No. 20-1492

In the Supreme Court of the United States

ABDULMALIK MAHYOUB MULHI ABDULLA, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioner did not derive citizenship through his father under former 8 U.S.C. 1432(a) (1994) because his father naturalized before, rather than after, allegedly separating from his mother.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-13a) is published at 971 F.3d 409. The decisions of the Board of Immigration Appeals (Pet. App. 14a-15a) and the immigration judge (Pet. App. 16a-34a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2020. A petition for rehearing was denied on November 19, 2020 (Pet. App. 1a). The petition for a writ of certiorari was filed on April 19, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Article I of the Constitution vests in Congress the "Power * * * To establish an uniform Rule of Naturalization * * * throughout the United States." U.S. Const. Art. I, § 8, Cl. 4. Under that authority, Congress

has conferred United States citizenship by statute on certain persons born outside the United States. At issue here is derivative citizenship, a form of naturalization that a child obtains after birth through the naturalization of a parent. See 7 Charles Gordon et al., *Immigration Law and Procedure* § 98.03[1] (2020).

Petitioner's claim of derivative citizenship is governed by former 8 U.S.C. 1432(a) (1994).[1] That provision conferred derivative citizenship upon a child born outside the United States to parents who were not U.S. citizens or nationals "upon fulfillment" of certain "conditions." *Ibid.* As relevant in this case, one condition was satisfied upon "[t]he naturalization of the parent having legal custody of the child when there has been a legal separation of the parents." 8 U.S.C. 1432(a)(3) (1994). The provision further required that "[s]uch naturalization take[] place while such child is unmarried and under the age of eighteen years" and that the child "resid[e] in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization" or "thereafter begin[] to reside permanently in the United States while under the age of eighteen years." 8 U.S.C. 1432(a)(4)-(5) (1994).

In short, Section 1432(a) provided for derivative citizenship when four key requirements were fulfilled before the child's eighteenth birthday: (1) the parents must legally separate; (2) one of the parents must naturalize; (3) the naturalized parent must have legal custody of the child; and (4) the child must reside in the

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[1] Although 8 U.S.C. 1432(a) was repealed by the Child Citizenship Act of 2000, Pub. L. No. 106-395, § 103(a), 114 Stat. 1631, it continues to apply to individuals (like petitioner) who turned 18 on or before February 27, 2001. See *In re Rodriguez-Tejedor*, 23 I. & N. Dec. 153, 156 (B.I.A. 2001).

United States as a lawful permanent resident at the time of or after the custodial parent's naturalization. In *Matter of Baires-Larios*, 24 I. & N. Dec. 467 (B.I.A. 2008), the Board of Immigration Appeals (Board) held that a claimant did not need to be in the legal custody of her naturalized parent on the date that the parent naturalized, so long as she was in that parent's custody before she reached the age of 18 years. *Id.* at 470. Subsequently, in *Matter of Douglas*, 26 I. & N. Dec. 197 (B.I.A. 2013), the Board reaffirmed that interpretation, confirmed its applicability to cases arising within the Third Circuit, and recognized that derivative citizenship could occur when the parents' separation occurred after the relevant parent naturalized (but before the child turned 18). *Id.* at 198, 201.

2. Petitioner was born in Yemen to two Yemeni parents on September 6, 1976. Pet. App. 3a; Gov't C.A. Br. 23. Petitioner later entered the United States as a lawful permanent resident on May 8, 1990. Pet. App. 3a; Gov't C.A. Br. 4. In 2014, petitioner was convicted of food stamp fraud and wire fraud in the United States District Court for the District of Maryland. Pet. App. 3a. In 2018, the Department of Homeland Security initiated removal proceedings against petitioner on the ground that he had been convicted of an aggravated felony fraud offense in which the loss was greater than $10,000. *Id.* at 4a; Gov't C.A. Br. 4-5.

a. Before the immigration judge, petitioner raised various claims for relief and protection. See Pet. App. 4a, 16a. At issue here is petitioner's claim that he is not removable because he derived citizenship from his father pursuant to former Section 1432(a). See *id.* at 4a. In support of that contention, petitioner submitted a naturalization certificate showing that his father natu-

ralized on March 20, 1986. Administrative Record (A.R.) 1271. He also provided an affidavit from a local official in Yemen dated January 8, 1989, which recounted the statement of petitioner's father that he and his wife were living apart and that he was petitioner's "only guardian." A.R. 1275. In an oral decision issued on October 4, 2018, the immigration judge rejected petitioner's arguments and ordered his removal. Pet. App. 16a.[2]

Petitioner filed an appeal with the Board on December 21, 2018. Pet. App. 14a. In support of his claim of derivative citizenship, petitioner asserted that his brother had been deemed a citizen in identical circumstances, and he submitted a copy of his brother's certificate of citizenship. A.R. 22, 73. The Board held that petitioner's appeal was filed beyond the 30-day appeal deadline and that he had failed to demonstrate exceptional circumstances warranting certification of the appeal out of time. Pet. App. 14a. It accordingly dismissed the appeal as untimely. *Ibid.*

b. Petitioner filed a petition for review, which the court of appeals denied in part and dismissed in part. Pet. App. 2a-13a. Despite petitioner's untimely appeal to the Board, the court found that it had jurisdiction over his nationality claim under 8 U.S.C. 1252(b)(5), which provides for judicial determination of such claims regardless of exhaustion. The court, however, denied that claim on the merits. Pet. App. 12a. Neither party brought *Matter of Baires-Larios* or *Matter of Douglas*

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[2] Because petitioner did not timely appeal the immigration judge's decision to the Board, see this page, the immigration judge's oral decision was not transcribed. See *Board of Immigration Appeals Practice Manual* § 4.2(f) (Feb. 20, 2020) (stating that transcripts are prepared in appropriate cases after a properly filed appeal).

to the attention of the court of appeals, which concluded that it was bound by its prior decision in *Jordon* v. *Attorney General*, 424 F.3d 320 (3d Cir. 2005). *Jordon* held that, to establish derivative citizenship under former 8 U.S.C. 1432(a)(3) (1999), the custodial parent must naturalize *after* the parents legally separate. 424 F.3d at 330. In this case, petitioner acknowledged that his father naturalized before the date on which he claims his parents separated. Pet. App. 12a. The court therefore found him statutorily ineligible for derivative citizenship. *Ibid.*

Petitioner filed a petition for panel rehearing and rehearing en banc, which the court of appeals denied. Pet. App. 1a.

ARGUMENT

Petitioner renews his contention (Pet. 23-33) that he is not removable because he derived citizenship from his father under former 8 U.S.C. 1432(a) (1994). The government argued below that *Jordon* v. *Attorney General*, 424 F.3d 320 (3d Cir. 2005), foreclosed petitioner's claim of citizenship, and the court of appeals accepted that argument. But the parties overlooked the subsequent Board decisions in *Matter of Baires-Larios*, 24 I. & N. Dec. 467 (B.I.A. 2008), and *Matter of Douglas*, 26 I. & N. Dec. 197 (B.I.A. 2013), which are entitled to deference and which rejected *Jordon*'s interpretation of the statute. This Court should accordingly grant the petition for a writ of certiorari, vacate the judgment below, and remand the case for further proceedings (GVR) to permit the court of appeals to apply the relevant Board decisions in the first instance.

1. In *Bagot* v. *Ashcroft*, 398 F.3d 252 (2005), the Third Circuit addressed a claim of derivative citizenship. *Id.* at 253. Summarizing the statute, the court

explained that the claimant must prove that "his father was naturalized *after* a legal separation from his mother." *Id.* at 257 (emphasis added). In the circumstances of that case, however, the government "concede[d]" that this requirement was satisfied. *Ibid.* The only dispute was whether the claimant's naturalized parent had "legal custody" of the claimant. *Ibid.*

In *Jordon*, the Third Circuit directly addressed the question whether separation must precede naturalization. There, the claimant's parents separated after the relevant parent naturalized. 424 F.3d at 330. The claimant argued that the statutory term "when" should be read in "its conditional sense (i.e., 'if')," not "its temporal sense (i.e., 'after')," and that, in any event, the term "'when' modifies 'having legal custody of the child,' not 'naturalization.'" *Id.* at 329; see 8 U.S.C. 1432(a)(3) (1994) (requiring "[t]he naturalization of the parent having legal custody of the child *when* there has been a legal separation of the parents") (emphasis added). The court rejected those arguments, reasoning that it "need not labor over the proper construction" of the statutory text because, in its view, *Bagot* "conclusively" held "that legal separation must occur prior to naturalization in order to satisfy the first clause of § 1432(a)(3)." 424 F.3d at 329-330.

After *Jordon*, the Board decided *Matter of Baires-Larios*, which addressed whether Section 1432(a)(3) requires a child to be in the custody of the parent at the time the parent naturalizes, or whether it is sufficient that the naturalized parent obtains custody prior to the child's eighteenth birthday. 24 I. & N. Dec. at 468. The Board acknowledged *Jordon* and *Bagot*, but observed that it was "not bound by" the reasoning of those decisions because "this case is within the jurisdiction of the

Fifth Circuit." *Id.* at 469. After examining various authorities, including judicial decisions and agency interpretations of Section 1432 and a related provision, the Board concluded that the claimant "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." *Id.* at 470.

The Board grappled directly with *Jordon* in its subsequent decision, *Matter of Douglas*, which arose in the Third Circuit. In that case, the claimant's mother naturalized prior to her parents' separation. 26 I. & N. Dec. at 198. The Board observed that the claimant qualified for derivative citizenship under *Matter of Baires-Larios*, and held that that decision "should be followed in the Third Circuit" despite the contrary precedent in *Bagot* and *Jordon*. *Id.* at 198-199. The Board explained that "[t]he Third Circuit's judicial construction of former section [1432(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." *Id.* at 200. The Board further observed that "[t]he word 'when' is not defined in the Act and has no 'plain meaning' in legal lexicon." *Id.* at 199. In light of these considerations, the Board concluded that the statute is ambiguous on the question presented, and that the Board was accordingly free, despite *Jordon*, to adopt a reasonable interpretation of the statutory text under *National Cable and Telecommunications Association* v. *Brand X Internet Services*, 545 U.S. 967 (2005). *Matter of Douglas*, 26 I. & N. Dec. at 199, 201.

The Board explained that it still considered its "original analysis [in *Matter of Baires-Larios*] to be sound." 26 I. & N. Dec. at 200. The Board summarized the

various sources examined in that decision and observed that it was not aware of any contrary case law—apart from "the Third Circuit's opinions." *Id.* at 201. The Board also reviewed the legislative history, finding nothing that "is inconsistent with or counsels against" its prior interpretation. *Ibid.* Ultimately, the Board stated its continued belief "that Congress' intent was to accord a child United States citizenship * * * so long as the statutory conditions were satisfied before the child reached the age of 18." *Ibid.*

The Board's interpretation of Section 1432 in *Matter of Douglas* is entitled to judicial deference. Where a statutory term is ambiguous, courts should defer to the agency's "permissible construction of the statute." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (quoting *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council*, 467 U.S. 837, 843 (1984)); see *id.* at 424-425 (deferring to the Board's interpretation); see also *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41, 57 (2014) (plurality opinion); *id.* at 79 (Roberts, C.J., concurring in the judgment) (agreeing that deference was warranted because "Congress did not speak clearly" to the issue); *Negusie* v. *Holder*, 555 U.S. 511, 516 (2009) ("It is well settled that 'principles of *Chevron* deference are applicable to this statutory scheme.'") (citation omitted). As long as the agency's interpretation is reasonable, a court "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. Those principles apply even when a court has previously answered the same interpretive question later addressed by the agency. "A court's prior judicial construction of a

statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982. Otherwise, "the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes." *Id.* at 983.

In this case, the statute is ambiguous with respect to the key interpretive question: whether a claimant's parents must have separated *before* the relevant parent's naturalization, or whether those conditions must simply each be fulfilled before the claimant's eighteenth birthday—regardless of the sequence in which that occurs. The Third Circuit's decisions in *Bagot* and *Jordon* neither addressed that question in detail nor found the statute unambiguous on this point. See pp. 5-6, *supra*. And the Board's contrary interpretation, which is consistent with the plain text, persuasive authority, and the legislative history, is eminently reasonable. That interpretation accordingly merits deference under *Brand X*.

2. In the court of appeals, petitioner argued that he had derived citizenship under former Section 1432(a), but he failed to identify either *Matter of Baires-Larios* or *Matter of Douglas* in his opening brief. See Pet. C.A. Br. 20-23. In its response brief, the government relied on *Jordon*, and similarly failed to identify the relevant Board decisions. See Gov't C.A. Br. 22-24. Petitioner's reply brief and rehearing petition also failed to mention either decision. See Pet. C.A. Reply Br. 9-11; see generally Pet. for Reh'g. Given that neither party brought *Matter of Baires-Larios* or *Matter of Douglas* to the attention of the court, the court held that it was bound by

the Third Circuit's prior holding in *Jordon* that the parents' separation must precede naturalization. Pet. App. 12a. And because petitioner's father had naturalized before the date on which he allegedly separated from petitioner's mother, the court found that petitioner is "statutorily ineligible" for derivative citizenship in light of *Jordon*. *Ibid.*[3]

Under the Board's contrary interpretation of Section 1432 in *Matter of Douglas*, however, petitioner may have acquired derivative citizenship through his father. In the agency proceedings below, petitioner submitted evidence suggesting that his father naturalized; his parents separated; his father assumed custody; and he became a lawful resident prior to his eighteenth birthday. See pp. 3-4, *supra*. If petitioner's factual presentation is accurate, and if his parents were "legal[ly] separat[ed]" rather than merely living apart, 8 U.S.C. 1432(a)(3) (1994), he would likely satisfy the prerequisites for derivative citizenship contained in Section 1432 as construed in *Matter of Douglas*. Moreover, if the record is not conclusive in petitioner's favor but there exists a genuine dispute of material fact, then petitioner would likely be entitled to de novo factfinding by a district court. See 8 U.S.C. 1252(b)(5)(B) (providing that "[i]f the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact * * * is presented, the court shall transfer the proceeding to" district court "for a new hearing on the nationality claim"); see also *Agosto* v. *INS*, 436 U.S. 748, 754-757 (1978).

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[3] In his petition for a writ of certiorari, petitioner cites both *Matter of Baires-Larios* and *Matter of Douglas* and notes the court of appeals' "failure to consider the longstanding administrative practice." Pet. 32.

In any event, the factual and legal determinations involved in ascertaining whether petitioner satisfies Section 1432(a)'s requirements in light of *Matter of Douglas*—as well as the related determination of whether a genuine dispute of material fact exists with respect to petitioner's satisfaction of those requirements—are properly made by the court of appeals in the first instance. It would therefore be appropriate for the Court to enter a GVR order to allow the Third Circuit to determine whether *Matter of Douglas* warrants deference under *Brand X* and, if the court of appeals concludes that it does, to apply *Matter of Douglas* to the facts of this case.

This Court entered a GVR order in similar circumstances in *Lawrence* v. *Chater*, 516 U.S. 163 (1996) (per curiam). There, the court of appeals had affirmed a denial of social security benefits by "expressly adopt[ing] the rationale for rejecting [petitioner's] claim that the Government advanced in its brief." *Id.* at 165. In its response to the petition for a writ of certiorari, however, the government advised the Court that the agency had reexamined the issue and concluded that the categorical position it had taken below was incorrect. The government acknowledged that the petitioner might be entitled to benefits under its revised interpretation, though "[w]ithout conceding [petitioner's] ultimate entitlement." *Ibid.* The government accordingly asked the Court to enter a GVR order in light of the agency's new interpretation.

In summarizing its prior practice, the Court observed that it had previously entered such orders on the basis of "administrative reinterpretations of federal statutes" and "confessions of error or other positions newly taken by the Solicitor General." *Lawrence*, 516

U.S. at 167. The Court noted that such an approach may "assist[] the court below by flagging a particular issue that it does not appear to have fully considered" and "assist[] this Court by procuring the benefit of the lower court's insight before we rule on the merits." *Ibid.*

In light of those considerations, the Court entered a GVR order in *Lawrence*. 516 U.S. at 165. The Court concluded that there was a "reasonable probability" that the court of appeals would accord deference to the agency's interpretation, which "may be outcome determinative." *Id.* at 174. The Court further reasoned that the equities supported a GVR, noting that this "disposition has the Government's express support, notwithstanding that its purpose is to give the Court of Appeals the opportunity to consider an administrative interpretation that appears contrary to the Government's narrow self-interest." *Id.* at 174-175; see also *Kaushal* v. *Indiana*, 138 S. Ct. 2567 (2018) (per curiam) (granting GVR for further consideration in light of Supreme Court precedent that predated decision below); *White* v. *United States*, 138 S. Ct. 641 (2018) (per curiam) (granting GVR "in light of the confession of error by the Solicitor General in his brief for the United States").

In this case, the government is now acknowledging an administrative interpretation that is not only contrary to its narrow self-interest but was also established by the agency before the decision below. Because that interpretation was not brought to the court of appeals' attention, that court should have the opportunity to address its viability and applicability in the first instance. Accordingly, a GVR order would be appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further proceedings in light of the position expressed in this brief.

Respectfully submitted.

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