No. 16-309

IN THE
Supreme Court of the United States

DIVNA MASLENJAK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Government in this case seeks to rend asunder what Congress has joined. The criminal denaturalization statute allows the Government to strip naturalized Americans of their citizenship *only* where they "procure[d]" their naturalization "contrary to law." 18 U.S.C. § 1425(a); 8 U.S.C. § 1451(e). The Government's brief in this case represents an extended attempt to divorce the underlying illegality from the eventual naturalization—in other words, to read the unlawful procurement requirement out of the statute.

The Government backed itself into that corner by successfully urging the district court to instruct the jury that it could convict petitioner upon finding that she (1) "obtained United States citizenship," and (2) "acted in violation of at least one law governing naturalization." Pet. App. 85a. Petitioner objected to those instructions precisely because they omit the statutory glue that connects the underlying illegality to the eventual naturalization. In particular, she argued that the false statements on which the Government based its case were not material. As a general matter, a false statement is material only "if it has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed." *Kungys v. United States*, 485 U.S. 759, 770 (1988) (internal quotation omitted). By definition, a defendant cannot have "procured" a favorable naturalization decision based on a statement with *no* "natural tendency to influence" and *no* "capab[ility] of influencing" that decision.

The Government has no answer to that straightforward, and dispositive, point. Thus, the Government tries to disregard or dilute the statutory unlawful procurement requirement. In particular, the Government argues that Section 1425(a) "punishes the commission of other violations of law *in the course* of procuring naturalization," U.S. Br. 14 (emphasis added)—or alternatively, that a defendant violates that provision if she "procure[s] her naturalization *in a manner* that violates the law," *id.* at 9 (emphasis added). But no matter how the Government tries to reword the statute (in ways that were never presented to the jury), it cannot bridge the procurement gap—*i.e.*, it cannot prove that petitioner "procure[d]" naturalization "contrary to law" if the underlying violation of law had no actual or potential effect on the naturalization decision.

Similarly unavailing is the Government's argument that Section 1015(a)—one of the predicate offenses alleged here—lacks a materiality requirement. Putting aside the Government's ineffective efforts to dodge the issue altogether, the Government's argument boils down to the proposition that a false-statement statute *never* has a materiality requirement unless it specifically includes the word "material." But this Court has never announced any such mechanical rule; to the contrary, this Court has long recognized that Congress enacts statutes against the background norm that the law does not care about immaterial matters (*de minimis non curat lex*). While that background norm may be overcome by statutory language that in effect supplies the constraints that a materiality requirement would otherwise provide, Section 1015(a) includes no such language.

The bottom line here is that, in light of the erroneous interpretation of both Section 1425(a) and Section 1015(a), or either, the Sixth Circuit's decision affirming petitioner's conviction, and her subsequent denaturalization, cannot stand. The Government argues that any such error is harmless, but that fact-intensive issue can and should be litigated on remand. It suffices for this Court to address the question on which it granted review: "[w]hether the Sixth Circuit erred by holding ... that a naturalized American citizen can be stripped of her citizenship in a criminal proceeding based on an immaterial false statement." Pet. i. This Court should answer that question in the affirmative, and accordingly reverse the judgment.

ARGUMENT

I. Section 1425(a) Requires A Causal Link Between A Predicate Violation Of Law And The Procurement Of Naturalization, And An Immaterial False Statement By Definition Establishes No Such Link.

A. The Government Misses The Point By Arguing That Section 1425(a) Contains No Independent Materiality Requirement.

The Government opens its argument with a spirited attack on a straw man. *See* U.S. Br. 12-18. According to the Government, "[t]he text of Section 1425(a) contains no independent materiality requirement," and there is no basis for "[i]mplying an element of materiality" in that provision. U.S. Br. 13, 14 (capitalization modified).

But petitioner is not arguing that there is an "independent materiality requirement" in Section 1425(a), or that any such requirement should be "implied" in that provision. To the contrary, her opening brief contends that "[t]he Sixth Circuit ... *missed the point* by insisting that Section 1425(a) does not contain the word 'material.'" Petr. Br. 24 (emphasis added). And the point is that "[t]he statute *does* contain the word 'procure[],' and a person cannot 'procure' citizenship 'contrary to law' based on an immaterial false statement." *Id.* at 24-25 (emphasis added).

This case, in short, does not turn on the absence of the word "material" from Section 1425(a), but on the presence of the term "procure[] ... contrary to law" in that provision. Truisms like "courts ordinarily resist reading words or elements into a statute that do not appear on its face," U.S. Br. 12 (internal quotation omitted), and "Congress says in a statute what it means and means in a statute what it says," *id.* at 13 (internal quotation omitted), thus have no bearing here. Petitioner does not ask this Court to read any new words into Section 1425(a); rather, she simply asks this Court to give effect to words already there.

The Government likewise proves nothing by insisting that "Section 1425(a) ... encompasses a number of predicate violations to which a materiality requirement could not sensibly be applied," such as bribery of an immigration official. U.S. Br. 15-16 (citing, *inter alia*, 18 U.S.C. § 201(b)(1)). That is true—as petitioner noted in her opening brief, *see* Petr. Br. 25 (citing 18 U.S.C. § 201(b)(1))—but irrelevant. Although this particular case happens to involve a false statement, the broader point is that,

by definition, a defendant cannot "procure" naturalization by means of a violation of law that did not or could not affect the naturalization decision—a point that applies to statement and non-statement cases alike. The relevant statutory requirement is unlawful procurement, not materiality. So the entire first section of the Government's argument, which triumphantly concludes that "materiality is not an independent element of the statute," U.S. Br. 18, is nothing but a statutory frolic and detour.

B. The Term "Procure[] ... Contrary To Law" Requires A Causal Link Between The Underlying Violation Of Law And The Naturalization Decision.

The Government finally joins battle with petitioner in the second section of its argument. *See* U.S. Br. 18-23. In particular, the Government rejects petitioner's position that the statutory term "procures ... contrary to law" "'requires a causal link—"procurement"—between the underlying violation of law and the naturalization decision.'" U.S. Br. 18 (quoting Petr. Br. 3). According to the Government, a naturalized American can be convicted under Section 1425(a), and consequently stripped of her citizenship, based on an underlying violation of law that had *no effect whatsoever* on the naturalization decision. That argument is manifestly incorrect, and indeed (as discussed in Subsection I.D.1 below) would raise constitutional questions of the first order.

As a threshold matter, the Government mischaracterizes the structure and operation of the statute. The Government describes Section 1425(a) as a pure "look through" provision that effectively

allows conviction and denaturalization based on violations of *other* laws: "Section 1425(a) ... is an umbrella statute that imposes criminal penalties on individuals who procure naturalization in a manner 'contrary to' other laws." U.S. Br. 8-9; *see also id.* at 14. Insofar as the Government thereby suggests that Section 1425(a) performs no substantial work of its own, it is mistaken. Proof of the violation of another law is *necessary*, but not *sufficient*, for a violation of Section 1425(a).

Read properly, Section 1425(a) creates a stand-alone crime, punishable by up to 25 years in prison and automatic loss of citizenship, for persons who knowingly "procure[] or attempt[] to procure" naturalization "contrary to law." 18 U.S.C. § 1425(a). The crux of the crime, therefore, is the *link* between the underlying violation of law and the procurement of naturalization. Section 1425(a) does not merely establish an extra penalty for the underlying violation of law; rather, it creates a distinct unlawful procurement offense. And in the absence of a causal link between the naturalization decision and the underlying violation of law, the defendant did not "procure" naturalization "contrary to law."

The Government challenges that straightforward textual argument by saying that it "is inconsistent with the structure of Section 1425(a)," and "restructures the statutory text to make 'contrary to law' the actor that does the procuring." U.S. Br. 18. That is wrong. No one disputes that the *defendant* is the actor who must do the procuring. What the Government misses, however, is that the defendant must do the procuring in a particular way—"contrary to law." If the violation of law has no effect on the procurement, then the defendant has not procured naturalization contrary to law. The Government thus errs by asserting that

anyone who violates the law "*in the course of* procuring naturalization," U.S. Br. 14, 19 (emphasis added), *ipso facto* violates Section 1425(a). Naturally read, the statutory term "procures ... contrary to law" applies only where the defendant procures naturalization by means of an underlying violation of law.

A simple example makes the point. It is a crime to knowingly possess a firearm in a federal facility. *See* 18 U.S.C. § 930. If an applicant for citizenship walks into a government office with a gun, draws and points it at an immigration officer, and demands and obtains a naturalization certificate, the applicant has "procured" naturalization "contrary to law." But if the applicant walks into the government office with a gun, never removes it from his coat, and is presented with a naturalization certificate in the ordinary course, the applicant has not "procured" naturalization "contrary to law," even though he has committed a crime "*in the course* of procuring naturalization." U.S. Br. 14 (emphasis added); *see also id.* at 19. That scenario is the analogue to this case—petitioner was essentially convicted of violating the law "in the course of procuring naturalization," without any proof that the violation affected the outcome of that proceeding in any way. Under the plain language of the statute, that conviction cannot stand.

That commonsense point is fully consistent with the cases cited by the Government. *See* U.S. Br. 19-22 (citing *Fedorenko v. United States*, 449 U.S. 490 (1981); *Maney v. United States*, 278 U.S. 17 (1928); *United States v. Ness*, 245 U.S. 319 (1917); *United States v. Ginsberg*, 243 U.S. 472 (1917)). In each of those cases, a naturalized American "illegally procured" citizenship by means of an underlying violation of law—or, put

differently, the naturalized American would not have obtained citizenship but for the underlying violation of law.

Thus, in *Maney, Ness*, and *Ginsberg*, the naturalized citizen failed to comply with an "essential prerequisite" to naturalization (in each case, an absolute procedural requirement), and thereby illegally procured citizenship. *Ness*, 245 U.S. at 322; *see also id.* at 324-25; *Maney*, 278 U.S. at 22-23; *Ginsberg*, 243 U.S. at 473-75. And in *Fedorenko*, the naturalized citizen made a *material* false statement in his initial visa application, and hence, as a matter of law, was ineligible for admission into the United States in the first place. *See* 449 U.S. at 507-16. None of these cases remotely stands for the proposition that *any* violation of law "in the course of procuring naturalization"—*even if it has no actual or potential effect on the naturalization*—means that a naturalized American "illegally procured" citizenship. To the contrary, the Court in these cases would have had no reason to consider whether the violation involved an "essential prerequisite" or a "prescribed qualification" for naturalization, *Ness*, 245 U.S. at 322; *Ginsberg*, 243 U.S. at 475, or was "material," *Fedorenko*, 449 U.S. at 507 & n.28, if it were enough for the Government merely to prove a violation of law that did not or could not affect the naturalization.

Indeed, *Fedorenko* specifically sought to harmonize "two lines of prior decisions of this Court that may, at first blush, appear to point in different directions." *Id.* at 505. The first line recognizes that "the right to acquire American citizenship is a precious right and that once citizenship has been acquired, its loss can have severe and unsettling consequences." *Id.* (citing *Costello v. United States*, 365 U.S. 265, 269 (1961); *Chaunt v. United States*, 364 U.S. 350, 353 (1960);

Baumgartner v. United States, 322 U.S. 665, 675-76 (1944), and *Schneiderman v. United States*, 320 U.S. 118, 122 (1943)). The second line recognizes that there must be "strict compliance with the statutory conditions precedent to naturalization." *Id.* at 506 (citing, *inter alia*, *Maney*, 278 U.S. 17, *Ness*, 245 U.S. 319, and *Ginsberg*, 243 U.S. 472). These two lines of cases, the *Fedorenko* Court declared, actually share a common thread, "reflect[ing] our consistent recognition of the importance of the issues that are at stake—for the citizen as well as the Government—in a denaturalization proceeding." *Id.* at 507.

The Government's position here would upset that essential balance between the Government and its citizens. It is one thing for the Government to establish strict conditions for naturalization and to strip away citizenship that was obtained without meeting those mandatory requirements. But it is a very different thing for the Government to strip away citizenship for a violation of law that had no actual or potential effect on the naturalization. The latter approach makes no effort to accommodate the important interests of *both* the Government *and* its citizens, but instead trivializes or denigrates the citizens' interests.

Equally unavailing is the Government's argument that petitioner's position on procurement is inconsistent with *Kungys*. *See* U.S. Br. 22-23. According to the Government, "[a] causation requirement of the sort petitioner proposes garnered only three votes" in that case. *See id.* at 23.

For starters, petitioner has never purported to delineate the metes and bounds of causation in this context. *See* Petr. Br. 23 n.4. Rather, her position is far more modest: the Government cannot prove that a defendant procured naturalization contrary to law

without—*at a minimum*—establishing a causal link between the procurement of naturalization and an underlying violation of law, and an immaterial false statement by definition establishes no such link.

For present purposes, therefore, the relevant fact is that a clear majority of the Court in *Kungys* endorsed the proposition that the "procurement" requirement of the civil denaturalization statute, 8 U.S.C. § 1451(a), requires a causal link between the procurement of citizenship and an underlying violation of law. The three-Justice plurality emphasized that "the 'procured by' language can and should be given some effect beyond the mere requirement that the misrepresentations have been made in the application proceeding." 485 U.S. at 777 (Scalia, J., joined by Rehnquist, C.J., and Brennan, J.). Another three Justices, concurring in the judgment, likewise agreed that "procurement" requires a causal link between naturalization and a predicate violation of law. *See id.* at 787 (Stevens, J., joined by Marshall & Blackmun, JJ., concurring in the judgment) (characterizing procurement as a "causation requirement" that "requires that the Government demonstrate that it relied on the misrepresentation in deciding whether to allow the applicant to become a citizen"); *see also id.* at 788 (procurement "requires that the material misrepresentation must have had the effect of allowing the person to obtain citizenship when a truthful statement would have led directly or after investigation to the denial of citizenship"). Both the plurality and the concurrence thus rejected the Government's argument (made in *Kungys* and again here) that a naturalized American could have "procured" citizenship based on a violation of law

that had no actual or potential effect on the naturalization decision.

Quite apart from its legal shortcomings, the Government's extreme position in this case would have the inevitable effect of rendering naturalized Americans "second-class" citizens, *Knauer v. United States*, 328 U.S. 654, 658 (1946), by leaving them at the mercy of overzealous prosecutors. As petitioner's *amici* have pointed out, applicants are unlikely to answer the voluminous, ambiguous, and often deeply personal questions on naturalization forms without even arguably omitting some immaterial information. *See* Br. of *Amici Curiae* Immigrant Defense Project *et al.* at 10 ("'Have you **EVER** been a member of, involved in, or in any way associated with, any organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other location in the world?'") (quoting Form N-400; emphasis and capitalization in original); *see also* Br. of *Amici Curiae* Asian Americans Advancing Justice *et al.* at 6 (same). While some omissions may be inadvertent, others may be knowing but still irrelevant to the naturalization decision. An applicant may not wish to disclose, for example, that he or she once attended a meeting of a gay students' association in school. Under the Government's interpretation, such an omission could lead to denaturalization and deportation, even though it had no bearing whatsoever on the procurement of citizenship.

C. The Legislative History Is Consistent With Giving The Term "Procure[] ... Contrary To Law" Its Ordinary Meaning.

The Government inexplicably devotes nine pages (almost a quarter of its argument) to an entirely unilluminating discussion of the legislative history of

Section 1425(a) and its civil analogue, Section 1451(a). *See* U.S. Br. 23-32. The Government devotes the first part of that argument to the proposition that "the legislative history of Section 1425(a) leaves no doubt that Congress did not intend to limit the scope of that provision to material false statements." *Id.* at 23. And the Government devotes the second part of that argument to the proposition that the legislative history explains the apparent anomaly of requiring material false statements for *civil* denaturalization under Section 1451(a), but not for *criminal* denaturalization under Section 1425(a). *See id.* at 29-32. But the legislative history supports neither of those propositions.

1. The History Of Section 1425(a)

The Government's first foray into legislative history is little more than a replay of its opening straw-man argument that Section 1425(a) does not contain an independent materiality requirement. *See* U.S. Br. 23-28. As the Government explains, "the progenitor of Section 1425(a)" is Section 23 of the Act of June 29, 1906, which made it a crime to "'knowingly procure[] naturalization in violation of the provisions of this Act.'" U.S. Br. 25 (quoting Act of June 29, 1906, ch. 3592 § 23, 34 Stat. 603). That Act was amended in 1940 to make it a crime "[k]nowingly to procure or attempt to procure ... [t]he naturalization of any ... person, contrary to the provisions of any law." *Id.* at 26 (quoting Nationality Act of 1940, ch. 876, Tit. I, § 346(a)(2), 54 Stat. 1163). And the Act was "modified to its present form" and moved to its current location as part of the overhaul of the federal criminal code in 1948. *See id.* at 27

(citing Act of June 25, 1948, ch. 69 § 1425(a), 62 Stat. 766).

That history, according to the Government, "leaves little doubt that Congress did not intend to limit Section 1425(a) to 'material' false statements." *Id.* But, as noted in Section I.A above, petitioner does not contend that Section 1425(a) is "limit[ed] ... to 'material' false statements." *Id.* Rather, by its plain terms, Section 1425(a) (like its statutory progenitors tracing back to 1906) is limited to the knowing "procure[ment]" of naturalization contrary to law. Neither the English language nor basic principles of logic have changed in any relevant way since 1906: if a predicate violation of law had no actual or potential effect on a naturalization decision, then the defendant could not have "procured" naturalization "contrary to law." Nothing in the legislative history of Section 1425(a) suggests that Congress intended for the the term "procure[] ... contrary to law" to carry anything but its ordinary meaning in this context. The Government's conclusion that the legislative history proves that "materiality is not an element of the statute," U.S. Br. 28, thus proves nothing.

2. The History Of Section 1451(a)

The Government's next foray into legislative history represents an attempt to explain the anomaly that, under the Government's position, "'Congress would have intended to authorize denaturalization in a criminal proceeding ... based on a *less* demanding substantive standard'" than in a civil proceeding. U.S. Br. 29 (quoting Petr. Br. 26; emphasis in original).

But nothing in the legislative history rationalizes that anomaly. As the Government notes, Section 1451(a) stems from the same 1906 statute as Section 1425(a). *See* U.S. Br. 29. The 1906 progenitor of Section 1451(a) authorized the Government to "institute proceedings ... for the purpose of setting aside and canceling [a] certificate of citizenship [1] on the ground of fraud or [2] on the ground that such certificate of citizenship was illegally procured." Act of June 29, 1906, ch. 3592 § 15, 34 Stat. 601. The provision was amended in 1952 to replace the term "fraud" with "concealment of a material fact or willful misrepresentation" and to delete the separate ground of illegal procurement. *See* Immigration & Nationality Act of 1952, ch. 477, Tit. III, § 340(a), 66 Stat. 260. And the provision was again amended in 1961 to restore the ground of illegal procurement. *See* Act of Sept. 26, 1961, Pub. L. No. 87-301, § 18(a), 75 Stat. 656. Since 1961, the civil denaturalization provision has remained essentially unchanged.

From this history, the Government draws the "inference" that Congress did not intend to "limit[] denaturalization" under Section 1425(a) to material misrepresentations or omissions because Congress included such a limitation in Section 1451(a). *See* U.S. Br. 31. But the United States did not need to turn to history to make this point; it could have made the same point from the statutory text. Either way, the point is exceedingly weak. Again, petitioner does not contend that Section 1425(a) includes an independent materiality element (as does the second clause of Section 1451(a)). Rather, she contends only that a defendant cannot "procure" naturalization "contrary to law" based on an immaterial false statement. Nothing in 1451(a) casts any doubt on

that contention. There is no reason to think that the "illegal procurement" clause of Section 1451(a) would allow denaturalization based on an immaterial false statement. The bottom line is that it remains utterly anomalous to suppose that Congress intended to authorize denaturalization in a criminal proceeding but not a civil proceeding based on the very same statement.

D. The Constitutional Avoidance Doctrine And The Rule Of Lenity Support Giving The Term "Procure[] ... Contrary to Law" Its Ordinary Meaning.

1. Constitutional Avoidance

The Government offers no real response to petitioner's constitutional avoidance argument, but instead mischaracterizes the argument. According to the Government, petitioner "contends that the severity of denaturalization requires the Court to infer a materiality requirement in Section 1425(a) to avoid constitutional concerns." U.S. Br. 35. That is not petitioner's argument.

Rather, petitioner's argument is that the Constitution gives Congress no denaturalization power at all—subject to just one exception: the power to strip naturalized Americans of "unlawfully procured" citizenship. *See* Petr. Br. 29 (citing *Afroyim v. Rusk*, 387 U.S. 253, 267 n.23 (1967)). And there is absolutely no basis to think that the Constitution grants Congress the power to strip a naturalized American of her citizenship based on a violation of law that had no actual or potential effect on the naturalization decision. Congress' narrow denaturalization power may not be used to punish natural-born or naturalized Americans, but only to

set aside "naturalization unlawfully procured." *Afroyim*, 387 U.S. at 267 n.23. Because there is no reason to conclude, as a constitutional matter, that a naturalized American "unlawfully procured" her citizenship if the predicate illegality had no actual or potential effect on the naturalization decision, the statute should be construed in tandem to preserve its constitutionality. *See*, *e.g.*, *Skilling v. United States*, 561 U.S. 358, 403 (2010).

2. The Rule Of Lenity

The Government declares that "[t]he rule of lenity does not apply" because petitioner's "reading of Section 1425(a) is inconsistent with the text, structure, and history of the statute." U.S. Br. 38. As explained in detail above, petitioner disagrees with the Government on each of those points. But if there were any room for doubt on this score, the rule of lenity (which applies with special force in the denaturalization context, *see, e.g.*, *Schneiderman*, 320 U.S. at 122) would demand the more defendant-friendly interpretation.

II. Section 1015(a) Requires Proof Of A Material False Statement.

The Government adheres to its overall theme by arguing that Section 1015(a), a predicate offense for petitioner's conviction under Section 1425(a), *also* imposes criminal liability for immaterial false statements. That theory—which largely depends on a blinkered reading of *United States v. Wells*, 519 U.S. 482 (1997)—likewise misses the mark.

A. The Government's Procedural Arguments Are Meritless.

As a threshold matter, the Government insists that the Section 1015(a) issue is not properly before the Court because it is not "fairly included" within the Question Presented. U.S. Br. 39.* If the Government means to suggest that the proper interpretation of Section 1015(a) is separate and distinct from the question whether petitioner "can be stripped of her citizenship in a criminal proceeding based on an immaterial false statement," Pet. i, it is obviously wrong. As the petition makes clear, petitioner's challenge to her loss of citizenship for an immaterial false statement rests on two alternative grounds: *first*, that, regardless of what the predicate offenses require, Section 1425(a) *itself* requires petitioner's statements to be material because it is impossible to "procure" citizenship by means of an immaterial false statement; and, *second*, that, in any event, Section 1425(a) requires petitioner's statements to be material because Section 1015(a), a predicate offense, imposes that requirement. As is always the case with alternative arguments, the Court may decide the case on the basis of one argument without reaching the other. But the arguments nevertheless are part and parcel of answering the same question.

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* The petition presented the following question: "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." Pet. i.

The Government tries to block consideration of Section 1015(a) by focusing on the words "'in direct conflict with the First, Fourth, Seventh, and Ninth Circuits,'" U.S. Br. 38 (quoting Pet. i), pointing out that the only "conflict" among the Circuits involves the interpretation of Section 1425(a), not Section 1015(a), *see id.* at 38-39. But this is truly straining at a gnat. Petitioner framed a broad question that encompassed both Section 1425(a) and Section 1015(a), and understandably highlighted a circuit split without specifying that it applied only to one aspect of that question. That framing is entirely consistent with this Court's Rule 14.1(a), which does not require petitioners to break Questions Presented into component parts. To the contrary, the Rule seeks to eliminate complexity by declaring that "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein," and admonishes petitioners to frame questions that are "short," not "repetitive," and "without unnecessary detail."

And if there were any doubt about the scope of the Question Presented, it was erased in the body of the petition, which expressly challenged petitioners' conviction under Section 1425(a) based on the Sixth Circuit's interpretation of Section 1015(a). *See* Pet. 22. The Government's brief in opposition raised no objection to inclusion of this argument—and, indeed, addressed it at some length, *see* Opp. 10-13—but the Government now asserts that a petitioner cannot present additional questions in the body of the petition itself. *See* U.S. Br. 39 (citing *Wood v. Allen*, 558 U.S. 290, 304 (2010)). But petitioner did not smuggle in a "different question" in the body of the petition, *Wood*, 558 U.S. at 304; rather, she

explained in detail why the Court should consider Section 1015(a) in deciding whether "a naturalized American citizen can be stripped of her citizenship in a criminal proceeding based on an immaterial false statement." Pet. i. Having first demonstrated that Section 1425(a) itself requires materiality in false statement cases, petitioner then explained why, in any event, Section 1425(a) requires materiality when a predicate offense, such as Section 1015(a), requires it. *See* Pet. 22. Both issues are thus properly before the Court.

The Government's other attempt to ward off review of the Section 1015(a) issue—by asserting that petitioner "waived" the issue below, *see* U.S. Br. 42—is equally insubstantial. Far from finding a waiver of this issue, which was controlled by circuit precedent, the Sixth Circuit squarely addressed and decided it. *See* Pet. App. 18-19a. Nothing more is necessary to present the issue for review: this Court will consider issues actually decided by the lower courts regardless of whether the parties raised them. *See, e.g., Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

B. The Government's Substantive Arguments Are Meritless.

The Government's reading of Section 1015(a) is, if anything, even more expansive than its reading of Section 1425(a). According to the Government, Congress intended to impose severe punishment (including up to five years in prison) for any false statement in a naturalization proceeding, *even if* the statement could not have influenced the naturalization decision and *even if* the applicant did not make the false statement for that purpose.

Given that the law traditionally does not care about immaterial matters, *see* Petr. Br. 32-33, it is highly unlikely that Congress had that kind of harsh result in mind—one that gives prosecutors license to turn trivial falsehoods into serious crimes. Against that background, it is notable that the Government fails to cite a single case upholding heavy criminal penalties for statements that were neither material nor uttered for the purpose of influencing an ultimate decision.

As it did with Section 1425(a), the Government emphasizes that Section 1015(a) does not contain the word "material." That would be a good starting point, of course, if the Government could back it up by showing that Congress requires false statements to be material only when it says so expressly. In fact, however, the Government immediately acknowledges just the opposite: that Congress has required proof of materiality in several federal statutes, even though the word "material" is nowhere to be found in the statutory text. *See* U.S. Br. 43 (citing *Neder v. United States*, 527 U.S. 1, 23 & n.7 (1999)). That is hardly surprising. As noted in petitioner's opening brief, *see* Petr. Br. 36-37, the U.S. Code is a checkerboard of false-statement statutes, many of which contain a specific reference to materiality and many of which do not. Unless it were clear that each of the omissions reflected a deliberate congressional choice—something that the Government does not even attempt to establish—the proper approach to statutory interpretation is to consider each statute on its own terms.

Lacking an absolute text-based rule, the Government winds up basing its "no materiality"

argument almost entirely on this Court's decision in *Wells*. But *Wells* involved a very different statute. Although Section 1014 did not contain an explicit materiality requirement, it did contain something else: a requirement that the defendant have made the false statement "for the purpose of influencing" a bank. As the Court observed, that specific purpose-of-influencing requirement made it likely that Section 1014 would apply almost exclusively to material statements. *See* 519 U.S. at 499; *see also Kungys,* 485 U.S. at 780-81 (similar). The Court thus concluded that its interpretation of Section 1014 would not have the unintended consequence of "mak[ing] a surprisingly broad range of unremarkable conduct a violation of federal law." 519 U.S. at 498 (internal quotation omitted).

The Government dismisses the importance of this analysis, saying that "[t]he Court [in *Wells*] did not suggest ... that courts must infer a similar limitation in other false-statement statutes that do not require materiality, or that this feature of Section 1014 was essential to finding that the statute lacked a materiality requirement." U.S. Br. 47. But that misses the point. Even before *Wells*, it was generally understood that a proper textual inquiry requires consideration of background interpretive norms like *de minimis non curat lex*. That is precisely the inquiry that the Court conducted in *Wells*. And, in doing so, it placed significant weight on the statute's purpose-of-influencing requirement because that requirement effectively imposed the same kind of limitation on Section 1014—preventing its application to minor falsehoods—as an explicit materiality requirement would have done.

Changing tack, the Government tries to fit this case within the *Wells* reasoning, arguing that applicants for naturalization will typically make false statements—even immaterial ones—for the purpose of influencing the naturalization decision. Even if that were so, the inescapable fact is that Section 1015(a) imposes no such purpose requirement. While it may be reasonable to suppose that statutes containing an explicit purpose requirement will result in convictions only for material statements, it is too great a leap to indulge the same belief about statutes that lack a purpose requirement (and thus do not require the jury to make any such finding). Indeed, the *amici* briefs in this case provide numerous examples of immaterial false statements that applicants might make for reasons having nothing to do with an attempt to influence official decisionmaking.

All in all, despite its mix of procedural and substantive arguments, the Government's brief is most striking for what it leaves out: any attempt to explain why Congress would want to subject someone to a five-year prison term for making false statements that were not intended to influence official action and that, in fact, had no possibility of doing so. No one disputes that honesty is the best policy, but there are obvious limits to what Congress will do in its pursuit of good policies. *See, e.g.*, *Bond v. United States*, 134 S. Ct. 2077, 2087-93 (2014). Yet instead of dealing with that question directly—by offering some plausible justification for punishing immaterial statements—the Government ultimately ducks the question altogether, abruptly abandoning its arguments about the proper interpretation of Section 1015(a) to make a case-specific argument

that petitioner's particular statements *were* material. *See* U.S. Br. 46. But that argument, which is nothing more than a preview of the Government's harmless-error argument, sheds no light whatsoever on the question whether Section 1015(a) applies to immaterial statements. The answer is no, and the Sixth Circuit's contrary holding provides an independent reason for reversing its judgment.

III. This Court Need Not And Should Not Perform A Harmless Error Analysis In The First Instance.

Finally, the Government argues that "any error" in the jury instructions "was harmless because petitioner's false statements to immigration officials were plainly material." U.S. Br. 48. But this Court is "a court of review, not of first view." *Expressions Hair Design v. Schneiderman*, 137 S. Ct. __, 2017 WL 1155913, at *7 (Mar. 29, 2017) (internal quotation omitted). This Court need not and should not root through the extensive factual record (including a jury trial) to determine whether the error(s) here—which the Government affirmatively invited, *see* Petr. Br. 37 n.6, and which (in sharp contrast to *Neder*) did not go "uncontested" at trial, 527 U.S. at 17—were harmless beyond a reasonable doubt.

The lower courts are better equipped to undertake such a fact-intensive inquiry after plenary briefing by the parties. Indeed, this Court itself undertakes such review only "sparingly," *United States v. Hasting*, 461 U.S. 499, 510 (1983), and "normally leaves it" to the lower courts "to consider whether an error is harmless," *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016); *see*, *e.g.*, *Shaw v. United States*, 137 S. Ct. 462, 470 (2017); *Kingsley v. Hendrickson*, 135 S. Ct.

2466, 2476-77 (2015); *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015); *Skilling*, 561 U.S. at 414; *Black v. United States*, 561 U.S. 465, 474 (2010).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

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Respectfully submitted,

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