighteenth birthday. But so long as all the conditions are fulfilled while the child is under 18, it is immaterial in what order the requisite events occurred." Senate Report No. 1515, 81st Congress, 1st Session, at p. 708. "Congress' reenactment of the statute in 195[2], using the same language, indicates its apparent satisfaction with the prevailing interpretation of the statute." *Davis v. United States*, 495 U.S. 472, 482 (1990) (citation omitted).

This Court should grant review to prevent the deportation of a United States citizen and provide for the uniform application of the naturalization laws as Congress intended when adopting the language of 1432(a) in the 1940 Nationality Law. See. S.Rep. No. 76-2150, 76th Cong., 3d Sess. p. 5 (Sept. 23, 1940) ("Congress is authorized by the Constitution to prescribe 'an uniform rule of naturalization.' Under the present nationality laws there is great difficulty in the attempt to reach this uniformity."). *Id.* ("The proposed code would authorize the Attorney General of the United States to approve the scope and nature of the examination ... for naturalization …. This would be an added assurance of greater uniformity of interpretation of the law.").

## IV. The Lack of Uniformity Promotes Forum Shopping and Impairs the Application of Criminal Laws

### A. Third Circuit's Outlier Interpretation Encourages Forum Shopping by Depriving Potential Citizens of an Opportunity to Present Their Claims

The lack of uniformity in the application of 1432(a)'s requirements incentives forum shopping as Petitioner was transferred from the Fourth Circuit where he could at a minimum present his claim on the merits, to the Third Circuit where the Court would not consider his claim and order him deported. Petitioner is not alone in this regard as a similar course of events occurred in *Klaiber, supra* where the criminal defendants in the District of Maryland was transferred to the Third Circuit where ICE then sought his deportation after first representing that the agency believed he was a citizen before he pled guilty.

### B. Uncertainty Prevents Providing Constitutionally Required Guidance under *Padilla*

Additionally, as shown in *Klaiber*, *supra*, the complications of providing the constitutionally required guidance under *Padilla* where the applied to a derivative citizenship claim is determined by the location where a criminal defendant serves his sentence and where he is taken into custody by ICE. Petitioner resided in Baltimore, Maryland. He was tried and convicted in the Federal District Court in

Maryland. However, he moved to the Third Circuit after his conviction and detained by ICE upon release. In *Klaiber*, the same set of events occurred, except Klaiber's passport had not been revoked by the State Department before he was released and was thus able to return to Baltimore where he was detained.

### C. Uncertainty in the Law Impacts Criminal Prosecutions

Finally, derivative citizenship is a defense to criminal prosecutions under 8 U.S.C. § § 1325 and 1326 or illegal entry and reentry, which were the two most common crimes prosecuted and accounted for approximately 60% of all federal crimes prosecuted in the first seven months of 2020[1]. At a minimum, this presents a significant area of concern where clear guidance from this Court will aid the district courts, prosecutors, defense bar, and potential citizens themselves as it relates to providing prosecuting cases, issuing jury instructions, and providing for a Constitutionally adequate representation of criminal defendants.

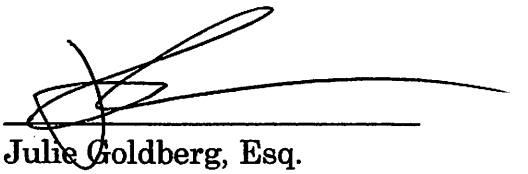
## V. CONCLUSION

For the above stated reasons and given the precious right of citizenship at stake – "the right to have

[1] "Prosecutions for 2020," Transactional Records Access Clearinghouse (TRAC), Syracuse University, report generated May 2020, https://tracfed.syr.edu/results/9x705ed667de5d.html. (last accessed April 17, 2021).

rights." *Trop v. Dulles*, 356 U.S. 86, 102 (1958) – this honorable Court should grant this petition for a writ for certiorari.

Dated: April 19, 2021



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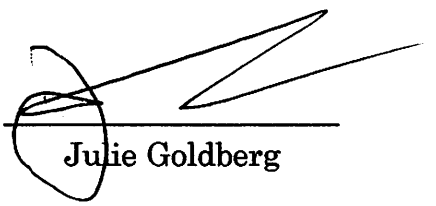
## CERTIFICATE OF COMPLIANCE

I hereby certify that the accompanying Petition for Writ of Certiorari in *Abdulla v. Garland*, complies with the word count limitations of Supreme Court Rule 33(g) in that it contains 8, 716 words, based on the word-count function of Microsoft Word – Office 365, including footnotes and excluding material not required to be counted by Rule 33(d).



Julie Goldberg

CERTIFICATE OF SERVICE

I, Julie Goldberg, counsel for the Petitioner, hereby certify that on this 19th day of April 19, 2021, I served by priority mail delivery, the Petition for Writ of Certiorari in *Abdulla v. Garland* on the following parties:

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