No.

IN THE
Supreme Court of the United States

DIVNA MASLENJAK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER LANDAU, P.C.
Counsel of Record
PATRICK HANEY
JEFF NYE
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

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QUESTION PRESENTED

Whether the Sixth Circuit erred by holding, in direct conflict with the First, Fourth, Seventh, and Ninth Circuits, that a naturalized American citizen can be stripped of her citizenship in a criminal proceeding based on an immaterial false statement.

TABLE OF CONTENTS

APPENDIX CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution and Statutes

Other Authorities

INTRODUCTION

As this Court has long recognized, "American citizenship is a precious right," and thus "naturalization decrees are not lightly to be set aside." *Costello v. United States*, 365 U.S. 265, 269 (1961) (internal quotation omitted). A naturalized citizen is as much a citizen as any other, and indeed naturalized Americans have enriched all areas of our national life, including business, government, law, science, sports, and the arts. The threat of denaturalization has never hung over these citizens, and their families, like a sword of Damocles.

Until now. In this case, the Sixth Circuit held that petitioner, a naturalized American originally from Bosnia, can be stripped of her citizenship in a criminal proceeding based on an *immaterial* false statement in an immigration proceeding. That holding is squarely inconsistent with decisions of the First, Fourth, Seventh, and Ninth Circuits. *See*, *e.g.*, *United States v. Munyenyezi*, 781 F.3d 532, 536 (1st Cir. 2015); *United States v. Latchin*, 554 F.3d 709, 712-15 (7th Cir. 2009); *United States v. Alferahin*, 433 F.3d 1148, 1154-56 (9th Cir. 2006); *United States v. Aladekoba*, 61 F. App'x 27, 28 (4th Cir. 2003) (*per curiam*). The resulting inconsistency in the application of the Nation's criminal and immigration laws is intolerable: a naturalized American can now be stripped of her citizenship based on an immaterial false statement if prosecuted in Cleveland, but not in Boston, Richmond, Chicago, or San Francisco. And, adding to the confusion, the United States itself has flip-flopped on this issue not only in different cases, but also at different stages of *this very case*.

In addition, the decision below is wrong. According to the Sixth Circuit, Congress could and would have included an express materiality requirement in the criminal naturalization fraud provision, 18 U.S.C. § 1425(a), if it had wanted one. But that provision applies only where an applicant "knowingly procures" naturalization "contrary to law," *id.*, and, as a matter of law and logic, an applicant cannot knowingly "procure" American citizenship illegally based on an immaterial false statement. In addition, the "contrary to law" requirement depends on an underlying predicate violation of law, and a predicate crime alleged here, 18 U.S.C. § 1015(a)—which proscribes false statements under oath relating to naturalization—also requires a material false statement.

The district court, however, instructed the jury that it could convict petitioner under § 1425(a), based on a predicate violation of § 1015(a), "[e]ven if you find that a false statement *did not influence* the decision to approve the defendant's naturalization." App. 86a (emphasis added); *see also id.* ("A false statement contained in an immigration or naturalization document *does not have to be material* in order for the defendant to have violated the law in this case.") (emphasis added). That approach turns the statutory scheme upside down: it is fanciful to think that Congress intended for naturalized Americans to lose their citizenship in *criminal* proceedings based solely on an immaterial false statement, especially because (as this Court has recognized) they cannot lose their citizenship in *civil* proceedings based solely on such a statement. *See Kungys v. United States*, 485 U.S. 759, 767 (1988).

And the decision below has sweeping implications for naturalized Americans. Over the past decade alone, more than 6.6 million persons have become naturalized citizens. Every one of these persons, as well as the millions of additional citizens naturalized over previous decades, is now subject to a possible loss of citizenship—and potential deportation—based on an *immaterial* false statement.

Because the Sixth Circuit erred, and created an acknowledged circuit conflict, by holding that a naturalized American can be stripped of her citizenship based solely on an immaterial false statement in an immigration proceeding, this Court should grant review.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 821 F.3d 675, and is reprinted in the Appendix ("App.") at 1-39a. The district court's colloquy with counsel on the jury instructions is unreported, and relevant excerpts are set forth at App. 75-82a. The district court's jury instructions are unreported, and relevant excerpts are set forth at App. 83-89a. The district court's unreported denaturalization order is set forth at App. 95-96a.

JURISDICTION

The Sixth Circuit entered judgment on April 7, 2016, App. 1a, and denied a timely petition for rehearing *en banc* on May 27, 2016, App. 40a. On August 3, 2016, Justice Kagan extended the time within which to file a petition for a writ of certiorari until and including September 26, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

8 U.S.C. § 1451(a) provides in relevant part:

It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any district court of the United States in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation ....

8 U.S.C. § 1451(e) provides in relevant part:

> When a person shall be convicted under section 1425 of Title 18 of knowingly procuring naturalization in violation of law, the court in which such conviction is had shall thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled.

18 U.S.C. § 1425 provides in relevant part:

> Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person … Shall be fined under this title or imprisoned not more than [10 to 25 years], … or both.

18 U.S.C. § 1015 provides in relevant part:

> Whoever knowingly makes any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registry of aliens … Shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Divna Maslenjak, an ethnic Serb, was born and raised in a predominantly Serb village in modern-day Bosnia. App. 3a. After the collapse of the former Yugoslavia in the early 1990s, clashes broke out between Bosnia's majority Muslim population and its minority Serbs, and members of each group reported persecution by the other. *Id.*

In April 1998, Maslenjak, along with her husband and their two children, met in Belgrade, Yugoslavia (now Serbia), with an American immigration official designated to assist refugees from Bosnia's ethnic strife. *Id.* As that official testified below, the refugees she interviewed in that position "were pretty much always ethnic Serbs that had been living in Bosnia and they were ... basically forced out of Bosnia, from ... their place they lived because of ethnic cleansing." App. 51a.

And that was true for Maslenjak: as the immigration official testified below, the basis for Maslenjak's claim of refugee status for her family was that "because they were ethnic Serbs, they had been forced to flee their home—the place they lived

in Bosnia, and that they were not able to go back because they feared, basically, for their life, which was plausible." App. 56a; *see also* App. 58a (Maslenjak's refugee application based on "fear that [her family] would be mistreated on account of their ethnicity if they returned back to their home"); App. 64a (Trial Exhibit 26) (stating that Maslenjak and her family "are registered refugees in [Yugoslavia]," who "see no prospects for local integration on account of their refugee status," and "fear maltreatment on account of their ethnicity if they return to their home village"). In addition, the immigration official testified that Maslenjak stated that, after a temporary stay in Yugoslavia, she and her children "had gone back to Bosnia, but a different part that was Serb held; but the husband did not return, because he was afraid that he would be forced to serve in the [Bosnian Serb] military if he went back to that part of Bosnia." App. 56-57a.

Maslenjak and her family were granted refugee status in 1999 and immigrated to the United States in 2000. App. 4a. They settled near Akron, Ohio, where two of Maslenjak's sisters, who were also refugees, were living.

In December 2006, Maslenjak applied for naturalization. App. 65-74a. As part of the application process, she was asked numerous questions, including whether she had "ever given false or misleading information to any U.S. government official while applying for any immigration benefit." App. 72a (Question 23). A separate question asked whether she had ever "lied to any U.S. government official to gain entry or admission into the United States." *Id.* (Question 24).

Maslenjak answered both questions in the negative. *See id.* She obtained United States citizenship on August 3, 2007. App. 5a.

Shortly before Maslenjak applied for citizenship, her husband was arrested on charges of making a false statement on government documentation. App. 4-5a. Specifically, the Government charged him with failing to report on his immigration application that he had served in the the Bosnian Serb military during the Bosnian civil war. *Id.* He was convicted in 2007 and, because his conviction subjected him to removal, taken into custody by U.S. Immigration and Customs Enforcement. App. 5a.

In an effort to avoid her husband's removal, Maslenjak testified at her husband's asylum hearing in April 2009. *Id.* In that testimony, Maslenjak admitted that her husband had served in the Bosnian Serb military during the Bosnian civil war, that the family had lived together in Bosnia (although not in their home village) from 1992 to 1997, and that she had misrepresented these facts during her 1998 interview for refugee status. *Id.*

B. Proceedings Below

In March 2013, a grand jury indicted Maslenjak for violating 18 U.S.C. § 1425(a), which makes it a crime to "knowingly procure[]" naturalization "contrary to law." *See* App. 41-42a. As relevant here, the indictment charged Maslenjak with making "material false statements" in response to Questions 23 and 24 of her 2006 naturalization application, on the theory that she "then well knew that she had lied to government officials when applying for her refugee status" in 1998. App. 42a.

A major issue at trial was the impact, if any, of Maslenjak's 1998 statements about her husband's military service on her application for refugee status. The Government tried to show that Maslenjak, who acted as the Primary Applicant ("PA") for her family, had been granted refugee status based on those statements. *See, e.g.*, App. 44-45a. Maslenjak, in contrast, tried to show that she had been granted refugee status based on fear of ethnic persecution. *See, e.g.*, App. 64a.

Although the indictment charged Maslenjak with making "material false statements," App. 41a, and the Government "adduced proof at trial relevant to the materiality element," App. 26a, the Government took the position at trial that proof of a material false statement was not necessary for a conviction under either § 1425(a) or 18 U.S.C. § 1015(a), which proscribes "mak[ing] any false statement under oath" in a naturalization proceeding and served as a predicate offense for the § 1425(a) charge in this case, App. 81-82a. Over Maslenjak's objection, *see* App. 75-82a, the district court (Pearson, J.) sided with the Government, and instructed the jury:

> Count 1 of the indictment charges the defendant with violating Section 1425(a) of Title 18 of the United States Code.
>
> * * *
>
> In order to prove defendant guilty of naturalization fraud, the government must prove each of the following elements beyond a reasonable doubt.
>
> * * *

> First, that defendant procured naturalization;
>
> Second, defendant procured her naturalization contrary to law; and
>
> Third, defendant acted knowingly.
>
> Element Number 1: Procured Naturalization. The government must prove beyond a reasonable doubt that defendant procured naturalization. To establish this element, the government must prove that defendant obtained United States citizenship.
>
> * * *
>
> Element Number 2: Contrary to Law. In order to prove that defendant acted "contrary to law," the government must prove that defendant acted in violation of at least one law governing naturalization.
>
> * * *
>
> Element Number 3: Knowingly. To act knowingly means to act intentionally and voluntarily, and not because of ignorance, mistake, accident or carelessness.

App. 84-86a.

With respect to Element Number 2 ("contrary to law"), the court explained that a predicate offense was 18 U.S.C. § 1015(a), which "prohibits an applicant from knowingly making any false statement under oath, relating to naturalization." App. 85a. And the court specifically instructed the jury that, in order to convict, it did not have to find that any such false statement was material:

> A false statement contained in an immigration or naturalization document *does not have to be material* in order for the defendant to have violated the law in this case. Even if you find that a false statement *did not influence* the decision to approve the defendant's naturalization, the government need *only* prove that one of the defendant's statements was false.

App. 86a (emphasis added).

During deliberations, the jury sent the court the following note:

> At start of trial jury was told that Divna applied for refugee status due to a fear of persecution due to her husband not serving in the military during the war.
>
> On Exhibit #26 it states that Divna was applying for refugee status due to fear of persecution due to her ethnicity.
>
> What was her refugee status granted on?
>
> Fear of not serving?
>
> Or fear of ethnic backlash[?]

App. 90a. The court responded by telling the jury:

> You must make your decision based only on the evidence you saw and heard here in court. ... You may also rely on your collective memories. ... You have now what you need to decide the case.

App. 89a.

The jury returned a guilty verdict both on Count 1 (violation of § 1425(a), which results in automatic

loss of citizenship), App. 91-92a, and Count 2 (violation of 18 U.S.C. § 1423, which does not result in loss of citizenship), App. 93-94a.[1] Shortly thereafter, the district court entered an order revoking Maslenjak's citizenship under 8 U.S.C. § 1451(e) as a mandatory and automatic consequence of her conviction under § 1425(a). App. 95-96a; *see generally Latchin*, 554 F.3d at 715-16; *United States v. Inocencio*, 328 F.3d 1207, 1210 (9th Cir. 2003); *United States v. Moses*, 94 F.3d 182, 187-88 (5th Cir. 1996); *United States v. Maduno*, 40 F.3d 1212, 1217-18 (11th Cir. 1994); *cf. Fedorenko v. United States*, 449 U.S. 490, 517 (1981) (in civil context, "district courts lack equitable discretion to refrain from entering a judgment of denaturalization against a naturalized citizen whose citizenship was procured illegally or by willful misrepresentation of material facts.").

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[1] Count 2 charged Maslenjak with a violation of 18 U.S.C. § 1423, which provides that "[w]hoever knowingly uses for any purpose any ... certificate of naturalization ... unlawfully issued or made ... showing any person to be naturalized or admitted to be a citizen, shall be fined under this title or imprisoned not more than five years, or both." App. 42a. Because that Count applies only insofar as a certificate of naturalization was "unlawfully issued," it is derivative of Count 1, which involves the validity of the underlying certificate. Indeed, with the parties' agreement, the district court instructed the jury that it could convict Maslenjak on Count 2 only if it found her guilty on Count 1. *See* App. 93a ("Complete this page *only* if your verdict on Verdict Form - Count 1 is guilty.") (emphasis added). Thus, if this Court were to reverse the judgment as to Count 1, it follows that Count 2 would necessarily fail as well.

Maslenjak appealed her conviction and the revocation of her citizenship, but the Sixth Circuit affirmed. App. 1-39a. As relevant here, the court held, "[b]ased on the plain language of the statute as well as the overall statutory scheme for denaturalization," that "proof of a material false statement is not required to sustain a conviction under 18 U.S.C. § 1425(a)," App. 7a, or a predicate crime at issue here, 18 U.S.C. § 1015(a), App. 18-19a.

With respect to the statutory text, the court noted that "the term 'material' is found nowhere in § 1425(a)." App. 8a. "Without statutory support for an element of materiality," the court declared, "we are hard-pressed to conclude that materiality is an element of the offense under 18 U.S.C. § 1425(a)." *Id.* Similarly, "[a] material false statement is not an element of the crime under § 1015(a)." App. 21a; *see also* App. 18-19a.

And with respect to the statutory structure, the court stated that the federal immigration laws create "what are essentially two alternative paths for denaturalization," one civil and one criminal. App. 10a. The civil path includes an express materiality requirement. *Id.* (citing 8 U.S.C. § 1451(a) and *Kungys*, 485 U.S. at 772-73). The criminal path does not. App. 12-13a. Rather than construing these two paths in tandem, the Sixth Circuit concluded that "the explicit requirement of materiality under one approach but not the other is actually consistent with a two-track statutory scheme for denaturalization":

> In a civil denaturalization suit, the government can bring its case simply by filing an equitable petition, proceed as in a

> civil case, and satisfy a lesser burden of proof than beyond a reasonable doubt. In light of the slightly lower burden of proof, Congress has required the government to prove that the naturalized citizen has concealed a material fact. By contrast, in a criminal case resulting in denaturalization, the government must prove the charge under 18 U.S.C. § 1425 beyond a reasonable doubt while meeting the demands of constitutional due process. Congress has not required proof of materiality in that scenario arguably because of the higher burden of proof, the additional safeguards for the naturalized citizen's constitutional rights, and the broad sweep of § 1425 itself.

App. 29a.

In so holding, the Sixth Circuit recognized that Maslenjak's position "finds support in a number of other circuit decisions holding that materiality is an implied element of 18 U.S.C. § 1425(a)," but "[b]y and large" deemed these decisions "unpersuasive." App. 22-23a (citing *Munyenyezi*, 781 F.3d at 536; *United States v. Mensah*, 737 F.3d 789, 808-09 (1st Cir. 2013); *Latchin*, 554 F.3d at 712, 713 n.3; *Aladekoba*, 61 F. App'x at 28; *United States v. Agyemang*, No. 99-4496, 230 F.3d 1354, 2000 WL 1335286, at *1 (4th Cir. Sept. 15, 2000); *United States v. Agunbiade*, No. 98-4581, 172 F.3d 864, 1999 WL 26937, at *2 (4th Cir. Jan. 25, 1999) (*per curiam*); *United States v. Puerta*, 982 F.2d 1297, 1301 (9th Cir. 1992)).

In particular, the Sixth Circuit rejected the analysis applied by the Ninth Circuit in *Puerta*, and

followed in other circuits, that the Government is required to establish materiality in a criminal denaturalization proceeding because (1) the Government is required to establish materiality in a civil denaturalization proceeding, and the elements of the two types of proceedings should be construed in tandem, and (2) Congress would not have intended to impose the grave consequence of mandatory denaturalization in either proceeding based on an immaterial false statement. App. 22-25a. The court also noted that in some, but not all, of the other cases, the Government had conceded that it was required to prove a material false statement, or that such a statement was an element of the underlying predicate offense. App. 22-23a & n.8.

Judge Gibbons concurred "with some reluctance," and characterized the court's result as "troublesome." App. 39a (concurring opinion). As she explained, "[i]nitially, I was not inclined to differ from our sister circuits' interpretation of 18 U.S.C. § 1425(a)," but ultimately was "persuaded ... that the view most faithful to the statute is that materiality is not an element" of that provision. *Id.* She emphasized, however, that "I am uncertain what goal Congress intended to further by omitting materiality" from the requirements for criminal denaturalization, and noted that she had "located no other federal criminal statute that punishes a defendant for an immaterial false statement." *Id.* Nor, for that matter, had she "located any analogous context in which the elements of a crime are less onerous than the elements of the related civil penalty proceeding." *Id.* Indeed, "the government, in response to questioning at oral argument, was unable to articulate any interest of

the United States in prosecuting statements that are immaterial." *Id.*

The Sixth Circuit denied a timely petition for rehearing *en banc*. App. 40a. This petition follows.

REASON FOR GRANTING THE WRIT

The Sixth Circuit Erred By Holding, In Direct Conflict With The First, Fourth, Seventh, And Ninth Circuits, That A Naturalized American Citizen Can Be Stripped Of Her Citizenship In A Criminal Proceeding Based On An Immaterial False Statement.

The decision below creates a direct, and acknowledged, circuit conflict on the question whether a naturalized American citizen can be stripped of her citizenship in a criminal proceeding based on an immaterial false statement. The Sixth Circuit answered that question in the affirmative. *See* App. 7-30a. In sharp contrast, four other circuits—the First, Fourth, Seventh, and Ninth—have answered it in the negative. *See Munyenyezi*, 781 F.3d at 536 ("[F]or a section 1425(a) crime: the naturalized citizen must have misrepresented or concealed some fact" and "the fact must have been material.") (internal quotation omitted); *Latchin*, 554 F.3d at 715 ("[A] conviction under § 1425(a) requires proof of both materiality and procurement."); *Alferahin*, 433 F.3d at 1156 ("[Section] 1425(a) contains a requirement of materiality."); *Aladekoba*, 61 F. App'x at 28 (under § 1425(a), "statements must be material in order to be contrary to law"); *Agunbiade*, 172 F.3d 864, 1999 WL 26937, at *2 ("To convict [the defendant], the Government must establish that ... the statements were material.") (citing 18 U.S.C. § 1425(a) and *Puerta*, 982 F.2d at

1301); *Puerta*, 982 F.2d at 1302 ("We conclude that [Congress] has not made immaterial false testimony in naturalization proceedings a crime."); *cf. United States v. Nguyen*, __ F.3d __, 2016 WL 3878217 (8th Cir. July 18, 2016) (noting circuit conflict but declining to take sides because the jury in that case had been instructed that the false statement must be material). This direct and acknowledged circuit conflict on an important and recurring question of federal law warrants this Court's review.

The Sixth Circuit dismissed the contrary line of cases as "unpersuasive." App. 9a, 22a. According to the Sixth Circuit, the jury instructions in this case were "an accurate statement of law because proof of materiality is not required to establish a violation of 18 U.S.C. § 1425(a) or the underlying violation of 18 U.S.C. § 1015(a)." App. 18a. That is so, first and foremost, because neither of those provisions by its terms imposes a materiality requirement. "Without statutory support for an element of materiality, we are hard-pressed to conclude that materiality is an element of [an] offense." App. 8a.

But that is an overly simplistic approach to statutory interpretation. Although Congress sometimes includes an express materiality requirement in a statute, the absence of such a provision is hardly dispositive. Here, § 1425(a) requires materiality through the word "procure." Not any predicate violation of law will establish a violation of that provision; rather, only a predicate violation for the purpose of "procur[ing]" citizenship will suffice. That is what distinguishes the § 1425(a) offense from an underlying predicate offense, and justifies the additional penalties—including

automatic denaturalization—imposed by that provision. Here, the district court essentially read the procurement element out of the statute by instructing the jury that it could convict petitioner under § 1425(a), based on a predicate violation of § 1015(a), "[e]ven if you find that a false statement *did not influence* the decision to approve the defendant's naturalization." App. 86a (emphasis added); *see also id.* ("A false statement contained in an immigration or naturalization document *does not have to be material* in order for the defendant to have violated the law in this case.") (emphasis added). As a matter of law, an immaterial false statement that "did not influence" the naturalization decision could not possibly have "procured" that decision.

The Sixth Circuit, however, criticized the courts—starting with the Ninth Circuit in *Puerta*—that have "read an implied materiality requirement into § 1425(a)." App. 22a. As the Sixth Circuit explained, "[t]he *Puerta* court based its holding on two factors: (1) proof of materiality was required in a civil denaturalization proceeding under 8 U.S.C. § 1451(a); and (2) the 'gravity of the consequences' of mandatory denaturalization justified a showing of materiality under 18 U.S.C. § 1425(a)." App. 22a (quoting *Puerta*, 982 F.2d at 1301). The Sixth Circuit discounted both of those grounds.

As to the relevance of the materiality requirement in *civil* denaturalization proceedings, *see, e.g.*, *Kungys*, 485 U.S. at 767, the Sixth Circuit declared that all of the other circuits had gotten matters backwards. Whereas those courts held that it would be anomalous for Congress to require the Government to establish materiality in civil but not

criminal proceedings, the Sixth Circuit said just the opposite was true. *See* App. 27-30a. In the Sixth Circuit's view, it makes sense for Congress to impose greater *substantive* requirements in civil denaturalization proceedings, where lesser *procedural* protections are required. App. 29a; *see also* App. 10a (criticizing the other circuits' reliance on *Kungys* because they "overlook the fact that Congress has created a two-track system for denaturalization").

The Sixth Circuit's approach is, to say the least, counter-intuitive. It is certainly true that, in our legal system, greater procedural protections are generally required for criminal as opposed to civil proceedings. *See*, *e.g.*, U.S. Const. amends. V, VI. But that is because criminal proceedings generally have a more direct adverse impact on a person's life, liberty, or property. *See, e.g.*, *In re Winship*, 397 U.S. 358, 363-64 (1970). That is as true in the immigration context as any other. Here, conviction under § 1425 can result in fines and imprisonment of up to 25 years, *see* 18 U.S.C. § 1425, as well as automatic denaturalization, *see* 8 U.S.C. § 1451(e). There is certainly no reason to suppose that Congress would have wanted this criminal denaturalization provision to sweep more broadly than its civil analogue, 8 U.S.C. § 1451(a). To the contrary, Congress hardly would have allowed the Government to (1) fine, (2) imprison, *and* (3) denaturalize an American citizen based on an immaterial false statement, while simultaneously preventing the Government from denaturalizing her in a civil proceeding based solely on the same statement. As Judge Gibbons noted in her concurrence, "the government, in response to

questioning at oral argument, was unable to articulate any interest of the United States in prosecuting statements that are immaterial." App. 39a. That is certainly a reason to construe the statute not to criminalize such statements in the first place.

And as to the "gravity of the consequences" of denaturalization, *Puerta*, 982 F.2d at 1301, the Sixth Circuit acknowledged the force of the argument against "mandatory denaturalization on anything less than proof of a materially false statement," App. 27a. Nonetheless, the court concluded that, "[w]hatever appeal this rationale might have, the argument invites us to overlook the plain text of 18 U.S.C. § 1425(a) and disregard the overall statutory scheme Congress has enacted for denaturalization ...." App. 27a. As noted above, however, the "plain text" of the statute hardly compels the Sixth Circuit's result, and the "overall statutory scheme" supports, not undermines, a materiality requirement in the criminal as well as the civil context.

The Sixth Circuit forthrightly acknowledged that it was creating a circuit conflict regarding the existence of a materiality requirement in § 1425(a), and dismissed the contrary authority as "unpersuasive." *See* App. 9a, 22a. To be sure, the court also observed that "[n]otably, the parties in *Puerta* agreed that the materiality requirement in the civil denaturalization proceeding implied materiality as an element of 18 U.S.C. § 1425(a) as well." App. 22-23a; *see also Puerta*, 982 F.2d at 1301 ("[T]he government agrees with Puerta that § 1425(a) implies a materiality requirement similar to the one used in the denaturalization context.").

But the Ninth Circuit in *Puerta* did not rest its holding on the Government's concession; to the contrary, relying on *Kungys*, it affirmatively held that the materiality requirement is the same in the civil and criminal contexts. *See id.*; *see also id.* at 1304 ("Under *Kungys*, Puerta's false statements were not material, and therefore may not form the basis of a criminal conviction under § 1425.").

And even if there were any doubt on this score, the Ninth Circuit subsequently dispelled it in *Alferahin*. There, the Government challenged the materiality requirement in the criminal context, and invited the Ninth Circuit to overrule *Puerta*. *See* 433 F.3d at 1155 ("The government argues that *Puerta* was decided incorrectly and that § 1425(a) contains no materiality requirement."). The Ninth Circuit declined the invitation, and held that it was not only error but plain error for the district court in that case to have failed to instruct the jury that a false statement must be material for a conviction under § 1425(a). *See id.* at 1156-57. As the Ninth Circuit explained, *Puerta* was based not on the Government's concession on materiality in that case, but "on 'the standards governing materiality in the [civil] denaturalization context,' and our explicit recognition of potentially incongruous materiality requirements in the criminal context." *Id.* at 1157 (quoting *Puerta*, 982 F.2d at 1300-01).

Similarly, the Sixth Circuit erred by asserting that the Seventh Circuit had "adopted the materiality element, at least in part, because, just as in *Puerta*, the parties to the case agreed that it was an element of 18 U.S.C. § 1425(a)." App. 23a (citing *Latchin*, 554 F.3d at 712, 713 n.3). While it is true that the

Government in *Latchin* conceded the materiality point, the Seventh Circuit (like the Ninth Circuit in *Puerta*) did not rest its decision on that concession. To the contrary, the court expressly "agree[d]" with the parties that the distinction between denaturalization in the civil and criminal contexts is "trivial," and that "the civil and criminal statutes both require a material misrepresentation and procurement of citizenship." 554 F.3d at 713 n.3; *see also id.* at 715 ("We have explained that a conviction under § 1425(a) requires proof of both materiality and procurement, as defined by *Kungys*. We are not alone in this view.") (citing *Alferahin*, 433 F.3d at 1155).

Indeed, if anything, the fact that the Government has conceded the materiality requirement of § 1425(a) in some cases, but not others, only underscores the prevailing confusion that warrants this Court's review. If the Government cannot maintain a consistent position on the meaning of that provision, it is no surprise that the courts cannot either. Indeed, the Sixth Circuit noted that the Government not only "has taken a contrary position on the materiality issue in different cases before different courts, including this one," but "has taken inconsistent positions on the materiality issue at key points in the case now before us." App. 25-26a. Judge Gibbons, concurring, was even more blunt: "The government's inconsistency in this case and on this issue is puzzling and indeed inappropriate." App. 39a. *Compare*, *e.g.*, App. 81-82a (Government contests materiality requirement); *Alferahin*, 433 F.3d at 1156 (same); *United States v. Biheiri*, 293 F. Supp. 2d 656, 657 (E.D. Va. 2003) (same) *with United States v. Shordja*, 598 F. App'x

351, 354 (6th Cir. 2015) (Government concedes materiality requirement); *Latchin*, 554 F.3d at 712 (same); *Puerta*, 982 F.2d at 1301 (same).

Above and beyond the materiality requirement of § 1425(a), moreover, the conviction here cannot stand because § 1015(a)—a predicate offense for the § 1425(a) violation in this case—also requires a material false statement. Such a requirement, as this Court has explained, is not always explicit in statutory text; rather, it may flow from background common-law rules and assumptions about legislative intent. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 21-22 (1999). Indeed, this Court has long held that the civil denaturalization provision, which by its terms applies to "[1] concealment of a material fact or ... [2] willful misrepresentation," requires a willful misrepresentation of a material fact. *See, e.g.*, *Kungys*, 485 U.S. at 767, 769; *Fedorenko*, 449 U.S. at 507-08 n.28; *Costello*, 365 U.S. at 271-72 n.3. Because the district court here instructed the jury that it could convict Maslenjak under § 1425(a) based on a violation of § 1015(a) without a material false statement, *see* App. 86a, the judgment must be reversed if *either* provision imposes a materiality requirement.

Finally, this Court's review is warranted in light of the signal importance of this issue. Over the past decade alone, more than 6.6 million persons have been naturalized as American citizens. *See* U.S. Citizenship & Immigration Services, *Naturalization Fact Sheet*, *available at* http://tinyurl.com/zwdeske. Until the Sixth Circuit's decision in this case, every circuit to have addressed the issue had concluded that, in the criminal as well as the civil context, a

naturalized American could not be stripped of her citizenship based solely on an immaterial false statement. The Sixth Circuit's decision now leaves these millions of naturalized Americans vulnerable to fines, imprisonment, and loss of citizenship based on immaterial false statements that did not procure their naturalization. The decision thus makes a mockery of this Court's repeated admonition that American citizenship "once conferred should not be taken away without the clearest sort of justification and proof." *Schneiderman v. United States*, 320 U.S. 118, 122 (1943); *see also Costello*, 365 U.S. at 269 ("The Government carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship."); *Kungys*, 485 U.S. at 783-84 (Brennan, J., concurring) ("[A]s we have repeatedly emphasized, citizenship is a most precious right and as such should never be forfeited on the basis of mere speculation or suspicion.") (internal citation omitted).

And this case provides an ideal vehicle for this Court to clarify the law in this area. Over Maslenjak's objection, *see* App. 75-82a, the district court instructed the jury that it could convict "even if you find that a false statement did not influence the decision to approve the defendant's naturalization," App. 86a. There was ample evidence for the jury to conclude that Maslenjak's statement about her husband's military service was not material to her application for refugee status. Indeed, the jury obviously struggled with the relevance of that statement, as indicated by the note requesting clarification on this score. *See* App. 90a. If the Government must prove materiality to establish a violation of either § 1425(a) or § 1015(a), then

Maslenjak is entitled at a minimum to a new trial before a properly instructed jury.

The inequitable and arbitrary consequences of the decision below are only magnified by the resulting inconsistency in the law. As a result of the Sixth Circuit's decision, juries in that circuit (like the jury in this case) will be instructed that a false statement need not be material to secure a conviction under § 1425(a), *see* App. 86a, whereas juries in the other circuits will be instructed that a false statement must be material to secure a conviction under that provision, *see, e.g.*, *Munyenyezi*, 781 F.3d at 536; *Latchin*, 554 F.3d at 712-15; *Alferahin*, 433 F.3d at 1154-56; *Aladekoba*, 61 F. App'x at 28. The same person should not be placed in jeopardy of losing her citizenship based on an immaterial false statement if prosecuted in Cleveland, but not in Boston, Richmond, Chicago, or San Francisco. Rather, the elements of a federal crime—especially one that carries the draconian consequence of denaturalization—should be uniform across the Nation.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

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Respectfully submitted,

CHRISTOPHER LANDAU, P.C.
Counsel of Record
PATRICK HANEY
JEFF NYE
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com